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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

BOOK OF AUTHORITIES OF THE INTERVENOR

THE CONSUMERS COUNCIL OF CANADA

December 15, 2011

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Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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 Goldcorp Canada Ltd. and Goldcorp Inc. for leave to construct new 115kV transmission facilities in the Municipality of Red Lake, and other orders.

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION AND ORDER

The Proceeding

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board (the "Board") under section 92 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the *"Act"*). Goldcorp sought an order of the Board granting leave to construct the following transmission facilities in the Municipality of Red Lake:

- a new switchyard connecting Hydro One Networks Inc's ("Hydro One's") tap on its E2R 115 kV transmission line approximately 2 km southwest of Harry's Corner with the proposed 115 kV transmission line;
- a new 10.7 km 115 kV single circuit transmission line running from the switchyard to the to-be-constructed Balmer Complex Transformer Station; and
- a 115 kV/44 kV Transformer Station at Goldcorp's Balmer Complex.

The Board issued a Notice of Application and Hearing ("Notice") on April 29, 2011. The Notice was served on potentially affected and interested parties and was published in the Northern Sun News and the Wawatay News.

Following the publication of the Board's Notice, the Independent Electricity System Operator ("IESO"), Lac Seul First Nation ("LSFN") and Hydro One requested intervenor status and were granted such status. The Board also determined that LSFN is eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards*. The IESO and Hydro One indicated that they did not intend to seek an award of costs.

On May 26, 2011, the Board issued Procedural Order No. 1, which amongst other things, set out the list of approved intervenors and the schedule for interrogatories and submissions.

Pursuant to Procedural Order No 1, Board staff and LSFN filed each of their interrogatories on Goldcorp's evidence on June 9, 2011. Goldcorp filed its responses to all interrogatories on June 17, 2011.

The Board received the final submissions from LSFN and Board staff on June 28, 2011 and a final reply argument from Goldcorp on July 8, 2011.

Motions

Goldcorp Motions

Goldcorp filed two separate Notices of Motion. In the first motion, which was filed on the same date as the application, Goldcorp sought an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the Balmer Complex Transformer Station site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application.

In a Decision and Order dated April 29, 2011, the Board dismissed the motion. In making its determination the Board considered the requirements of section 21(4)(b) of the Act and found as follows:

> The Board cannot determine whether and to what extent any person, other than the applicant in this case, will be adversely affected by the outcome of this proceeding, without having provided notice in the Board's standard form of Notice and communicated in the Board's required methods. Therefore, the Board cannot at this time grant relief of the type sought by the Applicant.

The Board noted that it was issuing the Notice of Application and Letter of Direction in the main leave to construct application simultaneously with its Decision and Order on the Motion.

On May 3, 2011, the Board received a second Notice of Motion. In this second motion, Goldcorp sought an order to carry out the work contemplated in the original motion, however, the second motion was filed following the publication of the Board's Notice in the main leave to construct application. Goldcorp requested that the motion be heard orally and some ten days after the publication and service of the Board's Notice.

The Board convened an oral hearing on June 7, 2011 to hear the second motion. Goldcorp, LSFN and Board staff attended the oral hearing.

The Board issued its decision dismissing the motion on June 20, 2011. Copies of both decisions are attached as Appendix B and Appendix C to this order.

LSFN Motion

On June 27, 2011 LSFN filed a letter with the Board requesting access to Goldcorp's Mine Development Plan (the "Plan") which LSFN had asked for in interrogatory 16(A)(c). Goldcorp had refused to provide the Plan claiming that the Plan was subject to confidential communication privilege. LSFN took the position that Goldcorp had not requested confidentiality with respect to the Plan and further that LSFN had not had the opportunity to object to any such requests for confidentiality. LSFN requested a revision to Procedural Order No. 1 with respect to filing deadlines for submissions while the issue of confidentiality remained outstanding.

As noted above and in adherence to Procedural Order No.1 LSFN filed its final submissions on June 28, 2011.

On June 28, 2011 Goldcorp filed a letter objecting to LSFN's June 27, 2011 request. LSFN filed a further response dated July 4, 2011 and re-asserted the need to file the Plan.

In a letter dated July 5, 2011 the Board provided its response stating that it would not compel Goldcorp to file the Plan. The Board further stated:

> The Board notes that LSFN has filed its submissions in which it argues that need has not been established and that it is necessary to examine the Plan as part of the determination of need. Goldcorp could have chosen to file the Plan and sought confidential treatment. Instead it has indicated that it will not file the Plan voluntarily, even on a confidential basis. The Board will not compel Goldcorp to file the Plan and will address in its decision the issue of the sufficiency of the evidence in support of the application.

On July 8, 2011 the Board received a Notice of Motion from LSFN in relation to the same matter it had raised in its letter of June 27, 2011. In the Notice of Motion, LSFN stated that it had not had an opportunity to formally address the matter and to make complete submissions before the Board rendered its decision not to compel disclosure of the Plan. The motion was for:

- An order directing Goldcorp to provide full and adequate response to interrogatory 16(A)(c) and to file the Plan;
- Alternately, an order that Goldcorp file portions of the Plan that are not considered confidential;
- And, that the Board order Goldcorp to file the Plan on a confidential basis, and that the Plan be provided to parties that have executed the Board's Confidentiality Declaration and Undertaking pending the resolution of this matter.

The Board has addressed the motion under the Project Need section of this Decision and Order.

Decision of the Board

For the reasons that follow the Board grants Goldcorp leave to construct the facilities applied for in its application, subject to conditions.

Positions of Parties and Board Findings

Section 96(2) of the Act provides that for an application under section 92 of the Act, when determining if a proposed work is in the public interest, the Board shall only consider the interests of consumers with respect to prices and reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. In the context of this application, the Board has considered the following categories of evidence in relation to its mandate under section 96(2):

- Project Need
- System Impact Assessment and Customer Impact Assessment
- Environmental Assessment, Land Matters and Permits
- Project Costs and Impact on Ratepayers

Project Need

Goldcorp submitted that the proposed transmission facilities are needed to meet its increasing electricity demand related to mining activities in the Red Lake area. Goldcorp's evidence is that the current peak demand for all of its complexes in Red Lake is 39.7 MVA and is forecast to increase to 50 MVA by 2015. Goldcorp's evidence further indicates that due to rising demand from other customers in the area and capacity limitations on the E2R line, Hydro One had imposed a limit of 41.7 MVA on Goldcorp's demand. Goldcorp submitted that it expected to exceed the imposed limit by 2012.

Goldcorp's evidence indicates that it had considered a number of alternatives to the proposed facilities, such as, obtaining additional supply from Hydro One, temporary use of diesel generation, on-site Natural Gas fired generators, wind and solar projects and conservation and demand management options. For each of the alternatives considered, Goldcorp explained why the alternatives were not appropriate and indicated that the building of the proposed transmission facilities was the most suitable alternative as it was technically feasible, made use of Goldcorp patented lands and available Crown lands and was supported by other users in the Red Lake area.

Goldcorp stated that the proposed facilities will also benefit other electricity customers in the area by improving the quality of electricity service and by freeing-up capacity at the Red Lake Transformer Station, which could be used to serve new customers. Goldcorp

also noted that the proposed facilities will allow it to avoid adverse operational and environmental effects of diesel generation and to meet the requirements of its Mine Development Plan, thereby creating employment opportunities in the Red Lake area.

LSFN submitted that the Board should not grant the relief sought by Goldcorp at this time.

LSFN argued that Goldcorp had not adequately demonstrated need for the proposed facilities and that Goldcorp's assertions regarding the benefits of the project, should be adopted with caution as they promote Goldcorp's self interest and not the broader public interest. With respect to the alternatives considered, LSFN submitted that Goldcorp's evidence lacked details and that Goldcorp had not fully considered all available conservation and demand management options, including lowering production. LSFN also submitted that the proposed facilities will likely not negate the need for diesel generation, noting that the System Impact Assessment Report had indicated that due to existing grid limitations, Goldcorp may have to arrange for additional supply "through other means, including from generators, not connected to the IESO-controlled grid".[1]

LSFN further submitted that the Board was being asked to approve a project that it knew little about. LSFN noted Goldcorp's refusal to provide the Mine Development Plan and argued that without the Plan, it was not possible to determine need or to test Goldcorp's load forecast.

Board staff submitted that Goldcorp had established need for the project and that the proposed facilities represented the best of the alternatives examined.

Goldcorp submitted that the Board should not accept LSFN's arguments. Goldcorp submitted that the question of need was not a determinative issue because under subsection 96(2) of the Act, the Board may only consider the interest of consumers with respect to prices and the reliability and quality of service. Goldcorp further submitted that there was no reason why Goldcorp, as a public-for-profit company, would invest millions in a project, if the project was not needed. Goldcorp also noted that LSFN had adduced no contrary evidence on the question of need and did not raise the matter at the oral hearing.

[1] Draft System Impact Assessment, p.i.

Goldcorp further submitted that LSFN's submissions did not directly address the question of need and are more emotive than material. In regards to the filing of the Plan, Goldcorp submitted that the Board had already ruled that it will not compel Goldcorp to file the Plan.

In the Board's view, the need for a project is a matter to be determined in the context of the Board's review of the interests of consumers with respect to "price". That is, if there is going to be any impact on "price" (i.e., impact on transmission rates), the Board will review the evidence of the applicant with respect to the costs for the project and any rate impacts against the evidence advanced by the applicant with respect to the need for the project. If the evidence demonstrates that the project is needed, then the Board must determine whether the price and, therefore, the rate impacts, if any, are commensurate with need. In section 92 applications, where the proponent is paying for a facility, the issue of impacts on ratepayers with regard to price does not surface.

However, where a proponent builds and then transfers a facility to a licensed transmitter (as is the case here), the rate impacts are addressed in the context of the Connection and Cost Recovery Agreement ("CCRA"). The Board notes that Goldcorp has provided assurances that the intent is for the CCRA, which will ultimately be entered into by Goldcorp and Hydro One, to hold provincial ratepayers harmless. The Board also notes that the terms of the CCRA are governed by the Transmission System Code and are a condition of Hydro One's licence. Further, parties will have an opportunity to examine the transfer of assets and the associated cost recovery in a future Hydro One rate application.

The issue of "price", (i.e. impacts on ratepayers) therefore does not arise in this case, and as a result the Board need not examine the issue of need in detail because it is not determinative. Certainly, even in the instance where there is no adverse impact on ratepayers, the Board would be unlikely to approve a project for which there was no demonstrable need. That is not the situation here. Goldcorp has provided evidence regarding its energy requirements. The Board finds that the evidence is sufficient.

LSFN's July 7th Motion for an Order compelling Goldcorp to provide the Plan either on a confidential or non-confidential basis is grounded on its assertion that "need' is a determinative factor in this application. The Board has determined that "need" is not a determinative factor in this application and therefore the Motion is hereby dismissed without a hearing.

System Impact Assessment (SIA) and Customer Impact Assessment (CIA)
The Board's filing requirements for leave to construct applications, specify that an applicant is required to file a SIA performed by the IESO and a CIA performed by the relevant licensed transmitter.

Goldcorp filed a draft SIA report and a draft CIA report. The SIA was performed by the IESO and the CIA was carried out by Hydro One. In response to a staff interrogatory, Goldcorp filed the final CIA.

Goldcorp submitted that the SIA confirms the need for the project and that the proposed facilities are adequate and will not adversely affect the IESO controlled grid, provided the conditions imposed by the IESO are met. Goldcorp submitted that the CIA confirms that the proposed transmission line will have a minimal impact on local supply facilities and on the reliability of service.

LSFN argued that the proposed facilities do not meet Goldcorp's long-term electricity requirements and that further upgrades would be needed to achieve the intended purpose. LSFN also submitted that it was unclear as to who would pay for these future upgrades. LSFN further submitted that there was no evidence on the impact on reliability and quality of service and that it was notable that Goldcorp had only received conditional approval in the SIA.

Goldcorp submitted that the proposed facilities are required to relieve the existing bottleneck at the Red Lake Transformer Station and if approved, would meet that intended purpose. With respect to LSFN's concerns regarding future upgrades, Goldcorp submitted that these would be resolved through discussions with Hydro One and others and would be the subject of future applications.

The purpose of the SIA was to study how the supply capability of the circuit E2R can be expanded beyond the existing 57 MVA threshold.[2] In that regard, the SIA concludes that the proposed facilities will not result in "any significant adverse impacts to the IESO controlled grid, provided that the requirements listed in this report are met". Similarly, the CIA concludes that the proposed transmission line will have a minimal impact on local supply facilities, no adverse affect on short circuits and will not materially affect the reliability of Hydro One's E2R line.[3]

[2] Draft System Impact Report, Ex B/T6/S3, p. i
[3] Final Customer Impact Assessment Report, dated June 10, 2011

The SIA and the CIA demonstrate that the project will have no adverse impact on the reliability and quality of electricity supply as long as Goldcorp fulfills the requirements included in each report. The Board's order will be conditioned accordingly to ensure theses requirements are fulfilled and the final SIA is filed.

LFSN raises concerns about potential future projects. The Board finds that future projects are beyond the scope of this proceeding. In any event, any concerns regarding future projects can be addressed at the appropriate time.

Environmental Assessment ("EA"), Land Matters and Permits

Goldcorp's evidence indicates that it was required to seek project approval under two Class EAs - *Class EA for Minor Transmission Facilities* and *Class EA for Resource Stewardship and Facility Development*. The pre-filed evidence notes that the project received approval from the Ministry of the Environment under the *Class EA for Minor Transmission Facilities* and that approval from the Ministry of Natural Resources (MNR) for the *Class EA for Resource Stewardship and Facility Development* was still pending. In its pre-filed evidence, Goldcorp indicated that approval from the MNR was expected by April 26, 2011. At the hearing of the motion, Goldcorp informed the Board that the MNR's approval and the issuance of permits was delayed until the MNR was satisfied that appropriate consultation with the affected First Nations had occurred.

With respect to land matters, Goldcorp's evidence is that the proposed facilities are to be constructed on land owned either by the province (Crown land held by the Ministry of Natural Resources) or by Goldcorp. Goldcorp stated that the necessary land rights required are confined to easements it expects to receive from the MNR over Crown lands and temporary access rights.

With respect to permits, in undertaking JM1.1, provided at the motion hearing, Goldcorp supplied a list of permits that it requires and the timelines for acquiring these permits. Goldcorp indicated that it would secure the necessary work permits from the MNR over Crown lands.

Board staff submitted that the Board's approval should be conditional on the completion of both Class EAs and on Goldcorp obtaining all necessary approvals.

LSFN submitted that granting leave to construct was premature and potentially adverse to the public interest. LSFN noted the Board should refrain from making a decision on

the application until the MNR had confirmed that duty to consult had been fully discharged. LSFN submitted that granting leave to construct prior to the conclusion of the consultation effectively narrows the range of possibility for adequate accommodation and presents a risk that the project may be cancelled due to lack of appropriate consultation, after it has been approved by the Board. LSFN also noted that Goldcorp had not yet acquired many of the permits that were required to begin construction.

Goldcorp submitted that not having the necessary permits is not a valid reason to deny the application. Goldcorp noted that it was usual Board practice to grant orders that were conditional on the issuance of the relevant permits. Goldcorp also referred to the Board's Decision in Yellow Falls[4] where the Board provided reasons in support of such an approach.

With respect to the duty to consult, Goldcorp again referred to the Yellow Falls Decision, in which the Board made a decision on a question of law, namely that in electricity leave to construct applications, the Board does not have the power to consider whether the degree of consultation with First Nations in relation to the EA process (which is conducted separately) has been adequate. Goldcorp further submitted that the Board's approach has been supported by the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel.*[5]

The Board does not believe it is necessary to refrain from making a decision in this application because of ongoing consultations being undertaken as part of the EA process. In the Board's view, to the extent there are any concerns with respect to the completion of the EA process or the acquisition of permits, these are appropriately dealt with by making the Board's approval conditional on the successful completion of both Class EA's and on Goldcorp obtaining all necessary permits. This has been the Board's practice in leave to construct applications for some time. Further, in its preliminary Decision in the Yellow Falls case the Board stated:

> Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary

[4] EB-2009-0120, Decision and Procedural Order No. 4 dated November 18, 2009.
[5] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel, [2010] 2 S.C.R.650.

> regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. [Emphasis Added]

Therefore, the Board's order granting leave to construct is conditional on Goldcorp obtaining all necessary Class EA approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities.

Project Cost and Impact on Ratepayers

Goldcorp's evidence is that the total cost of the proposed transmission facilities is approximately $15 million. Based on the breakdown provided, the cost of the transmission line is $2.6 million, the cost of the work on the switchyard is $0.5 million and the cost of the Balmer Complex Transformer Station is approximately $10 million.

The proposed facilities will be owned and constructed by Goldcorp until commissioned, following which, the switchyard and 115 kV transmission line, but not the Balmer Complex Transformer Station, will be transferred to and operated by Hydro One. The planned in-service date is December 2011.

In Board staff interrogatory no. 2, Goldcorp stated that the CCRA, under which the assets are to be transferred to Hydro One, had not been completed. In LSFN interrogatory no. 13, Goldcorp acknowledged that it had been informed by Hydro One that the terms of the asset transfer must not result in any negative impacts on electricity rates.

LSFN submitted that no evidence was provided with respect to the current project or with respect to possible future upgrades and their impact on electricity rates. As indicated above, the potential impact of other future projects is beyond the scope of this proceeding.

Goldcorp confirmed that it intended to transfer the facilities to Hydro One at no net cost to Hydro One and therefore the transfer will not adversely affect electricity rates. Goldcorp further submitted that it will follow the Transmission System Code Economic Evaluation and the CCRA to achieve the stated objective.

With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.

Conclusion

Having considered all of the evidence related to the application, the Board finds the proposed project to be in the public interest in accordance with the criteria established in section 96(2) of the Act.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, Goldcorp is granted leave to construct the proposed transmission facilities, all in the Municipality of Red Lake, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The Board had previously determined that LSFN was eligible to apply for an award of costs. Claims in this regard should conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Goldcorp by **August 3, 2011**. Goldcorp should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **August 10, 2011**. LSFN will have until **August 17, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on Goldcorp. Goldcorp shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, July 20, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

CONDITIONS OF APPROVAL

EB-2011-0106

DATED: JULY 20, 2011

Conditions of Approval for the
Goldcorp Transmission Line and Associated Facilities (the "Project")
EB-2011-0106

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1 General Requirements

1.1 Goldcorp shall construct the Project and restore the Project land in accordance with its Leave to Construct application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate July 31, 2012, unless construction of the Project has commenced prior to that date.

1.3 Goldcorp shall obtain all necessary Class Environmental Assessment approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

1.4 Goldcorp shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the Final System Impact Assessment Report, and such further and other conditions which may be imposed by the IESO. Goldcorp shall file the final System Impact Assessment Report with the Board, immediately upon its receipt and prior to the facilities being commissioned.

1.5 Goldcorp shall satisfy the Hydro One Networks Inc. requirements as reflected in the Final Customer Impact Assessment document dated June 10, 2011, and such further and other conditions which may be found to be necessary.

1.6 Goldcorp shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to material changes in the proposed route, construction techniques, construction schedule, restoration procedures, or any other material impacts of construction. Goldcorp shall not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

2 Project and Communications Requirements

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Electricity Facilities and Infrastructure Applications.

2.2 Goldcorp shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the

construction site. Goldcorp shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

2.3 Goldcorp shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. Goldcorp shall submit two (2) copies of the construction plan to the Board's designated representative at least ten (10) days prior to the commencement of construction. Goldcorp shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

2.4 Goldcorp shall furnish the Board's designated representative with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's Order.

2.5 Goldcorp shall, in conjunction with Hydro One Networks Inc., Ontario Power Generation and the IESO, develop an outage plan which shall detail how proposed outages will be managed. Goldcorp shall provide two (2) copies of the outage plan to the Board's designated representative at least ten (10) days prior to the first outage. Goldcorp shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

2.6 Goldcorp shall furnish the Board's designated representative with two (2) copies of written confirmation of the completion of Project construction. This written confirmation shall be provided within one month of the completion of construction.

3 Monitoring and Reporting Requirements

3.1 Both during and for a period of twelve (12) months after the completion of construction of the Project, Goldcorp shall monitor the impacts of construction, and shall file two (2) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Project. Goldcorp shall attach to the monitoring report a log of all comments and complaints related to construction of the Project that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

3.2 The monitoring report shall confirm Goldcorp's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included

and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

-- End of document --

APPENDIX B

TO DECISION AND ORDER

DECISION ON MOTION DATED APRIL 29, 2011

EB-2011-0106

DATED: JULY 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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 Goldcorp Canada Ltd. and Goldcorp Inc. for leave to construct new 115kV transmission facilities in the Municipality of Red Lake, and other orders.

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION ON *EX PARTE*, INTERIM AND INTERLOCUTORY MOTION UNDER SECTION 19 OF THE OEB ACT

BACKGROUND

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Applicant") filed an application, dated April 25, 2011, with the Ontario Energy Board under sections 92 and 19 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the "Act"). Goldcorp is seeking an order of the Board granting leave to construct 10.7 km of 115 kV single circuit transmission line from Hydro One Networks Inc.'s ("HONI")

115 kV E2R Transmission line at a point approximately 2 km south of Harry's Corner to the to-be-constructed Balmer Complex Transformer Station ("TS"), all in the Municipality of Red Lake. Goldcorp filed a Notice of Motion of the same date seeking an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the proposed Balmer Complex TS site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application and without prejudice to the Board's determination of that application.

Goldcorp Canada Ltd. is a federal company headquartered in Toronto, and carries on the business of, among other things, operating gold mines in Ontario.

This Decision deals solely with the section 19 Motion and with the threshold issue of the *ex parte* nature of the motion. For this reason, the Board has determined that no further submissions are required on the Motion.

THE MOTION

The relevant portions of section 19 of the Act read as follows:

> 19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.
>
> (2) The Board shall make any determination in a proceeding by order.
>
> (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

The evidence filed by the Applicant indicates that the Motion filed pursuant to section 19 of the Act is to authorize Goldcorp and its contractors to carry out:

- civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building for the Balmer Complex TS. The Applicant proposed to commence with work on May 1 and continue this work until the Board makes its determination with respect to whether to grant leave to construct under section 92 of the Act.
- Clearing and grubbing the right-of-way for the applied for transmission line starting May 1, 2011 and lasting until the commencement of the nesting season

for breeding and migrating birds in May, and then again in mid July on the portions of the right-of-way outside the buffer zone for two separate bald eagle nests on the proposed right-of-way, and finally, in September, 2011 after the bald eagle nesting period is complete.

The grounds cited for the Motion are provided at Exhibit A, Tab 4, Schedule 1, pages 3-6 of the Applicants evidence.

In essence Goldcorp indicates that it needs to have its proposed facilities in service by Q4 2011 in order to meet the requirements of its Mine Development Plan and the construction schedule dictates that construction should start sometime in June, 2011 and proceed continuously until November, 2011. The Applicant indicates that because the Board's normal procedure and timing for a leave-to-construct application could result in a decision on the leave to construct as late as the first of September, 2011 this would not allow the applicant to complete construction until February of 2012.

Goldcorp's evidence indicates that it is further constrained by seasonal restrictions imposed by the Ministry of Natural Resources ("MNR") which relate to bird nesting periods. The evidence indicates that there are no breeding bird nesting areas on or around the site and the Balmer Complex where the Applicant plans to locate the Balmer Complex TS, and that there are therefore no MNR restrictions on construction in that area. However, due to MNR rules, clearing and grubbing on the right-of-way may not be carried out within 1 km of two Bald Eagle nests found on the right-of-way until September 1, 2011. Clearing and grubbing may be carried out on the rest of the right-of-way until mid May and after mid July.

Goldcorp indicates that it is unaware of any opposition to its project or proposed facilities and that it expects all required permits from MNR by around April 26, 2011.

Goldcorp further indicates that it is prepared to accept the financial and regulatory risk of spending the money necessary to carry out these pre-construction activities before the Board has made a decision on its section 92 application.

BOARD FINDINGS

The Board has reviewed the evidence provided by the Applicant and considered the evidence relevant to the section 19 motion.

The Board has determined that it will not grant an *ex parte*, interim and interlocutory order granting the Applicant leave to carry out civil engineering work at the proposed Balmer Complex TS site and to clear and grub the right-of-way.

In making its determination, the Board has considered the requirements of section 21(4)(s) of the Act, which reads as follows:

> Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,
>
> ...
>
> (b) ***the Board determines that no person, other than the applicant,*** appellant or licence holder ***will be adversely affected in a material way by the outcome of the proceeding*** and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing. [Emphasis added]

In essence, the Applicant has asked that the Board dispose of its motion, which is in substance, a proceeding in which the Applicant seeks leave to have access to, enter upon, and complete certain works, some of which are of a permanent nature, on certain lands on an *ex parte* basis, that is without providing notice to parties that may be adversely affected in a material way by the outcome of the proceeding. Subsection 21(4)(b) is therefore operative in this case.

The Applicant has provided evidence to indicate that it has identified and notified stakeholders who may have an interest in the proposed transmission facilities and that it has conducted a public consultation process. Goldcorp also provided a list of stakeholders, including First Nations, that may have an interest in the proposed transmission facilities as well as a description of the consultation program and a list of correspondence.

The Board cannot determine whether and to what extent any person, other than the applicant in this case, will be adversely affected by the outcome of this proceeding, without having provided notice in the Board's standard form of Notice and communicated in the Board's required methods. Therefore, the Board cannot at this time grant relief of the type sought by the Applicant. The Board notes that it is issuing

the Notice of Application and Letter of Direction simultaneously with this Decision. The Board intends to take all reasonable steps to expedite the proceeding where possible and appropriate. In that context, the Applicant may consider seeking some form of relief in advance of the Board's final disposition of the application.

THE BOARD THEREFORE ORDERS THAT the Motion filed by the Applicant pursuant to section 19 for an *ex parte* interim and interlocutory order authorizing Goldcorp and its contractors to carry out (1) civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building for the Balmer Complex TS and (2) clearing and grubbing the right-of-way for the applied for transmission line starting May 1, 2011 and lasting until the commencement of the nesting season for breeding and migrating birds in May, and then again in mid July on the portions of the right-of-way outside the buffer zone for two separate bald eagle nests on the proposed right-of-way, and finally, in September, 2011 after the bald eagle nesting period is complete; is hereby denied.

ISSUED at Toronto, April 29, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX C

TO DECISION AND ORDER

DECISION ON MOTION DATED JUNE 20, 2011

EB-2011-0106

DATED: JULY 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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 Goldcorp Canada Ltd. and Goldcorp Inc. for leave to construct new 115kV transmission facilities in the Municipality of Red Lake, and other orders.

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION ON MOTION

BACKGROUND

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board under section 92 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the "*OEB Act*"). Goldcorp is seeking an order of the Board granting leave to construct 10.7 km of 115 kV single circuit transmission line from Hydro One Networks Inc.'s ("HONI") 115 kV E2R Transmission line at a point approximately 2 km south of Harry's Corner to

the to-be-constructed Balmer Complex Transformer Station ("TS"), all in the Municipality of Red Lake.

The Board issued a Notice of Application and Hearing ("Notice") on April 29, 2011. The Notice was served on all affected and interested parties and was published in the Northern Sun News and the Wawatay News.

On May 3, 2011, the Board received a Notice of Motion from Goldcorp, for:

1. An interim order authorizing Goldcorp and its contractors to carry out civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building, commencing on May 25, 2011 and continuing until the Board decides the leave to construct application.
2. An interim order authorizing Goldcorp and its contractors to carry out clearing and grubbing of the right-of-way for the applied for transmission line starting subsequent to completion of the nesting season for breeding and migrating birds, on the portions of the right-of-way outside the buffer zone for two separate Bald Eagle nests on the proposed right-of-way, and, finally, in September, 2011 after the Bald Eagle nesting period is complete.

Goldcorp requested an oral hearing of the motion. The grounds cited for the motion are provided at Exhibit A, Tab 4, Schedule 1, pages 3-6.

On May 26, 2011, the Board issued Procedural Order No.1, which amongst other things, set out the schedule for interrogatories and submissions on the main application and set a date for an oral hearing to hear the motion.

The oral hearing was held on June 7, 2011, in the Board's North Hearing Room at 2300 Yonge Street, Toronto. Goldcorp, Lac Seul First Nation (LSFN) and Board staff attended the oral hearing.

Positions of parties:

Goldcorp submitted that in order to achieve the target in-service date of December 2011, it needed to begin civil engineering work on the Balmer transformer site as soon as possible, and to begin clearing and grubbing of the right-of-way by the end of July.

Goldcorp acknowledged and accepted the financial risk of undertaking the proposed work ahead of the Board's determination of the leave to construct application.

Goldcorp submitted that failure to meet the target in-service date would affect production and have a detrimental effect on the Red Lake economy and the Company's ability to meet the requirements of its Mine Development Plan.

Goldcorp argued that the work proposed in the motion did not impact any private landowners, as the Balmer transformer site is located on Goldcorp land and the right-of-way is located on Crown land. Goldcorp also submitted that the proposed facilities will help alleviate system constraints and improve the reliability of service in the Red Lake area.

With respect to environmental restrictions, Goldcorp confirmed that there were no seasonal restrictions at the Balmer transformer site, however it also noted that due to Ministry of Natural Resource (MNR) restrictions[1], clearing and grubbing of the right-of-way could not be carried out within 1 kilometer of Bald Eagle nests until September 1, 2011. The evidence indicates that clearing and grubbing could be carried out on the rest of the right-of-way after July.

Goldcorp further submitted that the project had received approval under the *Class Environmental Assessment (EA) for Minor Transmission Facilities*, and that it was waiting for MNR approval for the *Class EA for Resource Stewardship and Facility Development*. MNR's approval and the issuance of permits were originally expected to occur by April 26, 2011. At the hearing, Goldcorp informed the Board that the Class EA approval and the issuance of permits were delayed until MNR was satisfied that appropriate consultation with the affected First Nations had occurred.

LSFN opposed the motion and argued that the Board did not have jurisdiction to grant the relief Goldcorp was seeking in its motion.

On the matter of jurisdiction, LSFN argued that the work proposed in the motion involved extensive construction activities at the Balmer transformer site and the right-of-

[1] In a letter dated June 6, 2011 MNR stated that "The restrictions on work in the proximity of the Bald Eagle nests were proposed by SNC Lavalin in the Environment Study Report. MNR endorsed this proposal, and still favours it, although it is not strictly required under the Forest Management Plan guidelines governing forestry work in proximity to Bald Eagle nets".

way, and approval to carry out this work could only be granted after the Board had made a final determination in the leave to construct application.

LSFN acknowledged that the Board had jurisdiction to make interim orders on all matters before it, however noted that in relation to leave to construct applications that authority was fairly limited, as provided in section 98(1.1). LSFN submitted that section 98(1.1) expressly defines, and as such limits, the type of work that can be carried out as part of an interim order to "surveys and examinations as are necessary for fixing the site for the work". LSFN argued that the work contemplated in the motion was far more extensive and intrusive than that provided for under section 98(1) and therefore the Board did not have jurisdiction to grant the relief that Goldcorp was seeking.

LSFN relied on the maxim of statutory interpretation called "implied exclusion", and argued that it was reasonable to conclude that if the legislature had intended to give the Board powers to make interim orders in relation to construction activities it would have expressly done so. LSFN also noted that the *OEB Act* did not have any provisions for compensation for damages in relation to the activities proposed by Goldcorp, as it has under section 98(1.1). LSFN argued that this exclusion was deliberate and was indicative of the Board's restricted authority in this matter.

LSFN also addressed the interim order provisions in section 16(1) of the *Statutory Powers and Procedure Act* (*SPPA*) and argued that the Board was not empowered under section 16(1) of the *SPPA* to make substantive interim orders. LSFN argued that section 16(1) can only be used to grant relief that was of a procedural nature. LSFN referred to two decisions[2] in support of this argument.

On the merits of the motion, LSFN submitted that Goldcorp had not adequately supported the need for the relief sought and that Goldcorp had alternatives, such as diesel generation, in the event the project was delayed. LSFN also stated that its concerns predominantly relate to the right-of-way, which is located on Crown land and not to the Balmer transformer site, which is located on Goldcorp land.[3] LSFN also submitted that its intention was not to delay the proceeding and noted that it had expressed concerns as far back as October 2010 with the baseline archeological work undertaken by Goldcorp as part of the EA.

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[2] Arzem v. Ontario (Ministry of Community & Social Services) and Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of the Environment)

[3] Oral Hearing Transcript, Vol. 1, p. 118

Board staff submitted that the Board did not have jurisdiction to grant the relief sought by Goldcorp.

Board staff agreed with LSFN that the principle of "implied exclusion" applies to this case and noted that section 98 and section 103 make clear that the legislature turned its mind to the concept of entry on land by a proponent. Board staff submitted that if the legislature had intended to allow entry on land for clearing and grubbing and to carry out civil engineering work, it would have expressly done so. Board staff also submitted that sections 19(1) and section 21(7), while broad, are circumscribed with respect to the entry onto land by a proponent. Board staff did note, however, that if the Board were to find that it has jurisdiction under section 19(1) and section 21(7), and decided to grant the relief sought by Goldcorp in this motion, then the approval could and should be conditional on approval of both Class EAs and receipt of necessary permits.

Board staff submitted that while the activities contemplated by Goldcorp have too significant an impact to authorize under an interim order, Goldcorp should not be prohibited from doing the work if it is able to negotiate access with landowners directly. Staff noted that the Board had followed a similar approach in EB-2007-0051[4].

Specifically in relation to the request for interim orders, Board staff submitted that such orders may not be needed at the present time.

With respect to the civil engineering work on the Balmer transformer site, Board staff submitted that it did not see the necessity for Board approval, given that the work proposed did not involve the connection of any equipment to the electricity grid. In this regard, Board staff acknowledged that while the definition of "transmission line" in section 89 of the *OEB Act* includes transformers, that definition specifies that the equipment must be "used for conveying electricity".

With respect to the work on the right-of-way, Board staff noted that the clearing and grubbing of the right-of-way cannot be started before mid-July and given the current schedule for the proceeding, it is conceivable that the Board will be able to issue a decision around that time. Therefore, staff submitted that an interim order may not be required for this work either.

[4] Decision granting entry on land in connection with the Bruce to Milton line, dated August 20, 2011

In final reply argument, Goldcorp submitted that the Board has jurisdiction to grant the relief sought in the motion. Goldcorp submitted that the argument of "implied exclusion" was based on an obsolete approach to interpreting statutes and argued that statutes should instead be read in a broad, liberal and purposive manner. Goldcorp pointed the Board to the case of *R. v. Kapp* in which the Supreme Court of Canada said that statutes should be interpreted in a purposive manner. Goldcorp also noted that Ontario's *Legislation Act* requires that statues should be interpreted in a liberal and purposeful manner.

Goldcorp also disagreed with Board staff and LSFN's interpretation of section 98. Goldcorp argued that section 98 does not deal with early access, but rather with getting access to land that a proponent does not own. Goldcorp also submitted that section 16(1) of the *SPPA* allows the Board to make interim orders to which the Board may attach conditions and for which the Board is not required to provide reasons. Goldcorp referred to two decisions of the Ontario Labour Relations Board[5] and submitted that these cases were of equal authority to the *Arzem* decision. Goldcorp submitted that the two Ontario Labour Relations Board decisions support the view that section 21(7) of the *OEB Act* permits substantial interim orders.

BOARD FINDINGS

The motion is denied. With respect to the civil engineering work (including grading, fencing, installing foundation for and constructing walls) at the Balmer transformer site, the Board is of the view that because the work proposed is on Goldcorp land and does not include the electrification of the facilities (i.e. will not be connected to the electricity grid) at the Balmer site, an explicit order of the Board is not required. In the Board's view, Goldcorp is free to undertake the civil engineering work, provided that Goldcorp is able to acquire any and all necessary permits and on the understanding that none of the facilities at the Balmer site will be energized.

With respect to the interim order to clear and grub the right-of-way, the Board finds that such an order is premature. Based on the current case schedule and on the basis that no new procedural or substantive issues arise, it is reasonable to expect that the Board will be able to issue a decision in the leave to construct application on or before the earliest time that Goldcorp, by it own evidence, has indicated that it could commence

[5] OPSEU v. Ontario (Management Board of Cabinet), [1996] OLRB Rep. 780 & Martin v. Tricin Electric Ltd., [2004] OLRB dep. 823

construction on the right-of-way, i.e. mid to end of July, 2011. The Board therefore finds that an interim order is not needed at this time.

The Board also notes that Goldcorp has not yet received approval from MNR for the Class EA and until that approval is received, and MNR is satisfied that appropriate consultation with affected First Nations and Metis has occurred, the evidence of Goldcorp is that MNR will not issue the permits needed to carry out the proposed work. According to Goldcorp's original pre-filed evidence, the approval for the Class EA and the necessary permits was expected by April 26, 2011, however given MNR's concerns that approval has been indefinitely delayed. While Goldcorp was not able to give an estimate as to when the permits from MNR will be issued, LSFN's assessment was that consultation matters could be resolved by the end of summer. Therefore, it is unlikely that Goldcorp will have the necessary permits to carry out the proposed work on the right-of-way before the end of summer and as such an interim order is not needed at this time.

Given that the motion is denied on its merits, there is no need for the Board to address the issue of jurisdiction.

ISSUED at Toronto, June 20, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Tab 2

Indexed as:

R. v. Conway

Paul Conway Appellant;

v.

Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health Respondents, and Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society Interveners

[2010] 1 S.C.R. 765

[2010] 1 R.C.S. 765

[2010] S.C.J. No. 22

[2010] A.C.S. no 22

2010 SCC 22

File No.: 32662.

Supreme Court of Canada

Heard: October 22, 2009;
Judgment: June 11, 2010.

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

(104 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law -- Charter of Rights -- Remedies -- Accused not criminally responsible by reason of mental disorder detained in mental health facility -- Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms -- Accused also seeking as remedy order directing mental health facility to provide him with particular treatment -- Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter -- If so, whether accused entitled to remedies sought -- Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law -- Charter of Rights -- Remedies -- Court of competent jurisdiction -- Remedial [page766] jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms -- New approach.

Criminal law -- Mental disorder -- Review Board -- Remedial jurisdiction under Canadian Charter of Rights and Freedoms -- Accused not criminally responsible by reason of mental disorder detained in mental health facility -- Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board -- Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code -- Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter -- If so, whether accused entitled to remedy sought -- Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Administrative law -- Boards and tribunals -- Jurisdiction -- Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms -- New approach.

Summary:

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(*a*) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental health centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of

Appeal unanimously concluded that it was unreasonable for the Board not to address the [page767] treatment impasse plaguing C's detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The *Mills* cases established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The *Slaight* cases established that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper [page768] exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

A merger of the three distinct constitutional streams flowing from this Court's administrative law

jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does, and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind [page769] of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing

the Board to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered [page770] by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to s. 24(1) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

Cases Cited

Considered: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326; **referred to:** *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6) 455, aff'd 2010 BCSC 105 (CanLII); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *[page771] Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Swain*, [1991] 1 S.C.R. 933; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Armstrong and Lang JJ.A.), 2008 ONCA 326, 90 O.R. (3d) 335, 293 D.L.R. (4) 729, [page772] 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Counsel:

Marlys A. Edwardh, *Delmar Doucette*, *Jessica Orkin* and *Michael Davies*, for the appellant.

Hart M. Schwartz and *Amanda Rubaszek*, for the respondent Her Majesty the Queen.

Janice E. Blackburn and *Ioana Bala*, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and *Elichai Shaffir*, for the intervener the Ontario Review Board.

Paul Burstein and *Anita Szigeti*, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., *Mark G. Underhill* and *Alison Latimer*, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

1 **ABELLA J.**:-- The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

2 There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section [page773] 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances". Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

3 When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

4 The first relevant wave of cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the *Charter*, a "court of competent jurisdiction" was a "court" with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* (*Carter v. The Queen*, [1986] 1 S.C.R. 981; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588;

R. v. Gamble, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("*Dunedin*"); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII)).

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5 The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. Although *Slaight* did not - and does not - offer any direct guidance on what constitutes a "court of competent jurisdiction", its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 875; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 38-40; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 22; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383, at paras. 20-24).

6 The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The legacy of these cases - the *Cuddy Chicks* trilogy - is in their conclusion that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257).

7 The impact of these three jurisprudential waves has been to confine constitutional issues for administrative tribunals to three discrete universes. [page775] It seems to me that after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged.

Background

8 Paul Conway is 56 years old. As a child, he was physically and sexually abused by close relatives. During his twenties, Mr. Conway was twice convicted of assault.

9 In September 1983, at the age of 29, Mr. Conway threatened his aunt at knife point and forced her to have sexual intercourse with him repeatedly over the course of a few hours. On February 27, 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon.

10 Since the verdict, Mr. Conway has been detained in mental health facilities across Ontario, primarily the Penetanguishene Mental Health Centre's maximum security unit. He has been diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.

11 In 2005, following Mr. Conway's mandatory annual review hearing before the Ontario Review Board, the Board transferred Mr. Conway from Penetanguishene to Toronto's Centre for Addiction and Mental Health ("CAMH"), a medium security facility. The Board observed that although Mr. Conway was "unconvinced that he suffers from a mental illness" and was "uncured", his treatment required that he have hope of eventually being integrated into the community.

12 Prior to his annual review hearing in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board, CAMH, and the Attorneys General of Ontario and Canada, alleging breaches of ss. 2(*b*), 2(*d*), 7, 8, 9, 12 and 15(1) of the *Charter*. He listed the following grounds as the basis of the [page776] claim that his constitutional rights had been violated and that he was therefore entitled to an absolute discharge under s. 24(1):

> Mr. Conway states that there is little regard for the living conditions under which he is detained and that these factors have a negative impact on his mental and physical health. These conditions include:
>
> a. Construction noise, fumes and dust associated with the renovation of the unit directly below him which affect his peace, tranquillity and convalescence;
> b. Failure to respect his rights, individuality, and expressions of same;
> c. Interruptions by staff of his telephone calls and unnecessary and improper implementation of call restrictions including when he is speaking with legal counsel;
> d. Unfair treatment by staff which manifests in differential treatment towards him compared with other NCR accused individuals detained on the unit; and
> e. Failure to provide for his needs and advocacy for his expressed needs;
>
> ...
>
> Mr. Conway is currently incarcerated and is subject to infringements on his

liberty, safety, dignity and security of his person without due process of the law, including:

a) environmental pollution;
b) noise pollution;
c) arbitrary actions by staff;
d) threats of attack and attacks by inpatients;
e) hostility by staff against him;
f) threats of the use of chemical and mechanical restraints;

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g) failure to provide emotional counselling for the abuse suffered by Mr. Conway as a child (including emotional, physical, sexual and domestic abuse) which is the real source of Mr. Conway's mental health problems and emotional distress;
h) failure to provide an environment which allows him to feel safe on a daily basis;
i) failure to provide an environment where the Rule of Law prevails;
j) failure to provide an environment where Mr. Conway is afforded procedural fairness in respect of any restriction of his liberties;
k) failure to provide an environment which is free of racism;
l) failure to provide [an] environment which is cross-culturally sensitive; and
m) such other and further infringements and violations as counsel may advise and the Board may permit;

These violations on Mr. Conway's rights have affected Mr. Conway such that he no longer can benefit therapeutically from the environment.

13 After an eight-day hearing, the five-member panel of the Ontario Review Board unanimously concluded that Mr. Conway was "an egocentric, impulsive bully with a poor to absent ability to control his own behaviour", had continued paranoid and delusional ideation, and had a persistent habit of threatening and intimidating others, high actuarial scores for violent recidivism and an untreated clinical condition.

14 He was consequently found to be a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute

discharge under the statute, which states that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54). Accordingly, Mr. Conway was ordered to remain at CAMH. The Board suggested, but did not formally order, that CAMH establish a "renewed treating team" for Mr. Conway, enrol him in anger management and [page778] sexual assault prevention programs, and investigate whether he had sustained brain damage in a car accident more than 30 years ago.

15 As for Mr. Conway's application for a remedy under s. 24(1) of the *Charter*, the Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s. 24(1) jurisdiction. It therefore had no jurisdiction to consider Mr. Conway's *Charter* claims.

16 Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s. 24(1) (2008 ONCA 326, 90 O.R. (3d) 335). Armstrong J.A. for the majority concluded that the Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. The Board was therefore not a court of competent jurisdiction pursuant to the test set out in *Mills* since it lacked jurisdiction over the particular remedy sought. Lang J.A. agreed that an absolute discharge was unavailable to Mr. Conway, but she was of the view that the Board was competent to make other orders that would be appropriate remedies for a breach of a patient's *Charter* rights.

17 Notably, the Court of Appeal also unanimously concluded that it was unreasonable for the Board not to make a formal order setting out conditions addressing the treatment impasse plaguing Mr. Conway's detention. This issue was remitted back to the Board.

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18 This Court, in order to decide whether Mr. Conway is entitled to the *Charter* remedies he is seeking, must first determine whether the Ontario Review Board is a court of competent jurisdiction which can grant *Charter* remedies under s. 24(1). In accordance with the new approach developed in these reasons, I am of the view that it is. On the other hand, I am not persuaded that Mr. Conway is entitled to the particular *Charter* remedies he seeks and would therefore dismiss the appeal.

Analysis

19 Section 24(1) states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

20 We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin*; *Douglas College*; *Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

21 The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

22 All of these developments serve to cement the direct relationship between the *Charter*, its [page780] remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

23 This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

The Mills Cases

24 In *Mills*, it was decided that relief is available under s. 24(1) of the *Charter* if the "court" from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts and tribunals acting under specific statutory schemes are courts [page781] of competent jurisdiction to grant particular remedies under s. 24(1).

25 The early cases considered the remedial jurisdiction of statutory and superior courts. In *Mills* and *Carter*, this Court held that a provincial court judge sitting as a preliminary inquiry court was not a court of competent jurisdiction for the purpose of ordering a stay of proceedings for an alleged s. 11(*b*) violation. The following year, this Court concluded that extradition judges had the same institutional features as preliminary inquiry judges, and could therefore not order a stay in the event of a *Charter* breach (*Mellino*; *Allard*). Further, in *Mellino*, the Court observed that since extradition proceedings were reviewable by superior courts by way of *habeas corpus*, those superior courts were the courts of competent jurisdiction to grant a stay under s. 24(1), not the extradition judge.

26 In 1988, in *Gamble*, the Court held that a superior court in the province where an individual is in custody is a court of competent jurisdiction to hear an application for *habeas corpus*, stating:

> Where the courts of Ontario have jurisdiction over the subject matter and the person, it seems to me that they may, under the broad provisions of s. 24(1) of the *Charter*, grant such relief as it is within their jurisdiction to grant and as they consider appropriate and just in the circumstances. [p. 631]

27 In 1995, in *Weber*, the Court expanded the scope of the *Mills* inquiry to cover administrative tribunals. The issue was whether a labour arbitrator appointed under the *Labour Relations Act*, R.S.O. 1990, c. L.2, was a court of competent jurisdiction for the purpose of granting damages and a declaration under s. 24(1) in relation to disputes which in their essential character arose out of the collective agreement between the parties. Weber had sought relief for what he alleged were breaches of ss. 7 and 8 of the *Charter* committed by his employer, Ontario Hydro, who had gathered surveillance evidence about him during his extended sick leave. [page782] The Court had to determine whether Weber was required to raise his *Charter* claims before a labour arbitrator or before the superior court.

28 For the majority, McLachlin J. rejected an approach that would bifurcate the proceedings between the arbitrator and the courts. In her view, the "essential character" of Weber's claim was unfair treatment by the employer. The collective agreement expressly stated that the grievance procedure applied to "[a]ny allegation that an employee has been subjected to unfair treatment". Weber's *Charter* claims were therefore found to be within the arbitrator's exclusive jurisdiction:

> [W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.
>
> ...

> ... it is not the name of the tribunal that determines the matter, but its powers... . The practical import of fitting *Charter* remedies into the existing system of tribunals, as McIntyre J. notes [in *Mills*], is that litigants have "direct" access to *Charter* remedies in the tribunal charged with deciding their case. [paras. 60 and 65]

29 Foreshadowing the debate that is before us in this case, Iacobucci J. in dissent, expressed the view that the arbitrator was neither a "court" nor of "competent jurisdiction" for the purpose of granting *Charter* remedies under s. 24(1). In his view, Weber was entitled to seek labour remedies from the arbitrator, but not those under the *Charter*.

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30 The *Weber* "exclusive jurisdiction model" enunciated by McLachlin J., which directed that an administrative tribunal should decide *all* matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Quebec (Human Rights Tribunal)*; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Okwuobi*; Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (2006), at p. 4-15).

31 The next year, this Court decided *Mooring*. The issue was whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Sopinka J., writing for the majority, considered only the third step of the *Mills* test since he found it to be determinative. In his view, it followed from the Parole Board's structure and function, as well as the language of its enabling statute, that the Board could not exclude evidence under s. 24(2) of the *Charter*. Pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the Board was not bound by the traditional rules of evidence and was obliged to consider all available, relevant information when rendering its decisions. The ability to exclude evidence would have been, in Sopinka J.'s view, inconsistent with the intent and specific provisions of the Parole Board's statutory scheme. Since the *Mills* test was ultimately a means of discerning Parliamentary intent, this inconsistency precluded the Board from being a court of competent jurisdiction for the purpose of granting the particular remedy sought. Sopinka J. concluded instead that the Parole Board's "duty of fairness" obligations offered sufficient protection to those appearing before the Board.

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32 Major J. (McLachlin J. concurring), in a vigorous dissent, criticized the majority's implicit

resurrection of the idea, rejected in *Weber*, that only courts could be "courts of competent jurisdiction" for the purpose of s. 24(1). Major J. was of the view that the policy considerations animating the Court's reasoning under s. 52 in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24(1). He felt that "[o]f primary importance is the ability of the citizen to rely upon and assert *Charter* rights in a direct manner in the normal procedural context in which the issue arises" (para. 61). As he explained:

> There is no reason in principle why any of the practical advantages enunciated by La Forest J. in the trilogy should apply with any less force to a tribunal granting a remedy under s. 24 than to a tribunal declining to enforce a constitutionally invalid statutory provision. If anything, tailoring a specific *Charter* remedy for a specific applicant before a tribunal is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise. It has less serious ramifications than determining that a statutory provision will not be applied on *Charter* grounds. [para. 64]

33 Turning to the *Mills* test, Major J. concluded that the only real question before the Court was whether the Parole Board was a court of competent jurisdiction for the purpose of awarding the specific remedy sought by the applicant, namely the exclusion of evidence. While the Parole Board was not bound by formal rules of evidence, it was nonetheless obliged to exclude information that was irrelevant, unreliable or inaccurate. Accordingly, the Board had the jurisdiction to exclude evidence and it therefore met the third *Mills* criterion. Major J. expressly disagreed with Sopinka J.'s conclusion that the doctrine of procedural fairness provided sufficient protection of constitutional rights in the context of the Board's proceedings.

34 More recently, the Court has had two further opportunities to consider the *Mills* test. In *Dunedin*, [page785] the issue was whether a provincial court judge with jurisdiction under Ontario's *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a court of competent jurisdiction for the purpose of ordering costs against the Crown for failure to comply with the *Charter*. McLachlin C.J., writing for a unanimous Court, again confirmed that applying the *Mills* test is, first and foremost, a matter of discerning legislative intent. The question in each case is whether the legislature intended to give the court or tribunal the power to apply the *Charter*:

> [W]here a legislature confers on a court or tribunal a function that involves the determination of matters where *Charter* rights may be affected, and furnishes it with processes and powers capable of fairly and justly resolving those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the *Charter*. [para. 75]

35 This approach "promotes direct and early access to *Charter* remedies in forums competent to issue such relief" (para. 75). Applying it to the issue before her, McLachlin C.J. concluded that both

the structure and function of the provincial offences court supported the view that it could and should apply the *Charter*. Looking first to function, McLachlin C.J. concluded that the provincial offences court's role as a quasi-criminal court of first instance weighed strongly in favour of expansive remedial jurisdiction under s. 24 of the *Charter*. Such jurisdiction would promote the resolution of *Charter* issues in the forum best situated to resolve them:

> Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing *Charter* remedies in the cases originating before them, where they will have the "fullest account of the facts available" ... . This role commends a full complement of criminal law remedies at the disposal of provincial offences courts. This broad remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. [para. 79]

[page786]

36 McLachlin C.J. also sought, as she had in *Weber*, to avoid the unnecessary bifurcation of avenues of relief:

> [F]racturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. [para. 82]

37 McLachlin C.J. then considered the structure of the provincial offences court. She concluded that since criminal and quasi-criminal proceedings are structurally indistinguishable, the criminal courts' jurisdiction to grant costs in the event of a *Charter* breach extends to the quasi-criminal courts. The *Provincial Offences Act* disclosed no contrary intention. McLachlin C.J. ultimately concluded that since the legislature gave the provincial offences court functions destined to attract *Charter* issues and *Charter* remedies, the legislature must have intended that it be able to deal with related *Charter* issues.

38 In the companion case of *Hynes*, the issue was whether a preliminary inquiry court was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Again, only the third step of the *Mills* test was considered, and again the tension on display in *Weber* and *Mooring* was exhibited. McLachlin C.J., for the majority, reiterated the principles set out in *Dunedin* and explained that in all cases the question is

> whether Parliament or the legislature intended to empower the court or tribunal to make rulings on [page787] *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violations. [para. 26]

She went on to conclude that a preliminary inquiry court was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). A preliminary inquiry's primary function was, in her view, to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. Empowering a preliminary inquiry judge to exclude evidence under the *Charter* would jeopardize the inquiry's expeditious nature. The criminal trial courts were better suited to the task of determining whether to exclude evidence.

39 Major J., writing in dissent for four judges, agreed that only the third step of the *Mills* test was at issue but disagreed with the majority as to the result. He noted that preliminary inquiry judges were authorized to exclude evidence under the common law confessions rule. It was not, therefore, supportable by "logic or efficiency to permit a preliminary inquiry justice to determine the admissibility of statements for common law purposes, but not for *Charter* purposes, when it is recognized that preliminary inquiry justices are armed with all the facts. Parliament could not have intended such waste" (para. 96). Accordingly, in his view, a preliminary inquiry judge was competent to exclude evidence under s. 24(2).

40 This review of *Mills*' progeny gives rise to three observations. First, this Court has accepted that the *Mills* test applies to courts as well as to administrative tribunals. Second, although *Mills* set out a three-pronged definition of "court of competent jurisdiction", the first two steps have almost never been relied on. Twenty-five years later, "jurisdiction over the parties" and "jurisdiction over the subject matter" remain undefined for the purposes of the test. The inquiry has almost always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). [page788] In other words, the inquiry is less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy*. Third, while there appears to be agreement that s. 24(1) jurisdiction is a function of legislative intent, the authoritative comments of the majorities in *Weber* and *Dunedin*, eschewing bifurcated proceedings and heralding early and accessible adjudication of *Charter* applications, may have been slightly unmoored by the majority in *Mooring*.

The Slaight Cases

41 The cases flowing from *Slaight*, while of no direct assistance on what constitutes a court of competent jurisdiction, are of interest as they too show how the Court increasingly came to expand the application of the *Charter* in the administrative sphere. In 1989, *Slaight* established that any exercise of statutory discretion must comply with the *Charter* and its values. The issue was whether an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, had the authority to

order an employer to write a content-restricted reference letter for an employee and to limit the employer's response to any inquiries about the employee to the comments in the letter. The employer argued that such an order violated s. 2(*b*) of the *Charter*. This Court agreed that the employer's s. 2(*b*) rights were violated, but a majority concluded that the arbitrator's order was justified under s. 1 of the *Charter*.

42 Lamer J. explained that it was "not ... open to question" that the adjudicator's orders were subject to the *Charter*:

> The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his [page789] powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied... . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis in original; pp. 1077-78.]

43 *Slaight* was applied in 1994 in *Dagenais*, where Lamer C.J. (for the majority on this issue) said that a judge's discretion to order a publication ban was subject to the *Slaight* principle. He concluded that the judge's discretion could not be open-ended or exercised arbitrarily, and had to be "exercised within the boundaries set by the principles of the *Charter*" (p. 875). Exceeding those boundaries would result in a reversible error of law (see also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188).

44 In the 1997 case of *Eaton*, the Ontario Special Education Tribunal, acting pursuant to the *Education Act*, R.S.O. 1990, c. E.2, had ordered that Emily Eaton, a child with cerebral palsy, be placed in a special classroom for students with disabilities. The Eatons alleged discrimination, arguing that their daughter's education should take place in the mainstream schools. Lamer C.J. wrote brief reasons to clarify what he had said in *Slaight*:

> [S]tatutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can [page790] potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton ... *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to

> not authorize breaches of the *Charter*. [para. 3]

45 In the 1997 case of *Eldridge*, the Court was asked to assess the constitutionality of certain aspects of British Columbia's health care delivery scheme. The issue was whether the *Charter* applied to the Medical Services Commission's decision not to provide sign language interpreters for the deaf as part of a publicly funded scheme for the provision of medical care. La Forest J., writing for a unanimous Court, said that the basic principle derived from *Slaight* was that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so (para. 35). The provincial government had delegated to the Medical Services Commission the power to decide whether a service was a "benefit" under the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, and to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. When exercising this discretion, the Commission was acting in a governmental capacity and was therefore subject to the *Charter*.

46 In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, [1959] S.C.R. 121, among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56).

[page791]

47 The following year, in *Blencoe*, the Court was asked to determine whether the provincial Human Rights Commission was subject to the *Charter*. Bastarache J., writing for the majority, explained that *Slaight* guaranteed that statutory bodies like the Commission are bound by the *Charter* even if they are independent of the government and/or exercising adjudicatory functions:

> The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy ... . The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

> Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission. [paras. 39-40]

The majority ultimately concluded that Blencoe's *Charter* rights had not been infringed.

48 Finally, in 2006, in *Multani*, the Court considered whether a decision of a school board's [page792] council of commissioners prohibiting one of its students from wearing a kirpan at school infringed the student's freedom of religion. Charron J., writing for the majority and relying on *Slaight*, explained:

> The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker. [para. 22]

The Cuddy Chicks Trilogy

49 While the courts and tribunals were preoccupied with the proper application of the principles in *Mills* and *Slaight*, another line of authority regarding the constitutional jurisdiction of statutory tribunals was emerging. These cases dealt with whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them because they are "of no force or effect" under s. 52(1) of the *Constitution Act, 1982*. The first case was *Douglas College*, in which two Douglas College employees challenged the mandatory retirement provision in their collective agreement, claiming that it was contrary to s. 15(1) of the *Charter*. The primary issue was whether a labour arbitrator, governed by the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, and appointed under the parties' collective agreement, had the jurisdiction to determine the collective agreement's constitutionality.

50 La Forest J., writing for the Court on this issue, concluded that the jurisdiction lay with the arbitrator. Under the *Industrial Relations Act*, the arbitrator had express authority to "provide a final and conclusive settlement of a dispute". To fulfill this mandate, arbitrators acting under the Act could interpret and apply any statute that regulated employment. This included the *Charter*. La

Forest J. noted that arbitrators were bound by the same Constitution as the courts. Accordingly, if a collective agreement was illegal or unconstitutional, [page793] an arbitrator must decline to apply it just as a court would.

51 La Forest J. rejected the College's argument that the informal arbitration process was unsuited to litigating a *Charter* issue, concluding that any disadvantages of allowing administrative tribunals to decide constitutional questions were outweighed by the "clear advantages" of granting them this jurisdiction. In his view, such jurisdiction promotes respect for the Constitution because "[t]he citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution" (p. 604). Constitutional issues should be raised at an early stage in the context in which they arise, without the claimant having to first resort to an application in superior court, which is more expensive and time-consuming than the administrative process. In addition, a "specialized competence can be of invaluable assistance in constitutional interpretation" (p. 605). Specialized arbitrators and agencies can sift through the facts and quickly compile a record for the benefit of a reviewing court. In this way, the parties (and the reviewing courts) benefit from the arbitrators' expertise. This practice also allows for all related aspects of a matter to be dealt with by the most appropriate decision maker. As La Forest J. pointed out, "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (p. 599).

52 In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of Ontario's *Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the certification of Cuddy Chicks' hatchery employees. The union challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(*d*) and 15 of the *Charter*, and sought to [page794] have it declared to be of no force and effect pursuant to s. 52(1).

53 In rejecting the employer's argument that the superior court, not the Labour Board, should deal with the constitutional question, and drawing on his reasons in *Douglas College*, La Forest J.'s "overarching consideration" was that where administrative bodies like the Labour Board have specialized expertise, that expertise makes them the appropriate forum for assessing *Charter* compliance:

> It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(*b*) of the

Labour Relations Act. [Emphasis added; p. 18.]

54 After citing a number of cases in which labour boards were found to have the jurisdiction to consider constitutional questions relating to their own jurisdiction, such as *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, La Forest J. observed:

> What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression [page795] of a well established principle. [Emphasis added; p. 19.]

55 La Forest J. ultimately concluded that it was within the Board's jurisdiction to consider the constitutionality of its enabling statute since it had the express authority to consider questions of law under the statute.

56 In *Tétreault-Gadoury*, Ms. Tétreault-Gadoury lost her job shortly after her 65th birthday and applied for unemployment insurance benefits. The Employment and Immigration Commission denied her application because, under s. 31 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, a person over 65 was only entitled to a lump sum retirement benefit. Ms. Tétreault-Gadoury appealed the Commission's decision to a Board of Referees, arguing that s. 31 of the Act offended s. 15(1) of the *Charter*. The Board declined to rule on the constitutional question. Rather than appeal to an umpire as directed by the Act, Ms. Tétreault-Gadoury appealed to the Federal Court of Appeal, which concluded that s. 31 of the *Unemployment Insurance Act, 1971* was contrary to s. 15 of the *Charter*.

57 On appeal, La Forest J., again writing for the Court on the jurisdictional issue, reiterated the principle that an administrative tribunal with the authority to interpret or apply the law is entitled to determine whether a particular statutory provision is unconstitutional. The *Unemployment Insurance Act, 1971* expressly conferred the jurisdiction to consider questions of law on the umpires, not the Board of Referees. This meant that under the legislative scheme, umpires, not the Referees, were authorized to resolve constitutional issues.

58 In 1996, the constitutional jurisdiction of another statutory body - the Canadian Human [page796] Rights Commission - came under scrutiny in *Cooper*. Two airline pilots filed a human rights complaint with the Commission alleging that the mandatory retirement provision in their collective agreement was discriminatory. Section 15(*c*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, permitted the imposition of mandatory retirement if the age set was the "normal age of

retirement for employees ... in [similar] positions". The complainants challenged the constitutionality of s. 15(*c*). The issue before the Court was whether the Commission and, in turn, a tribunal appointed by the Commission to hear a complaint, had the power to assess the constitutionality of a provision of the *Canadian Human Rights Act*.

59 *Cooper*, decided in the same year as *Mooring*, highlighted the conceptual debate in this Court as to the constitutional jurisdiction of administrative tribunals. La Forest J., writing for the majority, again confirmed that if a tribunal has the power to consider questions of law, then it "must be able to address constitutional issues" (para. 46). The Commission, however, lacked statutory authority to decide questions of law. While it was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that the Commission could consider general questions of law.

60 La Forest J. reached the same conclusion with respect to a human rights tribunal. While a tribunal could consider general legal and constitutional questions, "logic" demanded that it lacked the ability to assess the constitutionality of the *Canadian Human Rights Act* (para. 66). The tribunals lacked expertise; any gain in efficiency would be lost through the inevitable judicial review of a tribunal's constitutional determinations; the tribunals' loose evidentiary rules were unsuited to constitutional litigation; and constitutional matters would bog down the human rights system, which was intended to provide for efficient and timely adjudication of complaints.

[page797]

61 Lamer C.J. concurred with La Forest J., but wrote separate reasons urging the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. In his view, the principles enunciated in those cases were contrary to the separation of powers and Parliamentary democracy, two fundamental principles of the Canadian Constitution.

62 In dissent, McLachlin J. (L'Heureux-Dubé J. concurring) concluded that both the Canadian Human Rights Commission and a human rights tribunal were empowered to assess the constitutionality of the *Canadian Human Rights Act*. This result, according to McLachlin J., "best achieves the economical and effective resolution of human rights disputes and best serves the values entrenched in the *Canadian Human Rights Act* and the *Charter*" (para. 73). Like La Forest J., McLachlin J. reinforced the view expressed in the trilogy that "administrative tribunals empowered to decide questions of law may consider *Charter* questions" (para. 81), and once again confirmed that in light of the doctrine of constitutional supremacy,

> [c]itizens have the same right to expect that [the *Charter*] will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the *Charter*.

[para. 78]

In her view, both the Commission and the tribunals could consider whether the *Charter* renders invalid the "'normal age of retirement' defence", since both bodies were empowered to decide questions of law.

63 In *Martin*, in 2003, the Court sought to resolve the debate over the *Charter* jurisdiction of tribunals. The issue was whether s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, which precluded individuals suffering from chronic pain from receiving workers' compensation [page798] benefits, were contrary to s. 15(1) of the *Charter*. As a threshold issue, it was necessary to decide whether the Nova Scotia Workers' Compensation Appeals Tribunal had the jurisdiction to consider whether the benefits provisions of its enabling statute were constitutional.

64 Gonthier J., writing for a unanimous Court, expressly rejected the 1996 *ratio* in *Cooper*, particularly insofar as it distinguished between limited and general questions of law and insofar as it suggested that an adjudicative function was a prerequisite for a tribunal's constitutional jurisdiction. He also expressly rejected Lamer C.J.'s contention that the *Cuddy Chicks* trilogy was inconsistent with the separation of powers and Parliamentary democracy.

65 Instead, Gonthier J. affirmed and synthesized the main principles emerging from the trilogy. The first was the principle of constitutional supremacy, which provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. No government actor can apply an unconstitutional law, he observed, and, subject to an express contrary intention, a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions.

66 As a further corollary, Gonthier J. echoed the views expressed over the years by McLachlin J., Major J., La Forest J., and McIntyre J. confirming that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts". Explaining that this "accessibility concern" was "particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation", Gonthier J. concluded that "forcing litigants to refer *Charter* issues to the courts would [page799] result in costly and time-consuming bifurcation of proceedings" (para. 29).

67 In his view, a tribunal's factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations. The tribunal provides the reviewing court with the most well-informed, expert view of the issues at stake:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision

> maker to analyze competing policy concerns is critical... . The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. [para. 30, citing *Cuddy Chicks*, at pp. 16-17]

68 Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal's jurisdiction to subject a legislative provision to *Charter* scrutiny:

* Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.
* Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

69 Applying this approach, Gonthier J. noted that the Workers' Compensation Appeals Tribunal was explicitly authorized to "determine all questions of fact and law". Further, the Tribunal's [page800] decisions could be appealed "on any question of law". This confirmed that the Tribunal was entitled to decide legal questions which triggered the presumption that the Tribunal was authorized to decide *Charter* questions.

70 The adjudicative nature of the Tribunal was also relevant. It was independent of the Workers' Compensation Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

71 Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

72 Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

[page801]

73 *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission)*. Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982*. The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

74 Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982*. The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

75 The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

76 In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French language*, R.S.Q., c. C-11, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

> As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of [page802] a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

77 These cases confirm that administrative tribunals with the authority to decide questions of law

and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority - and duty - to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

> [E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Merger

78 The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, [page803] they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

79 Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

80 If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective

agreement violates the *Charter* and likewise grant remedies" [page804] (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

81 Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* - and *Charter* remedies - when resolving the matters properly before it.

82 Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to This Case

83 The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an [page805] order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

84 The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder ("NCR patient"). Section 672.72(1) provides that any party may appeal a board's disposition on any ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board's disposition where the court is of the opinion that the board's disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin* and *Paul*, this language is indicative of the Board's power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* - the Board's statutory scheme - which permits us to conclude that

Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board's mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

85 The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's statutory mandate and functions.

[page806]

86 Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, [1991] 1 S.C.R. 933. The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be "treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation" (*Winko*, at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, at para. 22).

87 Part XX.1 introduced a new verdict - "not criminally responsible on account of mental disorder" - into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

88 The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81(1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 29). It is well established that the review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately (*Winko*, at para. 20; House of Commons, *Minutes [page807] of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3rd Sess., 34th Parl., October 9, 1991, at p. 6). While public safety is the paramount concern, an NCR patient's liberty interest has been held to be the Board's "major preoccupation" within the fence posts staked by public safety (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at para. 19). The Board fulfills its

"primary purpose" therefore by protecting the public while minimizing incursions on patients' liberty and treating patients fairly (*Mazzei*, at para. 32; *Winko*, at paras. 64-71; *Penetanguishene*, at para. 51).

89 Section 672.54 of the *Criminal Code* sets out the remedial jurisdiction of review boards, stating:

> Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Accordingly, at a disposition hearing regarding an NCR patient, the Ontario Review Board is authorized to make one of three dispositions: an absolute discharge, a conditional discharge or a detention order. When making its disposition, the Board [page808] must consider the four statutory criteria: the need to protect the public from dangerous persons, the patient's mental condition, the reintegration of the patient into society and the patient's other needs.

90 The Board has a "necessarily broad" discretion to consider a large range of evidence in order to fulfill this mandate (*Winko*, at para. 61). The Board's assessment of the evidence must "take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system" (*Winko*, at para. 61). Upon considering the evidence, if the Board is not of the opinion that the patient is a significant threat to public safety, it must direct that the patient be discharged absolutely (s. 672.54(*a*); *Winko*, at para. 62). On the other hand, if the Board finds that

the patient is, as in Mr. Conway's case, a significant threat to public safety, an absolute discharge is not statutorily available as a disposition (s. 672.54; *Winko*, at para. 62).

91 A patient is not a significant threat to public safety unless he or she is a "real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying" (*Winko*, at para. 62). The conduct giving rise to the harm must be criminal in nature (*Winko*, at paras. 57 and 62).

92 Once a patient is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Board's jurisdiction (*Mazzei*, at para. 34). However, pending an absolute discharge, NCR patients are subject to a detention or conditional discharge order. The Board is entitled to include appropriate conditions in its orders (s. 672.54(*b*) and (*c*)). The appropriateness of conditions is tied, at least in part, to the framework for making the least onerous and least restrictive disposition consistent with public safety, the patient's mental condition and other needs, and the patient's reintegration into the community [page809] (s. 672.54(*b*) and (*c*); *Penetanguishene*, at paras. 51 and 56).

93 The Board is not entitled to include any conditions that prescribe or impose treatment on an NCR patient (s. 672.55; *Mazzei*) and any conditions must withstand *Charter* scrutiny (*Slaight*). In addition, disposition orders, including any conditions, are subject to appeal. The Court of Appeal is entitled to allow an appeal against a disposition if it is unreasonable, cannot be supported by the evidence, is based on a wrong decision on a question of law, or gives rise to a miscarriage of justice (s. 672.78(1); *Owen*).

94 Subject to these limits, the content of the conditions included in a disposition is at the Board's discretion. In this way, the Board has the statutory tools to supervise the treatment and detention of dangerous NCR patients in a responsive, *Charter*-compliant fashion and has a broad power to attach flexible, individualized, creative conditions to the discharge and detention orders it devises for dangerous NCR patients.

95 The Board's task calls for "significant expertise" (*Owen*, at paras. 29-30) and the Board's membership, which sits in five-member panels comprised of the chairperson (a judge or a person qualified for or retired from appointment to the bench), a second legal member, a psychiatrist, a second psychiatrist or psychologist and one public member (ss. 672.39 and 672.4(1)), guarantees that the requisite experts perform the Board's challenging task (*Owen*, at para. 29; s. 672.39). Further, as almost one-quarter of NCR patients and accused found unfit to stand trial spend at least 10 years in the review board system, with some, like Mr. Conway, spending significantly longer (Jeff Latimer and Austin Lawrence, *Research Report - The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, January 2006, at p. v), review boards become intimately familiar with the patients under their supervision. In light of this expertise, the appellate courts are "not [to] be too quick to overturn" a review board's [page810] "expert opinion" on how best to manage a patient's risk to the

public (*Owen*, at para. 69; *Winko*, at para. 61).

96 Mr. Conway submits that, pursuant to s. 24(1) of the *Charter*, and notwithstanding the Board's finding that he is a significant threat to public safety, he is entitled to an absolute discharge or, in the absence of a discharge, an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy. Mr. Conway admits that these remedies are outside the Board's statutory jurisdiction, but asserts that s. 24(1) of the *Charter* frees the Board from statutory limits on its jurisdiction.

97 I disagree. Part XX.1 of the *Code* provides the Board with "wide latitude" in the exercise of its powers (*Winko*, at para. 27; *Mazzei*, at para. 43). However, Parliament did not imbue the Board with free remedial rein, and in fact withdrew certain remedies from the Board's statutory arsenal. As noted above, Part XX.1 of the *Code* precludes the Board from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital authority provide an NCR patient with particular treatment (ss. 672.54(*a*) and 672.55; *Winko*; *Mazzei*). Parliament was entitled to withdraw these powers from the Board and, barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent.

98 Granting the Board the jurisdiction to unconditionally release a dangerous patient without the requisite treatment to resolve the dangerousness would frustrate the Board's mandate to supervise the special needs of those who are found [page811] to require the treatment/assessment regime (*Winko*, at paras. 39-42). It would also undermine the balance required by s. 672.54: it not only threatens public safety, it jeopardizes the interests of the NCR patient by failing to adequately prepare him or her for reintegration and, as a result, creating a substantial risk of re-offending and re-entry into the Part XX.1 regime (*Winko*, at paras. 39-41). As McLachlin J. wrote in *Winko*, at paras. 39-41:

> Treatment ... is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition... .
>
> Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the cause of the offending behaviour - the mental illness... .
>
> Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 of the *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offender is not criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response.

99 The Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view

to reintegration rather than recidivism, all point to Parliament's intent not to permit NCR patients who are dangerous to have access to absolute discharges as a remedy. These factors are determinative in this case and lead to the conclusion that it would not be appropriate and just in Mr. Conway's current circumstances for the Board to grant him an absolute discharge.

100 The same is true of Mr. Conway's request for a treatment order. Allowing the Board to [page812] prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55), it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. "It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused" (*Mazzei*, at para. 31).

101 A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.

102 Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.

103 Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30). Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at [page813] para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

104 I would dismiss the appeal. In accordance with the request of the parties, there will be no order for costs.

Appeal dismissed.

Solicitors:

Solicitors for the appellant: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitor for the respondent Her Majesty the Queen: Attorney General of Ontario, Toronto.

Solicitors for the respondent the Person in charge of the Centre for Addiction and Mental Health: Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Ontario Review Board: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition: Hiltz Szigeti, Toronto.

Solicitors for the intervener the British Columbia Review Board: Arvay Finlay, Vancouver.

Solicitor for the interveners the Criminal Lawyers' Association and the David Asper Centre [page814] for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

cp/e/qlIls

Tab 3

Case Name:

Snopko v. Union Gas Ltd.

Between
Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight,
Plaintiffs (Appellants), and
Union Gas Ltd. and Ram Petroleums Ltd., Defendants
(Respondents)

[2010] O.J. No. 1335

2010 ONCA 248

317 D.L.R. (4th) 719

261 O.A.C. 1

100 O.R. (3d) 161

187 A.C.W.S. (3d) 110

100 L.C.R. 137

Docket: C49977

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, J.L. MacFarland and D. Watt JJ.A.

Heard: January 22, 2010.
Judgment: April 7, 2010.

(32 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Judgments and orders -- Summary judgments -- Availability -- To dismiss action -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell

outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Natural resources law -- Oil and gas -- Royalties and rents -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Appeal by Snopko and others from the summary judgment dismissal of their action against Union. The motion judge concluded that section 38 of the Ontario Energy Board Act conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation run by the respondent Union, and that the various claims by the appellants fell within that exclusive jurisdiction. On appeal, the appellants contended that as their claim attacked the validity of agreements relied upon by the respondent and alleged breach of contract, negligence, unjust enrichment and nuisance, it fell outside the ambit of section 38 or, at the very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

HELD: Appeal dismissed. In substance, all of the claims raised by the appellants fell within the language of section 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order". The position advanced by the appellants that the Board's jurisdiction could have been avoided by virtue of the legal characterization of the cause of action asserted would have defeated the intention of the legislature. As the issue of jurisdiction was an issue of pure law, the motion judge was correct in dealing with it by way of summary judgment.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, S.O. 1998, c. 15, Sched. B, s. 19(1), s. 36.1(1), s. 36.1(2), s. 37, s. 38(1), s. 38(2), s. 38(3), s. 38(4)

Appeal From:

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated

January 6, 2009.

Counsel:

Donald R. Good, for the appellants.

Crawford Smith, for the respondents.

The judgment of the Court was delivered by

1 R.J. SHARPE J.A.:-- This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

2 The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

3 In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

4 In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

5 In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement,

Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

6 On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

7 Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

8 The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

9 Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

10 Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

11 Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

12 On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

13 The appellants advance the following claims against Union:

* *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
* *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));
* *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
* *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
* *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

14 The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

15 In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

16 Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

17 The Act provides as follows with respect to the regulation of gas storage areas:

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).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2(3).

Authority to store

38.(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38(1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized 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 any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38(2).

Determination of amount of compensation

(3) 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. 1998, c. 15, Sched. B, s. 38(3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply.

18 In addition, s. 19 of the Act provides as follows:

Power to determine law and fact

19.(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

19 The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

20 The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide

all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

21 While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

22 Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

23 The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

24 I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... 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."

25 The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

26 In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

27 Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

28 In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

29 By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

30 In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

31 As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

32 For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

R.J. SHARPE J.A.
J.L. MacFARLAND J.A.:-- I agree.
D. WATT J.A.:-- I agree.

cp/e/qllxr/qljxr/qljyw/qlhcs/qlced/qlhcs

Tab 4

James Stephen Wilson *Appellant*;

and

Her Majesty The Queen *Respondent*.

File No.: 16931.

1983: March 14; 1983: December 15.

Present: Laskin C.J. and Dickson, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts — Collateral proceedings — Superior court wiretap authorizations — Evidence obtained pursuant to authorizations found inadmissible by inferior court — Whether or not superior court can be collaterally attacked in any court and in particular by an inferior court — Criminal Code, R.S.C. 1970, c. C-34, ss. 178.12(1)(b),(g), 178.13(1)(b), 178.14, 178.16(1)(a), 178.16 (3)(b).

Appellant was acquitted in provincial court on the collapse of the Crown's case following the judge's ruling that the Crown's wiretap evidence was inadmissible as illegally obtained. The ruling was based on the information obtained from the cross-examination of the deponent of the affidavits that were made in support of the applications for authorization to wiretap in the Court of Queen's Bench. The authorizations were valid on their face and the trial judge did not open the sealed packets. The Manitoba Court of Appeal allowed an appeal from the acquittals and ordered a new trial. At issue here is whether or not a judge of an inferior court can look behind the apparently valid order of a superior court and rule the evidence obtained under that order inadmissible.

Held: The appeal should be dismissed.

Per Laskin C.J. and Estey and McIntyre JJ.: A court order that has not been varied or set aside on appeal cannot be collaterally attacked and must receive full effect according to its terms. This rule has not been altered with respect to wiretap authorizations by Part IV.1 of the *Code* except to the extent that a trial judge must consider the admissibility of wiretap evidence, but without going beyond the face of the authorization. In the absence of the right of appeal from an authorization, and given the inapplicability of *certiorari*, any application for review of an authorization must be made to the court that made it. As it is not always practical or

James Stephen Wilson *Appelant*;

et

Sa Majesté La Reine *Intimée*.

N° du greffe: 16931.

1983: 14 mars; 1983: 15 décembre.

Présents: Le juge en chef Laskin et les juges Dickson, Estey, McIntyre et Chouinard.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Tribunaux — Procédures indirectes — Autorisations d'écoute électronique accordées par une cour supérieure — Une cour inférieure juge irrecevable la preuve obtenue en vertu de ces autorisations — L'ordonnance d'une cour supérieure peut-elle être attaquée indirectement devant une cour quelconque et, en particulier, devant une cour inférieure? — Code criminel, S.R.C. 1970, chap. C-34, art. 178.12(1)b),g), 178.13(1)b), 178.14, 178.16(1)a), 178.16(3)b).

Un juge de la Cour provinciale ayant déclaré irrecevables pour cause d'illégalité des preuves obtenues par écoute électronique, le ministère public n'avait plus aucune preuve à l'appui des accusations et l'appelant a été acquitté. La décision a été fondée sur les renseignements recueillis au cours du contre-interrogatoire de l'auteur des affidavits appuyant les demandes d'autorisation d'écoute électronique présentées devant la Cour du Banc de la Reine. Les autorisations sont valides en apparence et le juge du procès n'a pas ouvert les paquets scellés. La Cour d'appel du Manitoba a accueilli un appel contre les acquittements et a ordonné la tenue d'un nouveau procès. La question litigieuse en l'espèce est de savoir si un juge d'une cour inférieure peut vérifier une ordonnance apparemment valide d'une cour supérieure et conclure à l'irrecevabilité de la preuve obtenue en vertu de cette ordonnance.

Arrêt: Le pourvoi est rejeté.

Le juge en chef Laskin et les juges Estey et McIntyre: Une ordonnance d'une cour qui n'a été ni modifiée ni infirmée en appel ne peut faire l'objet d'une attaque indirecte, mais doit recevoir son plein effet. En ce qui concerne les autorisations d'écoute électronique, la partie IV.1 du *Code* n'apporte aucune modification à cette règle, sauf dans la mesure où un juge du procès doit déterminer la recevabilité de preuves obtenues par écoute électronique. Toutefois, il est obligé à cette fin de s'en tenir à ce que dit l'autorisation. En l'absence d'un droit d'appel contre une autorisation et vu l'inapplicabilité du *certiorari*, toute demande de révision d'une auto-

possible to apply for review to the same judge who made the order, another judge of the same court can review an *ex parte* order if: 1) he has the power to discharge the order, 2) he acts with the consent of, or in the event of the unavailability of, the judge who made the order, and 3) he hears the motion *de facto* as to both the facts and the law involved. A judge reviewing a wiretap authorization must, in addition, not substitute his discretion for that of the authorizing judge.

Per Dickson and Chouinard JJ.: Subsections 178.16(1) and 176.16(3) in combination require a trial judge to go behind an apparently valid authorisation to consider its validity and therefore have modified the rule that a court order not be impeached except by appeal, by action to set aside or by prerogative writ. These subsections make no distinction between information on the face of the record and information *dehors* the record, and to restrict a trial judge to considering only the former as a matter of statutory interpretation would unnecessarily fetter his ability to determine admissibility. Section 178.16, too, makes no suggestion as to review of an authorization by anyone but the trial judge and s. 178.14 contemplates that the packet be opened by any judge of a superior court of criminal jurisdiction or by a judge as defined by s. 482. The common law doctrine that the authorization could only be reviewed by the Court making it, and preferrably by the actual judge, was therefore overridden. Further, it was implicit in the language of ss. 176.16(1) and (3)(*b*) that an inferior court judge could attack a superior court's authorization.

Prima facie evidence of fraud, non-disclosure or misleading disclosure are valid reasons for opening the sealed packet. Once a foundation for opening the packet is established, a trial judge within the contemplation of s. 178.14 can open the packet and make a full review for compliance with Part IV.1. Section 178.16(3)(*b*) grants a discretion to cure non-substantive defects, but substantive defects in the application render the evidence inadmissible. The trial judge cannot decide that he would have exercised his discretion differently from the authorizing judge.

risation doit être adressée à la cour qui l'a accordée. Comme il n'est pas toujours pratique ni possible d'adresser une demande de révision au juge qui a rendu l'ordonnance, un autre juge de la même cour peut réviser une ordonnance rendue *ex parte*: (1) s'il a le pouvoir d'annuler l'ordonnance, (2) s'il agit avec le consentement du juge qui a rendu l'ordonnance ou si ce dernier ne peut siéger, et (3) s'il reprend au complet l'audition de la demande, à la fois sur le plan du droit et celui des faits en cause. De plus, le juge qui procède à la révision d'une autorisation d'écoute électronique ne doit pas substituer son appréciation à celle du juge qui a accordé l'autorisation.

Les juges Dickson et Chouinard: Les paragraphes 178.16(1) et 178.16(3) ont pour effet cumulatif d'exiger du juge du procès qu'il vérifie une autorisation apparemment valide afin de déterminer si elle l'est en réalité. Cela constitue donc une modification de la règle selon laquelle une ordonnance d'une cour ne peut être attaquée si ce n'est par voie d'appel, d'action en annulation ou de bref de prérogative. Ces paragraphes ne font pas de distinction entre ce qui est manifeste à la lecture du dossier et ce qui est en dehors du dossier et si, par voie d'interprétation législative, le juge du procès était limité à l'examen des seuls cas qui relèvent de la première catégorie, cela aurait pour effet d'entraver inutilement sa capacité de décider de la recevabilité. Suivant l'art. 178.16, seul le juge du procès peut entreprendre la révision d'une autorisation et, aux termes de l'art. 178.14, le paquet peut être ouvert par tout juge d'une cour supérieure de juridiction criminelle ou par un juge défini à l'art. 482. Ne s'applique donc pas la doctrine de *common law* suivant laquelle l'autorisation ne peut être révisée que par la cour qui l'a accordée et, de préférence, par le même juge. De plus, il se dégage implicitement du texte du par. 176.16(1) et de l'al. 176.16(3)*b*) qu'un juge d'une cour inférieure peut attaquer une autorisation émanant d'une cour supérieure.

Une preuve *prima facie* de fraude, de non-divulgation ou de déclaration trompeuse justifie l'ouverture du paquet scellé. Du moment qu'il y a un motif de le faire, un juge du procès visé à l'art. 178.14 peut ouvrir le paquet et procéder à un examen complet afin de déterminer si les exigences de la partie IV.1 ont été respectées. L'alinéa 178.16(3)*b*) confère un pouvoir discrétionnaire de réparer les vices de forme ou de procédure, mais, si la demande est entachée d'un vice de fond, cela entraîne l'irrecevabilité de la preuve. Le juge du procès ne peut conclure que, dans l'exercice de son pouvoir discrétionnaire, il n'aurait pas agi de la même façon que le juge qui a accordé l'autorisation.

The deponent of an affidavit supporting an authorization request can be cross-examined to determine if the pre-conditions of s. 178.13(*b*) have been met. The questions can be put so as not to disclose information considered confidential by the judge and yet uncover any basis on which to argue invalidity.

The trial judge here was not authorized to order the opening of the sealed packet. The trial should have been adjourned to allow an application under s. 178.14 for an order to open the packet and the judge acting under that section would determine if the packet should be opened. The trial judge, however, would examine the packet's contents and decide if the authorization was valid. The ruling by the trial judge that admitting evidence obtained from unlawful wiretaps would bring the administration of justice into disrepute was irrelevant here. Section 178.16(2) does not deal with primary evidence of this kind but rather with derivative evidence.

Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, affirming *sub nom. Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385; *Royal Trust Co. v. Jones*, [1962] S.C.R. 132; *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58, considered; *Pashko v. Canadian Acceptance Corp. Ltd.* (1957), 12 D.L.R. (2d) 380; *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690; *Clark v. Phinney* (1896), 25 S.C.R. 633; *Maynard v. Maynard*, [1951] S.C.R. 346; *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363; *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506; *Charette v. The Queen*, [1980] 1 S.C.R. 785, affirming *R. v. Parsons* (1977), 37 C.C.C. (2d) 497; *Dickie v. Woodworth* (1883), 8 S.C.R. 192; *Stewart v. Braun*, [1924] 3 D.L.R. 941; *Re Stewart and The Queen* (1976), 30 C.C.C. (2d) 391, affirming (1975), 23 C.C.C. (2d) 306; *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 254, affirming (1976), 32 C.C.C. (2d) 249; *Bidder v. Bridges* (1884), 26 Ch. D. 1; *Boyle v. Sacker* (1888), 39 Ch. D. 249; *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625; *R. v. Dass* (1979), 47 C.C.C. (2d) 194; *R. v. Gill* (1980), 56 C.C.C. (2d) 169; *R. v. Ho* (1976), 32 C.C.C. (2d) 339; *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257; *Goldman v. The Queen*, [1980] 1 S.C.R. 976; *R. v. Miller and Thomas (No. 4)* (1975), 28 C.C.C. (2d) 128; *R. v. Newall (No.1)* (1982), 67 C.C.C. (2d) 431; *R. v.*

L'auteur d'un affidavit produit à l'appui d'une demande d'autorisation peut être contre-interrogé afin de déterminer si l'on a satisfait aux conditions préalables que pose l'al. 178.13(1)*b*). Il est possible de formuler des questions qui éviteront la divulgation de renseignements que le juge estime confidentiels et qui permettront en même temps de découvrir un fondement pour un argument d'invalidité.

En l'espèce, le juge du procès n'était pas autorisé à ordonner l'ouverture du paquet scellé. Il lui aurait fallu ajourner le procès afin de permettre que soit présentée une demande fondée sur l'art. 178.14 visant à obtenir une ordonnance qui aurait autorisé l'ouverture du paquet et c'est le juge saisi de cette demande qui aurait statué sur l'opportunité d'ouvrir le paquet. Le juge du procès doit toutefois examiner le contenu du paquet et décider de la validité de l'autorisation. La conclusion du juge du procès que l'admission de la preuve obtenue illégalement par écoute électronique aurait pour effet de ternir l'image de la justice n'est pas pertinente en l'espèce. Le paragraphe 178.16(2) ne porte pas sur une preuve principale de ce genre, mais plutôt sur la preuve dérivée.

Jurisprudence: arrêts examinés: *Poje v. Attorney General for British Columbia*, [1953] 1 R.C.S. 516, confirmant *sub nom. Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385; *Royal Trust Co. v. Jones*, [1962] R.C.S. 132; *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58; arrêts mentionnés: *Pashko v. Canadian Acceptance Corp. Ltd.* (1957), 12 D.L.R. (2d) 380; *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690; *Clark v. Phinney* (1896), 25 R.C.S. 633; *Maynard v. Maynard*, [1951] R.C.S. 346; *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363; *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506; *Charette c. La Reine*, [1980] 1 R.C.S. 785, confirmant *R. v. Parsons* (1977), 37 C.C.C. (2d) 497; *Dickie v. Woodworth* (1883), 8 R.C.S. 192; *Stewart v. Braun*, [1924] 3 D.L.R. 941; *Re Stewart and The Queen* (1976), 30 C.C.C. (2d) 391, confirmant (1975), 23 C.C.C. (2d) 306; *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 254, confirmant (1976), 32 C.C.C. (2d) 249; *Bidder v. Bridges* (1884), 26 Ch. D. 1; *Boyle v. Sacker* (1888), 39 Ch. D. 249; *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625; *R. v. Dass* (1979), 47 C.C.C. (2d) 194; *R. v. Gill* (1980), 56 C.C.C. (2d) 169; *R. v. Ho* (1976), 32 C.C.C. (2d) 339; *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257; *Goldman c. La Reine*, [1980] 1 R.C.S. 976; *R. v. Miller and Thomas (No. 4)* (1975), 28 C.C.C. (2d) 128;

Johnny and Billy (1981), 62 C.C.C. (2d) 33; *R. v. Bradley* (1980), 19 C.R. (3d) 336; *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No.3)* (1978), 40 C.C.C. (2d) 212; *Re Zaduk and The Queen* (1977), 37 C.C.C. (2d) 1; *R. v. Haslam* (1977), 36 C.C.C. (2d) 250; *Re Regina and Kozak* (1976), 32 C.C.C. (2d) 235; *R. v. Kalo, Kalo and Vonschober* (1975), 28 C.C.C. (2d) 1; *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330; *Re Regina and Collos* (1977), 37 C.C.C. (2d) 405, reversing on other grounds (1977), 34 C.C.C. (2d) 313; *R. v. Robinson* (1977), 39 C.R.N.S. 158; *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63; *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378; *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412; *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471; *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544, referred to.

APPEAL from a judgment of the Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 13 Man. R. (2d) 155, 65 C.C.C. (2d) 507, allowing an appeal from appellant's acquittals by Dubienski Prov. Ct. J. Appeal dismissed.

Robert L. Pollack, for the appellant.

John D. Montgomery, Q.C., for the respondent.

The judgment of Laskin C.J. and Estey and McIntyre JJ. was delivered by

MCINTYRE J.—The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV.1 of the *Criminal Code* from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;

AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

R. v. Newall (No. 1) (1982), 67 C.C.C. (2d) 431; *R. v. Johnny and Billy* (1981), 62 C.C.C. (2d) 33; *R. v. Bradley* (1980), 19 C.R. (3d) 336; *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3)* (1978), 40 C.C.C. (2d) 212; *Re Zaduk and The Queen* (1977), 37 C.C.C. (2d) 1; *R. v. Haslam* (1977), 36 C.C.C. (2d) 250; *Re Regina and Kozak* (1976), 32 C.C.C. (2d) 235; *R. v. Kalo, Kalo and Vonschober* (1975), 28 C.C.C. (2d) 1; *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330; *Re Regina and Collos* (1977), 37 C.C.C. (2d) 405, infirmant pour d'autres motifs (1977), 34 C.C.C. (2d) 313; *R. v. Robinson* (1977), 39 C.R.N.S. 158; *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63; *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378; *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412; *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471; *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544.

POURVOI contre un arrêt de la Cour d'appel du Manitoba, [1982] 2 W.W.R. 91, 13 Man. R. (2d) 155, 65 C.C.C. (2d) 507, qui a accueilli un appel de l'acquittement de l'appelant par le juge Dubienski de la Cour provinciale. Pourvoi rejeté.

Robert L. Pollack, pour l'appelant.

John D. Montgomery, c.r., pour l'intimée.

Version française du jugement du juge en chef Laskin et des juges Estey et McIntyre rendu par

LE JUGE MCINTYRE—L'appelant a subi son procès devant le juge Dubienski de la Cour provinciale du Manitoba relativement à neuf chefs d'accusation en matière de paris. Les accusations étaient fondées sur des preuves obtenues par écoute électronique en vertu de quatre autorisations accordées par des juges de la Cour du Banc de la Reine du Manitoba, conformément à la partie IV.1 du *Code criminel*. Chacune de ces autorisations contient les mots suivants:

[TRADUCTION] LECTURE FAITE de l'affidavit du sergent-détective Anton Cherniak;

ÉTANT CONVAINCU que l'octroi de cette autorisation sert au mieux l'administration de la justice, que d'autres méthodes d'enquête ont été essayées et ont échoué, ou ont peu de chance de succès, et que l'urgence de l'affaire est telle qu'il ne serait pas pratique de mener l'enquête relative aux infractions mentionnées ci-après en n'utilisant que les autres méthodes d'enquête;

At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(*b*) of the *Code* had been satisfied. That section reads:

178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.

. . .

(*b*) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

No objection was taken by the Crown to this line of examination.

On the basis of the cross-examination of the police officer, the trial judge made the following finding:

"No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency."

As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the *Criminal Code* and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was

Lors de son contre-interrogatoire au cours du procès, le policier Cherniak, dont il est question dans les autorisations, a témoigné qu'il était seul responsable de l'enquête et que c'est lui qui avait demandé les autorisations. Il a déclaré que les interceptions ont été faites en vertu des autorisations, qu'il s'agissait là des seules enquêtes effectuées et qu'aucune autre enquête n'a été effectuée ou ordonnée par lui après la première autorisation. Il n'était au fait d'aucune autre méthode d'enquête. Il est évident que par ce contre-interrogatoire, l'avocat de l'appelant tentait de déterminer la véracité de l'extrait précité de l'autorisation et si on avait rempli les conditions prescrites par l'al. 178.13(1)*b*) du *Code*, dont voici le texte:

178.13 (1) Une autorisation peut être donnée si le juge auquel la demande est présentée est convaincu

. . .

b) que d'autres méthodes d'enquête ont été essayées et ont échoué, ou ont peu de chance de succès, ou que l'urgence de l'affaire est telle qu'il ne serait pas pratique de mener l'enquête relative à l'infraction en n'utilisant que les autres méthodes d'enquête.

Le ministère public ne s'est pas objecté à ce genre de contre-interrogatoire.

Se fondant sur le témoignage rendu par le policier au cours de son contre-interrogatoire, le juge du procès a conclu ce qui suit:

[TRADUCTION] «Aucune autre méthode d'enquête n'avait été essayée ni n'avait échoué, rien n'indiquait que d'autres méthodes d'enquête avaient peu de chance de succès ni qu'il s'agissait d'un cas urgent.»

En définitive, le juge du procès a estimé que les interceptions des communications privées de l'appelant n'avaient pas été faites légalement comme l'exige l'art. 178.16 du *Code criminel* et il a conclu à l'irrecevabilité de la preuve obtenue par écoute électronique. Le ministère public n'ayant plus aucune preuve à l'appui des accusations, l'appelant a été acquitté relativement à chacun des chefs.

En appel devant la Cour d'appel du Manitoba, le ministère public a fait valoir que le juge de la Cour provinciale n'avait pas compétence pour vérifier les autorisations et ainsi attaquer indirectement l'ordonnance d'une cour supérieure. L'appel

allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the *Code*. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

a été accueilli et un nouveau procès ordonné. Le juge Monnin (c'était alors son titre), aux motifs duquel a souscrit le juge Matas, a conclu qu'une autorisation accordée par un juge d'une cour supérieure ne peut être attaquée indirectement devant une cour provinciale. Le juge O'Sullivan, qui a souscrit quant à l'issue, est allé encore plus loin, affirmant: [TRADUCTION] «Selon moi, une autorisation accordée par une cour d'archives supérieure ne peut être attaquée indirectement devant une cour et ne peut absolument pas être attaquée devant une cour inférieure.» L'appelant Wilson a soumis un autre argument selon lequel rien n'indiquait qu'on avait, conformément au par. 178.16(4) du *Code*, donné un préavis en bonne et due forme de l'intention de produire des éléments de preuve obtenus par écoute électronique. La Cour d'appel a rejeté cet argument et, comme on a reconnu qu'il y a eu un préavis d'environ cinq mois, cette Cour l'a rejeté également. La seule question qui reste donc à trancher est celle de savoir si le juge du procès a commis une erreur de droit en refusant d'admettre la preuve obtenue par écoute électronique.

In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

En Cour d'appel du Manitoba, le juge Monnin a affirmé:

> [TRADUCTION] Le dossier d'une cour supérieure doit être considéré comme la vérité absolue tant qu'il n'a pas été infirmé.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such

Je suis d'accord avec cette affirmation. Selon un principe fondamental établi depuis longtemps, une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement. Lorsqu'on a épuisé toutes les possibilités d'appel et que les autres moyens d'attaquer directement un jugement ou une ordonnance, comme par exemple les procédures par brefs de prérogative ou celles visant un contrôle judiciaire, se sont révélés inefficaces, le seul recours qui s'offre à une personne qui veut

grounds would include fraud or the discovery of new evidence.

Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an *ex parte* injunction in the Supreme Court restraining the defendant and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the *Trade-unions Act* and the *Laws Declaratory Act*; (3) that the injunction was in permanent form and no Court could grant a permanent injunction *ex parte*.
>
> To this the general answer is made that the order of a Superior Court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to

faire annuler l'ordonnance d'une cour est une action en révision devant la Haute Cour, lorsqu'il y a des motifs de le faire. Sans vouloir en dresser une liste complète, de tels motifs comprendraient la fraude ou la découverte de nouveaux éléments de preuve.

Ces propositions sont appuyées par beaucoup d'arrêts. L'arrêt de la Cour d'appel de la Colombie-Britannique, *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385, contient un énoncé particulièrement clair du droit applicable et mentionne un bon nombre de décisions. Dans cette affaire, des grévistes faisaient du piquetage sur un quai où un navire attendait d'être chargé. Le propriétaire du navire a obtenu en Cour suprême une injonction *ex parte* empêchant le défendeur et d'autres personnes de faire du piquetage. L'injonction n'a pas été respectée et des procédures pour outrage au tribunal ont été entamées contre le défendeur. En première instance, devant le juge en chef de la Cour suprême de la Colombie-Britannique, les défendeurs ont soutenu qu'un bref de contrainte par corps ne devait pas être décerné parce que l'injonction, accordée par un Juge de la Cour suprême, était entachée de nullité et, par conséquent, ne pouvait donner lieu à une ordonnance pour outrage au tribunal. Le Juge en chef a repoussé cette attaque indirecte, décerné un bref de contrainte par corps et imposé des amendes et une peine d'emprisonnement pour outrage au tribunal. L'appel formé devant la Cour d'appel a été rejeté, un juge étant dissident. Le juge Sidney Smith de la Cour d'appel affirme ce qui suit, à la p. 406:

> [TRADUCTION] On a d'abord soutenu que l'injonction du juge Clyne était entachée de nullité, qu'on pouvait l'ignorer impunément et qu'elle ne pouvait donner lieu à des procédures pour outrage au tribunal. L'ordonnance du savant juge a soulevé de nombreuses objections, mais ce qu'on lui reproche surtout c'est: (1) qu'elle était fondée sur une preuve irrégulière et irrecevable, (2) que l'injonction allait à l'encontre de la *Trade-unions Act* et de la *Laws Declaratory Act* et (3) qu'elle constituait une injonction permanente, ce qu'aucune cour ne peut faire *ex parte*.
>
> À cela on répond de manière générale que l'ordonnance d'une cour supérieure n'est *jamais* entachée de nullité; mais si erronée ou si irrégulière qu'elle puisse être, elle a quand même force exécutoire, elle ne peut

be estabished by the authorities cited by counsel for the Attorney-General, *viz., Scott* v. *Bennett* (1871), L.R. 5 H.L. 234 at p. 245; *Revell* v. *Blake* (1873), L.R. 8 C.P. 533 at p. 544; *Scotia Construction Co.* v. *Halifax*, [1935] 1 D.L.R. 316, S.C.R. 124; and to these I might add *Re Padstow* (1882), 20 Ch.D. 137 at p. 145, and *Hughes* v. *Northern Elec. etc. Co.* (1915), 21 D.L.R. 358 at pp. 362-3, 50 S.C.R. 626 at pp. 652-3. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th ed., p. 668, and 7 Hals., p. 32, which include the authoritative decision in *Eastern Trust Co.* v. *MacKenzie, Mann & Co.*, 22 D.L.R. 410 at pp. 418-9, [1915] A.C. 750 at p. 761, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry* v. *Braden* (1900), 7 B.C.R. 403, and *Bassel's Lunch Ltd.* v. *Kick*, [1936], 4 D.L.R. 106 at p. 110, O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.

Bird J.A., who wrote a separate concurring judgment, made the following comments, at p. 418:

The order under review is that of a Superior Court of Record, and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.

and later, at pp. 418-19:

In *Eastern Trust Co.* v. *MacKenzie, Mann & Co.*, 22 D.L.R. at p. 418, [1915] A.C. at p. 760, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said: "(The injunction) was, or course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged."

Duff C.J.C., approved the same principle in *Scotia Construction Co.* v. *Halifax,* [1935], 1 D.L.R. 316, S.C.R. 124, and expressed the principle in these terms (p. 317 D.L.R., p. 128 S.C.R.) "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing ... authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."

In my opinion these submissions must be rejected.

être attaquée indirectement et a plein effet tant qu'elle n'est pas infirmée en appel. C'est ce que semble établir la jurisprudence citée par le substitut du procureur général; voir les arrêts *Scott v. Bennett* (1871), L.R. 5 H.L. 234, à la p. 245, *Revell v. Blake* (1873), L.R. 8 C.P. 533, à la p. 544, *Scotia Construction Co. v. Halifax*, [1935] 1 D.L.R. 316, R.C.S. 124, auxquels je pourrais ajouter les arrêts *Re Padstow* (1882), 20 Ch.D. 137, à la p. 145 et *Hughes v. Northern Elec. etc. Co.* (1915), 21 D.L.R. 358, aux pp. 362 et 363, 50 R.C.S. 626, aux pp. 652 et 653. À cette jurisprudence générale on peut ajouter la série d'arrêts plus précis établissant qu'une injonction, si erronée soit-elle, doit être respectée jusqu'à ce qu'elle soit annulée, comme le démontrent les arrêts cités dans Kerr on Injunctions, 6e éd., à la p. 668, et dans 7 Hals., à la p. 32, au nombre desquels figure l'arrêt qui fait autorité, *Eastern Trust Co. v. MacKenzie, Mann & Co.*, 22 D.L.R. 410, aux pp. 418 et 419, [1915] A.C. 750, à la p. 761, où on a conclu que c'était à bon droit qu'une partie avait été incarcérée pour avoir désobéi à une injonction qui a été annulée par la suite. Les affaires *Leberry v. Braden* (1900), 7 B.C.R. 403 et *Bassel's Lunch Ltd. v. Kick*, [1936], 4 D.L.R. 106, à la p. 110, O.R. 445, à la p. 456, 67 Can. C.C. 131, à la p. 135, établissent elles aussi qu'une injonction, quoique erronée, doit être respectée jusqu'à ce qu'elle soit annulée.

Le juge Bird, qui a rédigé des motifs concordants, fait les observations suivantes, à la p. 418:

[TRADUCTION] Il s'agit en l'espèce d'une ordonnance d'une cour d'archives supérieure, qui, jusqu'à ce qu'elle soit annulée ou modifiée en appel, est concluante et a force exécutoire pour tous. Une telle ordonnance ne peut être considérée comme entachée de nullité.

Et il ajoute, aux pp. 418 et 419:

[TRADUCTION] Dans l'arrêt *Eastern Trust Co. v. MacKenzie, Mann & Co.*, 22 D.L.R., à la p. 418, [1915] A.C., à la p. 760, sir George Farwell, s'exprimant au nom des lords du Comité judiciaire, a affirmé: «(L'injonction) est, bien entendu, interlocutoire et non définitive, mais, tant qu'elle n'aura pas été levée, elle lie toutes les parties à l'ordonnance.»

Le juge en chef Duff a approuvé le même principe dans l'arrêt *Scotia Construction Co. v. Halifax*, [1935], 1 D.L.R. 316, R.C.S. 124, en l'énonçant en ces termes (p. 317 D.L.R.; p. 128, R.C.S.): «En tout cas, on n'a pas essayé d'interjeter appel et qu'il fût ou non susceptible d'être porté en appel, c'était un jugement d'une cour de juridiction générale dotée ... sous réserve de tout droit d'appel prévu par la loi, du pouvoir de statuer péremptoirement sur n'importe quelle question relevant de sa propre compétence.»

À mon avis, ces arguments doivent être rejetés.

On appeal to this Court, *sub nom. Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516, the appeal was dismissed. The question of a collateral attack upon a court order was not specifically dealt with. Kerwin J. expressed no opinion on the matter, but Estey J. in a short concurring judgment said at p. 528:

I agree the appeal should be dismissed. The learned Chief Justice, in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal, both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

The case was referred to in *Pashko v. Canadian Acceptance Corp. Ltd.* (1957), 12 D.L.R. (2d) 380, in the British Columbia Court of Appeal.

In addition to these authorities and those referred to in judgments of the majority in the *Canadian Transport* case, reference may be made as well to the words of Osler J.A. in *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690, at pp. 694-95, where a judgment was attacked on the basis of a deficiency in service during the earlier proceedings which gave rise to the judgment. Osler J.A. said:

If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in

Le pourvoi formé devant cette Cour a été rejeté sous l'intitulé *Poje v. Attorney General for British Columbia*, [1953] 1 R.C.S. 516. La Cour n'a pas traité explicitement de la question de l'attaque indirecte contre l'ordonnance d'une cour. Le juge Kerwin est resté muet sur la question, mais le juge Estey, dans de brefs motifs concordants, a affirmé à la p. 528:

[TRADUCTION] Je suis d'accord que le pourvoi doit être rejeté. À l'examen du dossier en l'espèce, j'estime que le savant Juge en chef avait compétence pour entendre la requête. Avec égards, je partage les conclusions de la majorité des savants juges de la Cour d'appel, tant à l'égard des exceptions opposées à l'ordonnance rendue par le juge Clyne qu'à l'égard des conclusions du savant juge en chef. Compte tenu de ce qui précède, il n'est pas nécessaire de déterminer la nature et le caractère de l'outrage au tribunal.

Cet arrêt a été mentionné par la Cour d'appel de la Colombie-Britannique dans l'arrêt *Pashko v. Canadian Acceptance Corp. Ltd.* (1957), 12 D.L.R. (2d) 380.

En plus de cette jurisprudence et de celle mentionnée par la majorité dans l'arrêt *Canadian Transport*, on peut aussi mentionner les propos du juge Osler dans l'arrêt *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690, aux pp. 694 et 695, où un jugement était attaqué en raison d'un vice de signification au début des procédures à l'origine du jugement. Le juge Osler a affirmé ce qui suit:

[TRADUCTION] Si le jugement rendu dans l'action intentée au Québec doit être considéré comme un jugement contre une société ou une personne morale, qui ne peut, par conséquent, donner lieu à une action contre une société de personnes ayant la même raison sociale, il s'agit là d'une exception qu'on aurait dû opposer à la requête en inscription d'un jugement sommaire, ce qui paraît ne pas avoir été fait. C'était le moyen de défense principal contre l'action et, à ce que je puis constater, il n'a pas été porté à l'attention de la cour à l'étape appropriée et il n'a fait l'objet d'aucune décision. L'exception relative à la signification du bref au gérant bute contre une difficulté analogue. Face à la requête en jugement, on aurait pu démontrer (à moins que la défenderesse n'ait fait quelque chose pour renoncer à l'exception) qu'on ne s'était pas conformé aux exigences de la règle 224 et que pour cette raison il n'y avait

fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, 1902, p. 655; Yearly Practice, 1904, p. 504. Or the firm might have moved to set aside the faulty service on the manager: *Nelson v. Pastorino* (1883), 49 L.T.N.S. 564. Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule 228.

Further authority in support of the rule against collateral attack may be found in *Clark v. Phinney* (1896), 25 S.C.R. 633; *Maynard v. Maynard*, [1951] S.C.R. 346; *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615; and particularly in *Royal Trust Co. v. Jones*, [1962] S.C.R. 132. In that case the validity of a codicil to a will was upheld in proceedings in the Supreme Court of British Columbia. The trial judgment was affirmed in the Court of Appeal. The unsuccessful party brought a new action to set aside this judgment which succeeded notwithstanding the confirmation on appeal of the earlier judgment. No appeal was taken and the trustee proceeded for a period of fifteen years to administer the estate on the basis that the codicil was invalid. On an application for directions on a matter which did not directly involve the validity of the codicil and which involved parties not in the first proceeding, the Court of Appeal on its own motion declared that the trial judge, Manson J., who had declared the codicil invalid and set aside the earlier judgment, was without jurisdiction to do so and reversed his judgment. On appeal to this Court the appeal was allowed. Cartwright J. (as he then was) said, at p. 145:

An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.

jamais eu signification réelle du bref à la société, la personne ayant reçu signification n'étant pas réellement un associé et n'ayant pas reçu l'avis prescrit que la signification lui était faite en sa qualité de gérant: Snow's Annual Practice, 1902, p. 655, Yearly Practice, 1904, p. 504. La société aurait pu aussi demander l'annulation de la signification incorrecte au gérant: *Nelson v. Pastorino* (1883), 49 L.T.N.S. 564. On n'a fait ni l'un ni l'autre, si bien qu'il y a maintenant un jugement contre une société de personnes, dont la validité est incontestée et qui ne peut être attaqué indirectement. Tant que ce jugement est valide, le demandeur a le droit de le faire respecter par tous les moyens que la règle 228 met à sa disposition.

Le principe qui interdit les attaques indirectes est appuyé également par les arrêts *Clark v. Phinney* (1896), 25 R.C.S. 633; *Maynard v. Maynard*, [1951] R.C.S. 346; *Badar Bee v. Habib Merican Noordin*, [1909] A.C. 615 et particulièrement par l'arrêt *Royal Trust Co. v. Jones*, [1962] R.C.S. 132. Dans cette affaire, la Cour suprême de la Colombie-Britannique a confirmé la validité d'un codicille et le jugement de première instance a été confirmé par la Cour d'appel. Malgré cette confirmation par la Cour d'appel, la partie qui avait échoué a intenté, avec succès, une action en annulation du premier jugement. Aucun appel n'a été interjeté et le fiduciaire a administré la succession pendant quinze ans en tenant pour acquise l'invalidité du codicille. Après avoir reçu une demande de directives au sujet d'une question qui ne concernait pas directement la validité du codicille et qui mettait en cause des personnes qui n'avaient pas été parties aux procédures initiales, la Cour d'appel, agissant de son propre chef, a déclaré que le juge Manson, qui avait déclaré invalide le codicille et annulé le premier jugement, n'avait pas compétence pour le faire et elle a infirmé son jugement. Le pourvoi devant cette Cour a été accueilli. Le juge Cartwright (alors juge puîné) affirme, à la p. 145:

[TRADUCTION] Un examen de la jurisprudence m'amène à conclure qu'il est établi depuis longtemps en Angleterre que la façon dont il faut procéder pour attaquer un jugement de la Haute Cour pour cause de fraude, ou pour en obtenir l'annulation en raison de la découverte subséquente d'éléments de preuve, consiste à intenter une action à cet effet, peu importe que la Cour d'appel ou un autre tribunal d'appel ait ou non confirmé le jugement attaqué ou en ait disposé autrement.

The first judgment had therefore been properly challenged by a direct action. The second judgment, not having been appealed or directly challenged, was binding. Cartwright J. said, at p. 146:

> It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, is a valid judgment of the Court binding upon all those who were parties to it.

The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

The authorizations in question here are all orders of a superior court. Unless Parliament has altered or varied the rule above-described, it would apply in this case. It would then follow that in this action to determine the guilt or innocence of the accused the trial judge was in error in entertaining a collateral attack on the validity of the authorizations and, in effect, going behind them. Support for this view, with some qualifications for cases where there has been a defect on the face of the authorization or fraud, is to be found in *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363 (Ont. C.A.), where Zuber J.A., at pp. 371-72, said:

> Ordinarily the trial Court is obliged to simply accept the authorization at face value. Cases in which a trial Court could decline to accept the authorization would be rare indeed and, without attempting to set out an exhaustive list, would include cases in which the authorization was defective on its face, or was vitiated by reason of having been obtained by a fraud. However, even an authorization that was said to be defective on its face may attract the curative provisions of s. 178.16(2)(*b*) [now s. 178.16(3)(*b*)].

In the case at bar, the trial judge preferred to follow the reasoning of Meredith J., of the British Columbia Supreme Court, in *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506, where he asserted a

Le premier jugement avait donc été attaqué régulièrement au moyen d'une action directe. Le second jugement, n'ayant fait l'objet d'aucun appel ni d'aucune attaque directe, liait les parties. Le juge Cartwright affirme, à la p. 146:

> [TRADUCTION] Il s'ensuit que le juge Manson pouvait connaître de l'action intentée devant lui et que son jugement, n'ayant été ni porté en appel ni autrement attaqué, est un jugement valide qui lie toutes les parties au litige.

Les arrêts déjà cités ainsi que la jurisprudence qui y est mentionnée confirment la règle bien établie et fondamentalement importante sur laquelle la Cour d'appel du Manitoba s'est fondée en l'espèce. Cette règle porte qu'une ordonnance d'une cour, qui n'a été ni annulée ni modifiée en appel, ne peut faire l'objet d'une attaque indirecte et doit être appliquée intégralement.

Les autorisations dont il est question en l'espèce sont toutes des ordonnances d'une cour supérieure. À moins que le Parlement n'ait de quelque façon modifié la règle précitée, elle s'applique en l'espèce. Il s'ensuit alors que, dans cette action visant à déterminer la culpabilité ou l'innocence de l'accusé, le juge du procès a eu tort de connaître d'une attaque indirecte portant sur la validité des autorisations et, en fait, de les vérifier. Sous réserve du cas où l'autorisation est à première vue entachée d'un vice et du cas où elle a été obtenue par la fraude, ce point de vue est appuyé par l'arrêt *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363 (C.A. Ont.), où le juge Zuber affirme, aux pp. 371 et 372:

> [TRADUCTION] Normalement, la cour de première instance doit simplement accepter l'autorisation telle quelle. Les cas où une cour de première instance pourrait refuser d'accepter l'autorisation seraient rares et, sans tenter de dresser une liste exhaustive, comprendraient ceux où elle est à première vue entachée d'un vice ainsi que ceux où elle a été obtenue par la fraude. Cependant, même une autorisation que l'on prétend entachée d'un vice à première vue peut bénéficier des dispositions réparatrices de l'al. 178.16(2)*b*) [l'actuel al. 178.16(3)*b*)].

En l'espèce, le juge du procès a préféré suivre le raisonnement du juge Meredith de la Cour suprême de la Colombie-Britannique, qui, dans la décision *R. v. Wong (No. 1)* (1976), 33 C.C.C.

broader power in the trial judge to go behind the authorization.

The question then is: has Parliament by the enactment of Part IV.1 of the *Criminal Code* altered the rule which would render the authorizations immune from collateral attack? In my opinion, the answer must be no.

Section 178.16(1) deals with the admissibility of evidence obtained under the authority of the authorization. Subsection (3) gives the trial judge a discretion to admit evidence that is inadmissible under subs. (1) "by reason only of a defect of form or an irregularity in procedure not being a substantive defect or irregularity, in the application for or the giving of the authorization". The trial judge may be required to determine whether he will admit under subs. (3) evidence otherwise inadmissible under the provisions of Part IV.1 of the *Code*. This step, it would seem, would require some examination of the procedures followed in obtaining the authorization in order to determine whether evidence has been rendered inadmissible only by a defect or an irregularity of a non-substantive nature.

It is my opinion that the trial judge in reaching a conclusion on this subject is limited to a consideration of defects and irregularities which are apparent on the face of the authorization and he may not go behind it. Such a step would involve a collateral attack upon the authorization. It would require, in my opinion, much clearer statutory language than that employed in subs. (3) of s. 178.16 to permit such a step in the face of the clearly established rule. I find additional support for this view in the fact that once an authorization is granted s. 178.14 provides that all documents connected with it, save the authorization itself, be sealed in a packet and kept in the custody of the court, to be opened only for the purposes of a renewal or by an order of a judge of a superior court of criminal jurisdiction or a judge defined in s. 482 of the *Code*. Many trial judges will not fall into either of those categories and accordingly will not have authority to direct the opening of the sealed packet. It follows that a trial judge *qua* trial judge has not, and was not intended to have, access to the materials necessary to review the granting

(2d) 506, a reconnu au juge du procès un pouvoir plus étendu de vérifier l'autorisation.

La question est donc la suivante: le Parlement a-t-il, par l'adoption de la partie IV.1 du *Code criminel*, modifié la règle selon laquelle les autorisations ne peuvent faire l'objet d'une attaque indirecte? À mon avis, la réponse doit être «non».

Le paragraphe 178.16(1) traite de l'admissibilité de la preuve obtenue en vertu d'une autorisation. Le paragraphe (3) investit le juge du procès du pouvoir discrétionnaire d'admettre en preuve ce qui est irrecevable en vertu du par. (1), lorsque l'irrecevabilité «tient non pas au fond mais uniquement à un vice de forme ou de procédure dans la demande d'interception ou dans l'autorisation». Le juge du procès peut avoir à déterminer s'il admettra en vertu du par. (3) des éléments de preuve qui seraient par ailleurs irrecevables aux termes de la partie IV.1 du *Code*. Cela, semble-t-il, nécessiterait un certain examen de la procédure suivie pour obtenir l'autorisation, afin d'établir si l'irrecevabilité de la preuve tient uniquement à un vice de forme ou de procédure.

J'estime qu'en statuant sur cette question, le juge du procès doit s'en tenir aux vices de forme et de procédure qui sont manifestes à la lecture de l'autorisation et qu'il ne peut la vérifier. S'il le faisait, cela constituerait une attaque indirecte contre l'autorisation. Étant donné la règle bien établie, il faudrait, selon moi, des dispositions législatives beaucoup plus claires que le par. 178.16(3) pour autoriser une telle vérification. Ce point de vue s'appuie en outre sur le fait que, une fois l'autorisation accordée, l'art. 178.14 prévoit que tous les documents qui s'y rapportent, sauf l'autorisation elle-même, doivent être scellés dans un paquet qui doit être gardé par le tribunal. Ce paquet ne pourra être ouvert qu'aux fins d'un renouvellement ou conformément à l'ordonnance d'un juge d'une cour supérieure de juridiction criminelle ou d'un juge défini à l'art. 482 du *Code*. Un bon nombre de juges du procès ne relèvent de ni l'une ni l'autre catégorie et, par conséquent, ils n'ont pas le pouvoir d'ordonner l'ouverture du paquet scellé. Il s'ensuit qu'un juge du procès, à ce titre, n'a pas et on n'a pas voulu qu'il ait accès aux

of the authorization. This makes any collateral attack on the authorization a virtual impossibility.

It should be observed as well that subs. (3) of s. 178.16 gives no power to go behind the authorization and no power to vary or question it. It merely provides that if in the performance of his task of determining the admissibility of evidence the trial judge forms the opinion that a relevant, private communication is inadmissible because of subs. (1) of s. 178.16 he may, if the admissibility results only because of a defect in form or an irregularity in procedure which is not substantive in the giving of the authorization, admit the evidence notwithstanding subs. (1). This subsection gives a power to the trial judge in appropriate circumstances to admit evidence despite its inadmissibility under the authorization, but it includes no power to attack the authorization itself. I have not overlooked the fact that this Court in *Charette v. The Queen*, [1980] 1 S.C.R. 785, approved the judgment of Dubin J.A. in the Ontario Court of Appeal in *R. v. Parsons* (1977), 37 C.C.C. (2d) 497, and that Dubin J.A. said in that case, at pp. 501-02:

> A *voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to the admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, *i.e.*, that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

In my view, these words do not support the notion that the trial judge may go behind the authorization. They indicate that consideration of the validity of the authorization on the part of the trial judge is limited to matters appearing on its face,

documents nécessaires pour examiner l'octroi de l'autorisation. Toute attaque indirecte contre l'autorisation devient dès lors quasi impossible.

Il faut noter également que le par. 178.16(3) n'habilite ni à vérifier l'autorisation ni à la modifier ou à la mettre en doute. Il prévoit simplement que si, en s'acquittant de sa tâche de déterminer la recevabilité de la preuve, le juge du procès décide qu'une communication privée pertinente est irrecevable en raison du par. 178.16(1), il peut, si l'irrecevabilité tient uniquement à un vice de forme ou de procédure dont l'autorisation est entachée, admettre cette preuve nonobstant le par. (1). Ce paragraphe confère au juge du procès le pouvoir, dans des circonstances appropriées, d'admettre des éléments de preuve malgré leur irrecevabilité en vertu de l'autorisation, mais il ne confère aucun pouvoir d'attaquer l'autorisation elle-même. Je n'ignore pas que cette Cour, dans l'arrêt *Charette c. La Reine*, [1980] 1 R.C.S. 785, a approuvé l'arrêt de la Cour d'appel de l'Ontario *R. v. Parsons* (1977), 37 C.C.C. (2d) 497, où le juge Dubin a affirmé, aux pp. 501 et 502:

> [TRADUCTION] On ne tient pas un voir dire pour déterminer le caractère suffisant de la preuve, mais seulement pour résoudre les questions de recevabilité. Dans des cas comme celui qui nous occupe, il se pose immédiatement des questions quant à la recevabilité de la preuve produite. Pour que soit recevable une preuve qui consiste en des communications privées interceptées par suite d'une autorisation, le substitut du procureur général doit en premier lieu convaincre le juge du procès qu'on a satisfait aux conditions préalables imposées par la loi, c.-à-d. que les interceptions ont été faites légalement et que l'avis exigé par la loi a été donné. Lorsque le ministère public invoque une autorisation, il appartient au juge du procès de déterminer notamment si cette autorisation est valide et si l'enquête autorisée a été menée de la manière prévue dans ladite autorisation. Le juge doit être convaincu que l'autorisation vise, nommément ou d'une autre manière, les parties à la communication et, je le répète, il doit être convaincu que le préavis exigé par la loi a été donné.

À mon avis, ce passage n'appuie pas l'idée que le juge du procès peut vérifier l'autorisation. Il en ressort plutôt que, lorsque le juge du procès examine la validité d'une autorisation, il doit se limiter aux questions qui sont manifestes à sa lecture,

and it is my opinion that Dubin J.A. did not in that case assert a power in the trial judge to do more.

Since no right of appeal is given from the granting of an authorization and since prerogative relief by *certiorari* would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an *ex parte* application. In civil matters, there is a body of jurisprudence which deals with the review of *ex parte* orders. There is a widely recognized rule that an *ex parte* order may be reviewed by the judge who made it. In *Dickie v. Woodworth* (1883), 8 S.C.R. 192, Ritchie C.J. said, at p. 195:

> The judge having in the first instance made an *ex parte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted . . . .

This view is reflected in the words of Mathers C.J.K.B. in the case of *Stewart v. Braun*, [1924] 3 D.L.R. 941 (Man. K.B.), at p. 945:

> But it frequently happens that Judges and judicial officers are called upon to make orders *ex parte*, where only one side is represented and where the order granted is not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an *ex parte* order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it . . . .

Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in *Re Stewart and The Queen* (1975), 23 C.C.C. (2d) 306 (County Court, Ottawa-Carleton Judicial District (Ont.)), application for *certiorari* dismissed: (1976), 30 C.C.C. (2d) 391 (Ont.H.C.); *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 249

et j'estime que le juge Dubin, dans cet arrêt, n'a pas reconnu au juge du procès un pouvoir d'en faire davantage.

Puisqu'il n'y a aucun droit d'appel contre l'octroi d'une autorisation et puisqu'il ne paraît pas y avoir lieu à *certiorari* (en l'absence d'une question de compétence), toute demande de révision d'une autorisation doit, selon moi, être adressée à la cour qui l'a accordée. Cette procédure est appuyée par la jurisprudence. Une autorisation est accordée par suite d'une demande *ex parte*. Il existe en matière civile un corps de jurisprudence qui porte sur la révision d'ordonnances rendues *ex parte*. Suivant une règle généralement acceptée, une ordonnance *ex parte* peut faire l'objet d'une révision par le juge qui l'a rendue. Dans l'arrêt *Dickie v. Woodworth* (1883), 8 R.C.S. 192, le juge en chef Ritchie affirme, à la p. 195:

> [TRADUCTION] Le juge de première instance ayant rendu une ordonnance *ex parte*, il avait pleinement compétence pour l'annuler du moment qu'on lui prouvait qu'elle n'aurait pas dû être accordée et, une fois annulée, c'était comme si elle n'avait jamais été accordée . . .

Ce point de vue se dégage des propos du juge en chef Mathers de la Cour du Banc du Roi dans l'arrêt *Stewart v. Braun*, [1924] 3 D.L.R. 941 (B.R. Man.), à la p. 945:

> [TRADUCTION] Mais il arrive souvent que les juges et les officiers judiciaires soient appelés à rendre des ordonnances *ex parte*; dans ces cas, une seule partie est représentée et l'ordonnance ne résulte pas d'une décision judiciaire mûrement pesée et rendue à l'issue d'une audience et de débats. Une demande d'annulation ou de modification d'une ordonnance *ex parte* n'étant ni un appel ni l'équivalent d'un appel, le juge ou l'officier qui l'a rendue a, depuis l'adoption de *The Judicature Act*, tout comme il l'avait avant son adoption, le droit d'annuler ou de modifier ladite ordonnance . . .

Ce pouvoir de révision a été invoqué et exercé à l'égard d'autorisations d'intercepter des communications privées dans les décisions suivantes: *Re Stewart and The Queen* (1975), 23 C.C.C. (2d) 306 (Cour de comté d'Ottawa-Carleton (Ont.)), demande de *certiorari* rejetée: (1976), 30 C.C.C. (2d) 391 (H.C. Ont.); *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 249

(B.C.S.C.), appeal dismissed for lack of jurisdiction (1976), 32 C.C.C. (2d) 254 (B.C.C.A.)

The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an *ex parte* order. See, for example, *Bidder v. Bridges* (1884), 26 Ch.D. 1 (C.A.), and *Boyle v. Sacker* (1888), 39 Ch.D. 249 (C.A.) In the case of *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R.(2d) 625 (B.C.C.A.), Smith J.A. said, at pp. 626-27:

> After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's *ex parte* order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, *e.g.*, where he acts by consent or by leave of the first Judge, or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it *de novo* as to both the law and facts involved.

I would accept these words in the case of review of a wiretap authorization with one reservation. The reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the *ex parte* review should the authorization be disturbed. It is my opinion that, in view of the silence on this subject in the *Criminal Code* and the confusion thereby created, the practice above-described should be adopted.

An application to challenge an authorization should be brought as soon as possible. In most cases, because of the requirement for reasonable notice of intention to adduce wiretap evidence, it may be that the application can be made before trial. Otherwise, defence counsel wishing to challenge an authorization may, in accordance with

(C.S.C.-B.), appel rejeté pour cause d'incompétence (1976), 32 C.C.C. (2d) 254 (C.A.C.-B.)

Les exigences de l'administration judiciaire ainsi que le décès ou la maladie du juge qui a accordé l'autorisation font qu'il n'est pas toujours pratique ou possible d'adresser une demande de révision au juge qui a rendu l'ordonnance. Il ressort de la jurisprudence qu'un autre juge de la même cour peut réviser une ordonnance rendue *ex parte*. Voir, par exemple, les arrêts *Bidder v. Bridges* (1884), 26 Ch.D. 1 (C.A.) et *Boyle v. Sacker* (1888), 39 Ch.D. 249 (C.A.) Dans l'arrêt *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625 (C.A.C.-B.), le juge Smith affirme, aux pp. 626 et 627:

> [TRADUCTION] Examen fait des arrêts, qui ne sont ni aussi concluants ni aussi uniformes qu'ils pourraient l'être, j'estime qu'il y a une jurisprudence prépondérante qui appuie les propositions suivantes relativement à la révision par un juge d'une ordonnance rendue *ex parte* par un autre juge: (1) il a le pouvoir d'annuler l'ordonnance ou l'injonction; (2) plutôt que d'exercer ce pouvoir, il devrait déférer la demande au premier juge, sauf dans des circonstances spéciales, par exemple, lorsqu'il agit avec le consentement ou l'autorisation du premier juge, ou lorsque celui-ci ne peut entendre la demande; (3) si le second juge entend la demande, il doit en reprendre l'audition au complet à la fois sur le plan du droit et celui des faits en cause.

J'estime qu'à une seule restriction près, ce passage s'applique à la révision d'une autorisation d'écoute électronique. Le juge chargé de la révision ne doit pas substituer son appréciation à celle du juge qui a accordé l'autorisation. Il n'y a lieu de toucher à l'autorisation que s'il appert que les faits sur lesquels on s'est fondé pour l'accorder diffèrent de ceux prouvés dans le cadre de la révision *ex parte*. À mon avis, compte tenu du mutisme du *Code criminel* sur ce point et de la confusion qui en résulte, il convient de suivre la pratique déjà décrite.

Une demande visant à contester une autorisation doit être présentée dans les plus brefs délais. Le plus souvent, à cause de l'exigence d'un préavis raisonnable de l'intention de produire des éléments de preuve obtenus par écoute électronique, il se peut qu'une demande à cet effet puisse être présentée avant le procès. Sinon, l'avocat de la défense

the suggestion made by O'Sullivan J.A. in the case at bar, have to apply for an adjournment for this purpose.

It may be argued that where a trial judge happens to be of the same court that made the authorization order (as was the case in *Wong (No. 1), supra*) an application to review the authorization could be made to him directly, rather than incurring extra expense and needless delay by instituting completely separate proceedings. There may be some merit to this argument but, if such a review were undertaken, it would be done by the judge in his capacity as a judge of the court that made the original order and not in his capacity as trial judge.

In the case at bar, the trial judge held the wiretap evidence to be inadmissible and at the same time he stated that he did not need to go behind the authorizations. In my opinion, he did go behind the authorizations even though he did not consider it necessary to open the sealed packets. In so doing, for the reasons discussed above, he exceeded his jurisdiction. I am in substantial agreement with the Manitoba Court of Appeal that the trial judge was in error in refusing to admit the evidence which was tendered by the Crown. I would therefore dismiss the appeal and confirm the order for a new trial.

The reasons of Dickson and Chouinard JJ. were delivered by

DICKSON J.—The issue is whether a trial judge, who is a provincial court judge, can look behind an apparently valid wiretap authorization given by a superior court judge and rule intercepted private communications inadmissible in evidence.

I The Facts and Judicial History

The appellant, James Stephen Wilson, was tried before Dubienski Prov. Ct. J. of the Manitoba Provincial Court (Criminal Division) on nine counts, all related to betting. The Crown sought to

qui souhaite contester une autorisation peut, comme l'a proposé en l'espèce le juge O'Sullivan de la Cour d'appel, avoir à demander un ajournement à cette fin.

On peut soutenir que, lorsque le juge du procès est de la même cour que celle qui a rendu l'ordonnance portant autorisation (comme c'était le cas dans l'affaire *Wong (No. 1)*, précitée), ce juge pourrait être saisi directement d'une demande de révision de l'autorisation, ce qui permettrait d'éviter les frais supplémentaires et les retards inutiles qu'entraîneraient des procédures tout à fait distinctes. Bien que cet argument puisse avoir un certain bien-fondé, si le juge devait entreprendre une telle révision, il le ferait en sa qualité de juge de la cour qui a rendu l'ordonnance initiale et non en sa qualité de juge du procès.

En l'espèce, le juge du procès a conclu à l'irrecevabilité de la preuve obtenue par écoute électronique, déclarant en même temps qu'il n'avait pas à vérifier les autorisations. Mais, selon moi, il a bel et bien vérifié les autorisations même s'il n'a pas jugé nécessaire d'ouvrir les paquets scellés. Ce faisant, pour les raisons déjà énoncées, il a outrepassé sa compétence. Pour l'essentiel, je partage l'avis de la Cour d'appel du Manitoba que le juge du procès a commis une erreur en refusant d'admettre la preuve produite par le ministère public. Par conséquent, je suis d'avis de rejeter le pourvoi et de confirmer l'ordonnance portant nouveau procès.

Version française des motifs des juges Dickson et Chouinard rendus par

LE JUGE DICKSON—La question est de savoir si le juge du procès, en l'occurrence un juge de la cour provinciale, peut vérifier une autorisation d'écoute électronique apparemment valide donnée par un juge d'une cour supérieure et conclure à l'irrecevabilité en preuve de communications privées interceptées.

I Les faits et l'historique des procédures judiciaires

L'appelant, James Stephen Wilson, a subi son procès devant le juge Dubienski de la Cour provinciale du Manitoba (Division criminelle) relativement à neuf chefs d'accusation se rapportant tous

adduce wiretap evidence. Dubienski Prov. Ct. J. ruled the evidence inadmissible as having been illegally obtained. The Crown's case collapsed and Wilson was acquitted on all nine counts. The issue on appeal is whether Dubienski Prov. Ct. J. exceeded his jurisdiction in refusing to admit the intercepted communications in evidence.

The tapes were made pursuant to four authorizations, obtained from judges of the Manitoba Court of Queen's Bench, concerning the accused Wilson and authorizing interceptions at named addresses. In each of the authorizations the following words appear:

AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;

AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

Counsel for Wilson concedes all four authorizations are valid on their face. Police Inspector Anton Cherniak testified as to the manner in which the authorizations had been obtained. Cherniak said, in respect of the first authorization:

... while in company with Mr. John Guy [a Crown counsel and designated agent] we attended in judges chambers before Mr. Justice Hunt. Mr. Justice Hunt was supplied with an application. He appeared to read it. He was supplied with an affidavit. He appeared to read it. He was then supplied with an authorization. He appeared to read it and he then applied his signature, in my presence, to the authorization.

Testimony with respect to the other authorizations was virtually the same. On cross-examination, Inspector Cherniak added that he might have been asked a number of questions. Wilson's counsel spent considerable time cross-examining Cherniak about the matters referred to in ss. 178.12(1)(*g*) and 178.13(1)(*b*) of the *Criminal Code*:

aux paris. Le ministère public a cherché à produire des éléments de preuve obtenus par écoute électronique. Le juge Dubienski les a déclarés irrecevables pour le motif qu'ils avaient été illégalement obtenus. Le ministère public n'ayant plus aucune preuve à l'appui des accusations, Wilson a été acquitté relativement à chacun des neuf chefs. La question sur laquelle porte le pourvoi est de savoir si le juge Dubienski a outrepassé sa compétence en refusant d'admettre en preuve les communications interceptées.

Les enregistrements ont été faits en vertu de quatre autorisations accordées par des juges de la Cour du Banc de la Reine du Manitoba. Chacune de ces autorisations, qui visent l'accusé Wilson et permettent des interceptions aux adresses indiquées, contient les mots suivants:

[TRADUCTION] LECTURE FAITE de l'affidavit du sergent-détective Anton Cherniak;

ÉTANT CONVAINCU que l'octroi de cette autorisation sert au mieux l'administration de la justice, que d'autres méthodes d'enquête ont été essayées et ont échoué, ou ont peu de chance de succès, et que l'urgence de l'affaire est telle qu'il ne serait pas pratique de mener l'enquête relative aux infractions mentionnées ci-après en n'utilisant que les autres méthodes d'enquête;

L'avocat de Wilson reconnaît que les quatres autorisations sont toutes valides à première vue. L'inspecteur de police Anton Cherniak a témoigné concernant la manière dont les autorisations ont été obtenues. Il a affirmé relativement à la première autorisation:

[TRADUCTION] ... accompagnés de Me John Guy [substitut du procureur général et représentant désigné], nous avons comparu devant le juge Hunt siégeant en chambre. On lui a présenté une demande qu'il a paru lire. On lui a remis un affidavit qu'il a paru lire. Puis on lui a présenté une autorisation. Il a paru la lire, après quoi il y a apposé sa signature en ma présence.

Le témoignage quant aux autres autorisations est quasi identique. Au cours de son contre-interrogatoire, l'inspecteur Cherniak a ajouté qu'on lui avait peut-être posé un certain nombre de questions. L'avocat de Wilson a passé beaucoup de temps à contre-interroger Cherniak sur les points visés aux al. 178.12(1)*g*) et 178.13(1)*b*) du *Code criminel*:

178.12 (1) An application for an authorization shall be made *ex parte* and in writing . . .

and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:

. . .

(*g*) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied

(*a*) that it would be in the best interests of the administration of justice to do so; and

(*b*) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The questions related to the actual state of facts at the time the authorizations were applied for and not to the contents of the affidavits. The Crown made no objection to this line of questioning. On the basis of Cherniak's testimony at trial, Dubienski Prov. Ct. J. decided none of the three alternative pre-conditions of s. 178.13(1)(*b*) had been met at the time the authorizations were given: (i) no other investigative procedures had been tried and failed, (ii) there was no evidence other investigative procedures were unlikely to succeed, (iii) there was no urgency. The judge concluded that the improper granting of the authorizations was not due to any error on the part of the authorizing judges, but due to the fault of the police.

My whole problem was that the evidence that was before me, as presented by the police, was quite different from the evidence that would appear to have been given and upon which the authorizations were based.

He further commented:

I am inclined to say the police have developed a pattern of application based on routine.

178.12 (1) Une demande d'autorisation doit être présentée *ex parte* et par écrit . . .

et il doit y être joint une déclaration assermentée d'un agent de la paix ou d'un fonctionnaire public pouvant être faite sur la foi de renseignements tenus pour véridiques et indiquant ce qui suit:

. . .

g) si d'autres méthodes d'enquête ont ou non été essayées, si elles ont ou non échoué, ou pourquoi elles paraissent avoir peu de chance de succès, ou si, étant donné l'urgence de l'affaire, il ne serait pas pratique de mener l'enquête relative à l'infraction en n'utilisant que les autres méthodes d'enquête.

178.13 (1) Une autorisation peut être donnée si le juge auquel la demande est présentée est convaincu

a) que l'octroi de cette autorisation servirait au mieux l'administration de la justice; et

b) que d'autres méthodes d'enquête ont été essayées et ont échoué, ou ont peu de chance de succès, ou que l'urgence de l'affaire est telle qu'il ne serait pas pratique de mener l'enquête relative à l'infraction en n'utilisant que les autres méthodes d'enquête.

Les questions portaient sur la situation de fait au moment où les autorisations ont été demandées et non pas sur la teneur des affidavits. Le ministère public ne s'est pas opposé à ce genre de questions. Se fondant sur le témoignage rendu par Cherniak au procès, le juge Dubienski a conclu qu'au moment de l'octroi des autorisations, on n'avait satisfait à aucune des trois conditions préalables énoncées à l'al. 178.13(1)*b*): (i) aucune autre méthode d'enquête n'avait été essayée ni n'avait échoué, (ii) rien n'indiquait que d'autres méthodes d'enquête avaient peu de chance de succès, (iii) il ne s'agissait pas d'un cas urgent. Le juge a conclu que l'irrégularité de l'octroi des autorisations était attribuable non pas à une erreur quelconque de la part des juges qui les ont accordées, mais à la faute de la police.

[TRADUCTION] Ce qui m'embarrassait c'était que la preuve que m'avait soumise la police différait sensiblement de celle sur laquelle les autorisations semblaient se fonder.

Il ajoute:

[TRADUCTION] Je suis porté à dire que la police a adopté une méthode de demande routinière.

It would be carrying it too far to say Dubienski Prov. Ct. J. concluded the authorizations had been obtained by fraud, but, at least, he assumed there had been insufficient or false information in the affidavits. This determination was reached without examination of the affidavits. They remain in sealed packets, pursuant to s. 178.14 of the *Code*, and Dubienski Prov. Ct. J., as a provincial court judge, had no authority to order the opening of the packets. The judge decided the interceptions of private communications had not been lawfully made and to admit the evidence would bring the administration of justice into disrepute. He therefore excluded the evidence.

The Crown appealed the acquittals to the Manitoba Court of Appeal, which unanimously allowed the appeal and ordered a new trial. Monnin J.A., as he then was, and Matas J.A. concurring, concluded that an authorization issued by a superior court could not be collaterally challenged in a provincial court. In separate reasons, O'Sullivan J.A. said that an authorization granted in a superior court could not be collaterally attacked in any court and could not be attacked at all in an inferior court.

In the Manitoba Court of Appeal and in this Court counsel for Wilson argued, as an additional point, that the requirement under s. 178.16(4) to give notice of intention to adduce wiretap evidence had not been proven at trial. The Manitoba Court of Appeal rejected this argument. In this Court we gave our opinion on the day of hearing that notice had been sufficiently proven. Thus, the only outstanding issue is the trial judge's treatment of the authorizations.

II The Reviewability of Authorizations

An authorization to intercept a private communication is an *ex parte* order which may be made by a judge of a superior court of criminal jurisdiction, as defined in s. 2 of the *Criminal Code*, or a judge, as defined in s. 482. That means

Il serait exagéré de dire que le juge Dubienski a conclu que les autorisations ont été obtenues par la fraude, mais, à tout le moins, il a présumé que les affidavits contenaient des renseignements insuffisants ou faux. Il a tiré cette conclusion sans avoir examiné les affidavits. Ils sont demeurés dans des paquets scellés comme l'exige l'art. 178.14 du *Code*, et le juge Dubienski, en sa qualité de juge d'une cour provinciale, n'avait pas le pouvoir d'ordonner l'ouverture des paquets. Le juge a décidé que les communications privées n'avaient pas été interceptées légalement et qu'on ne saurait les recevoir en preuve sans ternir l'image de la justice. Il les a donc écartées.

Le ministère public en a appelé des acquittements devant la Cour d'appel du Manitoba qui, à l'unanimité, a accueilli l'appel et ordonné un nouveau procès. Le juge Monnin (c'était alors son titre), aux motifs duquel a souscrit le juge Matas, a conclu qu'une autorisation délivrée par une cour supérieure ne peut être attaquée indirectement devant une cour provinciale. Dans des motifs distincts, le juge O'Sullivan a affirmé qu'une autorisation accordée par une cour supérieure ne peut être attaquée indirectement devant une cour et ne peut absolument pas être attaquée devant une cour inférieure.

En Cour d'appel du Manitoba et en cette Cour, l'avocat de Wilson a fait valoir en outre qu'on n'avait pas prouvé au procès qu'il y a eu respect du par. 178.16(4) qui exige un préavis de l'intention de produire des éléments de preuve obtenus par écoute électronique. La Cour d'appel du Manitoba a rejeté cet argument. Au cours de l'audience en cette Cour, nous avons exprimé l'opinion qu'on avait donné une preuve suffisante du préavis. Ainsi, la seule question qui demeure en litige porte sur la manière dont le juge du procès a traité les autorisations.

II Les autorisations sont-elles susceptibles de révision?

Une autorisation d'intercepter une communication privée constitue une ordonnance *ex parte* qui peut être rendue par un juge d'une cour supérieure de juridiction criminelle au sens de l'art. 2 du *Code criminel*, ou par un juge visé à l'art. 482. Cela

that in Manitoba authorizations may be obtained from judges of the Court of Appeal, the Court of Queen's Bench, or a County Court. The designations in other provinces are slightly different; I will use the Manitoba references in the following discussion.

To what extent, if any, and in what manner are authorizations reviewable? The Manitoba Court of Appeal identified two problems in the present case: (i) an inferior court had refused to accept the validity of superior court authorizations, and (ii) collateral attack. I will deal with the latter point first.

(A) Collateral Attack

In dealing with the issue of collateral attack I will, for the moment, put to one side the question of a trial judge assessing an authorization given by a higher court. I will assume that the trial judge is of the same court, or a higher court, than the judge who gave the authorization.

The collateral attack issue is this: in the absence of an actual application to set aside the authorization, can a trial judge, *qua* trial judge, consider the validity of an authorization in order to determine the admissibility of evidence? O'Sullivan J.A., as I indicated, expressed the view that a superior court authorization could not be collaterally attacked in any court. That was perhaps implicit in the judgment of Monnin J.A. In the earlier case of *R. v. Dass* (1979), 47 C.C.C. (2d) 194 (Man. C.A.), Huband J.A., speaking for a five judge Court, said this, at p. 214:

> A question arose as to whether objection could be taken in this Court, to evidence flowing from an interception which had been authorized by a Court order made by a Justice of the Manitoba Court of Queen's Bench .... There is a well-recognized rule that the orders of a superior Court cannot be made the subject of a collateral attack: see *Re Sproule* (1886), 12 S.C.R. 140 at p. 193. In this instance, however, defence counsel does not complain that an application to intercept communications was made. He does not complain that an

signifie qu'au Manitoba des autorisations peuvent être accordées par un juge de la Cour d'appel, un juge de la Cour du Banc de la Reine ou un juge d'une cour de comté. Les appellations dans les autres provinces sont légèrement différentes, mais, aux fins de la présente analyse, j'emploierai celles du Manitoba.

Dans quelle mesure, s'il y a lieu, et de quelle manière les autorisations peuvent-elles être révisées? La Cour d'appel du Manitoba a cerné deux problèmes: (i) celui d'une cour inférieure qui a refusé de reconnaître la validité d'autorisations émanant d'une cour supérieure, et (ii) celui d'une attaque indirecte. J'examinerai d'abord le second point.

(A) L'attaque indirecte

Dans mon étude de la question de l'attaque indirecte, j'ignorerai pour le moment la question du juge du procès qui examine une autorisation donnée par une cour d'instance supérieure. Je tiendrai pour acquis que le juge du procès est de la même cour ou d'une cour d'instance supérieure par rapport au juge qui a accordé l'autorisation.

La question de l'attaque indirecte peut se formuler de la façon suivante: en l'absence d'une requête en annulation de l'autorisation, un juge du procès peut-il, à ce titre, examiner la validité de cette autorisation afin de déterminer sa recevabilité en preuve? Le juge O'Sullivan, comme je l'ai déjà souligné, a exprimé l'avis qu'une autorisation émanant d'une cour supérieure ne peut être attaquée indirectement devant une cour. Cela se dégage peut-être implicitement des motifs du juge Monnin. Dans l'arrêt antérieur *R. v. Dass* (1979), 47 C.C.C. (2d) 194 (C.A. Man.), le juge Huband, s'exprimant au nom de la cour qui était composée de cinq juges, affirme, à la p. 214:

> [TRADUCTION] On s'est demandé si, en cette cour, on peut s'objecter à l'admission d'éléments de preuve découlant d'une interception autorisée par une ordonnance émanant d'un juge de la Cour du Banc de la Reine du Manitoba ... Il existe une règle bien établie selon laquelle les ordonnances d'une cour supérieure ne peuvent faire l'objet d'une attaque indirecte: voir *Re Sproule* (1886), 12 R.C.S. 140, à la p. 193. En l'espèce, toutefois, l'avocat de la défense ne se plaint pas de ce qu'on a demandé l'autorisation d'intercepter des com-

order was granted. He does not complain as to the terms or the wording of the order, except for the substitution of one location for another as previously discussed. The complaint is not as to the order itself, but rather as to the means by which the order was implemented. The issue raised is therefore not an attack on the order itself, and consequently it is an appropriate subject-matter for the consideration of this Court on appeal. [Emphasis added.]

The exception was, however, a broad qualification. There had been a renewal of the authorization in which a new location had been added; the Court of Appeal concluded that was improper; to that extent the renewal was invalid, and any communications intercepted at the new location should not have been admitted in evidence. (Nonetheless, s. 613(1)(*b*)(iii) was applied.) Despite its asseveration to the contrary, it is hard to conclude that the Manitoba Court of Appeal did not, in effect, collaterally attack the authorization in *Dass*.

I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs. This general rule is, however, subject to modification by statute. In my view, Parliament has indeed modified the rule in the enactment of two provisions of Part IV.I of the *Criminal Code*, ss. 178.16(1) and 178.16(3)(*b*):

178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

. . .

(3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings

munications. Il ne se plaint pas de ce qu'une ordonnance a été accordée. Il ne se plaint pas des termes ou de la formulation de l'ordonnance, sauf pour ce qui est de la substitution d'un lieu à un autre, comme je l'ai déjà dit. La plainte vise non pas l'ordonnance elle-même, mais plutôt la façon dont elle a été exécutée. La question soulevée n'attaque donc pas l'ordonnance elle-même et, par conséquent, elle se prête à un examen par cette cour dans le cadre de l'appel. [C'est moi qui souligne.]

L'exception était cependant d'une portée très large. On avait renouvelé l'autorisation dans laquelle un nouveau lieu avait été ajouté; la Cour d'appel a conclu que cela était irrégulier, que dans cette mesure le renouvellement était invalide et que les communications interceptées au nouveau lieu n'auraient pas dû être admises en preuve. (On a néanmoins appliqué le sous-al. 613(1)*b*)(iii).) Même si elle affirme le contraire, il est difficile de conclure que la Cour d'appel du Manitoba n'a pas en réalité attaqué indirectement l'autorisation dans l'arrêt *Dass*.

J'accepte la thèse générale portant qu'une fois rendue, l'ordonnance d'une cour peut être mise en question autrement que par une attaque directe au moyen d'un appel, d'une requête en annulation ou d'un bref de prérogative. Cette règle générale peut toutefois être modifiée par voie législative. À mon avis, le Parlement a effectivement modifié la règle en adoptant deux dispositions de la partie IV.1 du *Code criminel*, savoir le par. 178.16(1) et l'al. 178.16(3)*b*):

178.16 (1) Une communication privée qui a été interceptée est inadmissible en preuve contre son auteur ou la personne à laquelle son auteur la destinait à moins

a) que l'interception n'ait été faite légalement, ou

b) que l'auteur de la communication privée ou la personne à laquelle son auteur la destinait n'ait expressément consenti à ce qu'elle soit admise en preuve,

toutefois les preuves découlant directement ou indirectement de l'interception d'une communication privée ne sont pas inadmissibles du seul fait que celle-ci l'est.

. . .

(3) Par dérogation au paragraphe (1), le juge ou magistrat qui préside à une instance quelconque peut déclarer admissible en preuve une communication privée qui serait irrecevable en vertu du paragraphe (1), s'il estime

(*a*) is relevant to a matter at issue in the proceedings, and

(*b*) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,

he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

The present s. 178.16(3) was formerly, with slightly different wording, s. 178.16(2).

(i) Invalidity on the Face of the Authorization

On what basis can a trial judge assess the validity? This Court has been receptive to the view that a trial judge can collaterally attack an authorization. In *Charette v. The Queen*, [1980] 1 S.C.R. 785, affirming, *sub nom. R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), the trial judge had concluded the superior court authorization was invalid on its face and refused to admit the evidence obtained pursuant to it. The Ontario Court of Appeal disagreed, holding the authorization was valid on its face, but the Court accepted the submission that the trial judge had jurisdiction to consider the validity of the authorization. In *Charette* this Court adopted the reasons of Dubin J.A., which included the following passage at pp. 501-02:

A *voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, *i.e.*, that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any

a) qu'elle concerne un des points en litige; et

b) que l'irrecevabilité tient non pas au fond mais uniquement à un vice de forme ou de procédure dans la demande d'interception ou dans l'autorisation qui a été accordée à cet effet.

L'actuel par. 178.16(3) était autrefois le par. 178.16(2) dont la formulation était légèrement différente.

(i) L'invalidité à première vue de l'autorisation

Sur quoi le juge du procès peut-il se fonder pour déterminer la validité d'une autorisation? Cette Cour s'est montrée réceptive à l'avis que le juge du procès peut attaquer indirectement une autorisation. Dans l'affaire *Charette c. La Reine*, [1980] 1 R.C.S. 785, confirmant sous l'intitulé *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (C.A. Ont.), le juge du procès avait conclu que l'autorisation accordée par la cour supérieure était invalide à première vue et a refusé d'admettre la preuve obtenue en application de cette autorisation. La Cour d'appel de l'Ontario n'a pas partagé cet avis; elle a conclu que l'autorisation était valide à première vue, mais elle a retenu l'argument portant que le juge du procès avait compétence pour en examiner la validité. Dans l'arrêt *Charette*, cette Cour a fait siens les motifs du juge Dubin de la Cour d'appel, qui affirme notamment, aux pp. 501 et 502:

[TRADUCTION] On ne tient pas un voir dire pour déterminer le caractère suffisant de la preuve, mais seulement pour résoudre les questions de recevabilité. Dans des cas comme celui qui nous occupe, il se pose immédiatement des questions quant à la recevabilité de la preuve produite. Pour que soit recevable une preuve qui consiste en des communications privées interceptées par suite d'une autorisation, le substitut du procureur général doit en premier lieu convaincre le juge du procès qu'on a satisfait aux conditions préalables imposées par la loi, c.-à-d. que les interceptions ont été faites légalement et que l'avis exigé par la loi a été donné. Lorsque le ministère public invoque une autorisation, il appartient au juge du procès de déterminer notamment si cette autorisation est valide et si l'enquête autorisée a été menée de la manière prévue dans ladite autorisation. Le

of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge and are properly determined in a *voir dire*. [Emphasis added.]

The trial judge has the responsibility of deciding upon the admissibility of evidence. Section 178.16(1) says that, absent consent, evidence of a private communication can only be introduced if the interception was lawful. Absent consent, an interception is only lawful if made pursuant to an authorization given in accordance with Part IV.I of the *Criminal Code*. The fact that an authorization purports to be made under Part IV.I is insufficient. Section 178.16(3)(*b*) gives the trial judge discretion to admit unlawfully obtained evidence if there is a non-substantive defect in form or irregularity in procedure in the giving of the authorization. The corollary would seem to be that if the defect or irregularity is substantive, there is no such discretion and the evidence is inadmissible. If a court order authorizing the interception were conclusive, even if it did not comply with Part IV.I, there would be no need for the curative provisions of s.178.16(3)(*b*). The combination of ss. 178.16(1)(*a*) and 178.16(3)(*b*) requires the trial judge to consider whether the authorization was valid. The fact that it amounts to what might be called a collateral attack is no bar.

(ii) Going Behind an Apparently Valid Authorization

Does the same *rationale* apply when the question is one of going behind an apparently valid authorization? In the present case Dubienski, Prov. Ct. J. claimed he was not going behind the authorizations. In my view that position is untenable. When a trial judge rules evidence inadmissible because the authorization, although valid on its face, was not lawfully obtained, it can scarcely be said that he is not going behind the authorization. He is not necessarily declaring the authorization void. He is not necessarily declaring the authorization

juge doit être convaincu que l'autorisation vise, nommément ou d'une autre manière, les parties à la communication et, je le répète, il doit être convaincu que le préavis exigé par la loi a été donné.

Il appartient exclusivement au juge du procès de déterminer si on a satisfait aux conditions préalables qu'impose la loi et c'est au cours d'un voir dire qu'il doit le faire. [C'est moi qui souligne.]

C'est au juge du procès qu'il incombe de décider de la recevabilité de la preuve. Le paragraphe 178.16(1) édicte que, en l'absence de consentement, une communication privée ne peut être produite en preuve que si elle a été interceptée légalement. En l'absence de consentement, une interception n'est légale que si elle est faite conformément à une autorisation accordée en vertu de la partie IV.1 du *Code criminel*. Il ne suffit pas qu'une autorisation soit apparemment donnée en vertu de la partie IV.1. L'alinéa 178.16(3)*b*) confère au juge du procès le pouvoir discrétionnaire d'admettre des éléments de preuve obtenus illégalement dans le cas où l'octroi de l'autorisation n'est entaché que d'un vice de forme ou de procédure. Il paraît s'ensuivre que, s'il s'agit d'un vice de fond, il n'y a pas de pouvoir discrétionnaire et la preuve est irrecevable. Si une ordonnance d'une cour autorisant l'interception était concluante, même si elle n'était pas conforme à la partie IV.1, les dispositions réparatrices de l'al. 178.16(3)*b*) seraient dès lors inutiles. Les alinéas 178.16(1)*a*) et 178.16(3)*b*) ont pour effet cumulatif d'exiger du juge du procès qu'il détermine si l'autorisation est valide. Le fait que cela corresponde à ce qu'on pourrait appeler une attaque indirecte ne constitue pas un empêchement.

(ii) La vérification d'une autorisation apparemment valide

En va-t-il de même lorsqu'il s'agit de vérifier une autorisation apparemment valide? En l'espèce, le juge Dubienski a affirmé qu'il ne vérifiait pas les autorisations. À mon avis, cette affirmation est insoutenable. Quand un juge du procès conclut à l'irrecevabilité d'une preuve parce que l'autorisation, bien que valide à première vue, n'a pas été obtenue légalement, on ne saurait sûrement pas prétendre qu'il n'a pas vérifié cette autorisation. Il ne la déclare pas nécessairement invalide à toutes

tion invalid for all purposes; he is not actually setting it aside; but he is, for the purpose of determining the admissibility of evidence, going behind the authorization. Is there jurisdiction to do so?

I am of the view that ss. 178.16(1)(*a*) and 178.16(3)(*b*) apply to give the trial judge authority to go behind an apparently valid authorization. There is nothing in the language of the sections justifying a distinction between that which appears on the face of the record and that which is *dehors* the record. There is nothing limiting the trial judge to an examination only of what appears on the face of the authorization. To impose such a restriction as a matter of statutory interpretation would unnecessarily fetter his ability to determine whether the wiretap evidence is admissible. In many cases wiretap evidence may be the only evidence against the accused. It must be noted that not only does s. 178.16(3)(*b*) refer to defects or irregularities in the giving of the authorization, but also in the application for the authorization. Once again, since s. 178.16(3)(*b*), in effect, gives a discretion to cure for non-substantive defects or irregularities it would seem to follow as a necessary inference that substantive defects or irregularities in the application for the authorization will result in the evidence being inadmissible. In *R. v. Gill* (1980), 56 C.C.C. (2d) 169 (B.C.C.A.), Lambert J.A. expressed this view at p. 176:

> Subsection (2)(*b*) [now 178.16(3)(*b*)] of that section contemplates that any defect or irregularity in the application for or the giving of the authorization may make a private communication inadmissible, and that if it is inadmissible and if the defect or irregularity is a substantive one, then there is no discretion in the trial Judge to admit the private communication.

I think that s. 178.16 defines its own concepts and that if, in the application for the authorization, or in the giving of the authorization, there is a substantive defect or irregularity, then the interception cannot be regarded as being lawfully made within the meaning of s. 178.16(1)(*a*). A private communication intercepted under such an authorization would be inadmissible. In reaching that conclusion, I disagree on this narrow point with the reasons of Anderson J. of the Supreme Court of British Columbia in *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, 32 C.R.N.S. 192, and with the reasons of McDonald J.

fins que ce soit, il ne l'annule pas vraiment, mais il la vérifie pour déterminer la recevabilité de la preuve. A-t-il compétence pour le faire?

J'estime que les al. 178.16(1)*a*) et 178.16(3)*b*) confèrent au juge du procès le pouvoir de vérifier une autorisation apparemment valide. Rien dans ces alinéas ne justifie une distinction entre ce qui est manifeste à la lecture du dossier et ce qui est en dehors du dossier. Il n'y a rien qui limite le juge du procès à un examen de ce qui manifeste à la lecture de l'autorisation. L'imposition d'une telle restriction par voie d'interprétation législative aurait pour effet d'entraver inutilement sa capacité de décider de la recevabilité de la preuve obtenue par écoute électronique. Il peut arriver, dans bien des cas, que cette preuve soit la seule qui existe contre l'accusé. Il faut noter que l'al. 178.16(3)*b*) parle non seulement des vices de forme ou de procédure dans l'autorisation elle-même, mais aussi de ceux dans la demande d'autorisation. Je le répète, puisque l'al. 178.16(3)*b*) a pour effet d'accorder un pouvoir discrétionnaire de remédier aux vices de forme ou de procédure, il paraît s'ensuivre nécessairement que des vices de fond dans la demande d'autorisation rendent la preuve inadmissible. C'est l'avis qu'a exprimé le juge Lambert dans l'arrêt *R. v. Gill* (1980), 56 C.C.C. (2d) 169 (C.A.C.-B.), à la p. 176:

> [TRADUCTION] Suivant l'al. (2)*b*) [l'actuel al. 178.16(3)(*b*)] de cet article, tout vice dans la demande d'autorisation ou dans l'autorisation elle-même peut rendre inadmissible une communication privée, auquel cas, s'il s'agit d'un vice de fond, le juge du procès n'a pas le pouvoir discrétionnaire d'admettre cette communication.

J'estime que l'art. 178.16 définit ses propres notions et que si la demande d'autorisation ou l'autorisation elle-même est entachée d'un vice de fond, alors l'interception ne peut être considérée comme ayant été faite légalement au sens de l'al. 178.16(1)*a*). Une communication privée interceptée en vertu d'une telle autorisation serait irrecevable. Donc, sur ce point précis, je suis en désaccord avec les motifs rendus par le juge Anderson de la Cour suprême de la Colombie-Britannique dans l'arrêt *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, 32 C.R.N.S. 192, et ceux rendus par le juge McDonald de la Cour

of the Alberta Supreme Court, Trial Division, in *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58, [1976] W.W.D. 100.

A view similar to that of Lambert J.A. was expressed by Meredith J. in *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506 (B.C.S.C.), a case relied upon by Dubienski Prov. Ct. J. *Wong (No. 1)* involved, as does the present case, a question of compliance with s. 178.13(1)(*b*).

Notwithstanding what has been said by D.C. McDonald, J., in the case cited above, it seems to me to follow by necessary inference that a substantive defect of form or irregularity in procedure in an application for or the giving of the authorization may render the evidence of the communication intercepted as a result, inadmissible as unlawful. Thus, it seems to me that as I am the Judge who must rule on the admissibility of evidence in this case, I must consider whether there has been a substantive defect of form or irregularity in procedures as might render the evidence inadmissible. I do not think that such an examination requires that the *ex parte* order by which the authorization was granted be reviewed or set aside. [At pp. 509-10].

R. v. Ho (1976), 32 C.C.C. (2d) 339 (Vancouver Co. Ct. (B.C.)) is to the same effect. See Krever J. in *Re Stewart and The Queen* (1976), 30 C.C.C. (2d) 391 (Ont. H.C.), at p. 400. See also Manning, *The Protection of Privacy Act*, (1974) at pp. 135-37; Bellemare, *La révision d'une autorisation en écoute électronique* (1979), 39 R. du B. 496.

As noted in the above-quoted passages, there is a contrary view, expressed most strongly by McDonald J. in *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58 (Alta. S.C.), and by Anderson J. in *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257 (B.C.S.C.) I will refer specifically to the arguments raised by McDonald J. in *Donnelly and Acheson*, considerably influenced by the wording of s. 178.14:

178.14 (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) are confidential and, with the exception of the authori-

suprême de l'Alberta, Division de première instance, dans la décision *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58, [1976] W.W.D. 100.

Le juge Dubienski s'est fondé sur la décision *R. v. Wong (No. 1)* (1976), 33 C.C.C. (2d) 506 (C.S.C.-B.), où le juge Meredith exprime un avis semblable à celui du juge Lambert. Dans cette affaire, tout comme dans la présente espèce, la question était de savoir si l'on s'était conformé à l'al. 178.13(1)*b*).

[TRADUCTION] Nonobstant ce qu'a dit le juge D.C. McDonald dans la décision précitée, il me semble s'ensuivre nécessairement qu'un vice de fond dans une demande d'autorisation ou dans l'autorisation elle-même peut rendre irrecevable pour cause d'illégalité la communication interceptée par suite de cette autorisation. Ainsi, il me semble que, puisque je suis le juge à qui il incombe de décider de la recevabilité de la preuve en l'espèce, je me dois de déterminer s'il y a un vice de fond qui est de nature à rendre la preuve irrecevable. Je ne crois pas qu'un tel examen nécessite la révision ou l'annulation de l'ordonnance *ex parte* accordant l'autorisation. [aux pp. 509 et 510].

Le jugement *R. v. Ho* (1976), 32 C.C.C. (2d) 339 (Cour de comté de Vancouver (C.-B.)) va dans le même sens. Voir les motifs du juge Krever dans l'affaire *Re Stewart and The Queen* (1976), 30 C.C.C. (2d) 391 (H.C. Ont.), à la p. 400. Voir aussi Manning, *The Protection of Privacy Act* (1974), aux pp. 135 à 137; Bellemare, *La révision d'une autorisation en écoute électronique* (1979), 39 R. du B. 496.

Comme on a pu le constater dans les passages précités, il y a un point de vue contraire qui est exprimé le plus énergiquement par le juge McDonald dans l'affaire *Re Donnelly and Acheson and The Queen* (1976), 29 C.C.C. (2d) 58 (C.S. Alb.) et le juge Anderson dans l'affaire *Re Miller and Thomas and The Queen* (1976), 23 C.C.C. (2d) 257 (C.S.C.-B.) Je me rapporterai particulièrement aux points soulevés par le juge McDonald dans l'affaire *Donnelly and Acheson*, qui tiennent dans une large mesure de la formulation de l'art. 178.14:

178.14 (1) Tous les documents relatifs à une demande faite en application de l'article 178.12 ou du paragraphe 178.13(3) sont confidentiels et, à l'exception de l'autori-

zation, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be

(*a*) opened or the contents thereof removed except

(i) for the purpose of dealing with an application for renewal of the authorization, or

(ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and

(*b*) destroyed except pursuant to an order of a judge referred to in subparagraph (*a*)(ii).

(2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

sation, doivent être placés dans un paquet scellé par le juge auquel la demande est faite dès qu'une décision est prise au sujet de cette demande; ce paquet doit être gardé par le tribunal, en un lieu auquel le public n'a pas accès ou en tout autre lieu que le juge peut autoriser et il ne doit pas

a) être ouvert et son contenu ne doit pas être enlevé, si ce n'est

(i) pour traiter d'une demande de renouvellement de l'autorisation, ou

(ii) en application d'une ordonnance d'un juge d'une cour supérieure de juridiction criminelle ou d'un juge défini à l'article 482; ni

b) être détruit, si ce n'est en application d'une ordonnance d'un juge mentionné au sous-alinéa *a*)(ii).

(2) Une ordonnance prévue au paragraphe (1) ne peut être rendue qu'après que le procureur général ou le solliciteur général qui a demandé l'autorisation à laquelle les documents visés par l'ordonnance se rapportent, ou sur l'ordre de qui cette demande a été faite, a eu la possibilité de se faire entendre.

McDonald J. started with the assumption that, but for s. 178.16(2)(*b*) (now 3(*b*)), he would have thought "lawfully made" in s. 178.16(1)(*a*) meant in accordance with an apparently valid authorization. He conceded that s. 178.16(2)(*b*) appeared to imply that the evidence was inadmissible if there were a substantive defect in form or irregularity in procedure in the application for the authorization. He declined, however, to draw this inference, at the same time acknowledging that this relegated portions of s. 178.16(2)(*b*) to mere surplusage. He sought to avoid three consequences he asserted would flow if s. 178.16(2)(*b*) were interpreted to enable a trial judge to go behind an apparently valid authorization.

(1) That which was on its face lawfully done, pursuant to an order (*i.e.*, the authorization) of a Judge of a superior or district Court, would be held to have been unlawful. The trial Judge would retrospectively render unlawful that which had appeared to be lawful. I should think that a statute which is said to give a trial Judge such a power should be scrutinized very carefully to determine whether such a power has in fact been given by Parliament.

(2) The contents of the affidavit would be disclosed to public view even though it might reveal investigations not only which led to the prosecution of the accused but

Au départ, le juge McDonald a tenu pour acquis que, n'eût été l'al. 178.16(2)*b*) (l'actuel al. (3)*b*)), il aurait cru que les mots «faite légalement» à l'al. 178.16(1)*a*) signifiaient «conformément à une autorisation apparemment valide». Il a concédé que l'al. 178.16(2)*b*) semblait donner à entendre que la preuve est inadmissible si la demande d'autorisation est entachée d'un vice de fond. Il a toutefois refusé de conclure que c'est le cas, reconnaissant en même temps que cela avait pour effet de rendre superflues certaines parties de l'al. 178.16(2)*b*). Il a cherché à éviter trois conséquences qui, selon lui, résulteraient si on interprétait l'al. 178.16(2)*b*) de manière à permettre à un juge du procès de vérifier une autorisation apparemment valide.

[TRADUCTION] (1) Ce qui à première vue a été fait légalement, en conformité avec une ordonnance (c.-à-d. l'autorisation) d'un juge d'une cour supérieure ou de district, serait jugé illégal. Le juge du procès rendrait rétrospectivement illégal ce qui avait semblé légal. J'estime qu'une loi, dont on dit qu'elle confère un tel pouvoir à un juge du procès, doit être scrutée très minutieusement afin de déterminer si le Parlement a effectivement conféré ce pouvoir.

(2) Le contenu de l'affidavit serait divulgué au public, même s'il peut y être question non seulement des enquêtes qui ont abouti aux poursuites contre l'accusé, mais

also those which might relate to continuing or concluded investigations of other persons not yet charged or tried. I should think that a statute which is said to enable a trial Judge to do an act with such a consequence should be held to do so only if that power is given expressly or by necessary inference.

(3) The *Protection of Privacy Act*, 1973-74, c. 50, amended both the *Criminal Code* and the *Crown Liability Act*, R.S.C. 1970, c. C-38.

> 7.2(1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.
>
> (2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of
>
> (*a*) was lawfully made;
>
> (*b*) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or
>
> (*c*) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

Whatever interpretation is placed upon the words "lawfully made" in s. 178.16(1)(*a*) of the *Criminal Code* must surely be given also to s. 7.2(2)(*a*) of the *Crown Liability Act*, both those provisions having been created by the same statute. It would follow as well that where the issue arises not as one of the admissibility of an intercepted communication (or derivative evidence at a trial but as one of liability under the *Crown Liability Act*, the contention of the defence would entail that liability would flow from an act of interception which when done by a servant of the Crown had been done pursuant to an authorization which on its face made the interception lawful. [At pp. 64 and 65.]

With respect, I do not find these three arguments to be wholly persuasive. As to the third consequence, a majority of this Court was not convinced

aussi d'enquêtes, en cours ou terminées, sur d'autres personnes qui n'ont pas encore été inculpées ou qui n'ont pas encore subi leur procès. Selon moi, on doit conclure qu'une loi, dont on dit qu'elle habilite un juge du procès à accomplir un acte ayant une pareille conséquence, n'a cet effet que si elle confère ce pouvoir expressément ou par déduction nécessaire.

(3) La *Loi sur la protection de la vie privée*, 1973-74, chap. 50 a modifié à la fois le *Code criminel* et la *Loi sur la responsabilité de la Couronne*, S.R.C. 1970, chap. C-38.

> 7.2 (1) Sous réserve du paragraphe (2), lorsqu'un préposé de la Couronne, au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre, intercepte intentionnellement une communication privée dans l'exercice de ses fonctions, la Couronne est responsable de la totalité des pertes ou dommages causés par cette interception ou qui lui sont attribuables, et de dommages-intérêts punitifs n'excédant pas $5,000 envers chaque personne qui a subi ces pertes ou dommages.
>
> (2) La Couronne n'est pas responsable, en vertu du paragraphe (1), des pertes ou dommages ni des dommages-intérêts punitifs y mentionnés lorsque l'interception ayant fait l'objet de la plainte
>
> *a*) a été légalement faite;
>
> *b*) a été faite avec le consentement, exprès ou tacite, de l'auteur de la communication privée ou de la personne à laquelle son auteur la destinait; ou
>
> *c*) a été faite par un fonctionnaire ou préposé de la Couronne à l'occasion d'un contrôle au hasard nécessairement accessoire à la régulation du spectre des fréquences de radiocommunication au Canada.

Quelle que soit l'interprétation que l'on donne aux mots «faite légalement» qui figurent à l'al. 178.16(1)*a*) du *Code criminel*, elle doit sûrement s'appliquer aussi à l'al. 7.2(2)*a*) de la *Loi sur la responsabilité de la Couronne*, les deux dispositions ayant été créées par la même loi. Il s'ensuivrait également que, si la question soulevée concerne non pas la recevabilité dans un procès d'une communication interceptée (ou d'un élément de preuve dérivée), mais la responsabilité en vertu de la *Loi sur la responsabilité de la Couronne*, la défense plaiderait que la responsabilité découle d'une interception faite par un préposé de la Couronne en vertu d'une autorisation qui, à première vue, la rendait légale. [Aux pp. 64 et 65.]

Avec égards, j'estime que ces trois arguments ne sont pas globalement convaincants. Pour ce qui est de la troisième conséquence, cette Cour à la majo-

by an argument along the same line in *Goldman v. The Queen*, [1980] 1 S.C.R. 976, at pp. 998-99. Mr. Justice McDonald's first and third consequences are related. It does not necessarily follow that a determination of "not lawfully made" for the purposes of admissibility makes an interception unlawful for all purposes under Part IV.I. The evidence may be inadmissible yet there might be a defence to a criminal or civil proceeding arising from the interception. That question does not arise in this case and need not be decided here. The second consequence predicted by McDonald J. tends to overstatement. The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made public. As Stanley A. Cohen suggests in his work *Invasion of Privacy: Police and Electronic Surveillance in Canada* (1983), the integrity of the packet might be preserved "through initial judicial screening, and, if necessary, judicial editing" (p. 155). Due regard to the confidentiality provisions of s. 178.14 is not inconsistent with ruling evidence inadmissible under s. 178.16.

I therefore conclude that s. 178.16(1)(*a*) and 178.16(3)(*b*) do enable a trial judge to go behind an apparently valid authorization.

(iii) Examining the Contents of the Sealed Packet

In most cases it will be necessary to examine the contents of the sealed packet in order to determine whether there was a defect or irregularity in the application for the authorization.

In the present case Dubienski Prov. Ct. J. ruled that the requirements of s. 178.13(1)(*b*) had not been met, without examining the contents of the sealed packet. In this respect he followed Meredith J. in *Wong (No. 1)*, *supra*, and in my view fell into error. It is important to note that s. 178.13 does not require that the authorization contain a list of the reasons which prompted the judge to give the authorization. In order finally to determine whether

rité a rejeté un argument analogue dans l'arrêt *Goldman c. La Reine*, [1980] 1 R.C.S. 976, aux pp. 998 et 999. Les première et troisième conséquences mentionnées par le juge McDonald sont apparentées. Il ne s'ensuit pas nécessairement qu'une décision portant qu'une interception «n'a pas été faite légalement», aux fins de la recevabilité, rend cette interception illégale à toutes les fins envisagées à la partie IV.1. La preuve ainsi obtenue peut être irrecevable et pourtant il pourrait y avoir un moyen de défense contre des procédures criminelles ou civiles découlant de l'interception. Cette question ne se pose pas en l'espèce et nous n'avons donc pas à la trancher. Quant à la seconde conséquence que prédit le juge McDonald, elle tend à l'exagération. Il ne serait pas nécessaire, pour juger un élément de preuve inadmissible, de rendre public l'affidavit; il serait possible de n'en rendre publics que certains aspects. Comme le laisse entendre Stanley A. Cohen dans son ouvrage *Invasion of Privacy: Police and Electronic Surveillance in Canada* (1983), l'intégrité du paquet pourrait être préservée [TRADUCTION] «au moyen d'un tri judiciaire initial et, si l'accès est nécessaire, au moyen d'une sélection judiciaire» (à la p. 155). Le respect des dispositions de l'art. 178.14 relatives au caractère confidentiel n'est nullement incompatible avec une décision d'irrecevabilité en vertu de l'art. 178.16.

Je conclus donc que les al. 178.16(1)*a*) et 178.16(3)*b*) permettent au juge du procès de vérifier une autorisation apparemment valide.

(iii) L'examen du contenu du paquet scellé

Dans la plupart des cas, un examen du contenu du paquet scellé sera nécessaire afin de déterminer si la demande d'autorisation est entachée d'un vice quelconque.

En l'espèce, le juge Dubienski, sans avoir examiné le contenu du paquet scellé, a décidé qu'on n'avait pas satisfait aux exigences de l'al. 178.13(1)*b*). En cela, il a suivi le raisonnement du juge Meredith dans la décision *Wong (No. 1)*, précitée, et a, selon moi, commis une erreur. Il importe de noter que l'art. 178.13 n'exige pas que l'autorisation énumère les motifs qui ont incité le juge à l'accorder. Pour déterminer, somme toute, si

er other investigative procedures had been tried and failed, other investigative procedures were unlikely to succeed, or that there was urgency, it would be necessary to examine the affidavits. This would enable the trial judge to say whether the apparent conflict between the evidence at trial and what can be assumed to have been said in the affidavits is actual. It may be that the comparison will give rise to clarification, showing that one of the three pre-conditions had been met. For example, in the present case little was said in the testimony at trial as to whether other investigative procedures were unlikely to succeed. If one were to examine the affidavits, there might be an explanation that would satisfy the requirements of s. 178.12(1)(*g*) and 178.13(1)(*b*) and hence make the authorizations valid. I therefore conclude Dubienski Prov. Ct. J. could not properly decide the interceptions were not lawfully made without examining the contents of the sealed packets.

d'autres méthodes d'enquête ont été essayées et ont échoué, si elles avaient peu de chance de succès ou s'il y avait urgence, il serait nécessaire d'examiner les affidavits. Cela permettrait au juge du procès de décider si le conflit apparent entre la preuve produite au procès et ce qu'on peut supposer avoir été dit dans les affidavits, est réel. Il est possible que la comparaison apporte des éclaircissements, en démontrant que l'une des trois conditions préalables a été remplie. En l'espèce, par exemple, les témoignages rendus au procès ne précisent guère si d'autres méthodes d'enquête avaient peu de chance de succès. Un examen des affidavits pourrait éventuellement fournir une explication qui satisferait aux exigences des al. 178.12(1)*g*) et 178.13(1)*b*), rendant ainsi les autorisations valides. Je conclus donc que le juge Dubienski ne pouvait à bon droit conclure à l'illégalité des interceptions sans examiner le contenu des paquets scellés.

If this case had been before a superior court trial judge would it have been proper for the judge to order the opening of the sealed packet under s.178.14? Most of the cases have assumed that only rarely is this proper; there appears to be a reticence to go behind an apparently valid authorization; *R. v. Gill*, *supra*; *Re Stewart and The Queen*, *supra*; *R. v. Miller and Thomas (No. 4)* (1975), 28 C.C.C. (2d) 128 (Yale Co. Ct. (B.C.)); *R. v. Newall (No. 1)* (1982), 67 C.C.C. (2d) 431 (B.C.S.C.); *R. v. Johnny and Billy* (1981), 62 C.C.C. (2d) 33 (B.C.S.C.); *R. v. Bradley* (1980), 19 C.R. (3d) 336 (Que. S.C.); *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3)* (1978), 40 C.C.C. (2d) 212 (Alta. S.C.); *Re Zaduk and The Queen* (1977), 37 C.C.C. (2d) 1 (Ont. H.C.); *R. v. Haslam* (1977), 36 C.C.C. (2d) 250 (Nfld. District Ct.); *Re Regina and Kozak* (1976), 32 C.C.C. (2d) 235 (B.C.S.C.); *contra—R. v. Kalo, Kalo and Vonschober* (1975), 28 C.C.C. (2d) 1 (Peel Co. Ct. (Ont.)) It is not necessary to decide whether this restricted view of s. 178.14 is correct. There is a broad consensus that *prima facie* evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which

Si la présente affaire s'était déroulée devant un juge d'une cour supérieure, celui-ci aurait-il pu à bon droit ordonner l'ouverture du paquet scellé en vertu de l'art. 178.14? La plupart des décisions présument que cela ne peut se faire que rarement; *R. v. Gill*, précitée; *Re Stewart and The Queen*, précitée; *Re Miller and Thomas (No. 4)* (1975), 28 C.C.C. (2d) 128 (Cour de comté de Yale, C.-B.); *R. v. Newall (No. 1)* (1982), 67 C.C.C. (2d) 431 (C.S.C.-B.); *R. v. Johnny and Billy* (1981), 62 C.C.C. (2d) 33 (C.S.C.-B.); *R. v. Bradley* (1980), 19 C.R. (3d) 336 (C.S. Qué.); *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3)* (1978), 40 C.C.C. (2d) 212 (C.S. Alb.); *Re Zaduk and The Queen* (1977), 37 C.C.C. (2d) 1 (H.C. Ont.); *R. v. Haslam* (1977), 36 C.C.C. (2d) 250 (Cour de district, T.-N.); *Re Regina and Kozak* (1976), 32 C.C.C. (2d) 235 (C.S.C.-B.). La décision *R. v. Kalo, Kalo and Vonschober* (1975), 28 C.C.C. (2d) 1 (Cour de comté de Peel (Ont.)), va dans le sens contraire. Il n'est pas nécessaire de décider si cette interprétation restrictive de l'art. 178.14 est exacte. On s'entend généralement pour dire qu'une preuve *prima facie* de fraude ou de non-divulgation justifie l'ouverture du paquet. Il en irait de même des déclarations trompeuses. En l'espèce, le

the trial judge made a *prima facie* finding of either misleading disclosure or non-disclosure.

Opening the sealed packet, and holding an authorization to be invalid, on the basis of fraud, non-disclosure, or misleading disclosure, is, in a sense, a less serious interference with the authorizing judge's decision than a finding of invalidity on the face of the authorization. The latter conclusion connotes that the authorizing judge did something wrong—he signed an order not in accordance with the *Criminal Code*. On the other hand, a finding of invalidity based on fraud, non-disclosure, or misleading disclosure means that the authorizing judge acted properly on the basis of evidence before him—the invalidity arose because the evidence was false or incomplete—the fault of others.

Once a foundation is laid for the opening of the packet, I would say that the trial judge, assuming him to be a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, can open the packet and make a full review for compliance with Part IV.I. He cannot, of course, decide whether, in the exercise of his discretion, he would have granted the authorization. He can only decide whether it was lawfully obtained. He can also apply the curative provisions of s. 178.16(3)(*b*) to non-substantive defects or irregularities. A failure to comply with a mandatory provision such as 178.12(1)(*g*) or 178.13(1)(*b*) would, in my view, amount to a substantive and non-curable defect.

Although I conclude that Dubienski Prov. Ct. J. was in error in holding the authorizations to have been unlawfully made without examining the contents of the sealed packet, I also conclude, contrary to the Manitoba Court of Appeal, that a collateral attack by a trial judge, either in respect of invalidity on the face of the authorization or going behind an apparently valid authorization, is contemplated by Part IV.I of the *Criminal Code*.

juge du procès a conclu de prime abord qu'il y a eu soit déclaration trompeuse, soit non-divulgation.

L'ouverture du paquet scellé et la conclusion qu'une autorisation est invalide pour cause de fraude, de non-divulgation ou de déclaration trompeuse constituent dans un sens une atteinte moins grave à la décision du juge qui a accordé cette autorisation que ne l'est une conclusion qu'elle est invalide à première vue. Cette dernière conclusion laisse entendre que le juge a commis une erreur—il a signé une ordonnance non conforme au *Code criminel*. Par contre, une conclusion d'invalidité pour cause de fraude, de non-divulgation ou de déclaration trompeuse signifie que le juge a agi à bon droit compte tenu de la preuve produite devant lui, que l'invalidité est attribuable au caractère faux ou incomplet de la preuve, c'est-à-dire à la faute d'autrui.

Du moment qu'il y a un motif de le faire, j'estime que le juge du procès, à supposer qu'il s'agisse d'un juge d'une cour supérieure de juridiction criminelle ou d'un juge défini à l'art. 482, peut ouvrir le paquet et procéder à un examen complet afin de déterminer si les exigences de la partie IV.1 ont été respectées. Certes, il ne peut décider si, dans l'exercice de son pouvoir discrétionnaire, il aurait lui-même accordé l'autorisation. Il peut seulement décider si elle a été légalement obtenue. Il peut aussi appliquer à des vices de forme ou de procédure les dispositions réparatrices de l'al. 178.16(3)*b*). L'omission de se conformer à une disposition impérative comme l'al. 178.12(1)*g*) ou l'al. 178.13(1)*b*) constituerait, à mon avis, un vice de fond auquel il ne peut être remédié.

Tout en concluant que le juge Dubienski a commis une erreur en statuant, sans examiner le contenu du paquet scellé, que les autorisations ont été accordées illégalement, je conclus également, contrairement à la Cour d'appel du Manitoba, que la partie IV.1 du *Code criminel* envisage une attaque indirecte par un juge du procès, que ce soit à l'égard d'une autorisation invalide à première vue ou pour vérifier une autorisation apparemment valide.

(iv) Cross-examination of the Deponent

Cross-examination was conducted in the present case in order to determine whether any of the preconditions of s. 178.13(1)(*b*) had been met. The Crown made no objection, but in other cases objections have been made, and in some instances successfully. Such cross-examination of the deponent to the affidavit was ruled improper in *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330 (P.E.I. S.C.); *Re Regina and Collos* (1977), 37 C.C.C. (2d) 405 (B.C.C.A.), reversing on other grounds (1977), 34 C.C.C. (2d) 313 (B.C.S.C.); *R. v. Haslam*, *supra*; *R. v. Robinson* (1977), 39 C.R.N.S. 158 (Vancouver Co. Ct. (B.C.)) The *rationale* was that permitting such cross-examination would, by implication at least, reveal the contents of the sealed packet declared to be confidential by s. 178.14. On the other hand, cross-examination has been permitted in *R. v. Johnny and Billy*, *supra*, and in *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) I prefer the latter view. These authorizations are made *ex parte* and *in camera*. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained, without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuing police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict.

(iv) Le contre-interrogatoire du déposant

En l'espèce, le contre-interrogatoire s'est effectué afin de déterminer si l'on avait satisfait à l'une ou l'autre des conditions préalables que pose l'al. 178.13(1)*b*). Le ministère public n'a soulevé aucune objection, mais, dans d'autres cas, des objections ont été soulevées parfois avec succès. Un tel contre-interrogatoire du déposant a été jugé irrégulier dans *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330 (C.S.I.P.-É.), *Re Regina and Collos* (1977), 37 C.C.C. (2d) 405 (C.A.C.-B.), qui a infirmé pour d'autres motifs (1977), 34 C.C.C. (2d) 313 (C.S.C.-B.), *R. v. Haslam*, précitée, *R. v. Robinson* (1977), 39 C.R.N.S. 158 (Cour de comté de Vancouver (C.-B.)) La raison en était qu'en permettant le contre-interrogatoire, on révélerait, du moins indirectement, le contenu du paquet scellé que l'art. 178.14 déclare confidentiel. Par contre, on a permis le contre-interrogatoire dans les décisions *R. v. Johnny and Billy*, précitée et *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63 (Cour prov. Ont.) Je préfère ce dernier point de vue. Ces autorisations sont accordées *ex parte* et à huis clos. Si l'on reconnaît que le juge du procès a le droit de vérifier une autorisation apparemment valide, il doit être possible, au cours d'un contre-interrogatoire, de déterminer si l'argument d'invalidité est soutenable. Il ne sert à rien à l'avocat de la défense d'avoir un principe de droit portant qu'une autorisation peut être jugée invalide si, par exemple, elle a été obtenue par suite de la non-divulgation de faits pertinents, et qu'il lui soit ensuite interdit de poser des questions tendant à démontrer qu'il y a eu effectivement non-divulgation. L'interrogatoire peut être de nature à permettre à l'avocat de la défense d'apprendre si l'autorisation a été régulièrement obtenue, sans qu'il y ait divulgation de renseignements qui, de l'avis du juge, doivent rester confidentiels. Ces renseignements confidentiels pourraient comprendre notamment l'identité d'agents d'infiltration et d'informateurs ou des renseignements particuliers qui compromettraient une enquête policière alors en cours. Le droit au secret énoncé à l'art. 178.14 et le droit de l'avocat de la défense de vérifier la validité de l'autorisation ne sont pas forcément incompatibles.

v) Review by a Judge Other than the Trial Judge

I have said that in my view Part IV.I contemplates that the trial judge is the proper person to review the validity of the authorization whether on its face or otherwise. The Manitoba Court of Appeal, as I have indicated, thought otherwise. O'Sullivan J.A. said that Part IV.I contemplated a different form of review of authorizations; he suggested the trial could be adjourned and the review of the validity of the authorization would be conducted in the court that gave the authorization. At the hearing before this Court, Crown counsel adopted this position, adding that it was preferable that the actual judge who gave the authorization be the one to review it. Absent the statutory scheme of interception of private communications, and, in particular, s. 178.16, I would agree with this view. The law recognizes a general right of review of an *ex parte* order by the court which made the order and preferably by the judge who made the order. The statutory provisions, however, override the common law rules. As I read s. 178.16 Parliament mandated that the trial judge conduct such a review.

The language of s. 178.16 does not suggest review by anyone other than the trial judge. The only other provision that seems to say anything about review is s. 178.14, concerning the opening of the sealed packet. This would normally be used where an attempt was being made to go behind an apparently valid authorization. As a matter of statutory construction s. 178.14 seems to contemplate that the packet may be opened by any judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, and is not confined to either the court or the judge who granted the authorization. The policy consideration underlying this broader approach may lie in a desire to avoid any suggestion that the judge who granted the authorization might be inclined simply to reaffirm his previous order without serious consideration.

I do find statutory support for the proposition that the trial judge shall review an authorization, and I find no statutory support for the proposition

(v) L'examen par un autre juge que le juge du procès

J'ai affirmé qu'à mon avis la partie IV.1 prévoit qu'il appartient au juge du procès d'examiner la validité à première vue ou autre de l'autorisation. Comme je l'ai souligné, la Cour d'appel du Manitoba a exprimé l'avis contraire. Le juge O'Sullivan a affirmé que la partie IV.1 prévoit une autre forme de révision des autorisations; il a estimé que le procès pouvait être ajourné et que l'examen de la validité de l'autorisation pouvait être fait par la cour qui a accordé l'autorisation. À l'audience devant cette Cour, le substitut du procureur général a adopté cette position, ajoutant qu'il était préférable que la révision de l'autorisation soit faite par le juge qui l'a accordée. En l'absence de dispositions législatives concernant l'interception de communications privées et, en particulier, de l'art. 178.16, je serais du même avis. On reconnaît un droit général à la révision d'une ordonnance *ex parte* par la cour et, de préférence, par le juge qui a rendu cette ordonnance. Les dispositions législatives l'emportent toutefois sur les règles de *common law*. Selon mon interprétation de l'art. 178.16, le législateur a confié cette révision au juge du procès.

D'après le texte de l'art. 178.16, la révision ne peut être faite que par le juge du procès. La seule autre disposition qui semble traiter de la révision est l'art. 178.14, concernant l'ouverture du paquet scellé. On y recourt normalement dans le cas d'une tentative de vérifier une autorisation apparemment valide. Sur le plan de son interprétation, l'art. 178.14 semble prévoir que l'ouverture des paquets peut être faite par tout juge d'une cour supérieure de juridiction criminelle ou par un juge défini à l'art. 482 et n'est pas limitée à la cour ou au juge qui a accordé l'autorisation. La considération de principe qui sous-tend cette interprétation plus large peut résider dans la volonté d'éviter de laisser entendre que le juge qui a accordé l'autorisation pourrait être enclin simplement à réitérer sans motif sérieux son ordonnance antérieure.

J'estime que la loi nous permet d'affirmer que c'est le juge du procès qui doit réviser une autorisation et non pas qu'une autorisation ne peut être

that only the judge or court that made the order can review an authorization.

There is a further point. Any decision of the trial judge regarding admissibility of evidence, therefore including questions as to the validity of authorizations, will be subject to appeal on a question of law in the ordinary way. In contrast if only the court that made the order can review an authorization, there is no right of appeal from this review because the *Criminal Code* does not grant an appeal.

The suggestion of O'Sullivan J.A. that the trial be adjourned for review of the authorization by the court granting the authorization would result in needless delays and be costly in terms of trial economy.

(B) Trial Judges Dealing with Authorizations Given By Judges of Higher Courts

One issue identified by the Manitoba Court of Appeal remains to be addressed. Does the situation which I have been describing change when, as here, a provincial court judge is dealing with an authorization given by a superior court judge? There are examples in the cases of inferior courts purporting to review superior court authorizations, particularly for invalidity on the face of the authorization. In none of these cases, however, was the question of a trial judge in an inferior court assessing the validity of a superior court authorization mentioned as a problem or an issue.

As earlier noted, in *Charette v. The Queen*, *supra*, this Court approved the statement [found at (1977), 37 C.C.C. (2d) 497, at pp. 501-02]:

> . . . it is for the trial Judge to pass upon such matters as the validity of the authorization . . . .
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge . . . .

The appeal case in *Charette* discloses that the trial judge was a county court judge and the authorization had been given by a superior court judge.

révisée que par le juge ou la cour qui a rendu l'ordonnance.

Il y a un autre point. Toute décision du juge du procès concernant la recevabilité de la preuve, donc y compris les questions relatives à la validité d'une autorisation, peut faire l'objet d'un appel sur une question de droit suivant la procédure ordinaire. Par contre, si l'autorisation ne peut être révisée que par la cour qui a rendu l'ordonnance, il n'y a pas de droit d'appel contre cette révision parce que le *Code criminel* ne le permet pas.

La proposition du juge O'Sullivan d'ajourner le procès pour que l'autorisation soit révisée par la cour qui l'a accordée entraînerait des retards inutiles et aurait pour effet d'augmenter le coût du procès.

(B) Les juges du procès face aux autorisations accordées par des juges de cours d'instance supérieure

Il reste à étudier une question identifiée par la Cour d'appel du Manitoba. La situation que je viens de décrire change-t-elle lorsque, comme c'est le cas en l'espèce, un juge d'une cour provinciale est appelé à examiner une autorisation accordée par un juge d'une cour supérieure? Il existe des exemples dans la jurisprudence des cours inférieures qui tendaient à réviser des autorisations émanant d'une cour supérieure, particulièrement lorsque l'autorisation est invalide à première vue. Dans aucun cas toutefois, on ne présente comme un problème le cas où un juge du procès, qui est juge d'une cour inférieure, examine la validité d'une autorisation émanant d'une cour supérieure.

Comme nous l'avons déjà constaté, dans l'arrêt *Charette c. La Reine*, précité, cette Cour a approuvé la déclaration suivante [qui se trouve à (1977), 37 C.C.C. (2d) 497, aux pp. 501 et 502]:

> [TRADUCTION] il appartient au juge du procès de déterminer notamment si cette autorisation est valide . . .
>
> Il appartient exclusivement au juge du procès de déterminer si on a satisfait aux conditions préalables qu'impose la loi.

Il ressort du dossier conjoint, dans l'affaire *Charette*, que le juge du procès était un juge de la cour de comté et que l'autorisation avait été accordée par un juge d'une cour supérieure.

Other examples of an inferior trial court assessing the validity of a superior court authorization are: *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363 (Ont. C.A.); *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412 (York Co. Ct. (Ont.)); *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.); *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544 (B.C.C.A.)

None of the above cases is persuasive in view of the fact that the inferior court/superior court problem was not addressed, but it is curious that it was not identified as a problem.

In my opinion the implicit assumption that an inferior court can attack a superior court authorization is correct. At first glance, this may sound heretical, but I think the justification lies in the statutory language. As discussed earlier, I conclude that ss. 176.16(1)(*a*) and (3)(*b*) give the trial judge, *qua* trial judge, the authority to decide the validity of an authorization. There is nothing in the wording of s. 178.16 which suggests that certain trial judges are in a different position than other trial judges. I would not be prepared to read in such a distinction.

If an inferior court trial judge can determine the validity of a superior court authorization for the purpose of deciding admissibility of evidence, what happens when, as in the present case, the trial judge is not authorized to order the opening of the sealed packet? The answer must be, in obedience to the statutory language, that the trial be adjourned to allow counsel to apply under s. 178.14 for an order permitting the opening of the packet. The judge acting under s. 178.14 would not examine the contents of the packet or decide the validity of the authorization (see Bellemare, *supra*). That is the responsibility of the trial judge. This does not mean that the judge acting under s. 178.14 is performing a mere formality. He has a discretion whether to order opening of the packet. He may refuse, and if so the provincial court judge

Voici d'autres exemples de cas où une cour inférieure a examiné la validité d'une autorisation émanant d'une cour supérieure: *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363 (C.A. Ont.); *R. v. Crease (No. 2)* (1980), 53 C.C.C. (2d) 378 (C.A. Ont.); *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412 (Cour de comté de York (Ont.)); *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471 (Cour prov. Ont.); *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544 (C.A.C.-B.)

Aucune de ces décisions n'est convaincante compte tenu du fait qu'on n'a pas abordé le problème des rapports entre les cours inférieures et les cours supérieures, mais il est étrange que cela n'ait pas été identifié comme un problème.

À mon avis, la présomption implicite selon laquelle une cour inférieure peut attaquer une autorisation émanant d'une cour supérieure est exacte. À première vue, cela peut sembler hétérodoxe, mais je crois que cela se justifie par le langage législatif. Tel que discuté plus haut, je conclus que les al. 176.16(1)*a*) et 176.16(3)*b*) confèrent au juge du procès, à ce titre, le pouvoir de déterminer la validité d'une autorisation. Rien dans la formulation de l'art. 178.16 ne donne à entendre que certains juges du procès sont dans une situation différente de celle d'autres juges du procès. Je ne suis pas disposé à y voir une telle distinction.

Si le juge du procès, dans une cour inférieure, peut déterminer la validité d'une autorisation émanant d'une cour supérieure aux fins de statuer sur la recevabilité de la preuve, qu'arrive-t-il lorsque, comme c'est le cas en l'espèce, le juge du procès n'est pas autorisé à ordonner l'ouverture du paquet scellé? Compte tenu du langage législatif, le procès doit être ajourné pour permettre à l'avocat de demander, en vertu de l'art. 178.14, une ordonnance autorisant l'ouverture du paquet. Il n'appartient pas au juge qui agit en vertu de l'art. 178.14 d'examiner le contenu du paquet ou de déterminer la validité de l'autorisation (voir Bellemare, précité). C'est au juge du procès qu'il incombe de le faire. Cela ne signifie pas que le juge qui agit en vertu de l'art. 178.14 n'accomplit qu'une simple formalité. Il a le pouvoir discrétionnaire d'ordon-

will have to abide by that decision: see *Re Regina and Kozak, supra.*

III Bringing the Administration of Justice into Disrepute

After concluding that the interceptions were not lawfully made, Dubienski Prov. Ct. J. went on to hold that to admit the evidence would bring the administration of justice into disrepute. In the circumstances, this was an irrelevant consideration. Section 178.16(2) contains the only reference to bringing the administration of justice into disrepute:

178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

(2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

Section 178.16(2) deals with derivative evidence only, *i.e.* evidence discovered as a result of intercepting the private communication. It does not relate to primary evidence, *i.e.* evidence of the private communication itself—the wiretap. That was what was under consideration in this case. Once the interception is held to have been unlawful (and absent consent) it is inadmissible unless the curative provisions of s. 178.16(3)(*b*) are applied.

IV Conclusion

I conclude that Dubienski Prov. Ct. J. erred in deciding, without examining the contents of the

ner l'ouverture du paquet. Il peut refuser et, le cas échéant, le juge de la cour provinciale doit se soumettre à cette décision: voir *Re Regina and Kozak*, précitée.

III Le ternissement de l'image de la justice

Après avoir décidé que les interceptions n'ont pas été faites légalement, le juge Dubienski a ensuite conclu que l'admission de la preuve ainsi obtenue aurait pour effet de ternir l'image de la justice. Dans les circonstances, cette considération n'était pas pertinente. Seul le par. 178.16(2) parle du ternissement de l'image de la justice:

178.16 (1) Une communication privée qui a été interceptée est inadmissible en preuve contre son auteur ou la personne à laquelle son auteur la destinait à moins

a) que l'interception n'ait été faite légalement, ou

b) que l'auteur de la communication privée ou la personne à laquelle son auteur la destinait n'ait expressément consenti à ce qu'elle soit admise en preuve,

toutefois les preuves découlant directement ou indirectement de l'interception d'une communication privée ne sont pas inadmissibles du seul fait que celle-ci l'est.

(2) Par dérogation au paragraphe (1), le juge ou le magistrat qui préside à une instance quelconque peut refuser d'admettre en preuve des preuves découlant directement ou indirectement de l'interception d'une communication privée qui est elle-même inadmissible s'il est d'avis que leur admission en preuve ternirait l'image de la justice.

Le paragraphe 178.16(2) ne porte que sur la preuve dérivée, c.-à-d. celle obtenue par suite de l'interception de la communication privée. Il ne concerne pas la preuve principale, c.-à-d. la communication privée elle-même—l'écoute électronique. C'est ce dont il s'agit en l'espèce. Dès que l'interception est jugée illégale (et en l'absence de consentement), la communication est irrecevable, à moins que les dispositions réparatrices de l'al. 178.16(3)*b*) ne soient appliquées.

IV Conclusion

Je conclus que le juge Dubienski a commis une erreur en concluant, sans avoir examiné le contenu

sealed packet, that none of the three alternate preconditions of s. 178.13(1)(*b*) had been met.

I would dismiss the appeal and confirm the order of the Manitoba Court of Appeal directing a new trial on all counts.

Appeal dismissed.

Solicitors for the appellant: Skwark, Myers, Baizley and Weinstein, Winnipeg.

Solicitors for the respondent: Manitoba Department of the Attorney-General, Winnipeg.

du paquet scellé, qu'on n'avait satisfait à aucune des trois conditions préalables de l'al. 178.13(1)*b*).

Je suis d'avis de rejeter le pourvoi et de confirmer l'ordonnance de la Cour d'appel du Manitoba enjoignant de tenir un nouveau procès sur tous les chefs d'accusation.

Pourvoi rejeté.

Procureurs de l'appelant: Skwark, Myers, Baizley and Weinstein, Winnipeg.

Procureur de l'intimée: Ministère du procureur général du Manitoba, Winnipeg.

Tab 5

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006, July 14, 2008 and October 13, 2011)

TABLE OF CONTENTS

PART VII - REVIEW

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006, July 14, 2008 and October 13, 2011)

PART I - GENERAL

1. Application and Availability of Rules

1.01 These Rules apply to all proceedings of the Board. These Rules, other than the Rules set out in Part VII, also apply, with such modifications as the context may require, to all proceedings to be determined by an employee acting under delegated authority.

1.02 These Rules, in English and in French, are available for examination on the Board's website, or upon request from the Board Secretary.

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

2. Interpretation of Rules

2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

2.03 These Rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.

2.04 Unless the Board otherwise directs, any amendment to these Rules comes into force upon publication on the Board's website.

3. Definitions

3.01 In these Rules,

"affidavit" means written evidence under oath or affirmation;

"appeal" has the meaning given to it in **Rule 17.01**;

"appellant" means a person who brings an appeal;

"applicant" means a person who makes an application;

"application" when used in connection with a proceeding commenced by an application to the Board, or transferred to the Board by the management committee under section 6(7) of the *OEB Act* , means the commencement by a party of a proceeding other than an appeal;

"Board" means the Ontario Energy Board;

"Board Secretary" means the Secretary and any assistant Secretary appointed by the Board under the *OEB Act*;

"Board's website" means the website maintained by the Board at *www.oeb.gov.on.ca*;

"document" includes written documentation, films, photographs, charts, maps, graphs, plans, surveys, books of account, transcripts, videotapes, audio tapes, and information stored by means of an electronic storage and retrieval system;

"*Electricity Act*" means the *Electricity Act, 1998*, S.O. 1998, c.15, Schedule A, as amended from time to time;

"electronic hearing" means a hearing held by conference telephone or some other form of electronic technology allowing persons to communicate with one another;

"employee acting under delegated authority" means an employee to whom a power or duty of the Board has been delegated under section 6 of the *OEB Act*;

"fax" means the transmission of a facsimile of a document by telephone, computer network or other electronic means;

"file" means to file with the Board Secretary in compliance with these Rules;

"form" means a template for a document intended to demonstrate required content;

"hearing" means a hearing in any proceeding before the Board, and includes an electronic hearing, an oral hearing, and a written hearing;

"interrogatory" means a request in writing for information or particulars made to a party in a proceeding;

"intervenor" means a person who has been granted intervenor status by the Board;

"management committee" means the management committee of the Board established under section 4.2 of the *OEB Act*;

"market rules" means the rules made under section 32 of the *Electricity Act*;

"Minister" means the Minister as defined in the *OEB Act*;

"motion" means a request for an order or decision of the Board made in a proceeding;

"observer" means a person who has filed for observer status in compliance with these Rules;

"*OEB Act*" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, as amended from time to time;

"oral hearing" means a hearing at which the parties or their representatives attend before the Board in person;

"party" includes an applicant, an appellant, an employee acting under delegated authority where applicable, and any person granted intervenor status by the Board;

"*Practice Directions*" means practice directions issued by the Board from time to time;

"proceeding" means a process to decide a matter brought before the Board, including a matter commenced by application, notice of appeal, transfer by or direction from the management committee, reference, request or directive of the Minister, or on the Board's own motion;

"reference" means any reference made to the Board by the Minister;

"serve" means to effectively deliver, in compliance with these Rules or as the Board may direct;

"statement" means any unsworn information provided to the Board;

"writing" includes electronic media, formed and secured as directed by the Board;

"written" includes electronic media, formed and secured as directed by the Board; and

"written hearing" means a hearing held by means of the exchange of documents.

4. Procedural Orders and Practice Directions

4.01 The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. Every party shall comply with all applicable procedural orders.

4.02 The Board may set time limits for doing anything provided in these Rules.

4.03 The Board may at any time amend any procedural order.

4.04 Where a provision of these Rules is inconsistent with a provision of a procedural order, the procedural order shall prevail to the extent of the inconsistency.

4.05 The Board may from time to time issue *Practice Directions* in relation to the preparation, filing and service of documents or in relation to participation in a proceeding. Every party shall comply with all applicable *Practice Directions*, whether or not specifically referred to in these Rules.

5. Failure to Comply

5.01 Where a party to a proceeding has not complied with a requirement of these Rules or a procedural order, the Board may:

(a) grant all necessary relief, including amending the procedural order, on such conditions as the Board considers appropriate;

(b) adjourn the proceeding until it is satisfied that there is compliance;

or

(c) order the party to pay costs.

5.02 Where a party fails to comply with a time period for filing evidence or other material, the Board may, in addition to its powers set out in **Rule 5.01**, decide to disregard the evidence or other material that was filed late.

5.03 No proceeding is invalid by reason alone of an irregularity in form.

6. Computation of Time

6.01 In the computation of time under these Rules or an order:

(a) where there is reference to a number of days between two events, the days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens; and

(b) where the time for doing an act under these Rules expires on a holiday, as defined under **Rule 6.02**, the act may be done on the next day that is not a holiday.

6.02 A holiday means a Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed.

7. Extending or Abridging Time

7.01 The Board may on its own motion or upon a motion by a party extend or abridge a time limit directed by these Rules, *Practice Directions* or by the Board, on such conditions the Board considers appropriate.

7.02 The Board may exercise its discretion under this Rule before or after the expiration of a time limit, with or without a hearing.

7.03 Where a party cannot meet a time limit directed by the Rules, *Practice Directions* or the Board, the party shall notify the Board Secretary as soon as possible before the time limit has expired.

8. Motions

8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion.

8.02 The notice of motion and any supporting documents shall be filed and served within such a time period as the Board shall direct.

8.03 Unless the Board directs otherwise, a party who wishes to respond to the notice of motion shall file and serve, at least two calendar days prior to the motion's hearing date, a written response, an indication of any oral evidence the party seeks to present, and any evidence the party relies on, in appropriate affidavit form.

8.04 The Board, in hearing a motion, may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply.

PART II - DOCUMENTS, FILING, SERVICE

9. Filing and Service of Documents

9.01 All documents filed with the Board shall be directed to the Board Secretary. Documents, including applications and notices of appeal, shall be filed in such quantity and in such manner as may be specified by the Board.

9.02 Any person wishing to access the public record of any proceeding may make arrangements to do so with the Board Secretary.

9A Filing of Documents that Contain Personal Information

9A.01 Any person filing a document that contains personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*, of another person who is not a party to the proceeding shall file two versions of the document as follows:

(a) one version of the document must be a non-confidential, redacted version of the document from which the personal information has been deleted or stricken; and

(b) the second version of the document must be a confidential, un-redacted version of the document that includes the personal information and should be marked "Confidential—Personal Information".

9A.02 The non-confidential, redacted version of the document from which the personal information has been deleted or stricken will be placed on the public record. The confidential, un-redacted version of the document will be held in confidence and will not be placed on the public record. Neither the confidential, un-redacted version of the document nor the personal information contained in it will be provided to any other party, including a person from whom the Board has accepted a Declaration and Undertaking under the *Practice Directions,* unless the Board determines that either (a) the redacted information is not personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act,* or (b) the disclosure of the personal information would be in accordance with the *Freedom of Information and Protection of Privacy Act.*

10. Confidential Filings

10.01 A party may request that all or any part of a document, including a response to an interrogatory, be held in confidence by the Board.

10.02 Any request for confidentiality made under **Rule 10.01** shall be made in accordance with the *Practice Directions.*

10.03 A party may object to a request for confidentiality by filing and serving an objection in accordance with the *Practice Directions* and within the time specified by the Board.

10.04 After giving the party claiming confidentiality an opportunity to reply to any objection made under **Rule 10.03**, the Board may:

(a) order the document be placed on the public record, in whole or in part;

(b) order the document be kept confidential, in whole or in part;

(c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document prepared by the party claiming confidentiality be revised;

(d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality; or

(e) make any other order the Board finds to be in the public interest.

10.05 Where the Board makes an order under **Rule 10.04** to place on the public record any part of a document that was filed in confidence, the party who filed the document may, subject to **Rule 10.06** and in accordance with and within the time specified in the *Practice Directions*, request that it be withdrawn prior to its placement on the public record.

10.06 The ability to request the withdrawal of information under **Rule 10.05** does not apply to information that was required to be produced by an order of the Board.

10.07 Where a party wishes to have access to a document that, in accordance with the *Practice Directions*, will be held in confidence by the Board without the need for a request under **Rule 10.01**, the party shall make a request for access in accordance with the *Practice Directions*.

10.08 Requests for access to confidential information made at times other than during the proceeding in which the confidential information was filed shall be made in accordance with the *Practice Directions*.

10.09 The party who filed the information to which a request for access under **Rule 10.07** or **Rule 10.08** relates may object to the request for access by filing and serving an objection within the time specified by the Board.

10.10 The Board may, further to a request for access under **Rule 10.07** or **Rule 10.08**, make any order referred to in **Rule 10.04**.

11. Amendments to the Evidentiary Record and New Information

11.01 The Board may, on conditions the Board considers appropriate:

(a) permit an amendment to the evidentiary record; or

(b) order an amendment to the evidentiary record that may be necessary for the purpose of a complete record.

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision

or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

11.03 Where all or any part of a document that forms part of the evidentiary record is revised, each revised part shall clearly indicate:

(a) the date of revision; and

(b) the part revised.

11.04 A party shall comply with any direction from the Board to provide such further information, particulars or documents as the Board considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.

12. Affidavits

12.01 An affidavit shall be confined to the statement of facts within the personal knowledge of the person making the affidavit unless the facts are clearly stated to be based on the information and belief of the person making the affidavit.

12.02 Where a statement is made on information and belief, the source of the information and the grounds on which the belief is based shall be set out in the affidavit.

12.03 An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit, and the exhibit shall be attached to and filed with the affidavit.

12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board's directions.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

PART III - PROCEEDINGS

15. Commencement of Proceedings

15.01 Unless commenced by the Board, a proceeding shall be commenced by filing an application or a notice of appeal in compliance with these Rules, and within such a time period as may be prescribed by statute or the Board.

15.02 A person appealing an order made under the market rules shall file a notice of appeal within 15 calendar days after being served with a copy of the order, or within 15 calendar days of having completed making use of any provisions relating to dispute resolution set out in the market rules, whichever is later.

15.03 An appeal of an order, finding or remedial action made or taken by a standards authority referred to in section 36.3 of the *Electricity Act* shall be

commenced by the Independent Electricity System Operator by notice of appeal filed within 15 calendar days after being served with a copy of the order or finding or of notice of the remedial action, or within 15 calendar days of receipt of notice of the final determination of any other reviews and appeals referred to in section 36.3(2) of the *Electricity Act*, whichever is later.

16. Applications

16.01 An application shall contain:

(a) a clear and concise statement of the facts;

(b) the grounds for the application;

(c) the statutory provision under which it is made; and

(d) the nature of the order or decision applied for.

16.02 An application shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

17. Appeals

17.01 An "appeal" means:

(a) an appeal under section 7 of the *OEB Act*;

(b) a review under section 59(6) of the *OEB Act;*

(c) a review of an amendment to the market rules under section 33 or section 34 of the *Electricity Act*;

(d) a review of a provision of the market rules under section 35 of the *Electricity Act*;

(e) an appeal under section 36, 36.1 or 36.3 of the *Electricity Act*; and

(f) an appeal under section 7(4) of the *Toronto District Heating Corporation Act, 1998.*

17.02 A notice of appeal shall contain:

(a) the portion of the order, decision, market rules or finding or remedial action referred to in **Rule 15.03** being appealed;

(b) the statutory provision under which the appeal is made;

(c) the nature of the relief sought, and the grounds on which the appellant shall rely;

(d) if an appeal of an order made under the market rules under section 36 of the *Electricity Act*, a statement confirming that the appellant has made use of any dispute resolution provisions of the market rules;

(e) if an application by a market participant for review of a provision of the market rules under section 35 of the *Electricity Act*, a statement confirming that the market participant has made use of any review provisions of the market rules; and

(f) if an appeal of an order, finding or remedial action under section 36.3 of the *Electricity Act*, a statement confirming that the Independent Electricity System Operator has commenced all other reviews and appeals available to it and such reviews and appeals have been finally determined.

17.03 A notice of appeal shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

17.04 At a hearing of an appeal, an appellant shall not seek to appeal a portion of the order, decision, market rules, or finding or remedial action referred to in **Rule 15.03** or rely on any ground, that is not stated in the appellant's notice of appeal, except with leave of the Board.

17.05 In addition to those persons on whom service is required by statute, the Board may direct an appellant to serve the notice of appeal on such persons as it considers appropriate.

17.06 The Board may require an appellant to file an affidavit of service indicating how and on whom service of the notice of appeal was made.

17.07 Subject to **Rule 17.08**, a request by a party to stay part or all of the order, Decision, market rules or finding or remedial action referred to in **Rule 15.03** being appealed pending the determination of the appeal shall be made by motion to the Board.

17.08 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

17.09 In respect of a motion brought under **Rule 17.07**, the Board may order that implementation of the order, decision or market rules be delayed, on conditions as it considers appropriate.

18. Dismissal Without a Hearing

18.01 The Board may propose to dismiss a proceeding without a hearing on the grounds that:

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

18.02 Where the Board proposes to dismiss a proceeding under **Rule 18.01**, it shall give notice of the proposed dismissal in accordance with the *Statutory Powers Procedure Act*.

18.03 A party wishing to make written submissions on the proposed dismissal shall do so within 10 calendar days of receiving the Board's notice under **Rule 18.02**.

18.04 Where a party who commenced a proceeding has not taken any steps with respect to the proceeding for more than one year from the date of filing, the Board may notify the party that the proceeding shall be dismissed unless the person, within 10 calendar days of receiving the Board's notice, shows cause why it should not be dismissed or advises the Board that the application or appeal is withdrawn.

18.05 Where the Board dismisses a proceeding, or is advised that the application or appeal is withdrawn, any fee paid to commence the proceeding shall not be refunded.

19. Decision Not to Process

19.01 The Board or Board staff may decide not to process documents relating to the commencement of a proceeding if:

(a) the documents are incomplete;

(b) the documents were filed without the required fee for commencing the proceeding;

(c) the documents were filed after the prescribed time period for commencing the proceeding has elapsed; or

(d) there is some other technical defect in the commencement of the proceeding.

19.02 The Board or Board staff shall give the party who commenced the proceeding notice of a decision made under **Rule 19.01** that shall include:

(a) reasons for the decision; and

(b) requirements for resuming processing of the documents, if applicable.

19.03 Where requirements for resuming processing of the documents apply, processing shall be resumed where the party complies with the requirements set out in the notice given under **Rule 19.02** within:

(a) subject to **Rule 19.03(b)**, 30 calendar days from the date of the notice; or

(b) 10 calendar days from the date of the notice, where the proceeding commenced is an appeal.

19.04 After the expiry of the applicable time period under **Rule 19.03**, the Board may close its file for the proceeding without refunding any fee that may already have been paid.

19.05 Where the Board has closed its file for a proceeding under **Rule 19.04**, a person wishing to refile the related documents shall:

(a) in the case of an application, refile the documents as a fresh application, and pay any fee required to do so; or

(b) in the case of an appeal, refile the documents as a fresh notice of appeal, except where the time period for filing the appeal has elapsed, in which case the documents cannot be refiled.

20. Withdrawal

20.01 An applicant or appellant may withdraw an application or appeal:

(a) at any time prior to the hearing, by filing and serving a notice of withdrawal signed by the applicant or the appellant, or his or her representative; or

(b) at the hearing with the permission of the Board.

20.02 A party may by motion seek leave to discontinue participation in a proceeding at any time before a final decision.

20.03 The Board may impose conditions on any withdrawal or discontinuance, including costs, as it considers appropriate.

20.04 Any fee paid to commence the proceeding by an applicant seeking to withdraw under **Rule 20.01** shall not be refunded.

20.05 If the Board has reason to believe that a withdrawal or discontinuance may adversely affect the interests of any party or may be contrary to the public interest, the Board may hold or continue the hearing, or may issue a decision or order based upon proceedings to date.

21. Notice

21.01 Any notices required by these Rules or a Board order shall be given in writing, unless the Board directs otherwise.

21.02 The Board may direct a party to give notice of a proceeding or hearing to any person or class of persons, and the Board may direct the method of providing the notice.

21.03 Where a party has been directed to serve a notice under this Rule, the party shall file an affidavit or statement of service that indicates how, when, and to whom service was made.

22. Levels of Participation

22.01 A person who wishes to participate in a proceeding, shall comply with the Rules applicable to the intended level of participation:

(a) To actively participate in the proceeding as a party, the person shall comply with **Rule 23**.

(b) To provide comments in writing or through an oral presentation, the person shall comply with **Rule 24**.

(c) To participate as an observer, the person shall comply with **Rule 25**.

22.02 The manner in which persons may participate in a proceeding as identified in **Rule 22.01** is subject to any provision to the contrary in a notice or procedural order issued by the Board.

23. Intervenor Status

23.01 Subject to **Rule 23.05** and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively participate in the proceeding shall apply for intervenor status by filing and serving a letter of intervention by the date provided in the notice of the proceeding.

23.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by crossexamining a witness.

23.03 Every letter of intervention shall contain the following information:

(a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention;

(b) subject to **Rule 23.04**, a concise statement of the nature and scope of the intervenor's intended participation;

(c) a request for the written evidence, if it is desired;

(d) an indication as to whether the intervenor intends to seek an award of costs;

(e) if applicable, the intervenor's intention to participate in the hearing using the French language; and

(f) the full name, address, telephone number, and fax number, if any, of no more than two representatives of the intervenor, including counsel, for the purposes of service and delivery of documents in the proceeding.

23.04 Where, by reason of an inability or insufficient time to study the document initiating the proceeding, a person is unable to include any of the information required in the letter of intervention under **Rule 23.03(b)**, the person shall:

(a) state this fact in the letter of intervention initially filed; and

(b) refile and serve the letter of intervention with the information required under **Rule 23.03(b)** within 15 calendar days of receipt of a copy of any written evidence, or within 15 calendar days of the filing of the letter of intervention, or within 3 calendar days after a proposed issues list has been filed under **Rule 30**, whichever is later.

23.05 A person may apply for intervenor status after the time limit directed by the Board by filing and serving a notice of motion and a letter of intervention that, in addition to the information required under **Rule 23.03**, shall include reasons for the late application.

23.06 The Board may dispose of a motion under **Rule 23.05** with or without a hearing.

23.07 A party may object to a person applying for intervenor status by filing and serving written submissions within 10 calendar days of being served with a letter of intervention.

23.08 The person applying for intervenor status may make written submissions in response to any submissions filed under **Rule 23.07**.

23.09 The Board may grant intervenor status on conditions it considers appropriate.

24. Public Comment

24.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who does not wish to be a party in a proceeding, but who wishes to communicate views to the Board, shall file a letter of comment.

24.02 The letter of comment shall include the nature of the person's interest, the person's full name, address and telephone number, as well as any request to make an oral presentation to the Board in respect of the proceeding.

24.03 The Board shall serve a letter of comment filed under **Rule 24.01** on the party who commenced the proceeding and on any other party who requests a copy.

24.04 Any party may file a reply to the letter of comment, and shall serve it on the person who filed the letter and such other persons as directed by the Board.

24.05 Where the Board has permitted a person to make an oral presentation, that person shall contact the Board Secretary to arrange a time to be heard by the Board.

24.06 A person who makes an oral presentation shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

25. Observer Status

25.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who is interested in being served with documents issued by the Board in a proceeding shall file a request for the documents desired.

25.02 A person who is interested in being served with documents filed by a party in respect of a proceeding shall file and serve a request for documents on that party.

25.03 A party who has been served with a request under **Rule 25.02** is entitled to be reimbursed by the observer for expenses actually incurred in serving the documents on the observer, unless the Board directs otherwise.

25.04 Upon being reimbursed, if applicable, under **Rule 25.03**, the party shall serve the requested documents on the observer.

25.05 All documents filed in a proceeding may be examined free of charge at the Board's offices.

26. Adjournments

26.01 The Board may adjourn a hearing on its own initiative, or upon motion by a party, and on conditions the Board considers appropriate.

26.02 Parties shall file and serve a motion to adjourn at least 10 calendar days in advance of the scheduled date of the hearing.

PART IV - PRE-HEARING PROCEDURES

27. Technical Conferences

27.01 The Board may direct the parties to participate in technical conferences for the purposes of reviewing and clarifying an application, an intervention, a reply, the evidence of a party, or matters connected with interrogatories.

27.02 The technical conferences may be transcribed, and the transcription, if any, shall be filed and form part of the record of the proceedings.

28. Interrogatories

28.01 In any proceeding, the Board may establish an interrogatory procedure to:

(a) clarify evidence filed by a party;

(b) simplify the issues;

(c) permit a full and satisfactory understanding of the matters to be considered; or

(d) expedite the proceeding.

28.02 Interrogatories shall:

(a) be directed to the party from whom the response is sought;

(b) be numbered consecutively, or as otherwise directed by the Board, in respect of each item of information requested, and should contain a specific reference to the evidence;

(c) be grouped together according to the issues to which they relate;

(d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;

(e) be filed and served as directed by the Board; and

(f) set out the date on which they are filed and served.

29. Responses to Interrogatories

29.01 Subject to **Rule 29.02**, where interrogatories have been directed and served on a party, that party shall:

(a) provide a full and adequate response to each interrogatory;

(b) group the responses together according to the issue to which they relate;

(c) repeat the question at the beginning of its response;

(d) respond to each interrogatory on a separate page or pages;

(e) number each response to correspond with each item of information requested or with the relevant exhibit or evidence;

(f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;

(g) file and serve the response as directed by the Board; and

(h) set out the date on which the response is filed and served.

29.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

(a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;

(b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or

(c) otherwise explaining why such a response cannot be given.

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**.

29.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

29.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.

30. Identification of Issues

30.01 The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

(a) the identification of issues would assist the Board in the conduct of the proceeding;

(b) the documents filed do not sufficiently set out the matters in issue at the hearing; or

(c) the identification of issues would assist the parties to participate more effectively in the hearing.

30.02 The Board may direct the parties to participate in issues conferences for the purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

30.03 A proposed issues list shall set out any issues that:

(a) the parties have agreed should be contained on the list;

(b) are contested; and

(c) the parties agree should not be considered by the Board.

30.04 Where the Board has issued a procedural order for a list of issues to be determined in the proceeding, a party seeking to amend the list of issues shall do so by way of motion.

31. Alternative Dispute Resolution

31.01 The Board may direct that participation in alternative dispute resolution ("ADR") be mandatory.

31.02 An ADR conference shall be open only to parties and their representatives, unless the Board directs or the parties agree otherwise.

31.03 A Board member shall not participate in an ADR conference, and the conference shall not be transcribed or form part of the record of a proceeding.

31.04 The Board may appoint a person to chair an ADR conference.

31.05 The chair of an ADR conference may enquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

31.06 The chair of an ADR conference may attempt to effect a settlement of issues by any reasonable means including:

(a) clarifying and assessing a party's position or interests;

(b) clarifying differences in the positions or interests taken by the respective parties;

(c) encouraging a party to evaluate its own position or interests in relation to other parties by introducing objective standards; and

(d) identifying settlement options or approaches that have not yet been considered.

31.07 Subject to **Rule 31.08**, where a representative attends an ADR conference without the party, the representative shall be authorized to settle issues.

31.08 Any limitations on a representative's authority shall be disclosed at the outset of the ADR conference.

31.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.

31.10 Admissions, concessions, offers to settle and related discussions in **Rule 31.09** shall not be admissible in any proceeding without the consent of the affected parties.

32. Settlement Proposal

32.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement in order to allow the Board to review and consider the settlement.

32.02 The settlement proposal shall identify for each issue those parties who agree with the settlement of the issue and any parties who disagree.

32.03 The parties shall ensure that the settlement proposal contains or identifies evidence sufficient to support the settlement proposal and shall provide such additional evidence as the Board may require.

32.04 A party who does not agree with the settlement of an issue will be entitled to offer evidence in opposition to the settlement proposal and to cross-examine on the issue at the hearing.

32.05 Where evidence is introduced at the hearing that may affect the settlement proposal, any party may, with leave of the Board, withdraw from the proposal upon giving notice and reasons to the other parties, and **Rule 32.04** applies.

32.06 Where the Board accepts a settlement proposal as a basis for making a decision in the proceeding, the Board may base its findings on the settlement proposal, and on any additional evidence that the Board may have required.

33. Pre-Hearing Conference

33.01 In addition to technical, issues and ADR conferences, the Board may, on its own motion or at the request of any party, direct the parties to make submissions in writing or to participate in pre-hearing conferences for the purposes of:

(a) admitting certain facts or proof of them by affidavit;

(b) permitting the use of documents by any party;

(c) recommending the procedures to be adopted;

(d) setting the date and place for the commencement of the hearing;

(e) considering the dates by which any steps in the proceeding are to be taken or begun;

(f) considering the estimated duration of the hearing; or

(g) deciding any other matter that may aid in the simplification or the just and most expeditious disposition of the proceeding.

33.02 The Board Chair may designate one member of the Board or any other person to preside at a pre-hearing conference.

33.03 A member of the Board who presides at a pre-hearing conference may make such orders as he or she considers advisable with respect to the conduct of the proceeding, including adding parties.

PART V - HEARINGS

34. Hearing Format and Notice

34.01 In any proceeding, the Board may hold an oral, electronic or written hearing, subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises.

34.02 The format, date and location of a hearing shall be determined by the Board.

34.03 Subject to **Rule 21.02**, the Board shall provide written notice of a hearing to the parties, and to such other persons or class of persons as the Board considers necessary.

35. Hearing Procedure

35.01 Parties to a hearing shall comply with any directions issued by the Board in the course of the proceeding.

36. Summons

36.01 A party who requires the attendance of a witness or production of a document or thing at an oral or electronic hearing may obtain a Summons from the Board Secretary.

36.02 Unless the Board directs otherwise, the Summons shall be served personally and at least 48 hours before the time fixed for the attendance of the witness or production of the document or thing.

36.03 The issuance of a Summons by the Board Secretary, or the refusal of the Board Secretary to issue a Summons, may be brought before the Board for review by way of a motion.

37. Hearings in the Absence of the Public

37.01 Subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises, the Board may hold an oral or electronic hearing or part of the hearing in the absence of the public, with such persons in attendance as the Board may permit and on such conditions as the Board may impose.

38. Constitutional Questions

38.01 Where a party intends to raise a question about the constitutional validity or applicability of legislation, a regulation or by-law made under legislation, or a rule of common law, or where a party claims a remedy under subsection 24(1) of the Canadian Charter of Rights and Freedoms, notice of a constitutional question shall be filed and served on the other parties and the Attorneys General of Canada and Ontario as soon as the circumstances requiring notice become known and, in any event, at least 15 calendar days before the question is argued.

38.02 Where the Attorneys General of Canada and Ontario receive notice, they are entitled to adduce evidence and make submissions to the Board regarding the constitutional question.

38.03 The notice filed and served under **Rule 38.01** shall be in substantially the same form as that required under the Rules of Civil Procedure for notice of a constitutional question.

39. Hearings in French

39.01 Subject to this Rule, evidence or submissions may be presented in either English or French.

39.02 The Board may conduct all or part of a hearing in French when a request is made:

(a) by a party;

(b) by a person seeking intervenor status at the time the application for intervenor status is made; or

(c) by a person making an oral presentation under **Rule 24** who indicates to the Board Secretary the desire to make the presentation in French.

39.03 Where all or part of a hearing is to be conducted in French, the notice of the hearing shall specify in English and French that the hearing is to be so conducted, and shall further specify that English may also be used.

39.04 Where a written submission or written evidence is provided in either English or French, the Board may order any person presenting such written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

40. Media Coverage

40.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

40.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

PART VI - COSTS

41. Cost Eligibility and Awards

41.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

41.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 41.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

PART VII - REVIEW

42. Request

42.01 Subject to **Rule 42.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.

42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

43. Board Powers

43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

43.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

44. Motion to Review

44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

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

45. Determinations

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

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ONTARIO ENERGY BOARD

BOOK OF AUTHORITIES OF THE MOVING PARTY,

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