EB-2012-0006

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an appeal under section 7 of the *Ontario Energy Board Act, 1998* of a Decision and Order of the Board in EB-2011-0291, regarding an application by EnWin Utilities Ltd. to amend its Electricity Distribution License;

BOOK OF AUTHORITIES

RESPONDENT

ENWIN UTILITIES LTD.

INDEX

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PRINCIPLES OF ADMINISTRATIVE LAW

Fourth Edition

by

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(b) The General Test for Institutional Bias

For cases of institutional bias, the Supreme Court has retained the *Canada (National Energy Board)* test, but has added a slight wrinkle:[103]

> As a result of *Lippé*, *supra*, and *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, *inter alia*, the test for institutional impartiality is well established. It is clear that the governing factors are those put forward by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias *in a substantial number of cases*. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention.

Thus we can see that the unique feature of the test for institutional bias is the requirement that the apprehension of bias exist in "a substantial number of cases." As demonstrated in the *Québec (Régie des permis d'alcools)* case itself, the facts of any particular case before the tribunal can be of limited significance with respect to a finding of institutional bias. What tends to be more important is whether the legislature has expressly or impliedly authorized a decision-making scheme that gives rise to this type of apprehension of bias and, if so, whether that legislative decision can be successfully challenged using the *Charter* or a quasi-constitutional statute such as the *Canadian Bill of Rights*, the *Alberta Bill of Rights* or the *Quebec Charter of Rights and Freedoms*.

(c) Some Examples of Institutional Bias

As with most cases of bias, the difficulty in institutional bias cases is not stating the test. After *Québec (Régie des permis d'alcools)*, the test is well-settled. The difficulty comes in applying the test to a particular set of circumstances. Broadly speaking, institutional bias arguments have tended to be made in five types of situations: (i) where a tribunal member carries out more than one function in relation to a particular case; (ii) where tribunal staff are employed in ways that give rise to bias concerns; (iii) where a party to the proceeding has an institutional role in the proceeding that might be thought to bias the outcome; (iv) where the tribunal itself might be thought to have a financial interest in a particular outcome; and (v) where a tribunal engages in internal consultations concerning a case that is before it in a manner that is thought to be improper. These categories are not closed, and they are better understood as illustrations of a general principle rather than as a set of hard and fast rules.

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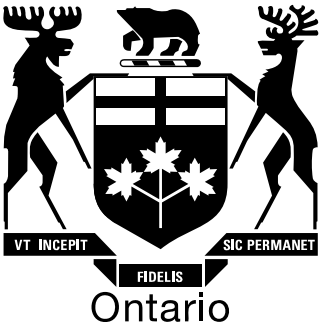
103 *Québec (Régie des permis d'alcool)*, *ibid.* at para. 44 (emphasis in original).

Ontario Energy Board

Commission de l'Énergie de l'Ontario



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

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

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

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

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

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

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

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

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

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

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

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

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

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Section A: Introduction

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

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

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

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

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

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

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

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

The NGEIR Decision

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

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

2) Storage regulation.

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

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

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

Kitchener

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

APPrO

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

IGUA/CCC/VECC

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

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

Organization of the Decision

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

The sections of this Decision are:

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

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

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

Section B: Board Jurisdiction to Hear the Motions

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

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

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

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

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

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Board's Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

Section D: Board Process

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

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

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

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

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

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

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

Examples of the alleged behaviour objected to by IGUA include:

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

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

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

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

The other parties largely supported the position of Board Staff.

Findings

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

- Parties must be given reasonable notice of the hearing (s 6)
- Hearings must be open to the public, except where intimate personal or financial; may be disclosed (s 9)
- Parties have the right to counsel (s 10)
- Parties have the right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

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

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

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

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

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

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

Section 21 of the OEB Act provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

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

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

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

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

IGUA also alleged that:

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section F: Status Quo

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

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

Section G: Onus

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

Findings

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

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

Section H: Competition in the Secondary Market

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

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

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

Section I: Harm to Ratepayers

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

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

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

Findings

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

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

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

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

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

Section J: Union's 100 PJ Cap

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

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

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

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

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

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

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

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

Page 7 of the CCC/VECC factum states:

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The NGEIR Decision stated:

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

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

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

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

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

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

Findings

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

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

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

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

The Board further noted:

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

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

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

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

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

Section M: Aggregate Excess Method of Allocating Storage

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

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

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

Findings

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

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

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

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

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

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

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

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

The NGEIR Decision also states:

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

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

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

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

Section N: Orders

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

The Board Orders That:

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

Section O: Cost Awards

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

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

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

DATED at Toronto, May 22, 2007

Original signed by

_____

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

_____

Paul Vlahos
Member

Original signed by

_____

Cathy Spoel
Member

SUPREME COURT OF CANADA

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

DATE: 20080307
DOCKET: 31459

BETWEEN:

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

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

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

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

David Dunsmuir *Appellant*

v.

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

Indexed as: Dunsmuir *v*. New Brunswick

Neutral citation: 2008 SCC 9.

File No.: 31459.

2007: May 15; 2008: March 7.

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

on appeal from the court of appeal for new brunswick

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

two standards: correctness and reasonableness.

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

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

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

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

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

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

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

Held: The appeal should be dismissed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

delivered by

BASTARACHE AND LEBEL JJ. —

I. Introduction

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

A. *Facts*

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

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

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

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

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

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

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

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

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

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

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

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

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

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

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

such a determination.

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

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

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

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

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

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

C. *Judicial History*

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

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

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

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

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

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

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

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

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

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

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

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

II. Issues

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

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

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

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

A. *Judicial Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Reconsidering the Standards of Judicial Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. *Two Standards of Review*

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

(1) Defining the Concepts of Reasonabless and Correctness

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

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

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

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

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

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

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

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

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

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

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

(2) Determining the Appropriate Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *Application*

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

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

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

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

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

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

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

appropriate.

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

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

(2) Was the Adjudicator's Interpretation Unreasonable?

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

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

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

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

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

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

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

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

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

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

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

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

A. *Duty of Fairness*

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

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

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

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

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

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

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

(1) The Preliminary Issue of Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

(3) Procedural Fairness in the Public Employment Context

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

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

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

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

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

contractual employees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Conclusion*

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

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

V. Disposition

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

The following are the reasons delivered by

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

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

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

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

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

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

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

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

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

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

A. *Limits on the Allocation of Decision Making*

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

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

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

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

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

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

general law should be left to judges.

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

B. *Reasonableness of Outcome*

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

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

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

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

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

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

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

D. *Standards of Review*

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

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

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

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

E. *Degrees of Deference*

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

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

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

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

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

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

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

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

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

F. *Multiple Aspects of Administrative Decisions*

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

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

G. *The Existence of a Privative Clause*

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

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

H. *A Broader Reappraisal*

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

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

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

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

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

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

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

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

I. *Judging "Reasonableness"*

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

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

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

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

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

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

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

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

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

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

J. *Application to This Case*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX

Relevant Statutory Provisions

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

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

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

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

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

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

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

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

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

. . .

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

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

. . .

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

. . .

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

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

Appeal dismissed.

Solicitors for the appellant: Stewart McKelvey, Fredericton.

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

proceedings, an owner of retail premises having an area more than 6,000 sq. ft. is entitled to a "minor variance" exempting him from the loading space provision; this issue is not removed from their jurisdiction solely because the effect of the variance is total exemption. Similarly, to take another example, in the case of side or rear yard set-back requirements, the fact the exemption sought is the full elimination of the set-back distance does not of necessity mean that the variance is not minor and must be beyond the jurisdiction of the committee and the Board. With the multitude of by-laws covered by s. 42(1) and the number of details they contain, there must be many instances where full exemption can properly be considered no more than a minor variance. It is, as I have said, for the committee and Board to make that determination.

Section 42 was enacted to provide a more expeditious and less cumbersome procedure than that required to effect a by-law amendment: *R. v. London Committee of Adjustment, Ex p. Weinstein*, [1960] O.R. 225, 23 D.L.R. (2d) 175 *sub nom. Re City of London By-law; Western Tire & Auto Supply Ltd. and Weinstein* (C.A.). The owners in this case are entitled to have their application determined under the procedure of s. 42 and not required, as suggested, to seek relief from City Council by amendment to the zoning by-law unless the Board determines if it does on the merits of the matter that the exemption sought is not, as the Committee of Adjustment found, a minor variance.

In sum, the Board erred in law in concluding it was without jurisdiction in respect to the variance in question. As a result it improperly declined to exercise its statutory powers under the *Planning Act*. The appeal must therefore be allowed and the matter remitted to the Municipal Board for decision. Costs of the appeal and the application for leave to appeal will be paid by the respondent.

Appeal allowed.

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Union Gas Ltd. v. Township of Dawn
Tecumseh Gas Storage Ltd. v. Township of Dawn

KEITH, MALONEY AND DONOHUE, JJ. 22ND FEBRUARY 1977.

Municipal law — By-laws — Township passing comprehensive zoning by-law — Approved by Ontario Municipal Board — One section of by-law dealing with location of gas pipelines — Whether by-law intra vires township — Whether Ontario Municipal Board had jurisdiction to approve by-law — Planning Act, R.S.O. 1970, c. 349, s. 35 — Ontario Energy Board Act, R.S.O. 1970, c. 312.

Planning legislation — Zoning by-laws — Township passing comprehensive

by-law — Approved by Ontario Municipal Board — One section of by-law dealing with location of gas pipelines — Whether by-law intra vires township — Whether Ontario Municipal Board had jurisdiction to approve by-law — Planning Act, R.S.O. 1970, c. 349, s. 35 — Ontario Energy Board Act, R.S.O. 1970, c. 312.

In accordance with the powers given to municipal councils by s. 35 of the *Planning Act*, R.S.O. 1970, c. 349, an agricultural township in south-western Ontario passed a comprehensive zoning by-law which was later amended. Both by-laws came before the Ontario Municipal Board for approval and were approved. A particular section of the zoning by-law, as amended, dealt with the locations in which, *inter alia*, gas pipelines could be constructed within the municipality. On appeal by two gas companies from the Municipal Board's approval of this section of the by-law, *held*, the appeal should be allowed. The by-law was *ultra vires* the municipality and the Municipal Board, therefore, was without jurisdiction to approve it.

The local problems of the township were insignificant when viewed in the perspective of the need for energy to be supplied to millions of residents of Ontario beyond the township borders. A potential not only for chaos but for the total frustration of any plan to serve this need would be created if by reason of powers vested in each municipality by the *Planning Act*, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. The *Ontario Energy Board Act*, R.S.O. 1970, c. 312, as amended, makes it clear that all matters relating or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act*. These are all matters that are to be considered in the light of the general public interest and not local or parochial interests.

Furthermore, the maxim *generalia specialibus non derogant* applied. The Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and this must be classified as special legislation. The *Planning Act*, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as is contained in the *Ontario Energy Board Act*.

[*Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, apld; *City of Ottawa v. Town of Eastview et al.*, [1941] S.C.R. 448, [1941] 4 D.L.R. 65, 53 C.R.T.C. 193, refd to]

APPEAL from a decision of the Ontario Municipal Board approving two municipal zoning by-laws.

J. J. Robinette, Q.C., and *L. G. O'Connor*, Q.C., for appellant, Union Gas Limited.

P. Y. Atkinson, for appellant, Tecumseh Gas Storage Limited.

W. B. Williston, Q.C., and *J. A. Campion*, for respondent, Township of Dawn.

T. H. Wickett, for Ontario Energy Board.

The judgment of the Court was delivered by

KEITH, J.:—Pursuant to leave granted by this Court on November 24, 1975, upon application made in accordance with s.

95(1) of the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323, the following questions are submitted to this Court for its opinion:

(a) Is section 4.2.3. of By-law 40 of the Township of Dawn as amended, ultra vires of the respondent municipality?

(b) Is the Ontario Municipal Board therefore without jurisdiction to approve the respondent's By-law 40 as amended including section 4.2.3. thereof?

The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on June 18, 1973 (By-law 40), and amending By-law 52 on September 3, 1974.

These two by-laws came before the Ontario Municipal Board on April 16 and 24, 1975, for approval. In addition to the parties appearing in this Court, two other parties interested in the effect of these by-laws were represented at the Municipal Board hearings, but the Ontario Energy Board, one of the most vitally interested parties, inexplicably was not.

The relevant sections of the by-law, as amended, read as follows:

1.1 *Section 1 — Introduction*

Whereas the Council has authority to regulate the use and nature of land, buildings and structures in the Township of Dawn by by-law subject to the approval of the Ontario Municipal Board and deems it advisable to do so.

1.2 Now therefore the Council of the Corporation of the Township of Dawn enacts as follows:

Title

2.1 This by-law shall be known as the "Zoning By-law" of the Township of Dawn.

Penalty

3.3.1. Every person who contravenes by-law is guilty of an offence and liable upon conviction to fine of not more than three hundred (300) dollars for each offence, exclusive of costs. Every such fine is recoverable under the Summary Convictions Act, all the provisions of which apply except that the imprisonment may be for a term of not more than twenty-one (21) days.

3.3.2. Where a person, guilty of an offence under this by-law has been directed to remedy any violation and is in default of doing such matter or thing required, then such matter or thing may be done at his expense, by the Corporation of the Township of Dawn and the Corporation may recover the expense incurred in doing it by action or the same may be recovered in like manner as municipal taxes.

Section 4 — General Use and Zone Regulations

4.1 Uses Permitted.

4.1.1. No land, building or structure shall be used or occupied and no building or structure or part thereof shall be erected or altered except as permitted by the provisions of this by-law.

4.2.3 Except as limited herein nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto, but no appurtenances in the form of a metering, booster, dryer, stipper or pumping station, shall be constructed closer than 500 feet to any adjacent residential or commercial zone or rural residence, except as otherwise provided. All transmission pipelines to be installed from or to a production, treatment or storage site shall be constructed

from or to such site to and along, in or upon a right-of-way, easement or corridor located as follows:

(a) running northerly or southerly within 100 feet perpendicular distance from the centre line dividing the east and west halves of a concession lot;

(b) running easterly and westerly within 100 feet perpendicular distance from a concession lot line not being a township, county or provincial road or highway;

(c) across, but not along a township, county or provincial road or highway.

Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

On May 20, 1975, the Ontario Municipal Board released its decision approving of By-law 40 as amended. The reasons are devoted almost exclusively to s. 4.2.3 as amended and the objections of the appellants thereto. To fully understand the approach taken by the Municipal Board, the following extracts from these reasons are quoted [4 O.M.B.R. 462 at pp. 463-6]:

The Township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookstone clay type which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 ft. apart throughout the whole of the Township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the Township is shown on ex. 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.

The evidence indicates that in respect of the pipeline installation on a right of way that may be 60 ft. wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farm land. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.

. . . . .

The Union Gas Limited (hereinafter to be referred to as "the Company") operates in the south-west part of the Province and has important connections with Consumers Gas Company of Toronto and other systems for whom it stores gas in the summer months for delivery in the winter. The relationship of the Union Gas Limited operation to other systems in the Province are well illustrated on ex. 33, filed. The hub of their system is in Dawn Township from which all the distribution and transmission lines radiate. The importance of the Company to the municipality is illustrated by ex. 26 filed, which shows that for the years 1970 to 1974 inclusive, the Company paid taxes which formed a sig-

nificant portion of the total Township levy varying from 24.3% to 30.6% in those years.

The by-law provides that transmission lines are to be laid in corridors 200 ft. wide running along the half lot lines in a north-south direction and along concession lines in an east-west direction, "across but not along a township, county or provincial road or highway", s. 4.2.3.

This corridor concept was the chief source of objection registered by the Company which in evidence indicated that the corridor method of laying their lines would be very costly. This was particularly so when some of the existing lines are now laid in a diagonal direction. When new looping lines are required they are now planned to run generally parallel to the existing lines. If they were to follow the corridors the length of line would be increased, in some cases the diameter of the pipe would have to be greater, and perhaps they might also require additional compression facilities. The additional costs were shown to be large and would result in increased costs to the public.

The Board must weigh the possibility of incurring these increased costs against the need for protecting the farm industry against unnecessary and unplanned disturbance in future years. There was ample evidence to indicate that the need for pipeline installations would increase in the future. There was also evidence to indicate that about 50% of the existing lines are already built in a north-south and east-west direction and that the corridor concept has therefore in fact found practical use in the past (exs. 7 and 27). It was the argument of counsel for the applicant that once the corridors were established the extra cost for looping will not be as significant.

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under s. 35(1)1 of the *Planning Act*, R.S.O. 1970, c. 349. To bolster this argument counsel referred the Board to the case of *Pickering Twp. v. Godfrey*, [1958] O.R. 429, 14 D.L.R. (2d) 520, [1958] O.W.N. 230. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a "land use". In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted [at p. 437] as meaning: "the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself."

The second major argument of counsel was that the municipality has no jurisdiction to deal with pipeline installation because of the existence of the *Ontario Energy Board Act*, R.S.O. 1970, c. 312, which creates the Ontario Energy Board and gives it jurisdiction to determine the route for a transmission line, production line, distribution line or a station (s. 40(1)). The Board was also referred to s. 57 of the *Ontario Energy Board Act* which reads as follows:

> "57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality."

In the opinion of the Board the above section provides only for the event of a conflict between the *Ontario Energy Board Act* and any other Act. It does not, nor can it be interpreted to mean that no other Act can be effective. It does not in the opinion of the Board prohibit the municipality from dealing with those matters referred to in s. 35 of the *Planning Act*.

The major considerations of the Ontario Energy Board are not directed towards planning. It is the responsibility and duty of Council to plan for the proper and orderly development of the municipality having regard to the

health, safety, convenience and welfare of the present and future inhabitants of the municipality all within the framework of the *Planning Act*.

The Board is of the opinion that zoning by-laws must provide for all ratepayers a degree of certainty for reasonable stability. This can be accomplished by passing restricted area by-laws for land use on a planning basis with proper and responsible study and public input. The evidence indicates that the municipality has indeed acted in a reasonable and responsible manner to achieve this end. The consideration for the farming community which forms a large proportion of the municipality is a proper and reasonable one. There is no certainty as to where the Ontario Energy Board may finally decide to place the pipelines required by the criteria they have and will develop. They will, however, have the legislative document before them giving the corporate expression of the municipality to indicate where, on the basis of planning considerations, the pipelines should go. The Ontario Energy Board will then, on the basis of its criteria and the evidence heard, be in a position to give its decision on the ultimate route chosen.

In the meantime, the municipality will by legislation inform all its ratepayers where the pipelines should be laid. The farmer will be able to proceed with the least amount of interference both during construction of pipelines on or near his lands and indeed in his everyday work. The pipeline companies will benefit from this as well. With less interference to the farmer there should be fewer difficulties experienced both in the installation of the pipelines and the servicing and maintenance of the pipelines and the tile drain systems.

By-law 40 as amended was enacted by the Council of the respondent in accordance with the powers given to municipal councils by s. 35 of the *Planning Act*, R.S.O. 1970, c. 349. The relevant portions of that section read as follows:

35(1) By-laws may be passed by the councils of municipalities:

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

Section 46 of the *Planning Act* is identical with s. 57(1) of the *Ontario Energy Board Act*, R.S.O. 1970, c. 312, quoted in the reasons of the Ontario Municipal Board. Fortunately, s. 46 of the *Planning Act* has no equivalent to s. 57(2) of the *Ontario Energy Board Act* or the Court might well have been forced to assert that its views prevailed over one or other or both of the statutes.

The appellant Union Gas operates an extensive network of natural gas transmission lines throughout south-western Ontario delivering this energy to customers, both wholesale and retail, extending from Windsor on the south-west, to Hamilton and Trafalgar on the east and Goderich and Owen Sound on the north.

It supplies scores of city, town and village municipalities in this extensive and heavily-populated area and its lines traverse 16 counties which contain upwards of 140 township municipalities.

The municipal councils of each of these has the same power under the *Planning Act* to pass zoning by-laws.

The principal source of the supply of natural gas to Union Gas is the Trans-Canada pipeline which enters the southern part of Ontario in Lambton County just south of Sarnia and connects with a major compressor station of Union Gas in the Township of Dawn. There are four other major compressor stations operated by this appellant, one just west of London, another at Trafalgar between Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

In addition, Union Gas lines serve as feeders for companies like the Consumers' Gas Company serving Metropolitan Toronto and another extensive area of Ontario.

In addition, a significant portion of the source of natural gas transmitted by Union Gas, comes from local wells found in southwestern Ontario, a number of which are located in the Township of Dawn.

The company also maintains reserves of gas in natural underground storage fields, some but by no means all of which are also located in the Township of Dawn.

The local wells and the storage fields must all be connected to the distribution lines and the compressor stations.

The second appellant, Tecumseh Gas Storage Limited, is equally affected by the impugned by-law, but no detailed description of its operations was presented to the Court.

I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the *Planning Act*, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.

At the conclusion of the argument of this appeal I informed counsel, on behalf of the Court, that the Appeal Book had been endorsed as follows:

> The appeal will be allowed with costs. In view of the importance of the issue, which is raised in this appeal insofar as it relates specifically to the Energy Board's jurisdiction as challenged by a municipal council, and in deference to the lengthy reasons delivered by the Ontario Municipal Board, the Court will in due course, deliver considered reasons which will be the basis of the formal order of the Court.

It is not necessary for my purpose to trace the history and origins of the present *Ontario Energy Board Act* as amended. Reference to s. 58 of the present Act will suffice to show that this industry has developed over many years under provincial legislation. Section 58 reads as follows:

> 58. Every order and decision made under,
>
> (*a*) *The Fuel Supply Act*, being chapter 152 of the Revised Statutes of Ontario, 1950;
>
> (*b*) *The Natural Gas Conservation Act*, being chapter 251 of the Revised Statutes of Ontario, 1950;
>
> (*c*) *The Well Drillers Act*, being chapter 423 of the Revised Statutes of Ontario, 1950;
>
> (*d*) *The Ontario Fuel Board Act, 1954*;
>
> (*e*) *The Ontario Energy Board Act, 1960*;
>
> (*f*) *The Ontario Energy Act*, being chapter 271 of the Revised Statutes of Ontario, 1960; or
>
> (*g*) *The Ontario Energy Board Act, 1964*.
>
> that were in force on the day the Revised Statutes of Ontario, 1970 is proclaimed in force shall be deemed to have been made by the Board under this Act.

Pursuant to s. 2 [am. 1973, c. 55, s. 2] of the Act, the Ontario Energy Board is composed of not less than five members appointed by the Lieutenant-Governor in Council. It has an official seal, and its orders which must be judicially noticed are not subject to the *Regulations Act*, R.S.O. 1970, c. 410.

By s. 14, many of the powers of the Supreme Court of Ontario are vested in this Board "for the due exercise of its jurisdiction".

Section 18 is important having regard to the penalty provisions of the township by-law quoted above. That section reads as follows:

> 18. An order of the Board is a good and sufficient defence to any action or other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order.

Section 19 [am. 1973, c. 55, s. 5(1)] vests power in the Board to fix rates and other charges for the sale, transmission, distribution and storage of natural gas.

Under s. 23 [am. *ibid.*, s. 8] the Board is charged with responsibility to issue permits to drill gas wells.

Section 25 prohibits any company in the business of transmitting, distributing or storing gas from disposing of its plant by sale or otherwise without leave, and such leave cannot be granted without, *inter alia*, a public hearing.

Section 30 provides that any order of the Board may be filed with the Registrar of the Supreme Court and is enforceable in the same way as a judgment or order of the Court.

Part II of the Act deals specifically with pipe lines and I quote s.

38(1), s. 39, s. 40(1), (2), (3), (8), (9) and (10), s. 41(1) and (3), and s. 43(1) and (3):

38(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.

. . . . .

39. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.

40(1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.

(2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture and Food, the Department of Municipal Affairs, the Department of Highways and such persons as the Board may direct.

(3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

. . . . .

(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

(9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has offered or will offer to each landowner an agreement in a form approved by the Board.

(10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 42.

41(1) Any person who has leave to construct a line or station under this Part or a predecessor of this Part may apply to the Board for authority to expropriate land for the purposes of the line or station, and the Board shall thereupon set a date for the hearing of such application, and such date shall be not fewer than fourteen days after the date of the application, and upon such application the applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land.

. . . . .

(3) Where after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.

. . . . .

43(1) Any person who has leave to construct a line may apply to the Board for authority to construct it upon, under or over a highway, utility line or ditch.

. . . . .

(3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon,

> under or over a highway, utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper.

Finally, with respect to the statute itself, it may not be amiss to again quote s. 57:

> 57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act*.

These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served. In this connection it will be recalled that s. 40(1) speaks of the requirement for filing a general location of proposed lines or stations showing "the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass".

Persons affected must be given notice of any application for an order of the Energy Board and full provision is made for objections to be considered and public hearings held.

In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

While the result in the case of *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, might perhaps be different today, having regard to the facts of that case and subsequent federal legislation, the principles enunciated are valid and applicable to the case before this Court.

In the *Campbell-Bennett* case, the defendant Trans Mountain Pipe Line was incorporated by a special Act of the Parliament of Canada to construct interprovincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a mechanics' lien on the works in British Columbia, and to enforce that lien under the

British Columbia *Mechanics' Lien Act* by seizing and selling a portion of the pipe line.

At p. 212 S.C.R., p. 486 D.L.R., Kerwin, J. (as he then was), on behalf of himself and Fauteux, J. (as he then was), said:

> The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

Then at pp. 213-5 S.C.R., pp. 487-9 D.L.R., Rand, J., on behalf of himself and the other three members of the Court, said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.
>
> The *Pipe Lines Act*, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tools therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the *Railway Act*. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tools or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.
>
> Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens? The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: *Winner v. S.M.T. (Eastern) Limited*, [1951] S.C.R. 887, affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.
>
> In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the

creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purpose of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the *Railway Act*, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the *Pipe Lines Act* is sale by the company, not one arising under the provisions of law and in a proceeding *in invitum*. The general principle was stated by Sir Hugh M. Cairns, L.J. in *Gardner v. London, Chatham and Dover Railway* (1867), L.R. 2 Ch. 201 at p. 212:—

> "When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said:—

> "The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed."

Several further and compelling submissions were made to the Court on behalf of the appellants, but having regard to the first submission which is irresistible and of fundamental importance, I do not think it necessary to deal with all of the arguments advanced.

Reference should be made, however, to two of them. First, attention should be directed to "An Act to regulate the Exploration and Drilling for, and the Production and Storage of Oil and Gas", 1971 (Ont.), c. 94, commonly referred to as the *Petroleum Resources Act*.

The objects of this legislation can be readily understood by reference to s. 17(1) of the statute, which reads as follows:

17(1) The Lieutenant Governor in Council may make regulations,

(*a*) for the conservation of oil or gas;

(*b*) prescribing areas where drilling for oil or gas is prohibited;

(*c*) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;

(*d*) regulating the location and spacing of wells;

(*e*) providing for the establishment and designation of spacing units and regulating the location of wells in spacing units and requiring the joining of the various interests within a spacing unit or pool;

(*f*) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;

(*g*) requiring operators to preserve and furnish to the Department drilling and production samples and cores;

(*h*) requiring operators to furnish to the Department reports, returns and other information;

(*i*) requiring dry or unplugged wells to be plugged or replugged, and prescribing the methods, equipment and materials to be used in plugging or replugging wells;

(*j*) regulating the use of wells and the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations.

The importance of this Act is reflected in s. 18 which reads as follows:

> 18(1) In the event of conflict between this Act and any other general or special Act, this Act, subject only to *The Ontario Energy Board Act* [1964], prevails.
>
> (2) This Act and the regulations prevail over any municipal by-law.

Similarly, although it was not referred to in argument, the *Energy Act*, R.S.O. 1970, c. 148 [since repealed by 1971, Vol. 2, c. 44, s. 32, and superseded by the *Energy Act, 1971*, and the *Petroleum Resources Act, 1971*], deals with other aspects of the natural gas and oil industry. The objects of the legislation are set out in s. 12(1) which I need not quote, but again s. 13 of this Act is identical in its wording to s. 18 of the *Petroleum Resources Act, 1971*, quoted above.

The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim *generalia specialibus non derogant*. For a discussion of the effect of this rule I will only refer to the case of *City of Ottawa v. Town of Eastview et al.*, [1941] S.C.R. 448 commencing at p. 461 [1941] 4 D.L.R. 65 at p. 75, 53 C.R.T.C. 193, and to the Dictionary of English Law (Earl Jowitt), at p. 862.

In the case before this Court, it is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

The *Planning Act*, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as in contained, for example, in the *Ontario Energy Board Act*, the *Energy Act* and the *Petroleum Resources Act, 1971*.

In the result, therefore, and in response to the questions with re-

spect to which leave to appeal was granted, this Court certifies to the Ontario Municipal Board:

(a) Section 4.2.3. of By-law 40 as amended, of the Township of Dawn is ultra vires the said municipality, and

(b) The Ontario Municipal Board therefore is without jurisdiction to approve the said by-law as amended in its present form by reason of section 4.2.3. thereof.

This Court further certifies that should the Ontario Municipal Board see fit to exercise the powers vested in it by s. 87 of the *Ontario Municipal Board Act*, the said By-law 40, as amended, may be approved after deleting from s. 4.2.3. the words "Except as limited herein" at the commencement of the said section and all the words after the word "thereto" in the fourth line of the said by-law as printed down to and including the words "road or highway" in subcl. (c) of the said s. 4.2.3., so that s. 4.2.3. as so approved would read:

> Nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto.
>
> Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

The appellants and the Ontario Energy Board are entitled to their costs of this appeal.

Appeal allowed.

[COUNTY COURT]
JUDICIAL DISTRICT OF YORK

Box v. Ergen

FERGUSON, Co. Ct. J. 23RD DECEMBER 1976.

Practice — Writ of summons — Substituted service — Application to set aside order permitting substituted service on defendant's liability insurer — Insurer unable to communicate with defendant — Order for substituted service set aside.

[*Saraceni v. Rechenberg*, [1971] 2 O.R. 735; affd *ibid.* at p. 738, distd; *Starosta v. Simpson et al.* (1974), 6 O.R. (2d) 384, discd; *Sakalo v. Tassotti, Lori et al.*, [1963] 2 O.R. 537, 40 D.L.R. (2d) 294, refd to]

APPLICATION to set aside an order of Henry, J., permitting substituted service of the writ upon the defendant's liability insurer.

P. Slocombe, for plaintiff.
S. C. Tessis, for applicant, Royal Insurance Company.

FERGUSON, Co. Ct. J.:—This is a motion to set aside the order of His Honour Judge Henry dated September 24, 1976, whereby it was ordered that substituted service of the writ of summons be affected on the defendant by addressing the writ to the defendant

Case Name:

Great Lakes Power Ltd. v. Ontario (Energy Board)

Between
Great Lakes Power Limited, Appellant, and
Ontario Energy Board, Respondent

[2009] O.J. No. 3146

253 O.A.C. 1

179 A.C.W.S. (3d) 490

Court File No. 610/08

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

J.M. Wilson, S.N. Lederman and K.E. Swinton JJ.

Heard: June 2, 2009.
Judgment: July 21, 2009.

(44 paras.)

Natural resources law -- Public utilities -- Operation of utility -- Toll methodology -- Rates -- Regulatory tribunals -- Appeals -- Appeal by Great Lakes Power Ltd (GLPL) from a decision of the Ontario Energy Board (OEB) dismissed -- GPLP was a licensed distributor, transmitter and generator of electricity -- The OEB decision refused GLPL's request for authorization to recover $14,890,315 through electricity distribution rates as GLPL's costs first had to be reviewed for reasonableness -- The OEB was obliged to protect the interests of ratepayers by ensuring the reasonableness of a distributor's revenue requirement -- Therefore, the OEB's conclusions were reasonable and it made no error of law or jurisdiction.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, s. 33, s. 78(3)

O.Reg. 339/02,

Counsel:

Alan H. Mark and Christine Kilby, for the Appellant.

Glenn Zacher and Patrick G. Duffy, for the Respondent.

The judgment of the Court was delivered by

S.N. LEDERMAN J.:--

Nature of the Proceeding

1 The Appellant, Great Lakes Power Limited ("GLPL"), appeals from the Decision and Order of the Ontario Energy Board (the "OEB"), dated October 30, 2008 (the "Decision"). The Decision was the OEB's ruling on a rate application by GLPL. GLPL contends that the Decision had the effect of denying GLPL recovery of all of its costs of service, including a return on its invested capital, of its electricity distribution business since 2002.

Background

2 GLPL is a private company that is a licensed distributor, transmitter and generator of electricity. It provides services to a small customer population in an expansive area of Northern Ontario. The OEB is the regulator of the Ontario electricity sector and has extremely broad authority under s. 78(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B) ("*OEBA*") to make orders approving or fixing "just and reasonable rates" for the distribution of electricity. As a privately owned utility, GLPL has always been allowed a return on equity ("ROE") and such return is recovered by way of rate treatment.

3 Prior to May 1, 2002, GLPL's rates were "bundled rates" for transmission, distribution and costs of power. As a result of the legislated restructuring of Ontario's electricity industry in May, 2002, GLPL was no longer able to maintain bundled rates for its distribution customers. As a result, it could no longer pass a portion of distribution costs on to non-distribution customers.

4 On March 28, 2002, GLPL filed a distribution rate application with the OEB (the "2002 Application") wherein it sought approval of a revenue requirement of $12.7 million. Included in this amount was a ROE of $2,891,600.

5 The restructuring of the electricity industry then underway in Ontario was going to result in a substantial rate increase for GLPL's distribution customers, if unmitigated.

6 To avoid the impact of "rate shock" on customers, GLPL voluntarily proposed a rate mitigation plan, which would result in 2002 and 2003 rates being set at levels which would recover revenues of only $9.8 million and defer the recovery of the remainder of the $12.7 million revenue requirement over four years beginning in 2005 (the "Deferral Plan").

7 To ensure that GLPL would have unbundled distribution rates in place for the electricity market opening on May 1, 2002, as required by legislation, the OEB issued an interim order (the "2002 Interim Order"). The OEB approved the rate proposed by GLPL's 2002 Application necessary to recover $9.8 million annually for its costs, which, according to GLPL, was calculated on the basis of approval and implementation of the Deferral Plan.

8 Commencing on May 1, 2002, GLPL charged the rates authorized by the 2002 Interim Order and began deferring approximately $2.8 million per year that it alleges that it has foregone as a result of its voluntary rate mitigation plan. It accumulated those amounts in its books in Account 1574 (a deferral account authorized by the *Accounting Procedures Handbook* issued by the OEB) to be collected at some future period.

9 Prior to the OEB conducting a full hearing in GLPL's 2002 Application, the Ontario Legislature, in December 2002, enacted Bill 210 to implement a "rate freeze" that prohibited the OEB from adjusting distribution rates without approval of the provincial Minister of Energy. Included in the legislation was a provision that deemed all outstanding interim rate orders to be final rate orders, such that the OEB's 2002 Interim Order was made a final Order. Bill 210 also created "Regulatory Assets" in the form of amounts recorded in prescribed accounts to be recovered at a prescribed point in the future. The Regulatory Asset accounts were intended to capture costs incurred by distributors in readying themselves for market opening. By regulation O.Reg. 339/02, Account 1574 was included in such Regulatory Assets.

10 On December 9, 2004, electricity rates were "unfrozen" by the enactment of Bill 100. As a result, GLPL was permitted to apply to the OEB for the approval of new rates. On January 17, 2005, GLPL applied to the OEB to recover a portion of outstanding balances in its Regulatory Asset accounts. GLPL's application expressly included the recovery of a portion of the outstanding balance in Account 1574. On March 30, 2005, the OEB approved, on an interim basis, recovery of 80% of the amount sought by GLPL. It thereby allowed GLPL to recover $1,265,541 of its Regulatory Asset account balances (including amounts from Account 1574), and adjusted GLPL's rates accordingly, effective April 1, 2005 (the "Recovery Order"). From and after April 1, 2005 until the Decision became effective, GLPL recovered, under the express authorization of the OEB, some of the deferred amounts accumulated in Account 1574.

11 On August 31, 2007, GLPL applied to the OEB to set new rates. Among other things, the application sought authorization to recover the balance of its Account 1574 in the amount of $14,890,315 and to recover that balance over 11 years through electricity distribution rates.

The OEB Decision

12 The OEB refused GLPL's request to recover the balance in Account 1574.

13 In the portion of its Decision addressing the recovery of the Account 1574 balance, the OEB focused on whether it had authorized GLPL's use of Account 1574 and whether such authorization was required. Because the 2002 Interim Order did not explicitly mention the Deferral Plan or the $12.7 million revenue requirement, the OEB found that there was insufficient evidence to demonstrate that the OEB had considered the Deferral Plan in setting rates in the 2002 Interim Order. The OEB concluded that the 2002 Interim Order could not be taken even implicitly as having in any way approved the revenue requirement or the accumulation of the deferred amounts in Account 1574.

14 The OEB found that the purpose of its 2002 Interim Order was to provide GLPL on an expedient basis with distribution rates in time for the opening of the new electricity market on May 1, 2002, and that the OEB had not considered the merits of, or approved the proposed rate Deferral Plan.

Jurisdiction and Standard of Review

15 The Divisional Court has jurisdiction to hear this appeal pursuant to section 33 of the *OEBA* which provides that an appeal may be made only on a question of law or jurisdiction.

16 On a question of law, the courts must consider a number of relevant factors before determining the relevant standard of review:

> (i) the presence of absence of a privative clause;
> (ii) the purpose of the Tribunal;
> (iii) the nature of the question at issue; and
> (iv) the expertise of the Tribunal
>
> (See *Dunsmuir v. New Brunswick* (2008), 291 D.L.R. (4th) 577 (S.C.C.) at para. 64.)

17 GLPL submits that having regard to these factors and in particular, the nature of the question at issue, the standard of review that applies is one of correctness.

18 The role of the OEB set out in section 78(3) of the *OEBA* is the setting of rates that are "just and reasonable". GLPL contends that it is settled law in Canada that a rate regulated enterprise must be permitted by the regulator to recover its reasonably incurred costs and a reasonable return on invested capital. Any rate order which does not do so is, by definition, not "just and reasonable". Accordingly, GLPL submits that the OEB erred in law in its decision by setting rates for GLPL which denied it any recovery of the amounts deferred under the Deferral Plan and, as a result, was not "just and reasonable" contrary to section 78(3) of the *OEBA*.

19 GLPL submits that while the OEB has the discretion to determine what costs are reasonable and what ROE is reasonable, and in what manner those costs should be collected from rate payers, the OEB cannot deny recovery altogether. Thus, GLPL submits that the question at issue is purely one of law, that is, can the OEB deny recovery of a utility's reasonable costs and ROE? It submits that this is a discrete question of law independent of the facts. Thus, it argues that the standard of review is correctness.

20 The OEB is an expert tribunal, given broad authority under the *OEBA* to protect the interests of consumers by, amongst other things, setting "just and reasonable" distribution rates. Moreover, the decision at issue - the fixing of just and reasonable rates - is the OEB's primary function. It has significant expertise and discretion in setting rates and its decisions have been accorded substantial deference in past jurisprudence (see *Graywood Investments Ltd. v. Toronto Hydro Electric System Ltd*. [2006] O.J. No. 2030, at para. 24 (C.A.)).

21 Counsel for the OEB does not contest the proposition advanced by GLPL that it is settled law that a utility is entitled to recover by way of just and reasonable rates its costs and ROE. That is not the issue. Rather, OEB counsel submits that the issue in this case is whether approximately $15 million in costs that were never subject to scrutiny or review, were properly denied by the OEB pursuant to its rate making authority under section 78(3) of the *OEBA*.

22 We are of the view that the issue in question is not simply a denial by the OEB of any right of recovery of costs by GLPL. Rather, in issue is the basis upon which such denial was made. In setting "just and reasonable" distribution rates, the OEB was engaged in an exercise of fact finding and, as well, applying law and policy considerations. It was performing its core function. Moreover, the OEB was interpreting the meaning and effect of its own 2002 Interim Order and its own review process. Given these matters, the standard of review is reasonableness.

GLPL's Position

23 In its Decision, the OEB focused on whether the 2002 Interim Order could be taken to establish that it had approved the Deferral Plan or that it approved the accumulation of $2.8 million per year in Account 1574 for future recovery from rate payers. It concluded that it did not, and stated at page 13 of its Decision as follows:

> In summary, GLPL's position is without foundation. There is simply no basis upon which the Board can conclude that the accumulation in this account was ever explicitly or implicitly approved by the Board, either as to the amounts added to it over the years, or the more basic question as to the appropriateness of the use made of the account by the Applicant at all. Permitting GLPL to dispose of the account as it has requested would not be consistent with reasonable regulatory practice or common sense, and the GLPL's proposal is denied.

24 GLPL argued that the OEB's conclusion that the 2002 Interim Order and subsequent orders

did not implicitly or explicitly approve the establishment of the deferral account is wrong or alternatively unreasonable and contrary to the evidence.

25 The OEB seized upon the fact that the 2002 Interim Order did not explicitly mention the Deferral Plan or the $12.7 million revenue requirement. As such, the OEB found that there was insufficient evidence to demonstrate that the OEB had considered the Deferral Plan in setting rates in the 2002 Interim Order. The OEB concluded that the 2002 Interim Order could not be taken as having in any way approved the revenue requirement or the accumulation of the deferred amounts in Account 1574.

26 GLPL submitted that prior OEB approval of the use of Account 1574 was not required for the following reasons:

a) Bill 210 expressly made Account 1574 a Regulatory Asset that would be eligible for recovery through rates at a later date. The Board's approval of the accrual therein of deferred amounts was not required;
b) Pursuant to the description of Account 1574 in the Board's own *Accounting Procedures Handbook*, it is within the discretion of the utility, without Board approval, to defer and record in the Account, amounts equal to rate impacts associated with market-based rate of return or transition costs, or extraordinary costs which the utility has decided to defer to future periods. The decision to defer and accrue amounts in Account 1574 did not require Board approval;
c) GLPL was permitted to make an independent decision to use Account 1574. Another example of a Regulatory Asset account is Account 1508. It was also available to GLPL for recording the deferred portion of its full revenue requirement without Board approval and from which the Board is obliged to allow recovery as long as the amounts sought to be recovered are reasonable. Account 1508 does not require Board authorization.

27 In summary, it is GLPL's position that although it may have been within the scope of the OEB's authority to consider the reasonableness of the costs in the proposed Deferral Plan, the OEB's prior approval to accrue costs in Account 1574 was not required.

28 GLPL submits that in any event, the 2002 Interim Order permitted accrual and recovery of Account 1574 amounts. It submits that by approving the rates proposed in GLPL's 2002 Application, the OEB necessarily authorized the accrual of the deferred amounts in Account 1574. It submits that the very making of the 2002 Interim Order had to allow for a fair return on GLPL's invested capital. The only way for GLPL to have earned a fair return on capital was if the OEB's 2002 Interim Order approved the Deferral Plan and GLPL's revenue requirement of $12.7 million - that is, $9.8 million received in rates, and $2.9 million per year deferred and subsequently to be recorded in Account 1574.

29 Moreover, GLPL pointed to the fact that on January 17, 2005, GLPL applied to the OEB to recover a portion of the outstanding balances in its Regulatory Asset accounts. GLPL's application expressly included the recovery of a portion of the outstanding balance in Account 1574 which was in the list of Regulatory Assets for which recovery was sought. Over 80% of the rate increase granted by the OEB in its order dated March 30, 2005 related specifically to Account 1574. In that order, the OEB allowed GLPL to recover $1,265,541 of its Regulatory Asset account balances (including amounts from Account 1574) and adjusted GLPL's rates accordingly, effective April 1, 2005. Although this was an interim order, the decision later issued by the OEB did not change the terms of the order as they related to Account 1574. Therefore, GLPL was allowed to recover under the express authorization of the OEB, some of the deferred amounts accumulated in Account 1574.

Analysis

30 Whether express OEB prior authorization was required for the opening or establishment of Account 1574, or whether such authorization was implicit in the 2002 Interim Order, or was granted retroactively by the 2005 interim Recovery Order, misses the main point in issue, which is whether the OEB would have approved a revenue requirement of $12.7 million without an appropriate review.

31 The OEB's Decision denying recovery was a response to the argument advanced by GLPL that the OEB approved the Deferral Plan and that the 2002 Interim Order when made final (by reason of Bill 210) established GLPL's unconditional right to access the deferred amounts in Account 1574. GLPL's position is that once the 2002 Interim Order was finalized by the operation of Bill 210, the OEB could not deny recovery. GLPL argued that its only discretion was to determine how recovery was to be effected in the manner of setting rates over a future period of time.

32 GLPL acknowledges that had Bill 210 not intervened, there would have been in the normal course, a prudency review that would have taken place after the 2002 Interim Order and before a final order was issued. GLPL, however, takes the position that a prudency review was foreclosed because of Bill 210 converting interim orders into final orders.

33 The OEB held that its 2002 Interim Order neither authorized nor approved the Deferral Plan and it would not do so without GLPL's costs being subject to scrutiny by a prudency review.

34 Although deferral plans may be allowed as an exception to the policy against retroactive rate setting, the OEB concluded that to accept GLPL's argument would deprive the OEB of any opportunity to have a review of GLPL's costs. The heart of its Decision in this regard is found at pages 11-12 of its reasons as follows:

> Secondly, GLPL's position ignores the context for the Board's May 13, 2002 interim decision. GLPL's distribution business was not regulated by the Board until 2002. The May 13, 2002 interim decision and order was the first Board order setting rates for GLPL's distribution business. *It is inconceivable that the*

> *panel that rendered the May 13, 2002 decision would have approved a $12.7 million revenue requirement (and the rate mitigation plan) without any input from the interested parties. To have done so would have been totally inconsistent with the Board's longstanding practice of ensuring that affected parties have a fair opportunity to be heard*. (Emphasis added)

35 It was reasonable for the OEB to conclude that before there can be recovery of the amounts in Account 1574, GLPL would be obliged to have its costs undergo a review by the OEB for a reasonableness assessment. The *OEBA* requires that the OEB protect the interests of ratepayers and this includes reviewing a distributor's revenue requirement and ensuring that it is reasonable before passing these costs off to customers through rates. If this is not done, electricity customers are put at risk.

36 The mere happenstance of Bill 210, that froze rates by deeming interim orders to be final orders, did not relieve GLPL of having its costs undergo appropriate scrutiny for reasonableness before recovery of those costs would be allowed.

37 It is of significance that the 2002 order was interim in nature and approved the rates proposed by GLPL necessary to recover $9.8 million. The Supreme Court of Canada commented on the nature of interim rate orders in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1989), 60 D.L.R. (4th) 682 at pg. 705 as follows:

> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. *Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order*. [Emphasis added.]

38 And while acknowledging that rates must be just and reasonable whether approved by interim or final order, the Supreme Court went on to say at page 706:

> However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for interim decision. It would be useless to order a final hearing if the [Board] was bound by the evidence filed at the interim hearing.

39 The fact remains that the GLPL's full revenue requirement of $12.7 million did not undergo the review process which, in the normal course, would have required notice to interested parties and an opportunity for them to present submissions at a hearing. To this day no prudency review has

taken place, nor has one been sought by GLPL.

40 The costs upon which GLPL's rate Deferral Plan is premised were never reviewed by the OEB and it would violate the OEB's statutory obligation to ratepayers and the "regulatory compact" (as coined by the Supreme Court of Canada in *Atco Gas & Pipelines Ltd. v. Alberta (Energy Utilities Board)* (2006), 263 D.L.R. (4th) 193 at para. 63 (S.C.C.), requiring a balancing of rights and interests of utilities against those of ratepayers) to permit recovery of those costs without this necessary review.

41 In its Decision, the OEB was engaged in an interpretation of its own 2002 Interim Order and knew full well the limited review of GLPL's costs that had been undertaken at the time that the 2002 Application was made. At p. 13 of its Decision, the OEB stated:

> Thirdly, GLPL is attaching much more significance to an interim order than is warranted. Section 21(7) of the *OEB Act* states: "The Board may make interim orders pending the final disposition of a matter before it." The evidentiary basis for interim rate decisions is almost always less complete than it is for a final decision and the applicant's pre-filed evidence is generally untested.

42 The OEB should be afforded due deference when it stated that to read its 2002 Interim Order as approving a revenue requirement of $12.7 million was "inconceivable" and " totally inconsistent with the OEB's longstanding practice of ensuring that affected parties have a fair opportunity to be heard".

43 When viewed in this context, it is clear that the OEB's conclusions regarding the 2002 Interim Order were reasonable. It made no error of law or jurisdiction.

Conclusion

44 Accordingly, the appeal is dismissed. As agreed by counsel there will be no costs of the appeal.

S.N. LEDERMAN J.
J.M. WILSON J.
K.E. SWINTON J.

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Kitchen v. Royal Air Forces Ass'n et al., [1958] 2 All E.R. 241, where he stated at p. 249:

> What is covered by equitable fraud is a matter which LORD HARDWICKE did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

In that case it was held that the action of solicitors in failing to disclose the source of settlement funds amounted to concealment by fraud, so the *Limitations Act* did not bar a negligence action against the solicitors.

I find that the act of the solicitors in informing the clients that they had obtained an advance ruling and their failure to disclose the true nature of their services amounted to concealed fraud. If the clients had been aware that not all steps had been taken to protect their tax positions they may have made an appointment for an immediate taxation. Instead, the true nature of the solicitors' services was not discovered until May, 1979, when the appeal was allowed. Accordingly, the 12-month period did not begin to run until this time, when the concealed fraud was discovered, so this application has not been brought outside the limitation period in s. 10 of the *Solicitors Act*.

In the circumstances, I find it necessary to exercise my discretion and refer the solicitors' bills for taxation to the Taxing Officer at Toronto. The applicants are entitled to their costs of this application on a solicitor-and-client basis forthwith after taxation.

Application allowed.

RE CITY OF PETERBOROUGH AND CONSUMERS' GAS CO. et al.

Ontario High Court of Justice, Divisional Court, Henry, Reid and Griffiths, JJ.
April 22, 1980.

Oil and gas — Natural gas — Franchises — Act empowering Ontario Energy Board to renew or extend term of right to supply natural gas to municipality for such period and upon such terms as Board may prescribe if public convenience and necessity appear to require it — Board extending franchise agreement between supplier and municipality for 20 years upon terms of draft of new franchise agreement prepared by supplier — Act does not require that terms and conditions be previously agreed upon or be acceptable to municipality — Board has jurisdiction to make order — Municipal Franchise Act, R.S.O. 1970, c. 289, s. 10.

APPEAL from a decision of the Ontario Energy Board varying an existing franchise agreement for the supply of natural gas to the appellant municipality.

G. H. T. Farquharson, Q.C., for appellant.
P. Y. Atkinson, for Consumers' Gas Company.
T. C. Marshall, Q.C., for Ontario Energy Board.

The judgment of the Court was delivered orally by

HENRY, J.:—This appeal is brought before us by the Corporation of the City of Peterborough, with leave granted by Callaghan, J., on August 22, 1979, to argue the following question:

> Did the Ontario Energy Board exceed its jurisdiction and authority under section 10(2) of the Municipal Franchises Act in imposing contractual obligations on the appellant which varied existing obligations or which were not contained in the existing franchise agreement dated the 26th day of January, 1959 on an application to the Board under the said section for renewal?

The appeal arises out of a franchise agreement made between the city and the Consumers' Gas Company (one of the respondents herein) on January 26, 1959, permitting the company to provide gas services to the city for a period of 20 years. That franchise agreement was set to expire on January 26, 1979.

Negotiations were undertaken between the company and the city with a view to the renewal of the franchise upon its expiry. It appears that agreement was not reached on the terms to be embodied in a new franchise agreement. As a result the matter came before the Ontario Energy Board as will be described.

In the circumstances regard must be had to the provisions of the *Municipal Franchises Act*, R.S.O. 1970, c. 289, ss. 3, 9 and 10 [am. 1974, c. 59, s. 1; 1979, c. 83, s. 1].

This statute provides for the franchising of the supply, *inter alia*, of natural gas, manufactured gas and other gases and it is provided in s. 3 that the municipal corporation shall not grant permission to supply gas to the municipality unless a by-law setting forth "the terms and conditions upon which and the period for which such right is to be granted" has been assented to by the municipal electors.

Section 9 provides that no by-law granting the right to supply gas shall be submitted to the municipal electors for their assent unless "the terms and conditions upon which and the period for which such right is to be granted, renewed or extended" have first been approved by the Ontario Energy Board. In granting such approval the Ontario Energy Board is by s-s. (3) required to hold a public hearing after giving notice to proper parties, and thereafter the Board may dispense with the assent of the electors.

Section 10 of the Act provides in part as follows:

> 10(1) Where the term of a right referred to in clause *a*, *b* or *c* of subsection 1 of section 6 that is related to gas or of a right to operate works for the

distribution of gas or to supply gas to a municipal corporation or to the inhabitants of a municipality has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

(3) The Board shall not make an order under subsection 2 until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

It was particularly with respect to s. 10 that Mr. Farquharson addressed his arguments before us.

In these circumstances the company applied to the Board under s. 10 in view of the imminent expiry of the existing franchise agreement asking for an order for an interim extension, which was granted, and the final renewal or extension of the term of the right under the franchise. Notice was given to persons who might wish to appear at a hearing which the Board advertised would be held. The company and the city among others appeared before the Board at the hearing. Before the Board, among other materials, was the expiring agreement, a proposed draft prepared by the company of a new franchise agreement which differed in some respects from the expiring agreement, and an answer filed by the city in the proceedings stating that the city would accept the company's proposed draft if certain amendments were made.

The Board then held the hearing and considered the contending proposals. There is no issue before us as to the adequacy or fairness or completeness of that hearing. In the result it rejected all of the city's proposals and accepted those of the company. The order of the Board then imposed terms and conditions, some of which were imposed upon the city that the city does not accept.

Mr. Farquharson's submissions on behalf of the city are really twofold. First he says that the Board under this statutory authority may only extend or renew an agreement that is in existence between the city and the company, whether that be the expiring agreement itself or a new one on terms negotiated. Second he says that no terms or conditions may be imposed by the Board upon the city that the city does not accept — in effect he urges us to interpret s. 10 as saying that terms and conditions are imposed upon the applicant who is seeking the order of the Board.

With respect we do not agree with these submissions.

In the sections that I have cited there is no requirement that the "terms and conditions" must be reached by agreement. No doubt this route will frequently be followed in circumstances such as these and there will be agreement between the parties as to the terms and conditions that ought to be imposed and it may be that the Board will adopt them. If, however, there is no agreement, it is obviously a matter for adjudication by the Board and they must decide the terms and conditions that the Act contemplates. This is a matter that is entirely within the Board's discretion, to be exercised after a proper hearing, and in our opinion that discretion was properly exercised. There is nothing in the statutory provisions to require that the terms and conditions found in the expiring agreement must be continued or that what is prescribed by the Board as a result of its adjudication be agreeable to either or both of the parties. It is for the Board to adjudicate when the matter is set down before them. Assuming that the hearing has been properly held, it is immaterial that the terms and conditions imposed are not those either in the expiring agreement or in a new agreement or are acceptable to the contending parties.

At the conclusion of the hearing the Board made the following order:

1. The Board is of the opinion that public convenience and necessity require it to make this Order.
2. The term of Consumers' right to construct and operate works for the transmission and distribution of gas in and through the City of Peterborough and to supply gas to the Corporation of the City of Peterborough and to its inhabitants is hereby renewed for a period of 20 years from the issue date of this Order.
3. The right is extended upon the terms and conditions of the proposed franchise agreement attached hereto as Appendix "A".
4. Consumers' shall pay to the Board its costs in the amount of $2,006.00.

In the reasons for its decision it simply dealt with that part of the matter as follows:

> Under s. 10(2) of the Act, the Board has jurisdiction, if public convenience and necessity appear to require it, to make an order renewing or extending the term of the right of a franchise for such period of time and upon such terms and conditions as may be prescribed by the Board. The Board is of the opinion that public convenience and necessity require it to make such an order. The Board has concluded that the term of right shall be renewed for a period of 20 years upon the terms and conditions contained in the proposed franchise agreement as submitted by Consumers' and attached hereto as app. "B". The costs of the Board shall be paid by the applicant.

In the result we find no fault in the decision of the Board. What it did was properly done within its statutory authority.

The appeal will therefore be dismissed. As no costs are asked there will be no order as to costs.

Appeal dismissed.

RE O'REILLY (No. 2)

Ontario High Court of Justice, Rutherford, J. April 25, 1980.

Executors and administrators — Executors de son tort — Testator devising farm to wife for life with remainder to nine children — Six children having left farm — Remaining three continuing farming operation with mother and after her death in own right — Whether executors de son tort — Whether limitation period applicable — Limitations Act, R.S.O. 1970, c. 246, s. 43.

Real property — Adverse possession — Requisites — Three of nine beneficiaries remaining on farm after testator's death and treating land as their own — Other beneficiaries taking no action for many years — Beneficiary subsequently appointed administrator of testator's estate — Whether three beneficiaries executors de son tort — Whether interest of other beneficiaries barred — Whether Court should deny recovery on basis of laches and acquiescence — Limitations Act, R.S.O. 1970, c. 246, s. 43.

O died in 1945 leaving a will devising his farm, stock and implements to his wife for life, with remainder to his nine children. All the children except A, B and C had already left the farm. The latter three remained on the farm with their mother and carried on the farming business with her until her death in 1957. The mother left all her property to A, B and C by her will. They continued to reside on the farm, maintained the property, paid the taxes and insurance premiums and completed the building of a new house on the farm. In 1962 some of the farm buildings were destroyed by fire and most of the remaining stock and equipment were auctioned off. A died in 1964 and left all his property to B and C by will. Thereafter, B and C continued to live on the farm, but rented out most of it. After A's death, one of the other children of O brought citation proceedings requiring B and C to produce their father's will. B and C failed to comply with the citation, and the matter was not pursued further.

In 1978, another of the children of O was granted letters of administration with the will annexed of the father's estate. He brought an application to construe the will, an application for advice and directions, and sought an order allowing him to register a caution on title. B and C also brought an application to construe the will and an application for a declaration that the interests of their brothers and sisters had been extinguished. On the application to construe the will, it was held by Craig, J., that it devised a life estate to the widow, with remainder to the children. He further directed the trial of an issue to determine whether the title of the children other than B and C had been extinguished. On the trial of that issue, *held*, their title was extinguished and the application for an order authorizing the administrator to register a caution should be refused.

(1) In order for a person to constitute himself an executor *de son tort* his conduct must be such as to indicate an intention to usurp the functions or authority of an executor. B and C had no such intention. They were simple, honest people, but virtually illiterate. They claimed possession on the basis of their interpretation of their parents' wills and their interpretation was reasonable, having regard to the

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DATE: 20090427

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Low and Karakatsanis JJ.

B E T W E E N:	)	
	)	
	)	*James Douglas*, for the Appellant
	)	
TORONTO HYDRO-ELECTRIC SYSTEM LTD.	)	
Appellant	)	
	)	
- and -	)	*Michael Millar*, for the Respondent
	)	
ONTARIO ENERGY BOARD	)	
	)	
Respondent	)	
	)	
- and -	)	*John De Vellis*, for the Intervenor
	)	
SCHOOL ENERGY COALITION	)	
Intervenor	)	
	)	
	)	**HEARD at Toronto:** March 30, 2009

KARAKATSANIS J.

[1] The appellant, Toronto Hydro-Electric System Ltd. (THESL) appeals s. 3.4 of Ontario Energy Board (OEB) Decision EB-2007-0680 dated May 15, 2008. The OEB allocated the net after-tax gains on the sale of three properties by the appellant to reduce the appellant's revenue requirement for 2008 and thereby reduced electricity distribution rates to ratepayers.

[2] The appellant submits that the OEB exceeded its jurisdiction in this allocation as it had no jurisdiction to appropriate the proceeds of sale to the ratepayers. It further submits that by allocating the entire net after tax gain on the sale of the properties to reduce the appellant's revenue requirement, the OEB granted ratepayers a property interest in the property of the utility, contrary to principles of corporate law and the Supreme Court of Canada's decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140.

[3] The respondent and the intervenor take the position that the OEB was acting within its rate setting authority and expertise and that deference is required. Furthermore they submit that the OEB was entitled to offset the proceeds of sale from the revenue requirements and made no errors of law in so doing.

[4] An appeal to this Court lies only on a question of law or jurisdiction pursuant to s. 33 of the *Ontario Energy Board Act, 1998*, S.O. 1998 c. 15, Sched. B (OEBA).

Background

[5] The appellant is an electricity distributor licensed by the OEB, which regulates the rates THESL can charge for electricity pursuant to the OEBA.

[6] THESL applied for rate approval for the years 2008, 2009, and 2010. THESL's rate application included submissions on its plans for facilities during that period. The facilities plan was to consolidate seven facilities into three to increase long term efficiencies. Three of the facilities would be sold in 2008. A fourth property would be sold after the period covered by the application. Two of the existing properties would be "repurposed to suit THESL's needs" and a third would be newly built.

[7] In the rate application, THESL voluntarily proposed to apply 50% of the net after-tax gains from the sale of the properties to reduce its revenue requirement. In addition, an OEB policy stipulates that in the normal course, ratepayers and shareholders share 50/50 in capital gains or losses below a certain threshold that applied in this case.

[8] THESL's position was that it would re-invest the other 50% of the capital gains share in the capital assets, thus creating efficiencies and avoiding the cost of borrowing those funds.

[9] After referring to the fact that properties to be sold in 2008 have been rendered redundant and have been or will be sold as part of the THESL's Facilities Consolidation and Renewal Plan, the OEB found:

> If it were not for the Plan, the properties would continue to be used and useful. The properties' functions are useful and will be transferred to or replaced by other facilities, at

> a substantial cost to the ratepayer. The total capital cost of the Plan to 2011 is estimated at $105 Million. The estimated capital cost of the Plan up to and including 2009 is $69.5 Million.
>
> To defray these substantial costs to the ratepayer, the Board finds that 100% of the net after tax gains from the sale of …the properties, that are planned to be sold in 2008 should go to the ratepayer. The Company's revenue requirement for the 2008 test year shall be adjusted downward by $10.3 million to reflect this finding.

Standard of Review

[10] The Appellant characterizes the question on appeal as one of 'true' jurisdiction, and therefore, in accordance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paras. 58-59 it must be correct. In the alternative, THESL submits that because the OEB erred in relation to general principles of corporate and property law, its expertise was not engaged and the appropriate standard of review is correctness.

[11] Finally, THESL submits that given that this Court has already determined that the standard of review in relation to similar questions of law by an Energy Board is correctness, it is not necessary to apply a standard of review analysis (*Dunsmuir* at para. 62).

[12] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, at paras. 21 and 32, the Supreme Court of Canada determined that the issue of the Alberta Board's power to allocate proceeds from a sale of utility assets to its ratepayers engages a standard of review of correctness because the issue "goes to jurisdiction". In *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board* (2008), 93 O.R. (3d) 380, leave to appeal granted, the Divisional Court held that the standard of review on a question of law in an appeal from the order of the OEB was correctness; in that case, the OEB directed the manner in which dividends of the utility were to be approved by the Board of Directors as a condition of its rate-setting decision.

[13] Although the appellant has characterized the legal issue as relating to jurisdiction - whether the OEB has an express or implied power to attribute a property interest in the assets of a utility to its ratepayers - I do not accept that characterization. Unlike *ATCO*, which involved the Board's authority to attach conditions to its approval of the sale of a utility's assets, the decision in this case was squarely within the rate setting authority of the OEB. The question of law is whether the OEB may allocate the net after tax gains on the sale of the properties to reduce THESL'S revenue requirements in the course of establishing just and reasonable rates. It goes to the very core of the OEB mandate.

[14] Subsequent to its decision in *ATCO*, the Supreme Court of Canada cautioned in *Dunsmuir* at para. 59, that reviewing judges must not brand as jurisdictional issues that are doubtfully so. The term jurisdiction is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. Jurisdictional questions will therefore be limited to this narrow construction. In my view, the OEB is entitled to enter into the inquiry of whether and how to allocate the capital gains upon the sale of the properties sale proceeds when fixing electricity distribution rates. The legal issue in this appeal does not relate to the jurisdiction of the OEB as contemplated in *Dunsmuir*.

[15] As noted in *Dunsmuir* (at paras. 54, 55 and 60), the standard of review for questions of law may depend upon the nature of the question of law. Where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

[16] In *Toronto Hydro*, the Divisional Court found that the standard of review was correctness in an appeal from a decision of the OEB requiring, as a condition of setting distribution rates, that any dividend paid by THESL to the City of Toronto be approved by a majority of THESL's independent directors. The issue in that case was whether the OEB had jurisdiction to impose conditions on the authority of the directors of a regulated business as to the declaration of dividends (para. 32). The Court noted that the legal question involved general principles of corporate law. In that case, the condition placed on a rate-setting order had no impact on the actual distribution rates. By contrast, the decision under appeal is a rate-setting decision, because it directly affects the revenue requirements of the utility.

[17] An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the OEBA which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests. See *Natural Resource Gas Ltd. v. Ontario Energy Board*, [2006] O.J. No. 2961 (C.A.) at para. 18.

[18] In my view, the question of law raised in this appeal relates to a question within the OEB's own jurisdiction under its enabling statute, which attracts deference. The standard of review is reasonableness.

Analysis

[19] The appellant submits that the OEB exceeded its jurisdiction as the OEB has no express or implied power to attribute a property interest in the assets of a utility to its ratepayers. The appellant argues that the OEB erred and acted unreasonably in allocating all the proceeds of a property sale to ratepayers, as it is contrary to corporate law and improperly accords a property interest in the assets of the THESL. Given that THESL is allowed a fair rate of return, it submits that it is unreasonable to allocate all of the proceeds of sale to the rate payers.

[20] The appellant concedes that the OEB has the jurisdiction to consider the financial circumstances of the utility, including its net gains from the sale of properties, in determining a just and reasonable rate. It argues, however, that in this case the OEB failed to consider the benefits of the facilities plan and proceeded under the erroneous impression that the ratepayers would pay for the entire capital costs of the facilities plan and were therefore entitled to all the profits from the sale of the properties. The appellant submits that in according the ratepayers a property interest in the properties, the OEB erred because pursuant to general corporate law principles, the profits (and the risk of loss) belong to THESL, a company incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.

[21] For the reasons that follow, I find that the OEB had the jurisdiction to allocate the net gains from the sale of properties to the rate-setting formula and that its decision was reasonable.

[22] The OEB regulates the electricity distribution system and is guided by its statutory objectives in s. 1 of the OEBA:

> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the …distribution of electricity and to facilitate the maintenance of a financially viable industry.

[23] The OEB has broad powers to set rates. The OEBA provides at s. 78(3) that "the Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity…." The OEB has broad powers to hear and determine all questions of law and fact, and the discretionary power to make any orders it sees fit (ss. 19(1), (6) and 23(1)). Rate-setting, and the determination of what is just and reasonable as between the utilities and the ratepayers, is at the heart of the OEB's jurisdiction.

[24] The appellant argues that *ATCO* stands for the proposition that a regulator cannot allocate all the proceeds of sale of a utility's property to the ratepayers because this, as noted, is contrary to the principle that customers do not have a property interest in the assets of a utility. In *ATCO*, the decision was made under the regulator's power to approve a sale, not under its rate-making power. However, the Supreme Court of Canada noted at para. 81, that the Board had the ability to modify and fix just and reasonable rates and to give due consideration to any new economic data anticipated as a result of the sale of property.

[25] In fixing rates, the OEB considers a distributor's revenue requirement for the period. The revenue requirement is the amount of money the utility must receive from its customers to cover its costs, operating expenses, taxes, interest paid on debts, and a reasonable rate of return on invested capital. The OEB sets the amount permitted to be treated as debt load for the purposes of determining the revenue requirement and therefore the equity and debt relationship. If property is sold, the amount required to provide a return on investment as part of the revenue requirements is reduced. If the capital gains on proceeds of sale are deducted from the utility's revenue requirement, it further tends to result in lowering the amount ratepayers would be charged. Conversely, if the utility borrows, its revenue requirements include the cost of borrowing. If the utility makes a capital investment, its revenue requirements include a rate of return on the invested capital. An increase in the revenue requirements tends to result in increasing the rates.

[26] Consideration of the financial circumstances of the utility, including its revenue (capital gains) from the sale of assets, is within the jurisdiction of the OEB.

[27] I do not agree with the appellant's submission that the OEB failed to consider the implications of the facilities plan. The lengthy decision deals only with the disputed areas. The decision was rendered following extensive evidence in a lengthy proceeding. The OEB clearly considered the impact of the facilities plan and some of the findings are reflected in its reasons. It found significant future capital costs of the facilities plan. It found that the properties sold or to be sold would have continued to be used and useful but for the facilities plan and that the properties' functions were not surplus, and would be transferred to or replaced by other facilities at substantial cost to the ratepayer.

[28] While the appellant suggests the OEB was under the erroneous impression that the ratepayers would be responsible for the entire future capital costs of the facilities plan, rather than an increased cost arising from that capital investment, it is not reasonable to conclude that the OEB was under such a misapprehension. While the decision could have expressed the relationship between the capital costs and the resulting cost to the ratepayers more clearly, the implications of capital investment and cost of borrowing on the revenue requirements are integral to the OEB rate setting exercise. The capital investment in the facilities plan (including any capital gains re-invested by the utility into future facilities) would impact on ratepayers as an ongoing return on equity routinely built into the rates. Any loans required to implement the

facilities plan would impact on ratepayers as the cost of borrowing would be routinely built into the rates.

[29] The appellants were seeking a significant increase in the rates. The OEB expressed concern about the increase of operating and capital expenditures and the impact on ratepayers. The OEB decision, quoted above, referred to the need to replace the properties with other facilities, at a substantial cost to the ratepayer and concluded:

> To defray these substantial costs to the ratepayer, the Board finds that 100% of the net after tax gains from the sale of the properties should go to the ratepayer. The Company's revenue requirement for the 2008 test year shall be adjusted downward by $10.3 million to reflect these findings.

[30] The language that "the gains…should go to the ratepayer" is unfortunate. However, read in the context of the rate setting process as a whole, and the allocation of revenue to the formula used by the OEB in the decision, it is clear that the OEB was not granting the ratepayers a property interest in the capital gains from the sale of the properties but was allocating a revenue offset – in a similar treatment to revenue from other sources - to adjust the revenue requirements of THESL for the 2008 year.

[31] The OEB also considered the need to replace the functions of that property and the costs to the ratepayer of doing so. It contrasted this case with another in which Union Gas Ltd. wished to sell cushion gas. In that case, the OEB considered *ATCO* and allocated 100% of the gains to the utility, because the cushion gas was truly surplus, in that the utility was not going to replace it. (Decision EB-2005-0211, June 27, 2007.)

[32] The OEB was required to balance the sometimes competing interests between the ratepayers and the appellant in determining just and reasonable rates. The decision is clearly reasonable as it falls within a range of outcomes and is defensible with respect to both the facts and the law. Given the nature of the statutory regime, the power given to the OEB when exercising its core function of setting rates, and its rate setting expertise, deference should be accorded to the decision-making process and the resulting outcome.

[33] For the foregoing reasons the appeal is dismissed. No costs were sought and none are awarded.

Karakatsanis J.

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Swinton J.

_____

Low J.

Released:

COURT FILE NO.: 307/08
DATE: 20090427

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:

TORONTO HYDRO-ELECTRIC SYSTEM LTD.
Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

- and -

SCHOOL ENERGY COALITION
Intervenor

REASONS FOR JUDGMENT

Swinton, Low and Karakatsanis JJ.

Released: April 27, 2009