ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, as amended (the **"OEB Act**").

AND IN THE MATTER OF an Application (the "**Application**") by K2 Wind Ontario Limited Partnership ("**K2 Wind**") for an order under section 92 and subsection 96(1) of the OEB Act granting leave to construct an electricity transmission line and related transmission facilities (the "**Proposed Facilities**").

AND IN THE MATTER OF a motion ("**Motion**") by K2 Wind, filed on April 1, 2013, to strike out the evidence of the intervenor, the Residents Group, filed on March 24, 2013.

AND IN THE MATTER OF Procedural Order No. 4 dated April 5, 2013 providing for submissions by K2 Wind on the Motion.

APPLICANT'S BOOK OF AUTHORITIES

Regulatory Decisions

Case Law

Dated April 8, 2013 at Toronto, ON

DENTONS CANADA LLP
77 King Street, Suite 400
Toronto Dominion Centre
Toronto, ON
M5K 0A1
Fax: (416) 863-4592

Helen T. Newland
Telephone: (416) 863-4471
Facsimile: (416) 863-4592
helen.newland@dentons.com

Nalin Sahni
Telephone: (416) 863-4463
Facsimile: (416) 863-4592
nalin.sahni@dentons.com

Lawyers for the Moving Party,
K2 Wind Ontario Limited Partnership

TO: Ms. Kirsten Walli
Board Secretary
Ontario Energy Board

All Intervenors

TAB 1

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Consolidation Period: From December 31, 2012 to the e-Laws currency date.

Last amendment: See Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2011.

PART VI
TRANSMISSION AND DISTRIBUTION LINES

Leave to construct, etc., electricity transmission or distribution line

92. (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection. 1998, c. 15, Sched. B, s. 92 (1).

Exception

(2) Subsection (1) does not apply to the relocation or reconstruction of an existing electricity transmission line or electricity distribution line or interconnection where no expansion or reinforcement is involved unless the acquisition of additional land or authority to use additional land is necessary. 1998, c. 15, Sched. B, s. 92 (2).

…

Order allowing work to be carried out

96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.

Applications under s. 92

(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.

Condition, land-owner's agreements

97. In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board. 1998, c. 15, Sched. B, s. 97.

———————

Français

Back to top

TAB 2

Français

Electricity Act, 1998

S.O. 1998, CHAPTER 15
Schedule A

Consolidation Period: From December 31, 2012 to the e-Laws currency date.

Last amendment: See Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2012.

PART VIII
ELECTRICAL SAFETY

Definitions

112.1 In this Part,

"Authority" means the Electrical Safety Authority; ("Office")

"authorization" means a licence, certificate or registration issued under this Part, despite the definition of "licence" in subsection 2 (1); ("autorisation")

"Director" means a person appointed as a Director under this Part; ("directeur")

"inspector" means an inspector appointed under this Part; ("inspecteur")

"investigator" means an investigator appointed under this Part; ("enquêteur")

"person" means an individual, a corporation, an association, a partnership or any other entity; ("personne")

"regulations" means the regulations made under this Part, despite the definition of "regulations" in subsection 2 (1). ("règlements") 2004, c. 19, s. 12 (2); 2006, c. 34, s. 12 (1).

Electrical Safety

Regulations, LG in C

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

(a) prescribing the design, construction, installation, protection, use, maintenance, repair, extension, alteration, connection and disconnection of all works, matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario;

(b) prohibiting the use, advertising, display, offering for sale, or other disposal, and the sale or other disposal, publicly or privately, in Ontario, of any such works, matters and things unless and until they have been inspected and approved, or deemed approved;

(c) prescribing the precautions to be taken in the sale or other disposal of such works, matters and things and the warnings and instructions to be given to purchasers and others in advertisements, by circular, labelling, including by tag, seal or other form of labelling, or otherwise, to prevent their use in such manner or under such conditions as may be likely to result in undue hazard to persons or property;

(d) providing for the inspection, test and approval of such works, matters and things before being used in the generation, transmission, distribution, retail or use of electricity in Ontario, and for a process for granting, renewing, suspending, revoking and reinstating approvals for the works, matters and things before they are used for any of those purposes;

(e) requiring compliance with any code, standard, guideline or procedure under a rule of a person retailing electricity to such works, matters and things. 2006, c. 34, s. 12 (2).

Regulations, Minister

(2) The Minister may make regulations,

(a) adopting by reference, in whole or in part, with such changes as the Minister considers necessary or advisable, any code or standard that governs any matter set out in subsection (1) and requiring compliance with any code or standard that is so adopted;

(b) establishing a code of ethics and a committee for the purpose of governing the conduct of authorization holders. 2006, c. 34, s. 12 (2).

Rolling incorporation

(3) If a regulation under clause (2) (a) so provides, a code or standard adopted by reference shall be a reference to it, as amended from time to time, whether before or after the regulation is made. 2006, c. 34, s. 12 (2); 2009, c. 33, Sched. 10, s. 6.

Delegation

(4) Despite subsection 3 (4) of the *Safety and Consumer Statutes Administration Act, 1996*, the Minister may, by regulation, delegate to the Authority the power to make some or all of the regulations under clause (2) (a) or (b). 2006, c. 34, s. 12 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (4) is repealed. See: 2012, c. 8, Sched. 11, ss. 46 (1), 54 (1).

Temporary codes, testing organizations, variations

(5) A director may, in writing,

(a) authorize, subject to such conditions as may be specified and for a limited time, the use of codes, standards, guidelines, plans, specifications and procedures or changes to codes, standards, guidelines, plans, specifications and procedures necessary to accommodate new developments or technological advances and require compliance with them and permit, subject to such conditions as may be specified, variances from them;

(b) designate organizations to test any thing for which standards, plans or specifications are established under this Part and provide for and require the placing of the organization's label on the thing or any parts of the thing that conform to the standards, plans or specifications;

(c) subject to such conditions as he or she may specify, allow a variance from any regulation made by the Minister under clause (2) (a) if, in his or her opinion, the variance would not detrimentally affect the safe use of the thing to which the regulation applies or the health or safety of any person. 2006, c. 34, s. 12 (2).

***Legislation Act, 2006*, Part III**

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to subsection (5). 2006, c. 34, s. 12 (2, 19).

Issuing of plans and specifications

(7) The Authority may, in accordance with the regulations, prepare and issue plans and specifications governing the design, construction and test of works, matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario, and may alter such plans and specifications. 2006, c. 34, s. 12 (2).

Appointment of persons to inspect and test

(8) The Authority may appoint persons, associations or organizations having, in the opinion of the Authority, special knowledge and facilities to inspect, test and report on any works, matters and things mentioned in subsection (1). 2006, c. 34, s. 12 (2).

Prohibition on holding out

(9) No person shall hold themself out as a person who has been appointed under subsection (8) if the person has not been so appointed. 2006, c. 34, s. 12 (2).

Approval by adoption of report

(10) The Authority may approve any work, matter and thing mentioned in subsection (1) by adopting a report made under subsection (8), or otherwise, as the Authority considers advisable. 2006, c. 34, s. 12 (2).

Orders relating to installations, alterations, etc.

(11) The Authority may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things mentioned in subsection (1) as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order. 2006, c. 34, s. 12 (2).

Offences

(12) Every person,

(a) disturbing or interfering with an inspector or other officer in the performance of the inspector's or officer's duty under this section is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(b) refusing or neglecting to comply with this section, or with any regulation, plan or specification made under its authority, is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(c) refusing or neglecting to comply with an order issued by the Authority under subsection (11) is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than $5,000 for each day upon which such refusal or neglect is repeated or continued. 2006, c. 34, s. 12 (2).

Same, corporation

(13) A corporation that is guilty of an offence described in subsection (12) is liable, on conviction, to a fine of not more than $1,000,000. 2006, c. 34, s. 12 (2).

Section not to apply to mines

(14) This section does not apply to a mine as defined in the *Mining Act*, save only as regards any dwelling house or other building not connected with or required for mining operations or purposes or used for the treatment of ore or mineral. 2006, c. 34, s. 12 (2).

Prohibitions

Causing damage

113.0.1 (1) No person shall damage or cause any damage to any work, matter or thing used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario. 2006, c. 34, s. 12 (3).

Interference

(2) No person shall interfere with any work, matter or thing used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario in the course of alterations or repairs to non-electrical equipment or structures except where it is necessary to disconnect or move components of an electrical installation, in which event it shall be the responsibility of the person carrying out the alterations or repairs to ensure that the electrical installation is restored to a safe operating condition as soon as the progress of the alterations or repairs permits. 2006, c. 34, s. 12 (3).

Removal of labels

(3) No person shall, without the consent of the Director, remove any label, tag, seal or warning, as prescribed by the regulations, applied by the Authority to any work, matter or thing used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario. 2006, c. 34, s. 12 (3).

Director

113.1 (1) The Authority may appoint one or more Directors for the purposes of this Part. 2004, c. 19, s. 12 (5).

Restrictions

(2) An appointment is subject to the restrictions, limitations and conditions that the Authority sets out in it. 2004, c. 19, s. 12 (5).

Powers

(3) Unless otherwise stated in the appointment, a Director,

(a) may supervise and direct inspectors and other persons responsible for administering or enforcing this Part, the regulations or an order of the Authority; and

(b) is an inspector and may exercise any of the powers and perform any of the duties of an inspector. 2004, c. 19, s. 12 (5).

Delegation

(4) A Director may delegate in writing any of his or her powers or duties to any person, subject to the restrictions, limitations and conditions that the Director sets out in the delegation. 2004, c. 19, s. 12 (5).

Document of appointment

(5) The Authority shall issue to each Director a document establishing his or her appointment, and the Director shall produce it on request. 2004, c. 19, s. 12 (5).

Authorization

113.2 (1) Except as provided in the regulations, no person shall carry out or propose to carry out, or permit or employ another person to carry out, an activity referred to in the regulations as requiring an authorization without first obtaining an authorization in accordance with this Part and the regulations. 2006, c. 34, s. 12 (4).

Refusal, suspension, etc.

(2) A Director may refuse to grant an applicant an authorization for the carrying out of activities or may refuse to renew, may suspend or may revoke an authorization holder's authorization for the carrying out of activities, if the Director has reason to believe that,

(a) the applicant or authorization holder will not carry out the activities in accordance with the law;

(b) the applicant or authorization holder will not carry out the activities safely;

(c) the applicant or authorization holder lacks the basic resources necessary to carry out the activities;

(d) the applicant or authorization holder will not conduct himself or herself with honesty and integrity or in accordance with the principle of protecting consumers;

(e) the applicant or authorization holder lacks the training, experience, qualifications or skills prescribed by the regulations;

(f) the applicant or authorization holder failed to comply with or to meet a requirement of this Part, the regulations or an order of the Authority;

(g) the authorization holder failed to comply with a restriction, limitation or condition of the authorization;

(h) the authorization holder obtained the authorization through misrepresentation or fraud; or

(i) the authorization holder permitted an unauthorized person to carry out the activities. 2004, c. 19, s. 12 (5).

Conditions

(3) An authorization is subject to,

(a) the restrictions, limitations and conditions that are prescribed by the regulations; and

(b) the restrictions, limitations and conditions that are imposed by a Director. 2004, c. 19, s. 12 (5).

Compliance with regulations

(4) In imposing a restriction, limitation or condition on an authorization, a Director shall comply with the rules prescribed by the regulations. 2004, c. 19, s. 12 (5).

Notice of proposal

113.3 (1) Subject to subsection (2), a Director who proposes any of the following shall serve notice of the proposal, together with written reasons, on the applicant or authorization holder:

1. To grant an authorization subject to restrictions, limitations or conditions imposed on it by the Director.
2. To renew an authorization subject to restrictions, limitations or conditions imposed on it by the Director.
3. To refuse to grant an authorization.
4. To refuse to renew an authorization.
5. To suspend an authorization.
6. To revoke an authorization. 2004, c. 19, s. 12 (5).

Exceptions

(2) A notice of proposal is not required,

(a) in the case of a provisional suspension of an authorization, or a provisional refusal to renew an authorization, under section 113.5;

(b) in the case of a refusal to grant or renew an authorization, or a suspension of an authorization, under section 113.6. 2004, c. 19, s. 12 (5).

Service of notice

(3) The Director may serve the notice of proposal personally or by registered mail addressed to the applicant or authorization holder at the last address known to the Director, by fax or by any other form of electronic transmission if there is a record that the notice has been sent. 2004, c. 19, s. 12 (5).

Deemed service, registered mail

(4) If registered mail is used, the notice shall be deemed to have been served on the third day after the day of mailing, unless the person on whom notice is being served satisfies the Director that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice until a later date. 2004, c. 19, s. 12 (5).

Deemed service, electronic transmission

(5) If a fax or any other form of electronic transmission is used, the notice shall be deemed to have been served on the day after the fax was sent or the other transmission was made, unless the person on whom notice is being served satisfies the Director that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice until a later date. 2004, c. 19, s. 12 (5).

Hearing

113.4 (1) A notice of proposal shall inform the applicant or authorization holder that the applicant or holder has a right to a hearing before the Director if the applicant or holder applies to the Director for the hearing within 15 days after being served with the notice. 2004, c. 19, s. 12 (5).

Extension of time

(2) The Director may extend the time for applying for a hearing, either before or after the 15-day period expires, if he or she is satisfied that,

(a) there are reasonable grounds for granting the extension; and

(b) there are apparent grounds for granting to the applicant or authorization holder the relief sought at the hearing. 2004, c. 19, s. 12 (5).

Directions

(3) In granting an extension, the Director may give any directions he or she considers appropriate. 2004, c. 19, s. 12 (5).

If no hearing requested

(4) If the applicant or authorization holder does not apply for a hearing in accordance with this section, the Director may carry out the proposal stated in the notice of proposal. 2004, c. 19, s. 12 (5).

If hearing requested

(5) If the applicant or authorization holder applies for a hearing in accordance with this section, the Director shall set a time for and hold the hearing, after issuing a notice of hearing to the applicant or authorization holder. 2004, c. 19, s. 12 (5).

Findings of fact

(6) The findings of fact made by the Director upon the hearing shall be based exclusively on evidence admissible or matters that may be noticed under sections 15, 15.1, 15.2 and 16 of the *Statutory Powers Procedure Act*. 2004, c. 19, s. 12 (5).

Decision

(7) After the hearing, the Director may carry out the proposal stated in the notice of proposal if,

(a) in the case of a proposal mentioned in paragraph 3, 4, 5 or 6 of subsection 113.3 (1), the Director is satisfied that any of the grounds set out in subsection 113.2 (2) exists; or

(b) in the case of a proposal mentioned in paragraph 1 or 2 of subsection 113.3 (1), the Director is satisfied that the imposition of the restrictions, limitations and conditions complies with the rules mentioned in subsection 113.2 (4). 2004, c. 19, s. 12 (5).

Provisional suspension or refusal to renew if safety involved

113.5 (1) A Director may, by serving notice on an authorization holder and without a hearing, provisionally suspend or provisionally refuse to renew the holder's authorization if, in the Director's opinion, the carrying on of the activities under the authorization is an immediate threat to public safety or the safety of any person. 2004, c. 19, s. 12 (5).

Notice

(2) A notice under subsection (1) shall state the Director's reasons for the decision to provisionally suspend or provisionally refuse to renew the authorization and shall inform the authorization holder that the holder has a right to a hearing before the Director if the holder applies to the Director for the hearing within 15 days after being served with the notice. 2004, c. 19, s. 12 (5).

Application of provisions

(3) Subsections 113.3 (3), (4) and (5) apply with respect to a notice under this section and subsections 113.4 (2), (3), (5) and (6) apply for the purposes of a hearing under this section. 2004, c. 19, s. 12 (5).

Decision

(4) After the hearing,

(a) if the Director is satisfied that a ground set out in subsection 113.2 (2) exists, the Director may suspend, revoke or refuse to renew the authorization;

(b) if the Director is satisfied that no ground set out in subsection 113.2 (2) exists, the Director,

(i) shall reinstate the suspended authorization, or

(ii) shall renew the authorization and may impose restrictions, limitations or conditions on the authorization in accordance with subsection 113.2 (4). 2004, c. 19, s. 12 (5).

Default in payment

113.6 (1) A Director may refuse to grant or to renew an authorization or may suspend an authorization, if,

(a) the applicant or authorization holder is in default of the payment of a fee, an administrative penalty, a cost or another charge owing to the Authority; or

(b) the applicant or authorization holder is in default of the payment of a fine imposed on conviction for an offence under this Part. 2004, c. 19, s. 12 (5).

Notice and hearing not required

(2) A Director is not required to give notice or to hold a hearing before acting under subsection (1). 2004, c. 19, s. 12 (5).

Granting of authorization or renewal

(3) If an application for an authorization or for the renewal of an authorization is refused under subsection (1), the applicant is entitled to the authorization or renewal on providing proof to the Director that the applicant is no longer in default. 2004, c. 19, s. 12 (5).

Reinstatement of suspended authorization

(4) If an authorization is suspended under subsection (1), the authorization holder is entitled to have the authorization reinstated on providing proof to the Director that the authorization holder is no longer in default. 2004, c. 19, s. 12 (5).

Opportunities before hearing

113.7 (1) A notice of hearing issued by a Director under this Part shall afford to the applicant or authorization holder a reasonable opportunity to show or to achieve, before the hearing, compliance with all lawful requirements for the granting, retention or renewal of the authorization. 2004, c. 19, s. 12 (5).

Examination of documentary evidence

(2) The applicant or authorization holder shall be given an opportunity to examine, before a hearing by a Director under this Part, any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing. 2004, c. 19, s. 12 (5).

Recording of evidence

113.8 (1) The oral evidence taken before a Director at a hearing under this Part shall be recorded at the request of the applicant, the authorization holder or the Director, and the recording shall be at the cost of the person making the request. 2004, c. 19, s. 12 (5).

Transcript

(2) If copies of the transcript are requested, they shall be provided at the cost of the person making the request. 2004, c. 19, s. 12 (5).

Conflict

113.9 If, under the *Safety and Consumer Statutes Administration Act, 1996*, this Part is designated legislation to be administered by a designated administrative authority, and if a regulation made under clause 15 (1) (c) of that Act requires that, before an appeal to the Divisional Court is made under section 113.10 of this Act, a review panel must review the decision made by a Director after a hearing under this Act, that regulation prevails over this Part to the extent of any conflict. 2004, c. 19, s. 12 (5).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 113.9 is repealed and the following substituted:

Conflict

113.9 (1) A regulation made under clause 42 (1) (a) of the *Delegated Administrative Authorities Act, 2012*, requiring a review panel to review a Director's decision before the decision may be appealed to the Divisional Court under section 113.10 of this Act, prevails over this Part to the extent of any conflict. 2012, c. 8, Sched. 11, s. 46 (2).

Application of subs. (1)

(2) Subsection (1) applies only if this Part is delegated legislation to be administered by a delegated administrative authority under the *Delegated Administrative Authorities Act, 2012*. 2012, c. 8, Sched. 11, s. 46 (2).

See: 2012, c. 8, Sched. 11, ss. 46 (2), 54 (1).

Appeal after hearing

113.10 (1) An applicant or authorization holder may appeal to the Divisional Court if, after a hearing, a Director does any of the following:

1. Grants the authorization subject to restrictions, limitations or conditions imposed on it by the Director.
2. Renews the authorization subject to restrictions, limitations or conditions imposed on it by the Director.
3. Refuses to grant the authorization.
4. Refuses to renew the authorization.
5. Suspends the authorization.
6. Revokes the authorization. 2004, c. 19, s. 12 (5).

How to appeal

(2) To appeal under this section, the applicant or authorization holder must file a notice of appeal with the court within 30 days after receiving notice of the Director's decision. 2004, c. 19, s. 12 (5).

Director is party

(3) The Director is a party to the appeal. 2004, c. 19, s. 12 (5).

Decision

(4) In deciding the appeal, the court may order the Director to take such action as the court considers proper. 2004, c. 19, s. 12 (5).

Continuation of authorization

Continuation upon renewal application

113.11 (1) If, within the time prescribed by the regulations, or, if no time is prescribed, before the expiry of the authorization, an authorization holder applies to a Director for renewal of the authorization, the authorization continues to be valid,

(a) until the Director renews the authorization, unless clause (b), (c) or (d) applies;

(b) until the Director provisionally refuses to renew the authorization under subsection 113.5 (1);

(c) until the Director refuses to renew the authorization under subsection 113.6 (1);

(d) subject to subsection (3), if the authorization holder is served with a notice under section 113.3 that the Director proposes to refuse to renew the authorization, or if the Director refuses to renew the authorization under subsection 113.5 (4),

(i) until the time for applying for a hearing by the Director under section 113.4 or 113.5 expires, unless subclause (ii) applies,

(ii) if the holder applies for a hearing in accordance with section 113.4 or 113.5,

(A) until the Director renews the authorization following the hearing, or

(B) if the Director refuses to renew the authorization following the hearing,

(1) until the time for filing a notice of appeal with the Divisional Court under section 113.10 expires, unless sub-sub-subclause 2 applies,

(2) if the holder files a notice of appeal with the Divisional Court in accordance with section 113.10, until the final disposition of the appeal. 2004, c. 19, s. 12 (5).

Continuation after suspension, revocation

(2) Subject to subsection (3), if a Director suspends or revokes an authorization under subsection 113.4 (7) or 113.5 (4), the suspension or revocation does not take effect,

(a) until the time for filing a notice of appeal with the Divisional Court under section 113.10 expires, unless clause (b) applies;

(b) if a notice of appeal is filed with the Divisional Court in accordance with section 113.10, until the final disposition of the appeal. 2004, c. 19, s. 12 (5).

Threat to safety

(3) If, in a Director's opinion, there is or may be a threat to public safety or to the safety of any person, the Director may specify that,

(a) the authorization in respect of which the renewal application has been made ceases to be valid earlier than the time specified in clause (1) (d); or

(b) the suspension or revocation referred to in subsection (2) takes effect earlier than the time specified in subsection (2). 2004, c. 19, s. 12 (5).

Compliance order

113.12 (1) If it appears to a Director that a person is not complying with subsection 113.2 (1), with a regulation made under the authority of clause 113.22 (1) (e) or with a restriction, limitation or condition of an authorization, the Director may apply to a judge of the Superior Court of Justice for an order directing compliance. 2004, c. 19, s. 12 (5).

Same

(2) The judge may make any order he or she considers just. 2004, c. 19, s. 12 (5).

Clarification

(3) A Director may make an application under subsection (1) even if a penalty or another sanction has been applied against the person in respect of the failure to comply and regardless of any other rights the person may have. 2004, c. 19, s. 12 (5).

Appeal

(4) An appeal lies to the Divisional Court from an order made under subsection (2). 2004, c. 19, s. 12 (5).

Definition

113.12.1 In sections 113.13 to 113.14.3,

"electrical product or device" means any thing used or to be used in the generation, transmission, distribution, retail or use of electricity. 2006, c. 34, s. 12 (5).

Inspections

113.13 (1) The Authority or a person appointed as an inspector in writing by the Authority may conduct an inspection and may, as part of that inspection, enter and inspect at any reasonable time any land or premises, including the business premises of an authorization holder, for the purpose of,

(a) ensuring compliance with this Act and the regulations; or

(b) determining that the authorization holder remains entitled to the authorization. 2006, c. 34, s. 12 (6).

Limitations on power to enter

(2) An inspector shall not,

(a) use force to enter and inspect land and premises under this section; or

(b) enter any part of premises that are being used as a dwelling, except with the consent of the owner or occupier. 2006, c. 34, s. 12 (6).

Identification

(3) An inspector shall produce, on request, evidence of his or her appointment as an inspector. 2006, c. 34, s. 12 (6).

Powers on inspection

(4) An inspector conducting an inspection on any land or in any premises, including premises of an authorization holder, may,

(a) examine all documents, records, electrical products, devices and other things that are relevant to the inspection;

(b) require a person on the premises being inspected to produce a document, record or other thing that is relevant to the inspection;

(c) use any data storage, processing or retrieval device or system used in carrying on business in order to produce information or a record that is relevant to the inspection and that is in any form; and

(d) subject to subsection (5), on giving a receipt for it, remove any thing relevant to the inspection, including a document, a record, a data storage disk or a retrieval device needed to produce information. 2006, c. 34, s. 12 (6).

Electrical product not included

(5) An electrical product or device may not be removed under clause (4) (d). 2006, c. 34, s. 12 (6).

Obligation to produce and assist

(6) A person who is required to produce a document, record, electrical product or device, or other thing under clause (4) (b) shall produce it and shall, on request by the inspector, provide any assistance that is reasonably necessary, including assistance in using any data storage, processing or retrieval device or system, to produce information or a record that is relevant to the inspection and that is in any form. 2006, c. 34, s. 12 (6).

Obstruction prohibited

(7) No person shall obstruct an inspector executing his or her duties or withhold from him or her or conceal, alter or destroy any document, record, electrical product or device or other thing that is relevant to the inspection. 2006, c. 34, s. 12 (6).

Copy and return of removed things

(8) An inspector who removes any document, record or other thing under clause (4) (d) may make a copy of it and shall promptly return it to the person being inspected. 2006, c. 34, s. 12 (6).

Admissibility of copies

(9) A copy of a document or record certified by an inspector to be a true copy of the original is admissible in evidence to the same extent as the original and has the same evidentiary value. 2006, c. 34, s. 12 (6).

Order to turn over or retain electrical product or device

113.13.1 (1) An inspector who is lawfully present in a place and who believes on reasonable grounds that an electrical product or device in the place is being sold or offered for sale in contravention of this Part or the regulations may order, orally or in writing, a person in the place,

(a) to turn the electrical product or device over to the inspector; or

(b) to retain and preserve the electrical product or device in accordance with the regulations. 2006, c. 34, s. 12 (6).

Obligation to retain electrical product or device

(2) A person who fails to immediately comply with an order to turn over the electrical product or device issued under subsection (1) shall retain and preserve the electrical product or device that was the subject of the order in accordance with the regulations. 2006, c. 34, s. 12 (6).

Inspector to inform director

(3) When an inspector issues an order under subsection (1), he or she shall promptly inform the director and, where the order is in writing, provide him or her with a copy of the order. 2006, c. 34, s. 12 (6).

Warrant to seize electrical product or device

113.13.2 (1) On application made without notice by an inspector appointed under subsection 113.13 (1), a justice of the peace may issue a warrant if he or she is satisfied on information under oath that there is reasonable ground for believing that,

(a) an inspector issued an order to turn over an electrical product or device or to retain and preserve such a product or device under subsection 113.13.1 (1);

(b) the person who was issued the order failed to comply with it; and

(c) the electrical product or device was being sold or offered for sale in contravention of this Part or the regulations. 2006, c. 34, s. 12 (6).

Powers under warrant

(2) Subject to any conditions contained in the warrant, a warrant issued under subsection (1) authorizes an inspector appointed under subsection 113.13 (1) to,

(a) enter or access the place in which a person is required to retain and preserve the electrical product or device under clause 113.13.1 (1) (b) and subsection 113.13.1 (2);

(b) require a person to produce the electrical product or device in question; and

(c) seize the electrical product or device in question. 2006, c. 34, s. 12 (6).

Obligation to produce and assist

(3) A person who is required to do so by an inspector under clause (2) (b) shall produce the electrical product or device in question. 2006, c. 34, s. 12 (6).

Entry of dwelling

(4) Despite subsection (2), an inspector shall not exercise the power under a warrant to enter a place, or part of a place, used as a dwelling unless,

(a) the justice of the peace is informed that the warrant is being sought to authorize entry into a dwelling; and

(b) the justice of the peace authorizes the entry into the dwelling. 2006, c. 34, s. 12 (6).

Conditions on search warrant

(5) A warrant shall contain such conditions as the justice of the peace considers advisable to ensure that any entry and seizure authorized by the warrant is reasonable in the circumstances. 2006, c. 34, s. 12 (6).

Assistance

(6) A warrant may authorize persons who have special, expert or professional knowledge, and such other persons as may be necessary, to accompany and assist the inspector in respect of the execution of the warrant. 2006, c. 34, s. 12 (6).

Time of execution

(7) An entry or access under a warrant shall be made between 6 a.m. and 9 p.m., unless the warrant specifies otherwise. 2006, c. 34, s. 12 (6).

Expiry of warrant

(8) A warrant shall name a date of expiry, which shall be no later than 30 days after the warrant is issued, but a justice of the peace may, on application without notice by the inspector, extend the date of expiry for an additional period of no more than 30 days. 2006, c. 34, s. 12 (6).

Use of force

(9) An inspector may call upon police officers for assistance in executing a warrant and the inspector may use whatever force is reasonably necessary to execute the warrant. 2006, c. 34, s. 12 (6).

Obstruction

(10) No person shall obstruct an inspector executing a warrant. 2006, c. 34, s. 12 (6).

Inspector to inform director

(11) When an inspector seizes an electrical product or device under this section, he or she shall promptly inform the director. 2006, c. 34, s. 12 (6).

RELEASE OR FORFEITURE OF ELECTRICAL PRODUCT OR DEVICE

Application of section

113.13.3 (1) This section applies in respect of an electrical product or device that,

(a) was turned over to an inspector in response to an order issued under subsection 113.13.1 (1);

(b) was retained and preserved in response to an order issued under subsection 113.13.1 (1), or in accordance with subsection 113.13.1 (2); or

(c) was seized by an inspector in accordance with the regulations under a warrant issued under subsection 113.13.2 (1). 2006, c. 34, s. 12 (6).

Application for release of electrical product or device

(2) Within 10 days of an electrical product or device being turned over or seized or ordered to be retained and preserved, a person who claims an interest in the electrical product or device may apply to the director for the release of the electrical product or device. 2006, c. 34, s. 12 (6).

Hearing

(3) Subject to subsection (4), a person who applies for the release of the electrical product or device within the time permitted under subsection (2) is entitled to a hearing before the Director. 2006, c. 34, s. 12 (6).

Director may refuse hearing

(4) The director may refuse to hold a hearing if the person who applies for the release of the electrical product or device is not the person who turned over the electrical product or device, who retained and preserved it or from whom it was seized and the director is not satisfied that the person has an interest in the electrical product or device. 2006, c. 34, s. 12 (6).

Director's determination

(5) After a hearing, the director may,

(a) release to the person the electrical product or device that he or she determines was not sold or offered for sale in contravention of this Part or the regulations; or

(b) direct that the electrical product or device that he or she determines was sold or offered for sale in contravention of this Part or the regulations is forfeited to the Crown. 2006, c. 34, s. 12 (6).

Forfeiture in other circumstances

(6) The director may direct that the electrical product or device is forfeited to the Crown if,

(a) no person applies for the release of the electrical product or device within the time permitted under subsection (2);

(b) the director refuses to hold a hearing under subsection (4); or

(c) the person who applied for the release of the electrical product or device does not appear at the hearing. 2006, c. 34, s. 12 (6).

Decision final

(7) Any determination or direction made by the director under this section is final. 2006, c. 34, s. 12 (6).

Appointment of investigators

113.14 (1) The Authority may appoint persons to be investigators for the purpose of conducting investigations. 2006, c. 34, s. 12 (6).

Identification

(2) An investigator shall produce, on request, evidence of his or her appointment as an investigator. 2006, c. 34, s. 12 (6).

Search warrant

113.14.1 (1) On application made without notice by an investigator, a justice of the peace may issue a warrant, if he or she is satisfied on information under oath that there is reasonable ground for believing that,

(a) a person has contravened or is contravening this Part or the regulations or has committed an offence that is relevant to the person's fitness for holding an authorization under this Part; and

(b) there is,

(i) on any land or in any building, dwelling, container or place any thing relating to the contravention of this Part or the regulations or to the person's fitness for holding an authorizaton, or

(ii) information or evidence relating to the contravention of this Part or the regulations or the person's fitness for holding an authorization that may be obtained through the use of an investigative technique or procedure or the doing of anything described in the warrant. 2006, c. 34, s. 12 (6).

Powers under warrant

(2) Subject to any conditions contained in the warrant, a warrant issued under subsection (1) authorizes an investigator to,

(a) enter or access the land, building, dwelling, container or place specified in the warrant, and examine and seize any thing described in the warrant;

(b) use any data storage, processing or retrieval device or system used in carrying on business in order to produce information or evidence described in the warrant, in any form;

(c) require a person to produce the information or evidence described in the warrant and to provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device or system to produce, in any form, the information or evidence described in the warrant; and

(d) use any investigative technique or procedure described in the warrant or do anything described in the warrant. 2006, c. 34, s. 12 (6).

Obligation to produce and assist

(3) A person who is required to do so by an investigator under clause (2) (c) shall produce information or evidence described in the warrant and shall provide whatever assistance is reasonably necessary to produce the information or evidence in any form. 2006, c. 34, s. 12 (6).

Entry of dwelling

(4) Despite subsection (2), an investigator shall not exercise the power under a warrant to enter a place, or part of a place, used as a dwelling unless,

(a) the justice of the peace is informed that the warrant is being sought to authorize entry into a dwelling; and

(b) the justice of the peace authorizes the entry into the dwelling. 2006, c. 34, s. 12 (6).

Conditions on search warrant

(5) A warrant shall contain such conditions as the justice of the peace considers advisable to ensure that any search authorized by the warrant is reasonable in the circumstances. 2006, c. 34, s. 12 (6).

Assistance

(6) A warrant may authorize persons who have special, expert or professional knowledge, and such other persons as may be necessary, to accompany and assist the investigator in respect of the execution of the warrant. 2006, c. 34, s. 12 (6).

Time of execution

(7) An entry or access under a warrant shall be made between 6 a.m. and 9 p.m., unless the warrant specifies otherwise. 2006, c. 34, s. 12 (6).

Expiry of warrant

(8) A warrant shall name a date of expiry, which shall be no later than 30 days after the warrant is issued, but a justice of the peace may, on application without notice by the investigator, extend the date of expiry for an additional period of no more than 30 days. 2006, c. 34, s. 12 (6).

Use of force

(9) An investigator may call upon police officers for assistance in executing a warrant and the investigator may use whatever force is reasonably necessary to execute the warrant. 2006, c. 34, s. 12 (6).

Obstruction

(10) No person shall obstruct an investigator executing a warrant or withhold from him or her or conceal, alter or destroy anything relevant to the investigation. 2006, c. 34, s. 12 (6).

Return of seized things

(11) Subject to subsection (12), an inspector who seizes any thing under this section may make a copy of it and shall return it within a reasonable time. 2006, c. 34, s. 12 (6).

Return of seized things not required

(12) An investigator is not required to return an electrical product or device seized under this section where the investigator believes on reasonable grounds that the electrical product or device was sold or offered for sale in contravention of this Part or the regulations. 2006, c. 34, s. 12 (6).

Admissibility of copies

(13) A copy of a document or record certified by an inspector to be a true copy of the original is admissible in evidence to the same extent as the original and has the same evidentiary value. 2006, c. 34, s. 12 (6).

No warrant required in exigent circumstances

113.14.2 (1) Although a warrant issued under subsection 113.14.1 (1) would otherwise be required, an investigator may exercise any of the powers described in subsection 113.14.1 (2) without a warrant if the conditions for obtaining the warrant exist but because of exigent circumstances it would be impracticable to obtain the warrant. 2006, c. 34, s. 12 (6).

Dwellings

(2) Subsection (1) does not apply to any part of a building that is being used as a dwelling. 2006, c. 34, s. 12 (6).

Use of force

(3) An investigator may, in executing any authority given by this section, call upon police officers for assistance and use whatever force is reasonably necessary. 2006, c. 34, s. 12 (6).

Application of other provisions

(4) Subsections 113.14.1 (6), (10), (11), (12) and (13) apply, with necessary modifications, to the exercise of powers under this section. 2006, c. 34, s. 12 (6).

Seizure of things in plain view

113.14.3 (1) An investigator who is lawfully present in a place under a warrant may seize any thing that is in plain view if the investigator believes on reasonable grounds that the thing will afford evidence of a contravention of this Part or the regulations. 2006, c. 34, s. 12 (6).

Return of seized thing

(2) Subsections 113.14.1 (11), (12) and (13) apply, with necessary modifications, to any thing seized under this section. 2006, c. 34, s. 12 (6).

Information confidential

113.15 (1) This section applies to a document or information obtained in the course of an inspection conducted for a purpose set out in clause 113.13 (1) (a) or (b). 2004, c. 19, s. 12 (5); 2006, c. 34, s. 12 (7).

Disclosure prohibited

(2) Subject to subsection (3), an inspector shall not disclose any document or information obtained in the course of an inspection except,

(a) for the purposes of carrying out his or her duties under this Act; or

(b) as authorized under the *Regulatory Modernization Act, 2007*. 2007, c. 4, s. 29.

Compellability in civil proceeding

(3) Subject to subsection (4), an inspector is a compellable witness in a civil proceeding respecting any document or information obtained in the course of an inspection. 2004, c. 19, s. 12 (5).

Refusal or conditional permission

(4) A Director may,

(a) on reasonable grounds, refuse to permit an inspector to attend as a witness; or

(b) require that an inspector's attendance as a witness be subject to such conditions as are reasonable and necessary for the proper administration of this Part and the regulations. 2004, c. 19, s. 12 (5).

Limitation

(5) Subsection (4) does not apply if,

(a) the court orders that the inspector attend as a witness;

(b) the proceeding is a proceeding under the *Provincial Offences Act*; or

(c) the Authority is a party to the proceeding. 2004, c. 19, s. 12 (5).

Written decision

(6) A Director who makes a decision referred to in subsection (4) shall issue the decision in writing. 2004, c. 19, s. 12 (5).

Disclosure by Director

(7) A Director may publish or otherwise disclose documents or information obtained under the powers conferred on the Director under this Part. 2004, c. 19, s. 12 (5).

Director's confirmation

113.16 (1) A Director may issue a written confirmation with respect to,

(a) the granting or non-granting of an authorization, the renewal or non-renewal of an authorization, or the revocation or suspension of an authorization;

(b) the restrictions, limitations and conditions to which an authorization is subject;

(c) the filing or non-filing of any document or material required or permitted to be filed with the Director; or

(d) any other matter prescribed by the regulations. 2004, c. 19, s. 12 (5).

Effect of confirmation

(2) A confirmation that purports to have been issued by a Director is proof, in the absence of evidence to the contrary, of the facts stated in it, without any proof of appointment or signature. 2004, c. 19, s. 12 (5).

Fees, etc.

113.17 (1) If the Authority does so in accordance with the process and criteria that it establishes and that the Minister responsible for the administration of this Part has approved, the Authority may establish fees, administrative penalties, costs or other charges related to the administration of this Part and may require that such fees, administrative penalties, costs and other charges be paid at the times and in the manner directed by it. 2004, c. 19, s. 12 (5).

Collection and application of fees

(2) The Authority shall collect the fees, administrative penalties, costs and other charges that it requires to be paid under this section and shall apply them to the expenses incurred by the Authority in administering this Part. 2004, c. 19, s. 12 (5).

Agreement to exercise Authority's powers

113.18 The Authority may enter into agreements with any person or body prescribed by the regulations authorizing the person or body to exercise and perform any of the powers and duties of the Authority under subsection 113 (11) or section 113.13 or 113.17 and, for that purpose, a reference in section 113.19 or 113.20 to the Authority shall be deemed to be a reference to the person or body. 2004, c. 19, s. 12 (5); 2006, c. 34, s. 12 (8).

Liability

113.19 (1) No action or other civil proceeding shall be commenced against a director, an officer, an employee or an agent of the Authority, or a Director, an inspector or an officer appointed under this Part, for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under this Part, or for any neglect or default in the exercise or performance in good faith of such a power or duty. 2004, c. 19, s. 12 (5).

Same

(2) Subsection (1) does not relieve the Authority of any liability to which it would otherwise be subject in respect of a cause of action arising from any act, neglect or default referred to in subsection (1). 2004, c. 19, s. 12 (5).

Offences

113.20 (1) Every person,

(a) that refuses or neglects to comply with section 113 or with any regulation, plan or specification made under its authority is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(b) that refuses or neglects to comply with an order issued by the Authority under subsection 113 (11) is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than $5,000 for each day upon which the refusal or neglect is repeated or continued;

(c) that refuses or neglects to comply with subsection 113.13 (6), 113.13.1 (2), 113.13.2 (3) or 113.14.1 (3) or (10) or disturbs or interferes with an inspector, investigator or other officer in the performance of a duty the inspector, investigator or officer was appointed to perform under this Part is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(c.1) that contravenes or fails to comply with section 113.0.1 is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(d) that contravenes or fails to comply with subsection 113.2 (1) is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than $5,000 for each day upon which the offence is repeated or continued;

(e) that contravenes or fails to comply with any regulation made under the authority of clause 113.22 (1) (a), (e), (e.1) or (j) is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than $5,000 for each day upon which the offence is repeated or continued;

(f) that contravenes or fails to comply with a restriction, limitation or condition of an authorization is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than $5,000 for each day upon which the offence is repeated or continued;

(g) that knowingly makes a false statement or furnishes false information to a Director under this Part is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(h) that knowingly holds out as genuine any document, certificate, identification card or any other document issued under this Part or the regulations is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both;

(i) that holds themself out as a holder of an authorization, an inspector, investigator or other official under this Part is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both. 2005, c. 33, s. 7 (3); 2006, c. 34, s. 12 (9-13).

Same, corporations

(2) A corporation that is guilty of an offence described in subsection (1) is liable, on conviction, to a fine of not more than $1,000,000. 2005, c. 33, s. 7 (3).

Duty of director or officer

(3) Every director or officer of a corporation has a duty to take all reasonable care to prevent it from committing an offence under subsection (2). 2006, c. 34, s. 12 (14).

Offence

(4) Every director or officer who has a duty under subsection (3) and fails to carry out that duty is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both. 2006, c. 34, s. 12 (14).

Separate offence

(5) Where a person contravenes any of the provisions of this Part, the regulations or any notice or order made under them on more than one day, the continuance of the contravention on each day shall be deemed to constitute a separate offence. 2006, c. 34, s. 12 (14).

Administrative penalty

(6) A person against whom an administrative penalty has been levied by a designated administrative authority or, in the absence of such authority, by the Minister does not preclude a person from being charged with, and convicted of, an offence under this Part for the same matter. 2006, c. 34, s. 12 (14).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (6) is repealed and the following substituted:

Administrative penalty

(6) The fact that an administrative penalty has been levied against a person by a delegated administrative authority or, in the absence of such authority, by the Minister does not preclude the person from being charged with, and convicted of, an offence under this Part for the same matter. 2012, c. 8, Sched. 11, s. 46 (3).

See: 2012, c. 8, Sched. 11, ss. 46 (3), 54 (1).

Time limit

(7) No proceeding in respect of an alleged offence under this Part may be commenced after two years following the date on which the facts that gave rise to the alleged offence first came to the attention of the Director. 2006, c. 34, s. 12 (14).

Conflict

113.21 This Part and the regulations prevail over any municipal by-law. 2004, c. 19, s. 12 (5).

Regulations

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

(a) prescribing activities that require an authorization, classifying the activities, the persons who carry out the activities and the authorizations, and prescribing the classes of authorizations that are required for different classes of activities or for different classes of persons;

(b) prescribing the training, experience, qualifications or skills that persons must have and the other requirements that persons must meet in order to obtain and retain a class of authorization;

(c) prescribing the period, or the manner of determining the period, for which a class of authorization is valid;

(d) governing applications for authorization and applications for renewal of authorization, including prescribing procedures and timing requirements for making such applications;

(e) prescribing duties, powers and prohibitions that apply to holders of an authorization;

(e.1) governing the documents and records that must be kept by holders of authorizations, including the manner and location in which they are kept and the time periods for retaining such information and authorizing the Director to specify the location at which they must be kept;

(f) prescribing rules with which a Director must comply in imposing a restriction, limitation or condition on an authorization;

(g) prescribing anything that must or may by this Part be done in accordance with the regulations or that is referred to in this Part as prescribed by, required by, provided in or referred to in the regulations;

(h) exempting any person, work, matter or thing from any provision of this Part or the regulations;

(i) defining electrical incidents or accidents and classes of incidents or accidents;

(j) providing for the reporting to the Authority of the electrical incidents or accidents referred to in clause (i), including the manner and time for reporting, and prescribing classes of persons who are required to make such reports;

(k) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Part. 2004, c. 19, s. 12 (5); 2006, c. 34, s. 12 (15, 16).

General or particular

(2) A regulation made under subsection (1) may be general or particular in its application. 2004, c. 19, s. 12 (5).

or pursuant to regulations made under those amendments. See: 2002, c. 23, s. 6.

Français

Back to top

TAB 3

Electricity Act, 1998
Loi de 1998 sur l'électricité

ONTARIO REGULATION 164/99
ELECTRICAL SAFETY CODE

Consolidation Period: From May 1, 2012 to the e-Laws currency date.

Last amendment: O. Reg. 2/12.

This Regulation is made in English only.

1. The code issued by the Canadian Standards Association entitled "Canadian Electrical Code Part I, C22.1-12", as amended by the document entitled "Ontario Amendments to the Canadian Electrical Code Part I, C22.1-12", dated November 11, 2011 and issued by the Electrical Safety Authority, are together adopted as the Electrical Safety Code. O. Reg. 2/12, s. 1.

2. Every act or omission in connection with the generation, transmission, distribution, retail or use of electricity in Ontario must be done or made in compliance with the Electrical Safety Code. O. Reg. 164/99, s. 2.

3. The Electrical Safety Authority shall ensure that an adequate supply of copies of the Electrical Safety Code is made available to the public. O. Reg. 164/99, s. 3.

Back to top

TAB 4

Ontario Energy Board

Report of the Board

Supplemental Report on Smart Grid

EB-2011-0004

February 11, 2013

Intentionally blank

Table of Contents

Intentionally blank

1. Introduction

In accordance with the Directive from the Minister of Energy dated November 23, 2010 (”Minister’s Directive”) the Ontario Energy Board (the “Board”) is required to provide guidance to licensed distributors, transmitters and other entities, such as the Ontario Power Authority, the Independent Electricity System Operator, and the Smart Metering Entity whose fees and expenditures are reviewed by the Board, that propose to undertake smart grid activities (collectively the “regulated entities”). The Minister’s Directive states that the guidance provided by the Board is to set out the Board’s expectations for regulated entities in the preparation of their plans for the development and implementation of the smart grid and identify the criteria that the Board will use to evaluate such plans. The Minister’s Directive is included as an Appendix to this report.

The Ontario Energy Board’s Report of the Board – A Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach (the “RRFE Report”) was issued on October 18, 2012. The RRFE Report noted that smart grid investments are considered integral to all utility investment and that planning for smart grid development and implementation by electricity distributors and transmitters will be an essential part of the broader network investment planning exercise. The RRFE Report indicated that the Board’s guidance to regulated entities with respect to smart grid activities, in response to the Minister’s Directive, would be provided in a Supplemental Report of the Board.

The Board has concluded that the objectives in the Minister’s Directive are aligned with the objectives of the renewed regulatory framework. The renewed regulatory framework set out by the Board in the RRFE Report is a comprehensive performance-based approach to regulation. It is designed to encourage cost-effective planning and operation of the electricity distribution network so that it is efficient, reliable and sustainable, and provides value for customers. Therefore, the Board will fulfill the

Minister's Directive by providing guidance on smart grid investments as part of implementing the performance-based framework set out in the RRFE Report.

2. Background

2.1 The Green Energy and Green Economy Act, 2009 and the Minister's Directive on Smart Grid

In 2009, the *Green Energy and Green Economy Act, 2009* ("*GEA*") established an additional objective[1] for the Board, namely, "to facilitate the implementation of a smart grid in Ontario". The *GEA* defined smart grid (by way of amendment to the *Electricity Act*[2]) as follows:

> (1.3) For the purposes of this Act, the smart grid means the advanced information exchange systems and equipment that when utilized together improve the flexibility, security, reliability, efficiency and safety of the integrated power system and distribution systems, particularly for the purposes of,
>
> (a) enabling the increased use of renewable energy sources and technology, including generation facilities connected to the distribution system;
>
> (b) expanding opportunities to provide demand response, price information and load control to electricity customers;
>
> (c) accommodating the use of emerging, innovative and energy-saving technologies and system control applications; or
>
> (d) supporting other objectives that may be prescribed by regulation. 2009, c. 12, Sched. B, s. 1 (5).

The Minister's Directive was issued pursuant to the authority provided by the *GEA* (by way of an amendment to the OEBA) and set out a number of objectives for the Board to consider in providing guidance on smart grid implementation, namely: customer control, power system flexibility and adaptive infrastructure. The Minister's Directive also set out a number of policy objectives to guide the Board's development of criteria for evaluating regulated entities' plans.

2.2 The Smart Grid Working Group

[1] *Ontario Energy Board Act,1998* ("*OEBA*"), section 1(1), paragraph 4
[2] *Electricity Act*, *1998*

On January 13, 2011, in response to the Minister's Directive, the Board established a Smart Grid Working Group (the "Working Group") to provide advice to Board staff on the technical aspects and related details in respect of the implementation of a smart grid. The feedback from the Working Group is summarized in a Board staff discussion paper "Developing Guidance for the Implementation of Smart Grid in Ontario" issued on November 8, 2011. The purpose of the discussion paper was to seek comments from stakeholders on the issues to be considered by the Board in providing guidance on the establishment, implementation and promotion of a smart grid in Ontario. These comments were considered by the Board in formulating the conclusions and policy direction set out in the RRFE Report.

2.3 A Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach

The regulatory framework set out by the Board in the RRFE Report is a comprehensive performance-based approach to regulation that is based on the achievement of outcomes in order to ensure that Ontario's electricity system provides value for money for customers. The Board established the following outcomes for distributors:

Customer Focus: services are provided in a manner that responds to identified customer preferences;

Operational Effectiveness: continuous improvement in productivity and cost performance is achieved; and utilities deliver on system reliability and quality objectives;

Public Policy Responsiveness: utilities deliver on obligations mandated by government (e.g., in legislation and in regulatory requirements imposed further to Ministerial directives to the Board); and

Financial Performance: financial viability is maintained; and savings from operational effectiveness are sustainable.

The Board developed a set of related policies to implement the new performance-based framework and facilitate the achievement of these performance outcomes. The policies are supported by fundamental principles of good asset management; coordinated, long-term planning; and a common set of performance measures, including productivity expectations.

Of most relevance to smart grid activities and related guidance to regulated entities are the policies regarding capital planning, innovation, and coordination.

With respect to planning, the Board will be requiring distributors to file 5-year capital plans to support their rate applications. Distributors will conduct integrated planning of all capital investments, including: expansion and renewal of their networks; connection of renewable generation; smart grid development; and investments identified through regional infrastructure planning. The capital plans must demonstrate that policy objectives have been considered in a distributors' evaluation of suitable expenditures, including the needs of existing and future customers and the costs of meeting those needs. The evidence must also demonstrate that, where applicable, planning has been informed by appropriate consultation with customers, municipalities and neighbouring distributors and transmitters.

As the Board stated in the RRFE Report, with respect to innovation the Board intends to explore further opportunities to embed the facilitation and recognition of technological innovation into the performance and rate-setting framework for electricity distributors. Smart grid development and implementation activities will be a central focus of the effort to incent innovation, given the importance of grid-enhancing advanced technology systems and equipment to network modernization.

With respect to coordination, the effective use of regional infrastructure planning and the inclusion of regional considerations in distributors' and transmitters' plans will be a key factor in ensuring that the development and implementation of smart grid is successful. The Board expects smart grid development to be coordinated on a regional basis in furtherance of the government policy objective set out in the Minister's Directive to the

effect that smart grid implementation efforts should involve regional coordination in order to achieve economies of scope and scale.

The Board also provided conclusions on two specific issues: the treatment of smart grid investments, and "behind the meter" activities.

Specifically, the Board determined that in order to facilitate integrated planning, no distinction will be made for regulatory purposes between "smart grid" and more traditional investments undertaken by distributors and transmitters.

The Board also stated that facilitation of access to customer data is key to facilitating the provision of behind the meter services, which are in turn necessary to achieve the customer control objectives set out in the Minister's Directive. The Board acknowledged that distributors currently undertake behind-the-meter services in carrying out conservation and demand management activities. However, the Board concluded that the provision of behind the meter services and applications that fall within the parameters set out in sections 71(2) or 71(3) of the *OEBA* is a non-utility activity. In accordance with the Board's policies[3] related to activities under those sections, such activities must be accounted for separately from utility activities and be undertaken on a full cost recovery basis (i.e. not recovered in rates).

2.4 The Minister's Directive and the Renewed Regulatory Framework for Electricity

As discussed above, the Minister's Directive requires the Board to provide regulated entities with the Board's guidance and expectations in relation to the establishment and implementation of a smart grid within the parameters of three objectives set out in the Minister's Directive: customer control, power system flexibility, and adaptive infrastructure. The Board is also to be guided in developing its criteria for evaluating

[3] For example, see the Accounting Procedures Handbook for Electricity Distributors.

regulated entities' plans by ten policy objectives of the government, including efficiency, customer value, interoperability, and privacy. (See Appendix)

The Board has concluded that the objectives in the Minister's Directive are aligned with the objectives of the renewed regulatory framework. (See Table 1) Further, the Board has determined that the most effective and efficient way to fulfill the Minister's Directive is through the implementation of the performance-based framework established in the RRFE Report. This approach provides for a flexible and robust framework. It ensures that the smart grid objectives and policy objectives set out in the Minister's Directive are considered as part of the overall approach to regulation and rate-setting for regulated entities.

Table 1

		Renewed Regulatory Framework			
		Customer Focus	**Operational Effectiveness**	**Financial Performance**	**Public Policy Responsiveness**
Minister's Directive	**Customer Control**	✓			✓
	Power System Flexibility		✓		✓
	Adaptive Infrastructure		✓		✓
	Policy Objectives	✓	✓	✓	✓

This alignment of the RRFE and the objectives in the Minister's Directive enables the Board to provide guidance and direction in a holistic manner. The alignment establishes that the integrated approach to infrastructure planning adopted as part of the renewed regulatory framework fully encompasses the objectives of the Minister's Directive.

2.5 The Reconvened Smart Grid Working Group

The Board stated in the RRFE Report that it would reconvene the Working Group to advise Board staff in the development of the regulatory documents to implement the Minister's Directive and the renewed regulatory framework.

The Working Group was reconvened and met during November 2012. The presentations and notes from these meetings are posted on the Board's website.

The Working Group provided advice on formulating guidance with respect to smart grid development, primarily addressing factors that regulated entities should consider when planning investments and operations. A number of key issues were discussed at length, including facilitating customer access to data, network evolution, innovation, economic development, and cyber-security.

In general, the Working Group advised that the Board should favour less prescriptive rules and not direct regulated entities to make specific investments, given the evolutionary nature of smart grid. Furthermore, the Working Group noted that grid modernization is a relative concept because, for example, a modernizing investment for one utility may be standard practice for another utility.

The Working Group pointed out that the varying preferences of different types of customers are important considerations. Coordination and a long term view of investment were discussed in relation to planning an interoperable and flexible system. However, the most important tool that was identified for planning investments and operations is the ability to leverage the new information that distributors will be able to collect with smart grid enhancements.

Lastly, the Working Group suggested that the Board consider the need for a mechanism for ongoing advice in respect of the implementation of smart grid, including input regarding technological adoption, utility experience, and emerging standards.

The Board was assisted greatly by the work of the Working Group. The expectations and guidance provided in this report have incorporated the insights provided by the Working Group. In providing its guidance in the following sections, the Board has identified the need for ongoing advice on certain matters and will look to the Working Group for input.

3. Guidance and Expectations Regarding Planning and Investments

This section sets out the high level expectations of the Board with respect to smart grid activities that electricity distributors and other regulated entities should consider when developing their investment plans.

The Board's intention is to provide guidance in a holistic manner, recognizing that the modernization of the electricity system is a continuous process with no specific end-state. The circumstances and needs of an electricity distributor's system and its customers vary significantly across the province. The Board has sought to provide as much guidance as possible to provide a long-term view of electricity network enhancement without prescribing specific investments, technologies, methodologies or standards, or applying procurement requirements and targets.

It should be understood by regulated entities that cost of investments made in accordance with the Board's guidance are not guaranteed to be recovered. All planned investments that reflect the Board's expectations as set out below will be assessed against the Board's evaluation criteria, similar to the assessment of any other investments, when a utility files a capital plan for approval by the Board. This topic is discussed more thoroughly in Section 4.1 of this Supplemental Report.

3.1 Customer Control

The Minister's Directive sets out customer control objectives as follows:

> "For the purpose of providing the customer with increased information and tools to promote conservation of electricity, which will 'expand opportunities to provide demand response, price information and load control to electricity customers', in accordance with subsection 2(1.3)(b) of the Electricity Act."

The Board has identified Customer Focus as a key outcome for electricity distributors to achieve, whereby services are provided in a manner that responds to identified customer preferences. The Customer Focus outcome aligns with objectives in the

Minister's Directive as both emphasize realizing customer value and empowering consumers.

Customer engagement is an essential activity in order for utilities to achieve the outcome of Customer Focus as set out in the RRFE Report. In order for a distributor to provide services in a manner that responds to customer preferences, they must engage with customers to understand their expectations. To achieve the objectives set out for customer control as defined in the Minister's Directive, distributors (and other regulated entities) will need to identify those services that will provide customers with the ability to take action in regard to their energy use. Regulated entities and third party providers (i.e. private, unregulated businesses) must know what information and services customers value (i.e. their preferences) in order to tailor their offerings (e.g., education, data, or services).

In their investment plans regulated entities must demonstrate that they have undertaken activities to understand their customers' preferences (e.g., data access and visibility, participating in distributed generation, and load management) and how they have addressed those preferences. Customer engagement can occur through a variety of approaches, including surveys, data analytics, and analysis of customer feedback, inquiries, and complaints. As the Working Group pointed out, different customer classes (residential, commercial/institutional and industrial) will have different preferences and customer engagement is required to determine the different preferences across customer classes.

In considering whether a regulated entity's activities meet the customer control objectives, the Board has two specific requirements, that they facilitate customer education and support access to electricity consumption data.

3.1.1 Customer Education

Regulated entities must provide information and education to their customers regarding the potential benefits of smart grid. In order for customers to be able to take advantage of the new services and data access that smart grid will provide, they

will need to be informed. This might include increasing customer awareness of the data available to them and the value of the data for determining their consumption. It may also include providing information regarding new service offerings that reflect their service expectations and requirements (e.g., conservation, demand shifting, micro-generation, and storage). While regulated entities should inform customers of specific services and applications, they should not endorse any specific provider of services or applications that are delivered in a competitive market place by private agents.

3.1.2 Data Access

In the RRFE Report, the Board emphasized the importance of data access to the achievement of customer control objectives. The Board has determined that smart grid activities by regulated entities should facilitate data access. The Board notes that the Government of Ontario is currently exploring providing greater access to electronic data through its Green Button initiative, which may be able to provide customers with access to their electricity consumption data through a secure download from their utility's website. Currently, all customers have access to historical (e.g., previous 24 months) consumption data, via the smart metering initiative. However, this data is not universally available online or electronically in Ontario.

Distributors must investigate options for facilitating customer access to consumption data in an electronic format. The options should be aimed at providing a more user friendly approach which allows customers to use, analyze, and share their data in an electronic format. This will involve working towards providing access to hourly billing quality data to customers, and to any third party authorized by the customer, through a recognizable electronic format similar to the way data is provided to retailers under the existing Electronic Business Transaction Standards.

The Board recognizes that some customers will want access to non-billing quality data (i.e. “real-time” or “near real-time” data) to better manage their electricity costs. As part of its customer engagement activities (e.g., surveys), the Board expects that all regulated entities will work towards identifying customer preferences with respect to

data access and ensuring that new services are consistent with these evolving customer needs.

This “near real-time” data is expected to be delivered through “behind the meter devices” (e.g., an in-home display) supplied by third party service providers. In the RRFE Report, the Board concluded that achievement of the customer control objective in the Minister’s Directive will require that “behind the meter” services and applications be available to customers. Further, the Board determined that there is no element of natural monopoly in the market for behind the meter services and concluded that customer control would be best served by the forces of market competition.

As metering infrastructure is renewed and replaced over time, distributors must explore mechanisms that facilitate “real-time” data access and “behind the meter” services and applications for the purpose of providing customers with the ability to make decisions affecting their electricity costs. As discussed by the Working Group, when facilitating customer access to data, mechanisms should recognize that customer preferences regarding the detail and frequency of information varies by customer type (residential, commercial/institutional, and industrial) and is likely to be related to the cost of electricity. The Board agrees that this is an important aspect of the development of data access mechanisms and expects that distributors will demonstrate how they are monitoring customer data expectations and requirements.

The Smart Metering Entity (SME) must investigate opportunities for providing access to depersonalized, generic data to third parties for planning, research, and customer benchmarking purposes (e.g., allowing customers to compare their consumption with that of their neighbours). The Meter Data Management and Repository (MDM/R) operated by the SME contains a wealth of data on Ontario electricity consumption that is being utilized solely for billing purposes. The Board is of the view that this represents an unrealized value in the MDM/R, which was also noted by the Working Group.

Consistent with the views of the Working Group, recognizing that mechanisms will evolve, and consistent with the expectations set out above, the Board will not specify

standard protocols or methods by which data and information is made available to customers or third parties at this time. However, the Board will take action (e.g., prescribing standards for data access and presentment) in the event that customer-friendly data access mechanisms do not emerge.

Lastly, the Board is of the view that the emergence of standard data access mechanisms represents an area for future discussions and advice from the Working Group (e.g., monitoring standards development in other jurisdictions).

3.2 Power System Flexibility

The Minister's Directive sets out power system flexibility objectives as follows:

> "For the purpose of 'enabling the increased use of renewable energy sources and technology, including generation facilities connected to the distribution system,' in accordance with subsection 2(1.3) (a) of the Electricity Act, 1998, and recognizing the need for flexibility on the integrated power system."

As noted in Section 2, the Board has established Operational Effectiveness as an outcome whereby continuous improvement in productivity and cost performance is achieved and utilities deliver on system reliability and quality objectives. The power system flexibility objectives in the Minister's Directive align very closely with this outcome.

Regulated entities must demonstrate in their investment plans how they have incorporated necessary investments to facilitate the integration of distributed generation and more complex loads (e.g., customers with self-generation and/or storage capability). The Board's expectations regarding the implementation of power system flexibility by regulated entities are based on the conclusion in the RRFE Report that grid-enhancing advanced information and exchange systems and equipment are integral to all utility investment. The investments may include: instrumentation; modeling and forecasting; system monitoring and other investments that provide visibility; control; and perhaps automation in distributor's control rooms. With regard to connecting

distributed generation, the Board notes that it has made a number of amendments to the Distribution System Code to facilitate the connection of distributed generation.

Another example of relevant investments would be using intelligent devices on the system such that network maintenance is enhanced. This investment can be targeted to where and when it is needed and operational efficiencies can be achieved, including improved power quality and outage management to increase reliability of service to customers.

The Board notes that some distributors have already undertaken, with Board approval, pilot and demonstration projects related to power system flexibility, including systems that facilitate real time communications with distributed generators and software solutions that enhance network intelligence (e.g., outage responsiveness).

As distributors plan for the modernization of their systems they must consider cost and the expectations for service from their customers and invest accordingly. The Board does not intend to prescribe specific investments and technological choices to be implemented. The Board recognizes that there is a diversity of circumstances among distributors. For example, an investment considered standard practice for one distributor may represent a significant modernization activity for a different distributor because of differences in size, geography, or evolution of customer preferences.

3.3 Adaptive Infrastructure

The Minister's Directive sets out the adaptive infrastructure objectives as follows:

> "For the purpose of 'accommodating the use of emerging, innovative and energy saving technologies and system control applications,' in accordance with subsection 2(1.3)(c) of the Electricity Act."

As noted in Section 2, the adaptive infrastructure objectives in the Minister's Directive align with the outcomes of Operational Effectiveness and Public Policy Responsiveness. The Board's expectations for this area are based on the renewed

regulatory framework's goals of promoting ongoing productivity improvements and encouraging innovation.

Regulated entities must demonstrate in their investment plans that they have investigated opportunities for operational efficiencies and improved asset management, enabled by more and better data provided by smart grid technology. Investments that support and advance network operation and evolution (e.g., energy storage, interoperability, forward compatibility, and electric vehicles) are expected to be pursued when and where appropriate. As stated with respect to power system flexibility in Section 3.2, the Board does not intend to prescribe specific investments and technological choices for regulated entities.

Following Board approval, some distributors have already undertaken pilot and demonstration projects related to adaptive infrastructure, including electric vehicle charging, home energy management applications, and electricity storage options. The Board expects that distributors will report on the outcomes and learning from these pilots for the benefit all regulated entities. This expectation is consistent with the Board's policies (e.g., Filing Requirements: Distribution System Plans), which emphasize the need to avoid duplication of efforts in testing out and learning about new technologies.

The adaptive infrastructure objective in the Minister's Directive includes the following parameters: "Encourage Innovation" and "Maintain Pulse On Innovation." **When applicable and appropriate, capital and investment planning by regulated entities must demonstrate the consideration and/or adoption of innovative processes, services, business models, and technologies as well as an awareness of innovation and best practices.** As the Board identified in the RRFE Report, additional guidance from the Board regarding innovation is forthcoming. The Board intends to explore further opportunities to embed in the rate-setting framework for distributors (and eventually all regulated entities) the facilitation and recognition of technological innovation. Smart grid development and implementation activities will be a central focus of that effort.

Furthermore, the Board is of the view that regional coordination is of primary importance with respect to adaptive infrastructure. As noted in the RRFE Report:

> …the Board expects that smart grid development will be coordinated on a regional basis in furtherance of the government policy objective set out in the Minister's Directive to the effect that smart grid implementation efforts should involve regional coordination in order to achieve economies of scope and scale. (RRFE Report, p. 47)

The Board is of the view that, in fulfilling the adaptive infrastructure objective the Working Group could be relied upon to provide advice to the Board regarding the deployment of smart grid technologies and activities. Further, the Board believes that the Working Group could serve as a forum in which electricity distributors and other parties can share information regarding experiences and best practices regarding pilot project results, technological adoption, and innovative practices.

4. Plan Evaluation and Measuring Performance

This section sets out guidance on how the Board will evaluate investment plans and performance related to smart grid activities undertaken by regulated entities.

As noted in Section 3 of this Supplemental Report, the RRFE Report states that distributors will be required to file 5-year capital plans to support their rate applications and to monitor achievement of the performance outcomes.

All capital and infrastructure plans must enable the Board to assess whether and how a distributor as well as any other regulated entity has sought to control costs in relation to its proposed investments through the appropriate optimization, prioritization and pacing of investment expenditures. The evidence contained in the plan must demonstrate that relevant policy objectives have been considered in regulated entities' evaluation of suitable expenditures. This evidence can be qualitative or quantitative.

The Board is currently engaging stakeholders on the identification and development of qualitative and quantitative approaches and tools to support investment proposals (i.e. Distribution Network Investment Planning Working Group).

4.1 Evaluation

Planned investments made in accordance with the expectations and guidance provided in Section 3 will be assessed against the Board's evaluation criteria when a utility files a capital plan for approval by the Board. As the Board has determined that an integrated approach to capital planning is the appropriate means to achieve the outcomes established in the renewed regulatory framework and the Board's rate-setting objectives, the evaluation of smart grid investments will be no different from any other investment made by a regulated entity. In order to have expenditures approved by the Board, regulated entities will be required to demonstrate that the expenditures are consistent with the evaluation criteria set out by the Board. The following constitutes the

Board's current guidance on evaluation respecting all ten policy objectives set out in the Minister's Directive.

4.1.1 Efficiency, Customer Value, and Reliability

The Board notes that these three policy objectives already form part of the Board's core work. The Board's renewed regulatory framework is designed to support the cost-effective planning and operation of the electricity distribution network – a network that is efficient, reliable, sustainable, and provides value for customers. Overall, the protection of consumer interests and the promotion of economic efficiency and cost effectiveness within a financially viable industry are the foundation of the renewed regulatory framework and continue to underpin all expenditure evaluations and assessments. Pacing and prioritization of capital investments to promote predictability in rates and affordability for customers must be a primary goal in a distributor's capital plan. Utility plans must deliver value for money for customers and system reliability. In developing plans in response to the Board's smart grid guidance, distributors will be expected to demonstrate how their plans address these criteria.

4.1.2 Safety

Safety has always been a priority of the Board and is essential to good utility practice. The Board recognizes that the Electrical Safety Authority oversees safety issues directly through the development of its regulations, codes, and inspection program.

In developing plans in response to the Board's smart grid guidance, distributors will be expected to demonstrate how their plans address safety.

The Board agrees with the views expressed by the Working Group that safety improvements will result naturally from the additional information and automation afforded by smart grid technologies.

4.1.3 Cyber-security and Privacy

The privacy and security of customer data has always been a priority of the Board as evidenced in licence conditions prohibiting unauthorized release of customer

information. However, privacy is becoming even more important with increasing electronic transmission of customer data. The Board will not develop its own set of cyber-security and privacy standards but instead will require regulated entities to provide evidence of meeting appropriate cyber-security and privacy standards. For example, in the case of cyber-security, this could take the form of providing a third-party audit confirming compliance with the standards of the National Institute of Standards and Technology's (NIST) Guidelines for Smart Grid Cyber Security. With respect to privacy, a regulated entity could, for example, provide evidence that existing privacy laws and standards, as well as best practices such as the Privacy by Design framework set by Ontario's Privacy Commissioner, have been met.

The Board believes that the area of cyber-security is particularly suitable for future discussion and advice from the Working Group. The development of standards and practice in this very complex field will require the continued monitoring of developments in other jurisdictions to ensure that regulated entities are following the best practices.

4.1.4 Co-ordination and Interoperability

Utility co-ordination and co-operation in planning is a key component of the renewed regulatory framework. The effective use of regional infrastructure planning and the inclusion of regional considerations in distributors' and transmitters' plans will be key in ensuring that the development and implementation of smart grid in Ontario is carried out on a coordinated basis and best serves the interests of the region. Distributors and transmitters will be expected to file evidence in rate applications and leave to construct proceedings that demonstrates that regional issues have been appropriately considered and, where applicable, addressed in developing the utility's capital budget or infrastructure investment proposal. The Board has convened a stakeholder working group to prepare a report that sets out the details of an appropriate regional infrastructure planning process.

The Board does not intend to prescribe interoperability standards (e.g., communication protocols between meters and "behind the meter" technologies), but expects interoperability. The Board also intends to ensure that distributors support the

development and adoption of standards through, for example, co-ordination (e.g., common technology procurement) and regional planning (e.g., common communication protocols) as well as links with third-party providers and industry. The Board will assess distributor plans to ensure that they are facilitating interoperability and that, where appropriate, proposed technology investments enable future potential applications or requirements.

The Board believes that the area of interoperability presents itself as a subject for future input from the Working Group (e.g., monitoring standards development in other jurisdictions).

4.1.5 Economic Development

The Board recognizes that economic development opportunities associated with smart grid are a significant part of the *GEA* and the Government of Ontario's Clean Energy Economic Development Strategy. In defining economic development, the Minister's Directive refers to economic growth and job creation within the province of Ontario as well as the development and adoption of products and services from Ontario-based sources. The Board will consider qualitative and quantitative evidence on economic development when reviewing proposed expenditures by regulated entities. The Board does not foresee economic development as being the primary driver for a project. Further, regardless of the expected economic development benefits, the Board does not expect to approve expenditures which are not otherwise cost-effective, prudent, long-term investments.

4.1.6 Environmental Benefits

The attainment of environmental benefits is an important part of the Government of Ontario's energy policy, including the *GEA*. In setting out environmental benefits as a policy objective, the Minister's Directive refers to the use of clean technology, conservation and more efficient use of existing technologies. The Board will consider qualitative and quantitative evidence on environmental benefits and assess claimed benefits on whether they promote the integration of clean technologies, conservation, or

more efficient use of existing technologies. However, the Board does not intend to develop a methodology for calculating and quantifying environmental benefits. Regardless of the expected environmental benefits, the Board does not expect to approve expenditures which are not otherwise cost-effective, prudent, long-term investments.

4.2 Measuring Performance

An important component of the performance-based regulatory framework is a robust set of performance and monitoring requirements to ensure that distributors are achieving the outcomes established by the Board. The Board stated in the RRFE Report that it will develop standards, and measures that will link directly to the performance outcomes (i.e. Customer Focus, Operational Effectiveness, Public Policy Responsiveness, and Financial Performance). Using a scorecard approach, distributors will be required to report annually on their key performance outcomes.

As part of the development of consolidated capital plan filing requirements, which will provide the basis for evaluating distributors' capital plans, the Board has stated that performance measures related to plan execution will be developed. The development of such performance measures is being undertaken as part of the distribution network investment planning initiative. The Board expects that the results of this work may be incorporated into the scorecard and/or reporting mechanisms to monitor progress in meeting the outcomes set by the Board.

The Board has also established a stakeholder working group to provide staff with expert assistance and to review and evaluate proposals regarding performance standards and measures, and the development of benchmarking. The end result of this work will be a Supplemental Report of the Board expected to be issued in mid-2013.

5. Next Steps

As noted throughout this Supplemental Report, additional work, in consultation with stakeholders, is required in some areas (i.e. investment planning, regional planning, innovation, and measuring performance) to implement the Board's guidance regarding smart grid as part of the Board's integrated approach to electricity system investments and planning set out in the RRFE Report.

These consultations will conclude with the issuance of filing requirements and guidance, code amendments, and/or supplemental Board policies that will provide further information to distributors and other regulated entities regarding the implementation of smart grid.

The Board's thinking regarding smart grid will evolve over time as investments are made, existing infrastructure is renewed and replaced, current technologies mature and new technologies emerge, and standard methodologies and protocols arise. As this process unfolds, the Board will issue further guidance and/or direction as appropriate, taking into account information and advice that emerges from the Working Group.

Appendix: Minister’s Directive

Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit:

WHEREAS it is desirable that the Province and the Ontario Energy Board move forward together with a plan to implement the advanced information exchange systems and equipment that together comprise the Smart Grid ("Smart Grid"), as defined in the amendments to the *Electricity Act, 1998* made by the *Green Energy and Green Economy Act, 2009*;

AND WHEREAS in furtherance of this goal, it is desirable that the Province provide guidance and direction to the Board as to the principles and objectives which must be met in order to fully achieve the Province's objectives related to the Smart Grid in a cost-efficient manner;

AND WHEREAS the Minister of Energy has the authority, with the approval of the Lieutenant Governor in Council, to issue Directives pursuant to section 28.5 of the *Ontario Energy Board Act, 1998*, as amended by the *Green Energy and Green Economy Act, 2009,* in relation to the establishment, implementation or promotion of a Smart Grid for Ontario;

NOW THEREFORE the Directive attached hereto, is approved.

Recommended: _____
Minister of Energy

Concurred: _____
Chair of Cabinet

Approved and Ordered: NOV 2 3 2010
Date

_____
Administrator of the Government

O.C./Décret 1515/2010

MINISTER'S DIRECTIVE

TO: THE ONTARIO ENERGY BOARD

I, Brad Duguid, Minister of Energy, hereby direct the Ontario Energy Board pursuant to section 28.5 of the *Ontario Energy Board Act, 1998* (the "Act"), as described below.

The Board shall take the following steps in relation to the establishment, implementation and promotion of a smart grid:

1. The Board shall provide guidance to licensed electricity distributors and transmitters, and other regulated entities whose fees and expenditures are reviewed by the Board, that propose to undertake smart grid activities, regarding the Board's expectations in relation to such activities in support of the establishment and implementation of a smart grid.

2. For licensed distributors and transmitters, the guidance referred to in paragraph 1 shall be provided in particular to: (a) guide these regulated entities in the preparation of plans for the development and implementation of the smart grid, as contemplated in subparagraph 70(2.1)2(ii) of the Act ("Smart Grid Plans"); and (b) identify the criteria that the Board will use to evaluate Smart Grid Plans.

3. In developing the guidance referred to in paragraph 1, and in evaluating the Smart Grid Plans and activities undertaken by the regulated entities referred to in that paragraph, the Board shall be guided by, and adopt where appropriate, the parameters for the three objectives of a smart grid referred to in subsection 2(1.3) of the definition for "smart grid" as provided for under the *Electricity Act, 1998*, where such elements of said objectives are set out in Appendices A through C.

4. Further, in developing the guidance referred to in paragraph 1 and in evaluating the smart grid activities of the regulated entities referred to in that paragraph, the Board shall be guided by the following policy objectives of the government:

    (i) *Efficiency***:** Improve efficiency of grid operation, taking into account the cost-effectiveness of the electricity system.

    (ii) *Customer value:* The smart grid should provide benefits to electricity customers.

    (iii) *Co-ordination*: The smart grid implementation efforts should be coordinated by, among other means, establishing regionally

coordinated Smart Grid Plans ("Regional Smart Grid Plans"), including coordinating smart grid activities amongst appropriate groupings of distributors, requiring distributors to share information and results of pilot projects, and engaging in common procurements to achieve economies of scale and scope.

(iv) *Interoperability:* Adopt recognized industry standards that support the exchange of meaningful and actionable information between and among smart grid systems and enable common protocols for operation. Where no standards exist, support the development of new recognized standards through coordinated means.

(v) *Security:* Cybersecurity and physical security should be provided to protect data, access points, and the overall electricity grid from unauthorized access and malicious attacks.

(vi) *Privacy:* Respect and protect the privacy of customers. Integrate privacy requirements into smart grid planning and design from an early stage, including the completion of privacy impact assessments.

(vii) *Safety:* Maintain, and in no way compromise, health and safety protections and improve electrical safety wherever practical.

(viii) *Economic Development:* Encourage economic growth and job creation within the province of Ontario. Actively encourage the development and adoption of smart grid products, services, and innovative solutions from Ontario-based sources.

(ix) *Environmental Benefits:* Promote the integration of clean technologies, conservation, and more efficient use of existing technologies.

(x) *Reliability***:** Maintain reliability of the electricity grid and improve it wherever practical, including reducing the impact, frequency and duration of outages.

The Board may consider such other factors as are relevant in the circumstances.

5. In furtherance of the government's policy objective as described in item (iii) of paragraph 4 above, the Board shall undertake a consultation process with licensed electricity distributors and other relevant stakeholders for the purpose of developing a regional or otherwise coordinated approach to the planning and implementation of smart grid activities by licensed electricity distributors that promotes coordination

amongst them having regard to, among other things, cost-effective outcomes.

6. Nothing in paragraph 5 shall be construed as limiting the ability of licensed electricity distributors to engage in smart grid activities or the authority or discretion of the Board in exercising its responsibilities in relation to the smart grid activities of licensed electricity distributors pending the development of the regional or coordinated approach referred to in that paragraph.

APPENDIX “A”

CUSTOMER CONTROL OBJECTIVES

For the purpose of providing the customer with increased information and tools to promote conservation of electricity, which will “expand opportunities to provide demand response, price information and load control to electricity customers”, in accordance with subsection 2(1.3)(b) of the Electricity Act, the following objectives apply:

- **ACCESS:** Enable access to data by customer authorized parties who can provide customer value and enhance a customer’s ability to manage consumption and home energy systems.

- **VISIBILITY:** Improve visibility of information, to and by customers, which can benefit the customer and the electricity system, such as electricity consumption, generation characteristics, and commodity price.

- **CONTROL:** Enable consumers to better control their consumption of electricity in order to facilitate active, simple, and consumer-friendly participation in conservation and load management.

- **PARTICIPATION IN RENEWABLE GENERATION:** Provide consumers with opportunities to provide services back to the electricity grid such as small-scale renewable generation and storage.

- **CUSTOMER CHOICE:** Enable improved channels through which customers can interact with electricity service providers, and enable more customer choice.

- **EDUCATION:** Actively educate consumers about opportunities for their involvement in generation and conservation associated with a smarter grid, and present customers with easily understood material that explains how to increase their participation in the smart grid and the benefits thereof.

APPENDIX “B”

POWER SYSTEM FLEXIBILITY OBJECTIVES

For the purpose of “enabling the increased use of renewable energy sources and technology, including generation facilities connected to the distribution system,” , in accordance with subsection 2(1.3)(a) of the Electricity Act, and recognizing the need for flexibility on the integrated power system, the following objectives apply:

- **DISTRIBUTED RENEWABLE GENERATION:** Enable a flexible distribution system infrastructure that promotes increased levels of distributed renewable generation.

- **VISIBILITY:** Improve network visibility of grid conditions for grid operations where a demonstrated need exists or will exist, including the siting and operating of distributed renewable generation.

- **CONTROL AND AUTOMATION:** Enable improved control and automation on the electricity grid where needed to promote distributed renewable generation. To the extent practical, move toward distribution automation such as a self-healing and self-correcting grid infrastructure to automatically anticipate and respond to system disturbances for faster restoration.

- **QUALITY:** Maintain the quality of power delivered by the grid, and improve it wherever practical.

APPENDIX "C"

ADAPTIVE INFRASTRUCTURE OBJECTIVES

For the purpose of "accommodating the use of emerging, innovative and energy-saving technologies and system control applications," in accordance with subsection 2(1.3)(c) of the Electricity Act, the following objectives apply:

- **FLEXIBILITY:** Provide flexibility within smart grid implementation to support future innovative applications, such as electric vehicles and energy storage.

- **FORWARD COMPATIBILITY:** Protect against technology lock-in to minimize stranded assets and investments and incorporate principles of modularity, scalability and extensibility into smart grid planning.

- **ENCOURAGE INNOVATION:** Nest within smart grid infrastructure planning and development the ability to adapt to and actively encourage innovation in technologies, energy services and investment / business models.

- **MAINTAIN PULSE ON INNOVATION:** Encourage information sharing, relating to innovation and the smart grid, and ensure Ontario is aware of best practices and innovations in Canada and around the world.

TAB 5

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2011-0063

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

AND IN THE MATTER OF an Application by Grand Renewable Wind LP for an Order granting leave to construct a new transmission line and associated facilities for the Grand Renewable Energy Park to be located in Haldimand County.

BEFORE: Paula Conboy
Presiding Member

Ken Quesnelle
Member

December 8, 2011

DECISION AND ORDER

I. DECISION

For reasons that follow in this decision the Board approves Grand Renewable Wind LP's application for an Order granting it leave to construct the transmission line and associated facilities as described in its February 28, 2011 application. Further and again for reasons that follow the Board finds it necessary to apply certain conditions to its Order granting the leave to construct.

II. SCOPE OF APPLICATION

Grand Renewable Wind, LP ("GRWLP") filed an Application with the Ontario Energy Board (the "Board") dated February 28, 2011 under sections 92 and 97 of the *Ontario*

Energy Board Act, *1998*, S.O. 1998, c.15, (Schedule B), (the "Act") seeking an Order of the Board to construct transmission facilities and approval of a form of easement agreement. The transmission facilities are required to connect the Grand Renewable Energy Park (the "GREP"), to be located in Haldimand County, to the IESO-controlled grid. The transmission facilities consist of approximately 19 kilometres of 230 kilovolt ("kV") transmission line, a collector substation consisting of two step-up transformers (34.5kV:230 kV), two transition stations to accommodate construction of an underground portion of the proposed 230 kV transmission line, and an interconnection station to connect to an existing Hydro One Networks Inc. owned 230 kV transmission line (collectively referred to as the "Transmissions Facilities" or the "Project").

GRWLP is seeking leave to construct the Project for the GREP, which covers an area of 7600 hectares of mainly agricultural land, and will comprise a 153 MW wind power generating facility (the "Wind Project"), and a 100 MW solar photovoltaic generating facility (the "Solar Project").

This Application is for approval to construct the Transmission Facilities and the form of easement only. GRWLP is not seeking any approvals from the Board through this Application for the GREP itself. All issues relating to the GREP, the Wind Project or the Solar Project, therefore, are outside the scope of this proceeding.

The Board assigned File No. EB-2011-0063 to the application.

III. THE BOARD'S JURISDICTION

The Board's power to grant an applicant leave to construct transmission facilities arises from section 92 (1) of the Act which states:

> 92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

In discharging its duties in this proceeding the Board is also bound by the provisions of section 96 of the Act which states:

96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

(2) In an application under section 92, the Board shall only consider the following when, under subsection 1, it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the government of Ontario the promotion of the use of renewable energy resources.

As discussed in further detail below, issues that might broadly be described as environmental issues are not within the Board's jurisdiction. These issues are dealt with through the separate Renewable Energy Approval ("REA") process, which does not involve the Board.

IV. THE PROCEEDING

The Board has chosen to summarize the record to the extent necessary to provide context to its findings. The full record of the proceeding is available on the Board's website.

The Board issued a Notice of Application and Written Hearing on April 1, 2011 and GRWLP served and published the Notice as directed by the Board.

Haldimand County Hydro Incorporated Motion

On April 29, 2011 Haldimand County Hydro Incorporated ("HCHI") filed a notice of motion under this proceeding and the Summerhaven proceeding (EB-2011-0027) seeking an order or orders of the Board to defer any final decision in EB-2011-0063 and EB-2011-0027 until the Board has conducted a generic proceeding. The generic

proceeding would deal amongst other things with the development of transmission lines in municipal rights-of-way ("ROW"); would establish procedures for the publication notice, participation and scheduling such proceeding; and would provide such other relief as the Board deems just and reasonable.

On May 30, 2011, the Board dismissed HCHI's Motion without a hearing. The Board held that the individual Board panels assigned to the Summerhaven and GRWLP applications were not empowered to initiate a generic proceeding. Only the Board as a whole could make such a decision. Although parties can request that the Board consider initiating a generic proceeding, that determination lies solely with the Board. The Board determined that the best place to hear many of the issues raised in the motion was through the existing hearing processes on the individual applications.

The Proceeding

The Board received several requests for intervenor and observer status as well as letters of comment. A number of these requests appeared to raise concerns about issues that are outside the scope of the Board's jurisdiction.

On May 18, 2011, the Board sent out a letter to all intervention applicants who filed their requests prior to that date reminding each party of the scope of the Board's jurisdiction in section 92 applications. The Board advised parties that:

- Environmental issues with respect to this project are considered through the separate Renewable Energy Approval ("REA") process that was being undertaken outside of the leave to construct application before the Board;
- The Board would be asking GRWLP to file an update on the status of the REA process, and that the Board will provide information on GRWLP's update; and
- The Board might seek further information regarding the nature of the proposed intervention in the Board's process. Specifically, how the expressed interest of intervenors relate to the matters that fall within the Board's jurisdiction.

By letter to GRWLP issued May 18, the Board sought further information from GRWLP in order to better inform all parties on the REA process. The Board also asked for clarification of the extent to which the route identified in the application before the Board is expected to be the final route subject to the REA approval.

In its response filed on May 26, GRWLP confirmed that the route in the leave to construct application and pre-filed evidence is the final route, subject to REA approval. GRWLP also indicated that it would update the Board on progress with respect to such Ground Leases as it became available.

On June 7, the Board issued another letter to provide parties with additional information it received from GRWLP with respect to the REA process. The Board's intention was to clarify the appropriate avenue for parties to bring forward any environmental concerns with the Transmission Facilities. The Board also used the letter to reiterate the scope of the Board's jurisdiction in applications of this kind.

On June 17, 2011 the Board issued Procedural Order No.1 requesting all previous intervention applicants to re-file with the Board no later than Monday, June 27, to clarify how their interests are within the Board's jurisdiction. Several of the original intervention applicants re-filed their requests with the Board. Procedural Order No.1 also specified dates for the filing of interrogatories, and for responses to be submitted by GRWLP.

The Board granted intervention status to HCHI, Hydro One Networks Inc ("Hydro One"), the Independent Electricity System Operator ("IESO"), the Six Nations Council, Haldimand Federation of Agriculture, the Corporation of Haldimand County, Norm Negus, Quinn Felker, Bruce Genery, Doug Maxwell and Geraldine Ratcliff & Lee Russell. The Board granted cost eligibility to the Six Nations Council, Nathan Armstrong, Quinn Felker and the Haldimand Federation of Agriculture to the extent that any evidence or submissions filed by those intervenors pertains to matters within the scope of the proceeding. Ms. Linda S. Link requested and was granted observer status. There were also numerous letters of comment and information from interested parties.

Procedural Order No.2 was issued on August 3, 2011 following a request from GRWLP for an extension of time to submit interrogatory responses, which the Board granted.

By letter dated August 18, 2001, HCHI advised the Board that it intended to file evidence relating to the need for a new transformer station in Haldimand County. HCHI argued that the evidence was necessary because the Transmission Facilities that are the subject of the current application would provide an ideal connection to the new transformer station. Absent a requirement that the GRWLP be a licensed transmitter, it would presumably have no obligation to connect HCHI and allow it to use the

Transmission Facilities, an issue of concern to HCHI. The evidence supporting the need for a new transformer station was filed on August 30, 2011.

On September 6, 2011 GRWLP filed a letter with the Board asking it to strike the evidence filed by HCHI on the ground that it had no relevance to the proceeding.

As indicated by the Board in Procedural Order No. 3, issued on September 8, 2011, this proceeding represents one of the first times since the enactment of the *Green Energy and Green Economy Act, 2009* that the Board has considered a leave to construct application from a renewable generation facility. Throughout the proceeding there appeared to be a level of disagreement amongst the parties regarding exactly what was within the scope of the proceeding. Although the Board received a number of submissions (in the form of letters to the Board secretary's office) regarding parties' views on jurisdictional issues, it did not occur in a structured manner throughout this proceeding rendering it difficult for the Board to make any interim rulings. As a result, the Board sought as part of final argument submissions which addressed the following questions:

1. What are the responsibilities, if any, of the applicant to provide access to its proposed Transmission Facilities?
2. Are broader transmission planning issues (i.e. beyond the Transmission Facilities proposed in the application) relevant considerations in this proceeding? What responsibilities does the applicant have, if any, with respect to broader transmission planning issues?
3. Does the fact that the proposed facilities will be located largely within a municipal ROW have any bearing on the applicant's obligation regarding future requests for connection?
4. Does section 96(2) permit the Board to consider the impact of the proposed Transmission Facilities on the reliability of the current or future distribution system owned and operated by HCHI?

The Board's findings with respect to these questions, where applicable, are found in the relevant sections below.

V. EVIDENCE AND BOARD FINDINGS

a. Prices and the reliability and quality of electricity service

The proposed Transmission Facilities are noteworthy in that the proposed route is along a municipal ROW, parts of which already accommodate the electrical distribution system owned and operated by HCHI. There have been claims made that the introduction of a high voltage transmission system in close proximity to an existing distribution system can result in negative impacts on the distribution system.

In Procedural Order No. 3, the Board asked parties to make submission on whether section 96(2) permitted the Board to consider the impact of the Project on the reliability of the current or future distribution system owned and operated by HCHI. The Board's assessment of the prices, reliability and quality of electricity service with a transmission leave to construct application does not typically necessitate consideration of these factors as they relate to electricity distribution. This is due to the fact that distribution systems are usually not located close to the transmission facilities in question. However, the Act does not specifically limit the section 96(2) considerations to the transmission system or the customers thereof. The Board therefore finds that the consideration of prices, reliability and quality of electricity service can include consideration of impacts on neighbouring transmission and distribution electricity systems and the customers connected to them.

Transmission System

Price Impacts

In regard to the impact on transmission rates, GRWLP indicated in its pre- filed evidence[1] that there would be no adverse impact on ratepayers as it would pay the entire cost of the proposed Transmission Facilities. GRWLP further re-stated this position in its Argument in Chief[2] where it said that:

> *"The Facility, including the Interconnection Station, will be entirely paid for by GRWLP. As such, the Facility will not impact transmission rates in Ontario".*

[1] Exh. A/Tab 2/Sch. 1/par. 21
[2] Argument in Chief, September 16, 2011, par. 38

No party disputed GRWLP's submission in regard to its claim that the proposed facility will not impact transmission rates in Ontario.

The Board accepts that there is no negative price impact arising from the costs associated with this project as they relate to the transmission system.

System Impact Assessment

System Impact Assessments ("SIA") are conducted by the IESO to assess whether a connection applicant's proposed connection with the IESO-controlled grid would have an adverse impact on the reliability of the integrated power system and whether the IESO should issue a notice of approval or disapproval of the proposed connection under Chapter 4, section 6 of the Market Rules. This is a technical document intended to provide a detailed review of the components of the proposal and its impacts on system operating voltage, system operating flexibility and the implications for other connections to deliver and withdraw power from the transmission system. GRWLP filed the final SIA on August 2, 2011, as required by the Filing Requirements for Transmission and Distribution Applications (the "Filing Requirements") as they relate to leave to construct proceedings. The SIA Report[3] indicated that the scope of its study focused on the evaluation of the impact of the two sources of generation, from the wind and solar power projects via the Hydro One owned 230 kV circuit N5M, on the reliability of the IESO-controlled grid. The SIA Report also included a Protection Impact Assessment Report[4] carried out by Hydro One for the IESO, which confirmed that it is feasible to connect the proposed 154 MW of wind and 100 MW of solar generation to circuit N5M as long as certain proposed changes are implemented[5]. The SIA Report indicated also that the proposed Project will not have a material adverse impact on the reliability of the IESO-controlled grid and recommended that a notification of conditional approval be issued subject to implementation of the requirements listed in the report[6].

GRWLP indicated[7] that it is in contact with the IESO in regard to various issues including "unbundling" the SIA given that the Solar Project and Wind Project will be owned by different entities. GRWLP also indicated that the Board may also take it

[3] IESO's SIA Final Report, May 5, 2011 (Filed August 2, 2011), page 6
[4] IESO's SIA Final Report, May 5, 2011 (filed August 2, 2011), pages 68 - 72
[5] Ibid, page 70, Executive Summary
[6] IESO's SIA Final Report, May 5, 2011 (filed August 2, 2011), page 10
[7] Argument in Chief, September 16, 2011, paragraph 27

under advisement that the unique metering configuration for the Project has been developed in conjunction with the IESO, and therefore meets the IESO's approval, and the fact that the Solar Project will be owned by an affiliate of GRWLP does not change the findings of the SIA, which are technical in nature.

The IESO in its submission[8] indicated that the IESO is not able to approve a specific metering configuration. GRWLP maintains that it is not required to obtain a transmitter licence, and that approval of the metering configuration will be granted during the Facility Registration and Market Entry process.

Customer Impact Assessment

As required by the Filing Requirements for leave to construct proceedings, a final Customer Impact Assessment Report ("CIA") conducted by Hydro One was filed on August 2, 2011. This study is designed to assess the implications of the project for other transmission customers of the transmission system. The assessment confirmed that the project is not expected to have any significant negative implications for other specific customers of the transmission system.

The Board notes that GRWLP confirmed[9] that it will make its required contribution towards the cost of short circuit mitigation measures at Caledonia TS. This requirement is triggered by the increase in short circuit levels at Caledonia TS to within a 5% limit of the maximum allowed level.

The Board accepts that the impacts on both the transmission system and its directly connected customers have been identified as well as the mitigation measures required to overcome those impacts. The Board conditions its granting of the leave to construct the project on GRWLP's execution of the required mitigations identified in the SIA and CIA reports.

Distribution System (HCHI)

The Board notes that GRWLP in its Argument in Chief[10]indicated that in the event that any of HCHI's existing distribution infrastructure needed to be relocated, GRWLP would

[8] IESO's submission, September 23, 2011/pp. 2-3/
[9] Argument in Chief, September 16, 2011, paragraph 28
[10]Argument in Chief, September 16, 2011, paragraph 22

be responsible for any costs incurred related to such a re-location. GRWLP further indicated in its argument that studies carried out in Summerhaven proceeding (EB-2011-0027) demonstrated that it was evident that the issues raised by HCHI in that proceeding regarding induced voltage or grounding could be mitigated and addressed in the design of the proposed Project. GRWLP also indicated in its argument that as currently designed, the majority of the Transmission Facilities would be on the opposite side of the road from any HCHI distribution infrastructure. As a result GRWLP asserted that it did not anticipate that any potential problem would occur that could not be mitigated.

In its submission HCHI indicated that[11] GRWLP's evidence[12] included a map of the transmission line which was devoid of any specific information regarding the alignment of the proposed transmission line within the municipal ROW or the extent of impact on the HCHI distribution system. HCHI further indicated that the application also included the cross-section of the tangent steel pole[13] which made no provision for joint use, and thus, HCHI was left without sufficient information to understand how the project would impact HCHI and its ratepayers.

In reply to HCHI's noted concerns, GRWLP[14] indicated that HCHI's ratepayers would not be impacted. GRWLP further indicated that it will absorb not only the cost of construction and operation of the Transmission Facilities, but also the costs related to the relocation (including burial and crossing) of any existing HCHI infrastructure that is necessitated by the Transmission Line[15]. GRWLP also indicated[16] that reliability and quality of service of HCHI's distribution infrastructure would not be adversely affected, and that GRWLP has taken steps to ensure that the Transmission Facilities are located on the opposite side of the Municipal ROW as much as possible and it would absorb the cost of relocating HCHI infrastructure to the other side of the municipal ROW in instances where the Transmission Facilities are co-located adjacent to HCHI infrastructure. Furthermore GRWLP stated that it would meet all applicable codes and standards.

[11] HCHI's Submission, September 23, 2011, page 2
[12] Exh. B/Tab 3/Sch. 2/
[13] Exh. B/Tab 4/Sch. 5
[14] Reply Submission, October 7, 2011, par.19
[15] Applicant's Interrogatory Reponses to HCHI ("HCHI IRRs") filed August 15, 2011, IRR# 1(d).
[16] ibid

In its assessment of impacts on prices, reliability and quality of electricity service the Board considers it appropriate that GRWLP be responsible to pay for any direct impacts its Project causes to the quality or reliability of the electricity service provided by HCHI's existing system. HCHI has made claims that both its current and future use of its system will (or may) be negatively impacted. In the context of the current proceeding, the Board does not consider it appropriate that GRWLP be held responsible for any alteration that HCHI may have to make to its future plans. This consideration would be beyond the scope of this proceeding and is not supported by any governing planning framework.

It is not necessary for the Board to make findings here as to the exact extent of what accommodation is required by GRWLP to mitigate any negative impacts that its project will have on the existing distribution system. The existence of applicable construction standards and/or codes as well as any requirements of the Electrical Safety Authority, in its role pursuant to Ontario Regulation 22/04, to ensure compliance of distributors in managing distribution systems in accordance with the noted regulation should serve to identify what accommodation is required.

The Board conditions its granting of the leave to construct on GRWLP providing the financial contributions to HCHI necessary to accommodate any mitigation measures to existing distribution facilities deemed necessary to ensure compliance with any relevant code, standard or Electrical Safety Authority requirement.

b. Project Need

As observed above, the Board's jurisdiction in a section 92 application is limited to a consideration of the interests of consumers with respect to prices, the reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the provincial government, the promotion of the use of renewable energy resources. "Project Need" is not itself listed as a consideration for the Board. In cases where a proponent will be seeking to recover the costs of a project through rates, the Board typically considers the "need" issue through the lens of price – in other words ensuring that consumers are not saddled with costs where a project is not actually needed. Similarly, routing alternatives are often considered from the perspective of price to ensure that the option chosen is the most cost effective. In the current case, all of the costs of the Project itself are being covered by GRWLP. GRWLP will not be seeking any rate to recover these costs, and therefore the costs of the Project will not

be passed directly to ratepayers (as well see finding above on possible project costs associated with potential impacts to the existing distribution system). The typical "price" consideration, therefore, does not necessarily apply in this case.

Regardless, the Board observes that there is a strong case for both the need for the Project and the route proposed by GRWLP. GRWLP indicated that it has executed two power purchase agreements with the Ontario Power Authority for the power delivery expected from the Wind Project and the Solar Project, respectively, to the IESO-controlled grid[17]. The Project is required to convey the electricity produced by these facilities to the IESO-controlled grid. GRWLP further indicated that the proposed Project is therefore consistent with government policy in respect of the promotion of renewable energy sources as the transmission line would be used to connect the two projects to the transmission system owned by Hydro One.

Six Nations Council disagreed with GRWLP's rationale for its need for the transmission line[18]. Six Nations Council stated in paragraph 10 of its submission that:

> *10. By definition, there is no Project Need for the Transmission Line if both the proposed Wind Project and Solar Project are not permitted to be built.*

Six Nations Council further indicated that since neither the contemplated Wind Project nor the contemplated Solar Project have received the required REA from the Ontario Ministry of the Environment, the Board should defer consideration of this application until the REA is secured. In its reply, GRWLP noted that it expected that the receipt of a REA would be a condition of approval in any order issued by the Board.

The Board accepts that the Project is needed in order to transmit the electricity generated by the two generation facilities. The Board's approval will be conditioned, however, on the two generation projects receiving the REA and any other approvals necessary for their construction.

[17] Argument in Chief, September 16, 2011, paragraph 19.
[18] Submissions of Six Nations Council, September 23, 2011, pages 4-5, paragraphs 9 - 17

c. Project Routing

GRWLP provided evidence[19] that it examined six different routing options, and that it has chosen the route with the least impact to the environment and landowners. GRWLP submitted that the chosen route will meet all regulatory standards.

Board staff noted in its submission that GRWLP's response to a HCHI interrogatory[20], provided a step by step description along with a map depicting the six alternatives and the process of elimination which ended with the selected proposed route. Based on that response, Board staff indicated agreement with GRWLP's selected route.[21]

HCHI noted in its submission[22] that GRWLP's proposed route is located within a few kilometres of two other significant renewable energy generation projects: (1) Summerhaven Wind Energy Centre ("Summerhaven"), subject of a separate leave to construct proceeding EB-2011-0027 and (2) the Port Dover and Nanticoke Windfarm ("PDNW"). HCHI's position[23], apart from generally not supporting the location of transmission facilities within municipal ROWs, is that the proposed route has not been demonstrated to be superior to another abandoned option, notably GRWLP's Option 1 or the HCHI's proposed Modified Option 1. HCHI indicated in its submission that its Modified Option 1 would allow for the sharing of a common connection amongst the three projects, with no usage of a municipal ROW and a requirement for a shorter transmission (25 km versus 28 km) line. HCHI further submitted that for the Board to meet its objectives and to ensure integrated system planning, the current route should not be approved. Rather, as a result of the proximity of GRWLP's project to the Summerhaven and the PDNW projects, a common connection for the three projects should be considered.

GRWLP in its reply submission[24] addressed HCHI's concerns in regard to the proposed route stated in part that:

---

[19] Argument in Chief, September 16, 2011, paragraphs 20 - 21
[20] Applicant Response to HCHI Interrogatory # 2, Question (h), August 15, 2011, pages 6 -8
[21] Board staff submission, September 23, 2011, p. 4, section B.2
[22] HCHI's Submission, September 23, 2011, page 4
[23] HCHI's Submission, September 23, 2011, pages 5-9
[24] Applicant reply Submision, October 7, 2011, par. 25

> *"there are many reasons that a route that attempted to coordinate with the Summerhaven and Port Dover project was not possible, including but not limited to: (i) the risk associated that one of the three projects does not (sic) proceed; (ii) all three projects have different commercial operation dates, with a spread of more than 18 months between all three projects; (iii) financing issues related to risk, which risk substantially increases when there are elements that are outside of the control of the developer (such as the development of neighbouring projects and transmission lines); (iv) protection and control coordination given that the proponents are using different technologies and different procurement methods, etc".*

GRWLP also indicated in its reply submission[25] that the concerns raised by HCHI seem to be related to matters of electricity policy rather than issues contemplated within the scope of section 96(2), and that a leave to construct for a privately owned generation connection transmission line is not the forum to carry out regional planning, to raise issues that are of general importance to the regulatory framework governing the connection of renewable projects.[26].

In Procedural Order No. 3, the Board asked parties to make submissions on relevance in this proceeding of broader transmission planning issues, and what responsibilities GRWLP has, if any, with respect to these broader transmission planning issues.

The Board has provided the context in which it typically reviews the route in the "Project Need" section above. To reiterate, the Board's focus would typically be on the cost effectiveness of the route where the price consideration is triggered by a cost to ratepayers. Given the findings in this decision as they relate to cost responsibilities there is no need for the Board to consider the route from a price perspective. As well, the Board has earlier communicated its views on the route considerations in the context of the REA process.

[25] Applicant reply Submision, October 7, 2011/par. 16
[26] HCHI Submission, September 23/p. 3/par. 16

The Board considers the other routing issues that have been raised to either be beyond the scope of this proceeding or in the case of the municipal ROW dealt with by the appropriate parties outside of this proceeding.

With respect to the issues raised by HCHI concerning the consideration of other area projects, the Board has found, on the matter of cost responsibility for any impact on HCHI's future distribution system plans, that there is no governing planning framework in place that conditions the Board's review of section 92 applications.

The Board notes Hydro One's submission that the Board's current Regional Planning for Electricity Infrastructure initiative (EB-2011-0043) or some other generic forum would be a more appropriate venue for a review of common issues arising from multiple projects in the same general proximity. The Board expects that the participants in the Board's Regional Planning initiative will take note of this application and decision in the context of that consultation.

With respect to the use of the municipal ROW, the Board notes that GRWLP indicated in its Argument in Chief[27] that Haldimand County, the owner of the municipal ROW in which 95% of the Transmission Line will be built, although an approved intervenor, did not submit any interrogatories in this process. The Board also notes that the Haldimand County did not make any submissions in regard to the proposed route and that GRWLP in its Reply Submission[28] stated in part that:

> *Haldimand County has agreed to allow GRWLP to use the Municipal ROW and has entered into a Community Vibrancy Fund Agreement, which provides a form of road use agreement.*[29]

There does not appear to be any dispute between GRWLP and the owner of the municipal ROW on which the Board would need to consider its responsibility to make findings in the resolution of such a dispute.

[27] Argument inChief, September 16, 2011/pp. 2 -3/par. 5
[28] Applicant reply Submission, October 7, 2011/par. 20
[29] See Applicant's Submissions, filed September 16, 2011/par. 30.

d. Form of easement

Section 97 of the Act states:

> In an application under section 90, 91 or 92, leave to construct shall not be granted until GRWLP satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

Pursuant to this section, GRWLP has provided a form of easement for the Board's approval.

The Board notes that the proposed Project will be built across land with three different types of owners, each requiring a distinct type of agreement. The three types of agreement are: three parcels of privately owned land – each requiring an Option Agreement and Ground Lease[30]; the Haldimand ROW[31] which is owned by Haldimand County; and the Ministry of Infrastructure ("MOI") Lands – the Option agreements sought by the Ontario Realty Corporation ("ORC") who is the land manager of MOI[32].

Three Landowner Easement Agreements (the "Ground Leases")

The Board notes that in regard to the privately held lands, GRWLP in its Argument in Chief[33] indicated that each of the three Landowners was provided with the appropriate Notice of Application. The Board notes that one of the three landowners who is an intervenor was replaced with another landowner as reported by GRWLP in a Board staff interrogatory[34], (where Landowner A was replaced with Landowner D). One of the three landowners has already reached an agreement with GRWLP, and negotiations with the other two landowners continue. A draft version of the Ground Leases was provided with the application.

---

[30] Exh. A/Tab 2/Sch. 1/paragraph 13 & Exh. B/Tab 3/Sch. 1/paragraphs 41, 43
[31] Exh. A/Tab 2/Sch. 1/paragraphs 14 and 15 & Exh. B/Tab 3/Sch. 1/par. 54 & Exh. B/Tab 3/Sch. 3, Form of Easement _ Haldimand ROW
[32] Exh. B/Tab 3/Sch. 1/paragraphs 44, 45,46
[33] Argument in Chief, September 16, 2011/par. 31
[34] Applicant Response to Board staff interrogatory # 3 Question (ii)

Haldimand Right of Way ("ROW") Form of Easement Agreement

The Board notes that in regard to the Haldimand ROW, GRWLP in its Argument in Chief[35] indicated that it is in the process of finalizing a Community Vibrancy Fund Agreement with Haldimand County. The Community Vibrancy Fund Agreement contemplates the parties concurrently executing a road use agreement for GRWLP's use of the Haldimand ROW. The Board also notes that GRWLP confirmed that it is not seeking exclusive use of the Haldimand ROW[36].

In its submission[37] HCHI indicated that GRWLP did not seek approval of the form of agreement for the Haldimand ROW, which is included in GRWLP's pre-filed evidence.[38] HCHI raised the concern that an easement is to be registered against the property identification number and many ROWs do not have such information, and that it is unclear if such information is available in the present circumstances. HCHI is of the view that GRWLP should submit a revised ROW Form of Easement Agreement consistent with its commitment to not seek exclusivity.

GRWLP responded[39] to HCHI's concerns indicating that the purpose of the Board's review of land owner agreements is to ensure that the affected landowner is protected. GRWLP further indicated that the Filing Guidelines[40] require GRWLP to file materials that demonstrate "compliance with legislative requirements and respects the rights of affected persons." GRWLP concluded that in the present circumstances, the landowner, Haldimand County, has not raised any concerns in the proceeding.

In Procedural Order No. 3, the Board asked parties to make submissions on whether the fact that the proposed facilities will be located largely within a municipal ROW have any bearing on GRWLP's obligation regarding future requirements for connection. GRWLP and Board staff argued that whether a project was to be located on a municipal ROW or not had no bearing on future connection requirements. HCHI argued[41] that:

---

[35] Argument in Chief, September 16, 2011/par, 30
[36] ibid
[37] HCHI's Submission, September 23, 2011/pp. 8 – 9/paragraphs 49 - 53
[38] Exh. B/Tab 3/Sch. 3
[39] Reply Submission, October 7, 2011/par.27
[40] EB-2006-0170: Filing Guidelines for Transmission and Distribution Applications/s. 4.3.6./p. 28.
[41] HCHI Submission, September 23, 2011/p.18/par. 97

> *"permitting a private single purpose interest to use that finite asset at no cost and to have no corresponding obligation to ensure the public interest is furthered would be inconsistent with the legislative scheme."*

As discussed in further detail below, the Board does not make a determination on this issue.

Option Agreements with Ontario Realty Corporation ("ORC") – Ministry of Infrastructure

The Board notes that GRWLP indicated in its Argument in Chief[42] that the terms of the ORC Option Agreements are currently being negotiated between the ORC and GRWLP's parent company, Samsung Renewable Energy Inc. ("SRE"). The Board also notes that all commercial terms have been agreed to between GRWLP and ORC, with the exception of a few real estate specific clauses, which are being negotiated in order to satisfy legal requirements for leasing land from the government[43].

The Board is satisfied with and approves the form of the filed ground lease[44]. The Board will not require re-filing of the ROW Form of Easement Agreement with Haldimand County. The record indicates that Haldimand County is currently working with GRWLP to address any of its concerns and the Board accepts that GRWLP's filed documentation satisfies the Board's filing requirements.

VI. OTHER ISSUES

a. Obligation to Provide Access and Licensing Issues

In Procedural Order No. 3, the Board asked parties to make submissions on (amongst other things): what are the responsibilities, if any, of GRWLP to provide access to its proposed facilities?

While the transmission facilities will be used to transmit the electricity generated from both the Wind Project and the Solar Project to the IESO-controlled grid, GRWLP submitted that any electricity generated by the Solar Project will be transmitted for a

[42] Argument in Chief, September 16, 2011/par. 32
[43] Applicant Response to Board staff Interrogatory #6, Question (i)
[44] Exh. B/Tab 3/Sch. 2

price that is no greater than that required to recover all reasonable costs. In transmitting the electricity generated from the Solar Project, the GRWLP stated that it relies on section 4.0.2(1)(d) of Ontario Regulation 161/99, Definitions and Exemptions made pursuant to the Act, to be exempt from the requirement to obtain a transmitter licence under section 57(b) of the Act. GRWLP has also indicated that it considers itself to be a generator pursuant to section 56 of the Act once the Wind Project achieves commercial operation. GRWLP indicated its intention to submit a notice of proposal to own transmission facilities pursuant to section 81 of the Act when it applies for a generating licence from the Board.

In its submissions on this issue, Board staff submitted that a transmitter only has an obligation to connect if it is licensed, and that licensed transmitters must comply with the provisions of the Transmission System Code ("TSC"). Board staff noted GRWLP's position was that it was exempt from the requirement to hold a licence pursuant to section 4.0.2(1)(d) of O. Reg. 161/99, and therefore did not have any formal duty to provide access to its proposed facilities. Board staff questioned this interpretation of O. Reg. 161/99, and submitted that it was not clear that GRWLP is exempt from holding a transmission licence. However, Board staff also submitted that the licensing status of GRWLP is not a relevant consideration in a leave to construct application, and that the Board need not make a determination on this issue in order to approve the application.

In its reply submission GRWLP agreed with Board staff that its licensing status is not a relevant consideration in a leave to construct application and that the Board should not address the issue in this decision. GRWLP did, however, respond to Board staff's arguments and reiterated its position that it is exempt from holding a transmission licence.

The question of whether GRWLP is exempt from the requirement to obtain a transmission licence and comply with the provisions of TSC is one that ultimately needs to be addressed. However, due to the scope of the Board's jurisdiction in applications of this kind, the current proceeding is not the appropriate venue to make this determination. The Board accordingly makes no findings on this matter in this decision.

b. Aboriginal Consultation

Six Nations Council argued that the Board should defer its decision until (amongst other things) the Crown's duty to consult has been fulfilled. Six Nations Council recognized

that there are statutory limits on the Board's jurisdiction to directly address consultation itself; however it submitted that the Board cannot approve the application until the Crown's constitutional duties have been satisfied.

GRWLP relies on the Board's decision in EB-2009-0120 ("Yellow Falls"), in which the Board determined that it did not have the jurisdiction to consider Aboriginal consultation issues in a section 92 leave to construct case except possibly where the Aboriginal or treaty right in question could be directly tied to prices, reliability, or the quality of electricity service.[45] The reason for this finding was that section 96(2) of the Act specifically limits the Board's consideration to these factors[46]. The Supreme Court's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* ("Rio Tinto"), which was issued after Yellow Falls, appears to support the Board's conclusions. The Court stated:

> *"[t]he power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power."*[47]

The Board does not dispute that, to the extent any Aboriginal or treaty rights are potentially affected by the Project, the Crown's duty to consult will have to be discharged. However, the forum for that discussion is the REA process. One of the conditions to this approval is that construction cannot commence until (amongst other things) GRWLP has obtained an REA approval. The Board can be satisfied, therefore, that the Project will not be built until any duty to consult issues are addressed. To the extent that the Six Nations Council is not satisfied with the results of the REA process, it can pursue its remedies (for example) through the courts. The Board will therefore not defer its decision.

c. HCHI Request for Cost Eligibility

In its final submission HCHI requested permission to make submissions in respect of costs in this proceeding citing the considerable expense incurred by HCHI in this

[45] Yellow Falls decision, p. 9 and p. 11.
[46] section 96(2) of the Act has been amended since then by adding "Where applicable and in a manner consistenet with policies of the Government of Ontario, the promotion of the use of renewable energy sources."
[47] Rio Tinto, 2010 SCC 43, para. 69 (emphasis added).

proceeding and in light of the public interest and importance of the issues raised by HCHI.

In assessing a party's eligibility for costs, the Board is guided by the *Practice Direction on Cost Awards* (the "Practice Direction"). The Board notes that HCHI is a distributor and is explicitly excluded from eligibility as per section 3.05 of the Practice Direction. sections 3.06 and 3.07 of the Practice Direction provide the basis on which the Board will consider exceptions to the applicability of section 3.05. HCHI is not a customer of GRWLP therefore section 3.06 does not apply. In consideration of the applicability of section 3.07 the Board notes HCHI's claim that it raised important matters of public interest. The Board considers HCHI's intervention in this application to have been largely focused on matters respecting its own stated interests. While there may be other entities that would have similar interest in the matters examined in this application if they were to be impacted in a similar fashion by a similar application the Board does not consider this potential scenario to represent special circumstances, as contemplated in section 3.07 that would result in having GRWLP cover HCHI's costs of intervention. The Board therefore finds that HCHI is not eligible for an award of costs.

d. Cost Claims

The Board reminds parties that were granted cost eligibility in its July12, 2011 Decision and Order that cost eligibility will be considered to the extent that costs relate to matters directly within the scope of this proceeding as stated in the Notice of Application and Written Hearing dated April 1, 2011, under the section titled Board Jurisdiction. The Board also advises applicants for cost claims to refer to the noted July 12 Decision and Order for guidance as to which costs may or may not be recovered, and to the Practice Direction on Cost Awards and related forms that are available on the Board's website at www.ontarioenergyboard.ca.

THE BOARD ORDERS THAT:

1. Grand Renewable Wind LP is granted:

    a. pursuant to section 92 of the Act, leave to construct electricity transmission facilities, as described in the first paragraph of section II. titled "SCOPE OF APPLICATION" in this Decision and Order, connecting the Grand Renewable

Energy Park to the IESO-controlled grid subject to the Conditions of Approval attached as Appendix "A" to this Order; and

b. pursuant to section 97 of the Act, approval of the form of easement agreement included in the pre-filed evidence of Grand Renewable Wind LP..

2. Parties that were granted cost eligibility may file with the Board by **Friday, December 16, 2011**, their cost claims, and deliver a copy to Grand Renewable Wind LP, in accordance with the Board's Practice Direction on Cost Awards.

3. Grand Renewable Wind LP may object to any of the cost claims no later than **Friday, January 6, 2012**, by filing its submission with the Board and deliver a copy to the party whose cost claim is disputed.

4. If an objection to any of the cost claim is filed by Grand Renewable Wind LP, the party whose cost claim is disputed, will have until **Friday, January 13, 2012** to file a reply submission to the Board, with a copy to Grand Renewable Wind LP as to why its cost claim should be allowed.

5. Grand Renewable Wind LP shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number EB-2011-0063, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

ISSUED at Toronto on December 8, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX "A"

TO DECISION AND ORDER

BOARD FILE NO. EB-2011-0063

DATED December 8, 2011

Conditions of Approval
Grand Renewable Wind LP
Transmission Line and related transmission facilities
(Collectively the "Transmission Facilities")
[EB-2011-0063]

1 0 General Requirements

1.1. Grand Renewable Wind LP ("GRWLP") shall construct the Project in accordance with its Leave to Construct application, and evidence, except as modified by this Order and these Conditions of Approval.

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

1.3. GRWLP shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the System Impact Assessment document dated May 5, 2011, and such further and other conditions which may be imposed by the IESO.

1.4. GRWLP shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment document dated May 6, 2011,

1.5. GRWLP shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to material changes in the proposed route,

1.6. GRWLP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

2.0 Reliability Considerations - Transmission and Distribution Lines

2.1 GRWLP shall be responsible to pay for the mitigation requirements to avoid any direct impacts its Transmission Facilities causes to the quality or reliability of the electricity service provided by Haldimand County Hydro Incorporated's ("HCHI") existing system. Such requirements are to be determined through an assessment of construction standards and/or codes as well as any requirements of the Electrical Safety Authority, in its role pursuant to Ontario Regulation 22/04.

Conditions of Approval
Grand Renewable Wind LP
Transmission Line and related transmission facilities
(Collectively the "Transmission Facilities")
[EB-2011-0063]

3.0 Project and Communications Requirements

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

3.2 GRWLP shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. GRWLP shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

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

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

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

-- End of document --

TAB 6

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2008-0023

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc., for an order or orders granting Leave to Construct transmission facilities in Norfolk County for the Vanessa - Norfolk Transmission Reinforcement Project.

BEFORE: Paul Vlahos
Presiding Member

Paul Sommerville
Member

Cathy Spoel
Member

DECISION AND ORDER

1.0 THE APPLICATION

Hydro One Networks Inc. ("Hydro One" or the "Applicant") has filed an application with the Ontario Energy Board (the "Board") dated March 13, 2008 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B. The Applicant has applied for an order or orders of the Board granting leave to construct transmission facilities for the Vanessa - Norfolk Transmission Reinforcement Project. The work involves reinforcing the existing 12 km 115 kilovolt ("kV") single-circuit transmission line in Norfolk County between Vanessa Junction and Norfolk Transformer Station by:

- replacing the existing conductors with higher capacity conductors;

- installing a new set of conductors to establish a second 115 kV circuit on the existing structures; and
- constructing a short (20 metre) line tap to connect Bloomsburg Municipal Transformer Station to the 115 kV line.

(collectively, the "Project")

The proposed in-service date for the Project is April 2009.

The Board has assigned File No. EB-2008-0023 to this application.

2.0 THE PROCEEDING

The Board issued a Notice of Application and Hearing on March 28, 2008. The Notice was published and served by the Applicant as directed by the Board. Two parties were granted intervenor status in this proceeding: (i) the Independent Electricity System Operator (the "IESO"); and (ii) property owners Allan and Carol Skoblenick.

The Board has proceeded with this application by way of a written hearing.

Board staff issued written interrogatories on May 23, 2008. No other party submitted interrogatories. Responses to the interrogatories were filed by Hydro One on June 2, 2008. On July 4, 2008, the Board issued a letter to Hydro One requesting clarification and additional information pertaining to Hydro One's responses to Board staff interrogatories as well as other evidence on the record. Hydro One filed its response on July 18, 2008.

3.0 THE PUBLIC INTEREST TEST

Section 96(1) of the Act provides that if, after considering an application under section 92 of the Act, the Board is of the opinion that a proposed work is in the public interest, then the Board shall make an order granting leave to carry out the work.

In the context of this Application, the main issues for the Board are as follows:

- Is the Project needed and have appropriate alternatives been considered?
- Have the cost responsibility principles set out in the Transmission System Code been appropriately interpreted and applied?
- What impact will the Project have on transmission rates?

- What impact will the Project have on reliability of supply?
- Have the Environmental Assessment requirements been met?
- Have the land-related matters been addressed?
- Have consultations with Aboriginal Peoples been conducted appropriately?

Each of these issues is considered below.

3.1 Project Need and Alternatives Considered

Hydro One stated that this is a non-discretionary transmission project, as that term is used in the Board's Filing Requirements for Transmission and Distribution Applications, because it allows Hydro One:

- to satisfy reliability standards and guidelines within a specified operating timeframe; and
- to address near-term equipment or facility loading or ratings when their capacities are, or are about to be, exceeded.

Based on Hydro One's evidence, the Project is needed to: (i) increase the capacity of the existing Vanessa Junction to Norfolk TS 115 kV line in order to meet the forecast load on the line; and (ii) improve reliability of supply by making available a second circuit in the event that one of the circuits is out of service.

Hydro One submitted that it undertook a study in 1998 to develop a long term plan for electricity supply in Norfolk County. Three alternatives were considered and the alternative chosen was to install a 230-115 kV autotransformer station at Caledonia TS to establish a new source of 115 kV supply in the area and refurbish existing 115 kV lines as needed. Much of the work for the preferred alternative, including the provision for a second 115 kV circuit on the Vanessa Junction to Norfolk TS line has been completed since 1998. The Project is the next and final stage to implement the preferred alternative.

Hydro One considers the Project to be superior to any other reasonable option since those alternatives would involve a new greenfield right-of-way or conversion of the existing 115 kV line and Stations to 230 kV supply at significantly higher cost.

The Board accepts Hydro One's evidence that the Project is needed and that it is the best alternative to fulfill the need, especially considering that much of the work related to installation of the second circuit has already been carried out.

3.2 Cost Responsibility

Hydro One's pre-filed evidence indicates that the total cost of the Project is estimated to be $3,580,000 broken down as follows:

(i)	Transmission Line Facilities:	
	(a) Upgrading Existing Circuit	$ 1,097,000
	(b) Adding New Circuit	$ 1,695,000
(ii)	Station and Telecommunication Facilities:	$ 447,000
(iii)	Line Tap to Bloomsburg MTS and Associated Facilities	$ 341,000
		$ 3,580,000

Hydro One submitted that:

- The proposed line facilities, (i)(a) and (i)(b), are considered line connection assets and will be included in the Line Connection Pool. The cost for (i)(a) was assigned to customers for cost responsibility purposes and the cost for (i)(b) was assigned to the Line Connection Pool for cost responsibility purposes.

- The proposed transformation assets (ii) will be included in the Transformation Connection Pool. These costs are assigned to customers for cost responsibility purposes.

- The line tap to Bloomsburg MTS and associated facilities (iii) will be funded 100% by Norfolk Power.

Hydro One submitted that its proposal to assign the cost of the addition of a new circuit (item (i)(b) above) to the Line Connection Pool is consistent with section 6.3.6 of the Transmission System Code, which states that a transmitter is obligated to

> "develop and maintain plans to meet load growth and maintain the reliability and integrity of its transmission system. The transmitter shall not

require a customer to make a capital contribution for a connection facility that was otherwise planned by the transmitter, except for advancement costs."

Hydro One further explained that the Vanessa to Norfolk transmission reinforcement project, including provision of a second circuit, was originally included in Ontario Hydro's plans in the late 1990's and that, in 1999, the existing Vanessa to Norfolk transmission line was re-built to accommodate a second circuit, at a cost of approximately $4.2 million. Hydro One also submitted that the plan to add a second circuit was initiated by Hydro One and not based on a request from Norfolk Hydro.

Hydro One carried out a 25-year Discounted Cash Flow (DCF) calculation for each pool based on the economic evaluation requirements of the Transmission System Code and the above-noted cost responsibility allocations. The results of the DCF analysis show that the customer capital contribution amounts (rounded) are:

- Transmission Line Facilities	$ 0.5 million
- Station and Telecommunication Facilities:	$ 0
- Line Tap to Bloomsburg MTS and Associated Facilities	$ 0.4 million
Total customer contributions	$ 0.9 million

The Board accepts Hydro One's evidence that the proposed cost responsibility for the Project is appropriate and consistent with Section 6.3.6 of the Transmission System Code.

More specifically, the Board accepts Hydro One's determination that the proposed new circuit from Vanessa Junction to Norfolk TS is a "connection facility that was otherwise planned by the transmitter" and as such the transmitter shall not require a customer to make a capital contribution for that facility, in accordance with Section 6.3.6 of the Transmission System Code.

3.3 Impact on Transmission Rates

Hydro One submitted that the Project will not affect the Network Pool revenue requirement and that there would be only minor changes in the Line Connection Pool revenue requirement and the Transformation Connection Pool revenue requirement.

The Board accepts Hydro One's submission that there would be no impacts in the Network Pool revenue requirement and only minor changes in the Line and Transformation Connection Pool revenue requirements.

3.4 Reliability and Quality of Service

System Impact Assessment ("SIA"): The evidence includes two SIAs carried out by the IESO related to the Project - one dated November 12, 2002 and the other dated January 18, 2008. The IESO supports the Project and concludes that the proposed facilities will result in an improved level of load supply reliability to the Norfolk TS connected customers. Hydro One submitted that the IESO's connection requirements will be implemented.

Customer Impact Assessment ("CIA"): Hydro One did not file a CIA for the Project. In its pre-filed evidence and responses to interrogatories, it submitted that a CIA is not required for the Project since the addition of the second circuit does not negatively impact the customers.

The Board notes that Section 6.4.3 of the Transmission System Code as well as Section 2.4 of the Transmission Connection Procedures state that a CIA is required in cases where an SIA is required.

The Board therefore concludes that a CIA is required for the Project and that Hydro One must carry out the CIA prior to commencing construction of the Project.

3.5 Environmental Assessment

Hydro One advised that the Project falls within the definition of the projects covered by the Class Environmental Assessment for Minor Transmission Facilities ("Class EA"), under the Ontario *Environmental Assessment Act*. Hydro One submitted that, in accordance with the Class EA process, it completed and filed an Environmental Study Report in March 1999 with the Ministry of the Environment in relation to the upgrading of the existing 115 kV line from Vanessa Junction to Norfolk TS.

Hydro One further submitted that, for due diligence purposes, it has completed an environmental screening which included updating of existing data bases and a field visit. The screening report was provided to the Ministry of the Environment on January 8, 2008 and there have been no concerns expressed by the Ministry.

The Board accepts Hydro One's submission that it has fulfilled the requirements of the *Ontario Environmental Assessment Act* for the Project.

3.6 Land Matters

Hydro One submitted that it will be using its existing land rights along the corridor from Vanessa Junction to Norfolk TS, and no additional land rights are expected to be required. Temporary access rights may be required.

Hydro One also submitted that it provided landowner intervenors Allan and Carol Skoblenick, who own a farm through which the transmission line passes, with a copy of the application and evidence for this case and that no further inquiries have been received from the Skoblenicks.

Hydro One further submitted that its Property Agent, as a representative of Hydro One, will, as part of the owner contact program, advise affected landowners of the construction timing and advise them to call the Property Agent if they have any questions concerning the Project.

Furthermore, Hydro One submitted that it will make every attempt to minimize any damage to the property of landowners and will fully compensate landowners if damage does occur.

The Board is satisfied that Hydro One has appropriately addressed the land-related matters.

3.7 Aboriginal Peoples Consultations

Hydro One submitted that it identified the following five Aboriginal groups that may be affected by the Project: the Six Nations of the Grand River; the Mississaugas of the New Credit River Nation; the Chippewas of the Thames Nation; the Oneida Nation of the Thames; and the Munsee-Delaware Nation.

Hydro One has contacted in writing the five Aboriginal groups that may be potentially affected or have an interest in the Project. The letters to the first four groups were sent on January 31, 2008 and the letter to the last group was sent on May 30, 2008.

The Six Nations of the Grand River (“Six Nations”) responded by a letter dated May 20, 2008. The letter mentions their treaty rights with the Province of Ontario but adds no specific comments with respect to the Project.

Hydro One submitted that there was no response from the other four Aboriginal groups and, during May and June 2008, Hydro One made follow-up calls with them. In all cases the Chiefs were not available and detailed messages were left but no responses have been received to date.

The Board accepts Hydro One’s evidence that it has taken appropriate steps with respect to Aboriginal Peoples consultations and concludes that the steps taken are in line with existing Board guidelines for such consultations.

4.0 CONCLUSION

Based on the evidence provided and the above findings, the Board has determined that the Project is in the public interest and that, in accordance with Section 96(1) of the Act, an order granting leave to construct the Project should be made.

THE BOARD THEREFORE ORDERS THAT:

Hydro One Networks Inc. is granted leave to construct facilities associated with the Vanessa to Norfolk Transmission Reinforcement Project which include:

- replacing the existing conductors with higher capacity conductors;
- installing a new set of conductors to establish a second 115 kV circuit on the existing structures; and
- constructing a short line tap to connect Bloomsburg Municipal Transformer Station to the 115 kV line.

This approval is subject to the Conditions of Approval set forth in Appendix A to this Order.

DATED at Toronto, August 14, 2008

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

TO BOARD DECISION AND ORDER

IN THE MATTER OF EB-2008-0023

DATED AUGUST 14, 2008

CONDITIONS OF APPROVAL

CONDITIONS OF APPROVAL

EB-2008-0023

HYDRO ONE NETWORKS INC.

VANESSA - NORFOLK TRANSMISSION REINFORCEMENT PROJECT

1.0 GENERAL REQUIREMENTS

1.1 Hydro One Networks Inc. (“Hydro One”) shall construct the facilities and restore the land in accordance with its application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2009, unless construction has commenced prior to that date.

1.3 Except as modified by this Order, Hydro one shall implement all the recommendations of the Environmental Study Report that has been prepared for the Project.

1.4 Hydro One shall satisfy the Independent Electricity System Operator (“IESO”) requirements and recommendations as reflected in the System Impact Assessment documents dated November 12, 2002, and January 18, 2008 and such further and other conditions which may be imposed by the IESO.

1.5 Hydro One shall, prior to the start of construction, carry out a Customer Impact Assessment (“CIA”) in accordance with Section 6.4 of the Transmission System Code and Section 2.4 of Hydro One’s Transmission Connection Procedures. Hydro One shall address any requirements identified in the System Impact Assessment in accordance with the process set out in the Transmission System Code and Hydro One’s Transmission Connection Procedures. Hydro One shall send a copy of the CIA report to the Board’s designated representative immediately upon completion of the report.

1.6 Hydro One shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to changes in: the proposed route; construction techniques; construction schedule; restoration procedures; or any other impacts of construction. Hydro One shall not make a

material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

1.7 Hydro One shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

2.0 PROJECT AND COMMUNICATIONS REQUIREMENTS

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

2.2 Hydro One shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. Hydro One shall provide a copy of the Order and Conditions of Approval to the project engineer within ten (10) days of the Board's Order being issued

2.3 Hydro One shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

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

2.5 Hydro One shall develop, as soon as possible and prior to start of construction, a detailed construction plan. The detailed construction plan shall cover all activities and associated outages and also include proposed outage management plans. These plans should be discussed with affected transmission customers before being finalized. Upon completion of the detailed plans, Hydro One shall provide five (5) copies to the Board's designated representative.

2.6 Hydro One shall furnish the Board's designated representative with five (5) copies of written confirmation of the completion of construction. This written confirmation shall be provided within one month of the completion of construction.

3.0 MONITORING AND REPORTING REQUIREMENTS

3.1 Both during and after construction, Hydro One shall monitor the impacts of construction, and shall file five (5) copies of a monitoring report with the Board within fifteen months of the completion of construction. Hydro One shall attach to the monitoring report a log of all complaints related to construction that have been received. The log shall record the person making the complaint, the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.

3.2 The monitoring report shall confirm Hydro One's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction and the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.
Within fifteen (15) months of the completion of construction, Hydro One shall file with the Board a written Post Construction Financial Report. The report shall indicate the actual capital costs of the Project with a detailed explanation of all cost components and shall explain all significant variances from the estimates filed with the Board.

4.0 ENVIRONMENTAL ASSESSMENT ACT REQUIREMENTS

4.1 Hydro One shall comply with any and all requirements of the Environmental Assessment Act relevant to this application.

TAB 7

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0027

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

AND IN THE MATTER OF an Application by Summerhaven Wind LP, for an Order or Orders granting leave to construct Transmission Facilities.

BEFORE: Cathy Spoel
Presiding Member

DECISION AND ORDER

SUMMARY OF APPLICATION AND PROCEEDING

On January 27, 2011, Summerhaven Wind LP ("Summerhaven" or the "Applicant") filed an application (the "Application") under Sections 92 and 97 of the *Ontario Energy Board Act, 1998* (the "Act") seeking leave to construct transmission facilities to connect the Summerhaven Wind Energy Centre ("SWEC") to the IESO-controlled grid and approval of a form of easement. The work involves constructing 9 km of 230 kilovolt (kV), single circuit overhead transmission line and associated facilities in the County of Haldimand to connect the wind farm to the existing transmission corridor at the Hydro One Networks Inc. ("HONI") N1M designated 230 kV transmission line (the "Transmission Facilities"). The proposed transmission line would extend from a new substation located at the wind farm to a new HONI switchyard at the N1M termination. The Board assigned file number EB-2011-0027 to this proceeding.

The Board issued a Notice of Application and Written Hearing on February 24, 2011 and the Applicant served and published the Notice as directed by the Board. In response to the Notice, six parties requested and were granted intervenor status in this proceeding: Capital Power, Glenfred Gaswells Ltd; the Corporation of Haldimand County; Haldimand County Hydro Inc. ("HCHI"); HONI; and the Independent Electricity System Operator ("IESO"). None of these parties was determined to be fully cost eligible. The Corporation of Haldimand County filed a letter on October 12, 2011 indicating its withdrawal from the proceeding. Addressed in a separate section in this Decision and Order, is a partial cost eligibility award granted to HCHI. HCHI has been found eligible for a partial award of costs principally in recognition of the helpful evidence it filed during the hearing that addressed distribution reliability concerns that relate generally to public interest issues in this proceeding.

Ms. Becky Haywood, Rob and Diana Smuck, requested and were granted observer status.

The Board issued eight procedural orders in this proceeding. Appendix B of this decision and order provides details on procedural matters.

On September 30, 2011, the record of the proceeding was completed with parties filing their comments on the Draft Conditions of Approval which were issued on September 20, 2011.

For the reasons set out below, the Board finds the proposed 230 kV transmission line to be in the public interest and grants leave to construct the Transmission Facilities, subject to the Conditions of Approval attached to this Decision.

PROJECT OVERVIEW

The applicant entered into a feed-in-tariff ("FIT") contract with the Ontario Power Authority ("OPA") in April 2010 in respect of the sale of electricity from SWEC, a windfarm. Summerhaven is seeking leave to construct Transmission Facilities to connect the SWEC in Nanticoke, County of Haldimand, to the IESO-controlled grid.

THE BOARD'S JURISDICTION

The Application has been made under s. 92(1) of the Act for an order of the Board for leave to construct the proposed Transmission Facilities.

The Board's jurisdiction to consider issues in a section 92 leave to construct case is limited by sub section 96(2) of the OEB Act which states:

> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

EVIDENCE AND BOARD FINDINGS

Project Need

The Applicant is the owner responsible for the development, construction and operation of the 124.4 MW SWEC. The Applicant was also awarded a 20-year power purchase agreement[1] under the OPA's FIT program in April 2010.

As a result of the requirement to deliver renewable energy to the IESO-controlled grid, the Board is satisfied that the need for the transmission line and related facilities has been established.

Price, Reliability and Quality of Electricity Service

While the route selected by the Applicant for the proposed Transmission Facilities is on private lands, the Board notes that the evidence provided in the proceeding indicated that this route is likely to result in the Transmission Facilities being located in close

[1] Exh. A/Tab 2/Sch. 1/p.1/paragraph. 3

proximity to HCHI's distribution system along a certain distance on Concession Rd 5. The evidence is that close proximity of transmission and distribution facilities could result in negative impacts on the distribution system that require mitigation activities. In the Board's view, this situation requires assessment of the price, reliability and quality of electricity service from two perspectives; 1) potential impacts on transmission facilities and 2) potential impacts on distribution facilities and by extension, on distribution ratepayers.

HCHI argued [2] that the Act does not restrict the Board's consideration of impacts to the facilities and consumers of the connecting utility, in this case HONI. HCHI's position was, therefore, that the Board should also consider the impacts of the Transmission Facilities on HCHI's consumers in regards to price, reliability and quality of service, taking into account both HCHI's existing plant as well as any new plant that HCHI has planned for the reasonably foreseeable future.

Board staff submitted that it considers investigation and mitigation of potential negative impacts resulting from the induction phenomenon attributable to the proximity of the proposed 230 kV transmission line to HCHI's distribution lines and to HCHI's customers to be part of the consideration of "reliability of electricity service" which is within the Board's jurisdiction.

The Applicant did not dispute either the position of HCHI or that of Board staff that potential negative impacts of the Transmission Facilities on HCHI's distribution system and on HCHI's customers is within the jurisdiction of the Board in this proceeding.

The Board finds that it is within the Board's jurisdiction to review any potential negative impacts of the Applicant's proposed Transmission Facilities on HCHI's distribution system and on HCHI's customers.

Transmission System

Transmission Pricing Impacts

The Board notes that even though the proposed Transmission Facilities will be funded by the Applicant, the connection to HONI's system was at issue in this case. The issue arose since an alternative arrangement of sharing a connection station with another wind project, was, according to IESO evidence, a more economic alternative to the

[2] HCHI's Submission, June 22, 2011, paragraph 22)

Applicant's selected option and would result in less impact on transmission rate payers than building two separate connection stations. The common connection station matter is addressed in a separate section in this Decision and Order.

Transmission Reliability and Quality Impacts

An IESO System Impact Assessment ("SIA") for this project, dated November 4, 2010 was filed by the Applicant on January 27, 2011. The SIA concluded that the proposed project does not have a material adverse impact on the reliability of the IESO-controlled grid. The SIA report included a number of detailed recommendations and technical requirements. The Applicant did not object to any of the technical requirements and recommendations contained in the SIA, except for the SIA recommendation of a shared common switching station for this project and the Port Dover Nanticoke Wind Project (outlined in Figure 2 in the SIA report).[3]

A completed Customer Impact Assessment ("CIA "), dated November 9, 2010, by HONI was filed by the Applicant on January 27, 2011. The CIA concluded that with appropriate construction and outage planning, it is expected that the connection of Summerhaven's proposed transmission facilities can be implemented with minimal supply impact to the existing transmission customers in the area. The Applicant did not object to any of the conclusions and recommendation listed in the CIA report.

The Board accepts the conclusions of the SIA and CIA reports which indicate that the proposed project will not have a negative impact on the reliability of the IESO-controlled grid or on the reliability of supply to the transmission customers in the area. With the exception of the recommendation in relation to a shared connection station, compliance with the requirements and recommendations of the SIA and the CIA is required by section 1.7 of the Conditions of Approval, attached as Appendix A to this Decision and Order.

Distribution System

Distribution Pricing Impacts

The Board notes that HCHI's submission[4] acknowledged the Applicant's offer to bear responsibility for the cost of mitigating any induction effects on the distribution system. HCHI, noted, however that since there is no direct connection between the two systems

[3] Exh. B/ Tab 8/ Sch. 2/SIA Report/Section 3.1 Proposed Connection Arrangements/p. 16

[4] HCHI's Submission, June 22, 2011, p. 4, par.13)

i.e., no joint pole use, there is no requirement for a contractual relationship between HCHI and the Applicant. In the absence of a contract, HCHI could therefore have difficulty recovering costs from the Applicant.

The Board notes that the Applicant has offered to absorb the costs of mitigating possible induction effects on HCHI's distribution system and HCHI's customers. The Board also finds it appropriate to explicitly address HCHI's concerns about cost recovery for any impacts that the Transmission Facilities have on HCHI's distribution system. The Board has addressed the details of potential impacts of the Transmission Facilities on HCHI's system and the recovery of costs to mitigate such impacts in the Conditions of Approval, attached as Appendix A to this Decision and Order.

Distribution System Reliability and Quality Impacts
Four issues were considered in assessing the potential impacts of the proposed Transmission Facilities on HCHI's distribution system reliability.

The first issue related to HCHI's expressed need to increase the capacity of a certain distribution feeder via a 27.6 kV voltage conversion (the "Distribution Upgrade"), and the co-location of the new distribution line required to be built as part of the Distribution Upgrade adjacent to a portion of the proposed transmission line along Concession Rd 5.

The second issue concerned the review of two induction studies; 1) a preliminary study commissioned by HCHI (the Kinectrics Report); and 2) a study commissioned by the Applicant[5] and filed as an attachment to its Final Argument.

The third issue was a review of the proximity requirements for the proposed transmission and Distribution Upgrade along the co-location distance on Concession Rd 5.

The fourth issue related to mitigation of possible increased impacts on animal contact potential at certain farms due to the presence of the proposed Transmission Facilities in close proximity to the proposed Distribution Upgrade along Concession Rd 5.

[5] Applicant Reply Submission, July 27, 2011, Schedule C, Peak Induction Study and Schedule D, Peak GPR Report

1. Need and Location of the Proposed Distribution Upgrade

The Board notes that in its response to a Summerhaven Interrogatory,[6] HCHI indicated that any additional load such as the supply to Summerhaven's transformer station from its single phase distribution lines along Concession Rd 5 and Concession Rd 4 (currently operating at 4.8 kV) would trigger an immediate need to convert to higher system voltage. HCHI confirmed its plans[7] to upgrade the existing distribution system, along Concession Rd 5, and also indicated that construction on the opposite side of the municipal right of way would likely be more expensive and would also be inconsistent with HCHI's policy of only locating poles along one side of municipal rights of way.

In its Reply Argument, the Applicant indicated its disagreement with the position of both HCHI and of Board staff in regard to the location of the proposed 27.6 kV distribution line. The Applicant pointed out that if HCHI were to upgrade to 27.6 kV by replacing the existing distribution line, the Adjacent Length would only be approximately 550 metres. The Applicant also stressed[8] that it is not aware of any power system design or regulatory principle that states that electricity infrastructure should be built only on one side of a municipal right of way. The Applicant also submitted that it has equal rights, along with distributors, to the use of municipal rights of way.

The Board observes that as a regulated distributor, HCHI is obligated under section 28 of the Electricity Act,[9] to connect new customers, and that this obligation is also a condition in its licence, the Distribution System Code and its Conditions of Service. The Board accepts HCHI's assertion that it needs to increase the capacity of its single distribution line along Concession Rd. 5. The Board also notes that at 66 feet (about 20.1m), Haldimand County Concession Rd. 5 has a narrower right of way than most other Haldimand County roads. The Board finds that HCHI's position of avoiding locating utility poles on both sides of this municipal right of way is reasonable.

2. Status of Completed Induction Studies

The Board found the exchange[10] between the Applicant and HCHI that took place during the Technical Conference on the issue of the potential induction impact of the proposed Transmission Facilities on HCHI's distribution system to be very helpful. This

[6] HCHI response to interrogatory #1 (a), June 15, 2011, page 2
[7] HCHI's submission, June 23, 2011[correcting typographical error on page 3, section 11(d)], page 8, paragraph 39)
[8] Applicant Reply Submissions, July 27, 2011, paragraph 20, and Schedule B, Photos
[9] Electricity Act,1998, S.O. 1998, c.15, Schedule A, section 28
[10] Technical Conference, May 17, 2011, pages 52-53

exchange ultimately led to the filing by HCHI of a preliminary induction study report (the "Kinectrics Report").[11]

The Board notes that the preliminary results and recommendations of the Kinectrics Report include: (1) maintaining a distance of 10 metres or more between transmission and distribution poles; (2) calculations of the neutral to remote earth to be about 7 Volts (which meets the Ontario Electrical Safety Code limit of 10 Volts); (3) the assertion that the 10 Volt limit can be exceeded in certain circumstances; and (4) a reminder that distributors must maintain their contributions to animal contact potential at customer premises under 0.5 Volts, according to the Board's Distribution System Code.[12]

The Board also appreciates that the Applicant's Reply Submissions[13] included four Schedules, two of which are detailed studies relevant to the induction issue. Schedule C contained a Peak Induction Study and Schedule D contained a Peak Underground Arcing and Ground Potential Rise Report. The Applicant indicated[14] that with one exception related to induced voltage during fault conditions, the conclusions of the Peak Induction Study are not significantly different from the HCHI Induction Study – the Kinectrics Report.

The Board also found helpful the Applicant's proposal[15] to carry out a neutral voltage survey to establish a baseline prior to commercial operation of the Transmission Facilities and a post-energization neutral voltage survey that would be based on field measurements rather than theoretical models. These surveys would be used to identify areas where mitigation by the Applicant may be required.

The Board finds that it is not necessary to carry out a final induction study prior to the issuance of any decision by the Board, as originally proposed by Board staff.[16] The Board is satisfied that any potential impacts of induction attributable to the proposed Transmission Facilities will be addressed through the requirements in the Conditions of Approval, attached as Appendix A to this Decision and Order.

---

[11] HCHI's evidence, May 31, 2011 – INDUCTION STUDY FOR HALDIMAND COUNTY HYDRO INC, Kinectrics Report, pages 4-5
[12] Distribution System Code, February 7, 2011, Section 4.7.4
[13] Applicant Reply Submissions, July 27, 2011
[14] Applicant Reply Submissions, July 27, 2011, paragraph 25
[15] Applicant Reply Submissions, July 27, 2011, paragraph 27
[16] Board staff Submission, June 22, 2011, section B.1.6, pages 8-9

3. Co-location Implication on Transmission Design

As directed by the Board, HCHI filed its proposed 27.6 kV distribution system design on July 13, 2011, and Summerhaven filed its proposed transmission design on July 27, 2011.

The Board notes that in HCHI's submission, it listed conditions including: (a) the requirement that the Applicant's transmission facilities maintain clearances relative to HCHI's proposed distribution line as indicated in the Kinectrics report[17] (including the neutral height of 25 feet above the crown of the road); (b) the requirement that all transmission road crossings be built to provide adequate clearance for HCHI's future needs; (c) the stipulation that the centreline of the proposed 230kV transmission line along Concession Rd. 5 be located on private property at least 10 metres from the property line paralleling the municipal right of way: (d) the requirement that the installation of guy wires not be anchored within a municipal road right of way and (d) the requirement that, where any span guys cross over the roadways, appropriate clearances under the span guys be provided for HCHI's facilities.

Board staff's submission[18] generally agreed with HCHI's positions except for the required separation between the two lines. Board staff's view favoured a diagonal separation between any proposed 230 kV pole and any pole of HCHI's planned 27.6/16 kV pole line for the 2 km stretch along Concession 5 Road (as described in the Kinectrics Report).[19]

The Applicant's submission indicated agreement with some of the conditions of approval proposed by both HCHI and Board staff. The following were highlighted as areas of clarification or disagreement: (a) in regard to HCHI's noted requirements for span guys crossing over the road ways, the Applicant asserted that HCHI needs to provide the exact location of its proposed distribution facilities in advance of the Applicant finalizing the design of the Transmission Facilities; (b) with the exception of the calculation of induced voltage during fault conditions as a result of differing calculation assumptions between HCHI and the Applicant, the conclusions of the Applicant's Peak Induction Study are not significantly different than the HCHI Induction Study; (c) the Applicant disagreed with HCHI's proposal that the transmission line be

[17] HCHI's evidence, May 31, 2011 – INDUCTION STUDY FOR HALDIMAND COUNTY HYDRO INC, Kinectrics Report, drawing 01-316
[18] Board staff submission, June 22, 2011
[19] HCHI's evidence, May 31, 2011 – INDUCTION STUDY FOR HALDIMAND COUNTY HYDRO INC, Kinectrics Report, page 5, first paragraph

placed a minimum of 10 metres from the edge of the municipal right of way and also disagreed with the Board staff proposal that there should be a minimum 10 metre diagonal separation between the transmission line poles and HCHI's distribution poles. The Applicant indicated that the basis for the 10 metre separation is not relevant to the case at hand and referenced an interrogatory response,[20] where it was stated that this distance was based on CSA Standard CSA-C22.3 No. 6 (the "Gas Pipeline Standard"). The Applicant submitted that its proposal to locate the transmission line within 5 metres of the HCHI proposed distribution line should be accepted by the Board. The Board, notes, however that the Applicant's own commissioned study[21] indicated that 6 metres is adequate separation between any transmission pole and a distribution pole. The noted Applicant's study conclusion states in part that:

> *In summary, on the basis of the engineering calculations described in this report, the design separation of **6 m [19.7 ft]** between the transmission line ground electrodes and the distribution line ground electrodes was determined to be more than adequate to avoid underground arcing.[emphasis added]*

The Board accepts as reasonable the results of the Applicant's study,[22] which indicated that a distance of 6 metres between the transmission and distribution lines was adequate to maintain induction voltages (under fault conditions) within allowable safety standards. The Board agrees with the Applicant that additional modeling in the form of induction studies at a later date would be of limited value in addressing HCHI's concerns. However, the Board, finds that it would be appropriate to include in the Conditions of Approval the Applicant's proposal to carry out early stage neutral voltage surveys to establish a baseline prior to commercial operation of the transmission line, and a post-energization neutral voltage survey that would be based on field measurement. The Board also finds that it is reasonable that for any areas that are identified as requiring mitigation, the Applicant and HCHI will jointly decide on the appropriate mitigation steps, which steps the Applicant will be required to undertake at its own cost.

In regard to HCHI's condition that the guy wires be anchored outside of the municipal right of way, the Board accepts the Applicant's position that it does not at this time anticipate it will need to install any guy wires in the municipal right of way, and that

---

[20] HCHI's response to Applicant's Interrogatory # 3, (b), page 5, dated June 15, 2011
[21] Applicant Reply Submission, July 27, 2011, Schedule D, page 13, last paragraph "Peak GPR Report" - [Underground Arcing and Ground Potential Rise]
[22] Ibid

going forward, the Applicant will make commercially reasonable efforts to locate guy wires outside of these rights of way. In instances where this may be required, the Applicant will be required to make best efforts to minimize any impact to HCHI.

4. Mitigation of Increased Impacts - Animal Contact Potential

The Board notes that in regard to the issue of Animal Contact Potential, Board staff indicated that it is important to address the implications of the impact of the proposed Transmission Facilities on 21 farm properties that are in proximity to the estimated 2 km stretch where HCHI's future 27.6/16 kV distribution line will be co-located.[23]

The Board also notes that the Applicant submitted that contrary to Board staff's view,[24] it does not believe that a post-energization animal contact potential study (which would involve carrying out testing at every farm within the vicinity of the proposed Transmission Facilities) is necessary. Rather, the Applicant submitted that it proposes to install neutral decoupling devices on HCHI's existing infrastructure at all relevant customers' points of interconnection. This would effectively pre-empt any possibility that animal contact voltage may arise as a result of the proposed Transmission Facilities and in addition it would likely be a more cost effective solution.

The Board notes that the Applicant indicated in its Reply Argument[25] that it would be willing to cover any costs associated with effective mitigation measures that would address the induction issues by improving the grounding (reducing the ground resistance to a range of 3 Ohms to 15 Ohms[26] by installing additional ground rods at the pole locations) of the distribution line poles on HCHI's proposed 27.6 kV distribution system along the Adjacent Length.

The Board finds the Applicant's proposal to cover the additional cost of improving the grounding[27] of HCHI's proposed 27.6 kV distribution system along the Adjacent Length, to be reasonable.

The Board also accepts the Applicant's proposal to cover the cost of installing neutral decoupling devices on HCHI's existing infrastructure at relevant customers' points of

[23] Figure 3 of the Kinectrics Report dated May 31, 2011, has been updated and filed as part of HCHI's Response to Board staff Interrogatory #3, Question (i)
[24] Board staff Submission, June 22, 2011, Sec B.1.5, page 7
[25] Applicant Reply Submission, July 27, 2011, paragraph 40
[26] Applicant Reply Submissions, July 27, 2011, Schedule "C", Peak Induction Study, Section III.D
[27] Applicant Reply Submissions, July 27, 2011, Schedule "C", Peak Induction Study, Section III.D

interconnection. In the event that this solution proves inadequate, the Board will require that the Applicant make best efforts to provide further required mitigation of these effects at its own cost as specified in the Conditions of Approval, attached as Appendix A to this Decision and Order.

Land Matters and Form of Easement Agreement

Summerhaven has indicated that there may be a requirement for permanent easements and/or temporary easements or rights of way for access associated with construction activities. This entails entering into agreements with the affected parties. The Applicant has identified fourteen properties that would be affected by the proposed route, and advises that property rights are presently being negotiated for these locations.[28]

In accordance with Section 97 of the Act, the Board must be satisfied that Summerhaven either has or will offer to each owner affected by the proposed route or location an agreement in a form approved by the Board. Summerhaven filed draft forms of agreement with its pre-filed evidence for the following land options: Option Agreement, Transmission Easement, Option to Purchase and Substation Easement.

The Board notes that there were no requests to vary the forms of land agreements to be offered to affected landowners and the evidence shows that Notice was properly served. The Board therefore finds the forms of land agreement acceptable.

Environmental Study and the Renewable Energy Approval Process

This project falls within the definition of projects that are governed by the Renewable Energy Approval (”REA”) process, provided for under the *Environmental Protection Act*, and the project will ultimately require an approval by the Ontario Ministry of the Environment (“MOE”). The REA process emphasizes a broad consultative approach, requires public information meetings and with the preparation of several reports, including but not limited to, a project description report, a construction plan report, a consultation report, a design and operations report, a decommissioning plan report, an archaeological and heritage report, a natural heritage and water report as well as additional technical reports. The Applicant filed an REA update recently[29] indicating that it filed the REA application with the MOE on June 14, 2011. The MOE has

[28] Response to Undertaking TCJ1.1 filed on May 27, 2011
[29] Applicant REA Update, filed on November 1, 2011.

screened the REA submission, and is now undertaking a technical review of this document. The Applicant also indicated that minor project location changes have been proposed since the time of the REA application, but that none of these changes affect the Facility (as defined in the Applicant's REA documentation).

Since the REA process has extended beyond the evidentiary portion of this proceeding, the Board's order granting leave to construct will be conditioned on the successful completion of the REA approval process.

Common Switching Station Impact

As previously noted, the final SIA report[30] strongly recommended that a common switching station to connect both the Port Dover Nanticoke Wind project and Summerhaven's proposed Transmission Line instead of utilizing two separate stations. HONI's interrogatory response to the IESO[31] indicated that the estimated cost of the common switching station would be $30 million as compared to the estimated cost of $40 million for the two separate stations. The prospect of constructing a common switching station was explored during the Technical Conference.[32] At this venue both Summerhaven and Capital Power, owner of the Port Dover Nanticoke Wind project, explained that a common switching station proposal was not possible given the timelines for the REA processes of the two projects.[33]

The IESO submitted that[34] it completed its Connection Assessment and Approval process within 145 days, which met the 150 days allowed in accordance with section 25.37(2) of the *Electricity Act, 1998* and Ontario Regulation 326/09, parts 3(1)(2). The IESO also pointed out that the preliminary findings and recommendations were presented jointly to both connection proponents on September 2, 2010, approximately 78 days from the date of receiving the earliest completed connection assessment application, and this provided ample time for the two proponents to accommodate the common switching station option in their plans.

In its Reply Submission,[35] the Applicant noted that it had completed over 3 years of environmental field surveys and reports by the time the concept of a joint switchyard

[30] Exh. B/ Tab 8/ Sch. 2/SIA Report/Section 3.1 Proposed Connection Arrangements/p. 16
[31] Hydro One Response to the IESO's interrogatory # 2, dated June 21, 2011
[32] Technical Conference, May 17, 2011, pages 82-97
[33] Transcripts of the Technical Conference held on May 17, 2011
[34] The IESO revised submission dated June 24, 2011, paragraph 4

with Capital Power was raised in September, 2010. It stressed that any delay resulting from rework of the draft reports or requirements for additional field studies would have significantly delayed its development and would risk exposing the Applicant to large financial penalties from suppliers and from the OPA.

The Board notes that Capital Power's views[36] were very similar to those of Summerhaven, where Capital Power indicated that a change in its Port Dover Nanticoke Wind project's connection point, whether initiated in the fall of 2010 (when HONI first raised the issue) or now, would mean that the Project would meet neither its Commercial Operation Date ("COD") of October 31, 2012, nor its Milestone COD under the FIT Contract of March 10, 2013. This could lead to a potential termination of the OPA Contract and the risk of losing the initial security deposit of (approximately $2 million) of the FIT application as well as significant liquidated damages in the event that the Milestone COD of March 2013 is not met.

The Board acknowledges and agrees in principle with the IESO recommendation expressed in the final SIA report that a common switching station is generally the preferred solution both economically and from a flexibility and reliability perspective. However, in this case, the Board accepts HONI's evidence in its response to an IESO interrogatory,[37] which indicated that the common station option in this circumstance was not feasible from a practical timing and scheduling viewpoint. The Board has therefore not required the Applicant to implement the common switching station recommendation provided in the SIA.

Conditions of Approval

On September 20, 2011, the Board circulated draft Conditions of Approval seeking comments from Summerhaven and intervenors.

The Board Conditions of Approval attached to this Decision and Order as Appendix A were modified from the originally circulated draft version in three areas to increase clarity, to reflect comments received from the parties and to better balance the interests of all parties. The following are the areas where material variations were effected in the Conditions of Approval.

---

[35] Summerhaven's Reply Submission, July 27, 2011, par. 50
[36] Capital Power Submission, June 22, 2011, Section 5.
[37] Hydro One Response to the IESO Interrogatory #3, List 1, filed on June 21, 2011

Condition 1.4

Condition 1.4 was amended to clarify that compliance with the SIA requirement does not include the requirement to build a common switching station for the Summerhaven and Port Dover Nanticoke Wind projects.

Conditions 2.3 and 2.5 (minimum distance between transmission and distribution lines)

The Board acknowledges the Applicant's observation[38] that Condition 2.3 in the draft Conditions of Approval cannot be implemented in the event that the Transmission Line is constructed prior to the HCHI Upgrades, because if that occurred it would be impossible to determine the centreline of the HCHI Upgrades without knowing the exact location of the distribution pole placements.

The Board considered the Applicant's proposed re-write of Condition 2.3, and the two competing standards for a minimum separation distance between transmission and distribution poles (the 10 metre separation referenced in HCHI's Kinectrics Report and the 6 metre separation recommended in the noted study that was commissioned by the Applicant[39]). The Board is now of the view that a 6 metre minimum distance is an acceptable separation distance. The Board finds this 6 metre minimum separation distance can be achieved by requiring that the portion of the transmission line running adjacent to HCHI's upgraded distribution line be kept at a minimum distance of 4 metres from the south property line of the Concession Rd 5 right of way. This finding is based on the premise that HCHI will locate its upgraded distribution line at least 3 metres from the property line as depicted in the three drawings[40] included in the attached Schedule "A" to the Conditions of Approval.

Condition 2.10

Changes were introduced in this clause to accommodate HCHI's comments requesting flexibility under certain conditions.

[38] Applicant's response to the Draft Conditions of Approval, September 30, 2011, p. 2

[39] Applicant Reply Submission, July 27, 2011, Schedule D, page 13, last paragraph "Peak GPR Report" - [Underground Arcing and Ground Potential Rise]

[40] Three drawings, part of the design drawings included in HCHI's Design Submission, July 13, 2011, and attached as Schedule "A" to the Conditions of Approval. The three drawings are titled [CROSS SECTION "A" CONCESSION ROAD 5], [CROSS SECTION "B" CONCESSION ROAD 5], and[CROSS SECTION "C" CONCESSION ROAD 5]

COST AWARDS

In Procedure Order No. 2 issued on March 28, 2011, the Board denied the cost award requests of HCHI and the Corporation of Haldimand County. In that Order the Board indicated that the Corporation of Haldimand County, being a public body, is not eligible for cost awards, and that HCHI, is explicitly excluded from eligibility by the Board's *Practice Direction on Cost Awards*.

HCHI's Reply Submission[41] dated August 3, 2011, indicated that it is appropriate for the Board to reconsider the request given the unique nature of this proceeding and the considerable expense that HCHI incurred to file expert evidence regarding the proposed design for the transmission facilities.

The preliminary induction study by Kinectrics[42] filed on May 31, 2011 by HCHI was helpful to the Board in better understanding the issues in this proceeding. The Board is therefore inclined, under these unusual circumstances, to deviate from its *Practice Direction on Cost Awards* to allow HCHI to file a cost claim restricted to all reasonable costs associated with the preparation and filing of the Kinectrics study and the preparation and participation of the Kinectrics expert witness, Dr. Emanuel Petrache in the technical conference, held on May 17, 2011, and the costs of counsel's attendance at the technical conference held on May 17, 2011. Any claim for costs outside of these areas will not be considered.

CONCLUSION

Having considered all of the evidence related to the Application, the Board finds the proposed Transmission Facilities to be in the public interest.

THE BOARD ORDERS THAT:

Pursuant to section 92 of the Act, Summerhaven Wind LP is granted leave to construct electricity transmission facilities, as described in the first paragraph of this Decision and Order, connecting the Summerhaven Wind Energy Centre to the IESO-controlled grid subject to the Conditions of Approval attached as Appendix A to this Order.

---

[41] HCHI Reply Submission, August 3, 2011/p. 7/Part VI. Costs

[42] Kinectrics Report dated May 31, 2011 titled "INDUCTION STUDY FOR HALDIMAND COUNTY HYDRO INC."

1. Haldimand County Hydro Inc. may file with the Board by **Monday, November 21, 2011** its cost claim restricted to costs associated with the preparation and filing of the preliminary induction study by Kinectrics, filed on May 31, 2011 and for the preparation and participation of the Kinectrics' expert witness, Dr. Emanuel Petrache, in the Technical Conference, held on May 17, 2011 and the costs of counsel's attendance at the Technical Conference held on May 17, 2011. Cost claims must be filed in accordance with the Board's Practice Direction on Cost Awards.
2. Summerhaven Wind LP may object to the cost claim no later than **Monday, November 28, 2011**, by filing its submission with the Board and delivering a copy to Haldimand County Hydro Inc.
3. If an objection to the cost claim is filed by Summerhaven Wind LP, Haldimand County Hydro Inc. will have until **Monday, December 5, 2011** to make a reply submission to the Board, with a copy to Summerhaven Wind LP as to why its cost claim should be allowed.
4. Summerhaven Wind LP shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number EB-2011-0027, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

ISSUED at Toronto, November 11, 2011
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

BOARD FILE NO. EB-2011-0027

CONDITIONS OF APPROVAL FOR SUMMERHAVEN WIND LP
LEAVE TO CONSTRUCT PROCEEDING

DATED November 11, 2011

Conditions of Approval

Note:

The Conditions of Approval attached to the Ontario Energy Board ("Board") Decision and Order include references to permits and approvals by other organizations, Crown corporations, or Government Ministries that are prerequisites for the successful completion of the facilities that are the subject of this Ontario Energy Board process. Notwithstanding any such references in these Conditions of Approval, the Ontario Energy Board is not responsible for ensuring the implementation or operationalization of any of the requirements enumerated in such permits or approvals or the reports associated therewith even where such permits, approvals or associated reports are required, for any reason, to be filed with the Board.

1.0 General Requirements

1.1 Summerhaven Wind LP ("Summerhaven" or the "Applicant") shall construct the 9 km of 230 kV overhead transmission line (the "Transmission Line") and associated facilities, (collectively, the "Transmission Facilities") in accordance with applicable laws, codes and standards and restore all lands in accordance with its Leave to Construct application, evidence and undertakings, except as modified by the Board's Decision and Order and by these Conditions of Approval.

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

1.3 Summerhaven shall implement all the recommendations included in the Decision from the Ministry of Environment regarding the Renewable Energy Approvals under Part V.O.1 of the Act made pursuant to the Environmental Protection Act, R.S.O. 1990, c. E.19.

.

1.4 Summerhaven shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the System Impact Assessment document dated November 4, 2010, ("SIA") and such further and other conditions which may be imposed by the IESO with the exception of Recommendation (1) at page 7 of the SIA that a common switching station be built for the Applicant's project and the Port Dover and Nanticoke Wind Farm.

1.5 Summerhaven shall satisfy Hydro One Networks Inc.'s requirements as reflected in the Customer Impact Assessment document dated November 9,

2010, and such further and other requirements or conditions which may be imposed by Hydro One Networks Inc.

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

1.7 Summerhaven shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Transmission Facilities, and shall provide copies of all such written approvals, permits, licences and certificates and any related reports or documentation upon the Board's request.

2.0 Reliability Considerations - Transmission and Distribution Lines

2.1 In designing and constructing that portion of the Transmission Line that runs parallel to the proposed location of certain upgrades proposed by Haldimand County Hydro Inc. ("HCHI") consisting of two 27.6KV, 3 phase circuits on the south side of Concession Road 5 as further outlined in Schedule "A" attached hereto (the "HCHI Upgrades") for a certain distance (the "Adjacent Length"), the Applicant is required to accommodate the HCHI Upgrades. Specific accommodation measures are described in sections 2.2, 2.3, 2.5, 2.9 and 2.13 of these Conditions of Approval. The location of the Transmission Line parallel to the HCHI Upgrades for the Adjacent Length is hereinafter referred to as the "Co-location Option".

2.2 Under the Co-location Option, the pole locations, pole heights, and clearances for the Transmission Line along the Adjacent Length shall accommodate the HCHI Upgrades and comply with all applicable codes and standards.

2.3 Under the Co-location Option, the Transmission Line must be located on private property at a minimum distance of 4 metres from the south property line of Concession Rd 5 right of way and as described in the Application.[1]

2.4 Under the Co-location Option, the Transmission Line must be designed to accommodate the distribution neutral height of 25 feet (7.62 metres) above the crown of the road.

[1] Application, Exhibit B/Sch. 6/Tab 1, filed 2011-03-02.

2.5 Under the Co-location Option, and in the event that HCHI commences construction of its HCHI Upgrades prior to the construction of the Transmission Line, the Applicant shall locate its Transmission Line poles such that a minimum distance of 6 metres is maintained between any Transmission Line pole and any distribution pole, unless otherwise agreed to by HCHI and the Applicant. Under the Co-location Option, and in the event that the construction of the Transmission Line commences[2] prior to the HCHI Upgrades, it is assumed that HCHI will locate its distribution poles such that a minimum distance of 6 metres is maintained between any distribution pole and any Transmission Line pole, unless otherwise agreed to between HCHI and the Applicant.

2.6 With the potential exception, due to environmental considerations, of the crossing of the Transmission Line at Concession Rd 4, all road crossings shall be designed and built to provide adequate clearance for the HCHI Upgrades, whether or not the Co-location Option is selected by HCHI. Should issues arise between HCHI and the Applicant regarding the crossing of the Transmission Line at Concession Rd 4, the Applicant and HCHI will cooperate to ensure selection of an acceptable configuration to both parties that meets applicable laws, codes, standards and environmental permitting requirements. In the event that environmental permitting requirement imposed on the Applicant result in the construction of the Transmission Line in such a configuration that HCHI is later required to install the 27.6kV circuit underground to achieve compliance with applicable laws, codes and standards, the Applicant will bear the incremental cost of an underground installation.

2.7 The Applicant shall make every commercially reasonable effort to avoid locating guy wire anchors within a municipal road right of way.

2.8 Where any span guys for the Transmission Line cross over municipal roadways, appropriate clearances under the span guys, such clearances to be determined in accordance with applicable codes and standards, must be provided in order to allow HCHI to construct the HCHI Upgrades, including maintaining a neutral height of 25 feet (7.62 metres) above the crown of the road.

2.9 The Applicant shall provide HCHI with all necessary information related to the location of any span guys for the Transmission Line that cross over the municipal roadways.

2.10 The Applicant shall carry out and make available to HCHI a primary circuit baseline neutral voltage survey (the “Baseline Survey”) to establish a baseline on the primary circuit prior to commercial operation of the

[2] based on a design of the Transmission Line that has been finalized and made available to HCHI

Transmission Line, and a primary circuit post-energization neutral voltage survey (the "Post-Energization Survey") based on field measurement. For the purpose of conducting the Baseline Survey and the Post Energization Survey, the Applicant shall, with the cooperation of HCHI, conduct the noted field measurement for a continuous period of 48 hours.

For any areas that are identified as requiring mitigation, the Applicant and HCHI will cooperate to decide on the appropriate mitigation steps, which the Applicant will undertake at its own cost, provided that the Applicant shall not be required to undertake any mitigation measures on any aspect of HCHI's existing or future distribution infrastructure that does not already meet the prescribed standards established by the Distribution System Code, Electrical Safety Code and such other standards and codes as may be applicable.

In a situation where the HCHI Upgrades are constructed after the Baseline Survey is completed but prior to the energization of the Transmission Line, the Applicant and HCHI may agree to coordinate their schedules to conduct the Post-Energization Survey on HCHI Upgrades at the Applicant's cost. If the Applicant, acting reasonably, indicates that it cannot coordinate its schedule with that of HCHI, and HCHI wants a Post-Energization Survey to be carried out on the HCHI Upgrades by the Applicant, the Applicant shall not be responsible for the costs to carry out a new Baseline Study on the HCHI Upgrades.

2.11 Should HCHI select the Co-location Option and should HCHI choose to use additional grounding at the distribution poles for the stretch of HCHI Upgrades along the Adjacent Length as recommended by the Applicant[3] the Applicant will absorb the cost difference between the standard design as specified in the HCHI Upgrades and the proposed design noted in the Applicant's Reply Submission.

2.12 The Applicant shall bear the cost of installing neutral decoupling devices on HCHI's existing infrastructure at relevant customer points of interconnection (the "Customer Interconnection Points") as agreed to by the Applicant and HCHI, acting reasonably. It is anticipated that this would pre-empt any possibility that unacceptable animal contact voltage ("ACV") may arise as a result of the Transmission Line. In principle, should installation of such devices prove to be insufficient or inadequate at any of the Customer Interconnection Points, the Applicant will be responsible for any reasonable costs incurred by HCHI to mitigate and reduce the level of the ACV to within the acceptable level as set out in the Distribution System Code,[4] provided

[3] Applicant's Reply Submission, July 27, 2011, paragraph 40.
[4] Distribution System Code, last revised February 7, 2011 and any amendments thereto, Section 4.7.

that HCHI has implemented the Applicant's recommendation for ground rod specification as outlined in the Applicant's Reply Submission.[5]

2.13 The Applicant will be responsible for the additional cost of oversizing lightning arresters on the HCHI Upgrades, to take into account the expected voltage rise due to induction as recommended in the Applicant's Reply Submission.[6]

2.14 The Applicant and HCHI shall make best efforts to address all issues that arise in respect of the design and construction of the Transmission Line and the Transmission Facilities along the Adjacent Length. If the parties are unable to resolve any disputes and to the extent such disagreement impacts materially upon the construction of the Transmission Line or Transmission Facilities, the Applicant shall notify the Board's designated representative of such disagreement.

3.0 Transmission Facilities and Communications Requirements

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

3.2 Summerhaven shall designate a person as Project manager and shall provide the name of the individual to the Board's designated representative. The Project manager will be responsible for the fulfillment of the Conditions of Approval on the construction site. Summerhaven shall provide a copy of the Order and Conditions of Approval to the Project manager, within ten (10) days of the Board's Order being issued.

3.3 Summerhaven shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. Summerhaven shall submit five (5) copies of the construction plan to the Board's designated representative at least ten (10) days prior to the commencement of construction. Summerhaven shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

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

[5] July 27, 2011, at paragraph 40.
[6] July 27, 2011, Schedule C-Peak Induction Study, Section VI – Mitigation, Section D – Surge Arresters.

3.5 Summerhaven shall, in conjunction with Hydro One Networks Inc. and the IESO, and other parties as required, develop an outage plan which shall detail how proposed outages will be managed. Summerhaven shall provide five (5) copies of the outage plan to the Board's designated representative at least ten (10) days prior to the first outage. Summerhaven shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

3.6 Summerhaven shall furnish the Board's designated representative with five (5) copies of written confirmation of the completion of Transmission Facilities construction. This written confirmation shall be provided within one month of the completion of construction.

4.0 Monitoring and Reporting Requirements

4.1 Both during and for a period of twelve (12) months after the completion of construction of the Transmission Facilities, Summerhaven shall monitor the impacts of construction, and shall file five (5) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Transmission Facilities. Summerhaven shall attach to the monitoring report a log of all comments and complaints related to construction of the Transmission Facilities that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

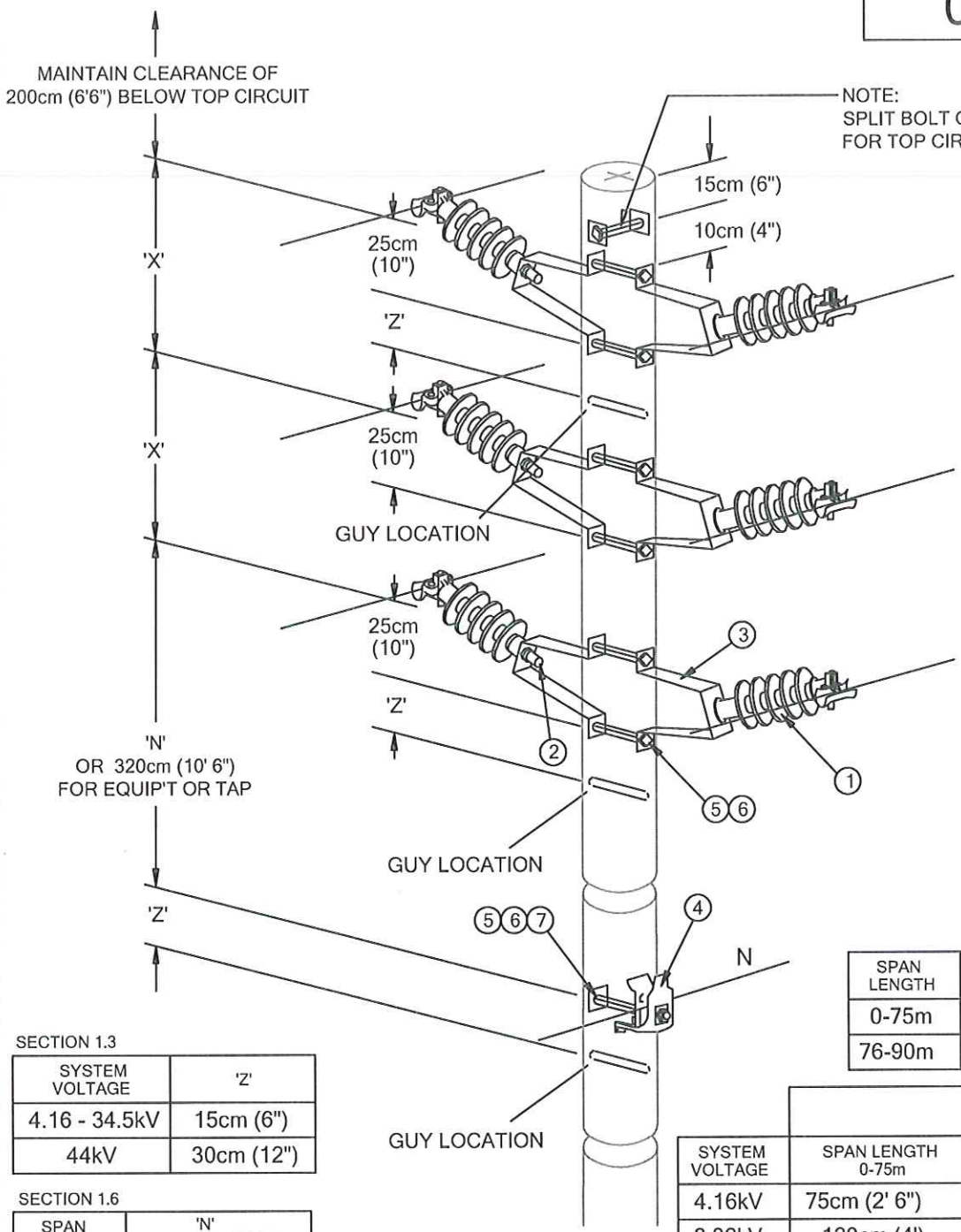
4.2 The monitoring report shall confirm Summerhaven's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Transmission Facilities and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Transmission Facilities. This report shall describe any outstanding concerns identified during construction of the Transmission Facilities and the condition of the rehabilitated Transmission Facilities' land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

End of document

Appendix A (Cont’d)
Conditions of Approval - (EB-2011-0027)

Schedule “A”
HCHI’s Design Upgrades
[13 pages filed with the Board on July 13, 2011]

01-316



SECTION 1.3

SYSTEM VOLTAGE	'Z'
4.16 - 34.5kV	15cm (6")
44kV	30cm (12")

SECTION 1.6

SPAN LENGTH	'N' MIN CLEARANCE
0-45m	1.5m (5')
46-60m	1.8m (6')
61-70m	2.1m (7')
71-90m	2.4m (8')

SPAN LENGTH	MINIMUM STAND-OFF BRACKET REQUIRED
0-75m	22.5cm (9")
76-90m	45cm (18")

	'X'	
SYSTEM VOLTAGE	SPAN LENGTH 0-75m	SPAN LENGTH 76-90m
4.16kV	75cm (2' 6")	105cm (3' 6")
8.32kV	120cm (4')	150cm (5')
13.8kV	120cm (4')	150cm (5')
27.6kV	150cm (5')	180cm (6')
34.5kV	150cm (5')	180cm (6')
44kV	150cm (5')	180cm (6')

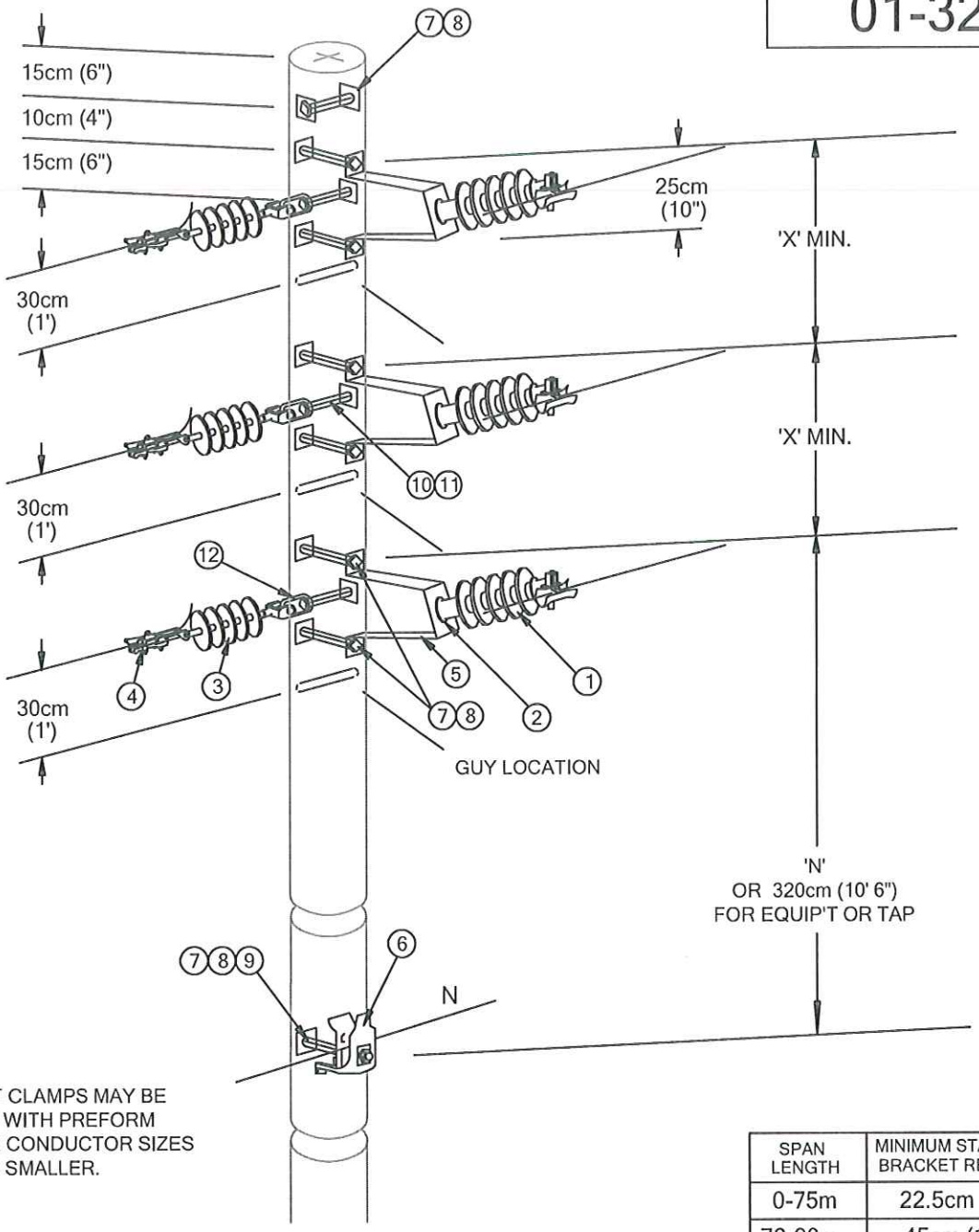
Utilities Standards Forum USF

Title: PRIMARY 3-PHASE 2-CCT, TANGENT
or LINE ANGLE 0° to 15° or UNDER-BUILT
4.16 to 44kV, MAX SPAN 90m

SIZE	FILE NAME:	DWG NO.	REV
A	01-316.DWG	01-316	3

SCALE	DATE:	SHEET
NTS	2008-07-14	1

01-323



NOTE:
WAVESEAT CLAMPS MAY BE REPLACED WITH PREFORM GRIPS FOR CONDUCTOR SIZES OF 3/0 AND SMALLER.

SPAN LENGTH	MINIMUM STAND-OFF BRACKET REQUIRED
0-75m	22.5cm (9")
76-90m	45cm (18")

SECTION 1.6

SPAN LENGTH	'N' * MIN CLEARANCE
0-45m	1.5m (5')
46-60m	1.8m (6')
61-70m	2.1m (7')
71-90m	2.4m (8')

	'X'	
SYSTEM VOLTAGE	SPAN LENGTH 0-75m	SPAN LENGTH 76-90m
4.16kV	75cm (2' 6")	105cm (3' 6")
8.32kV	120cm (4')	150cm (5')

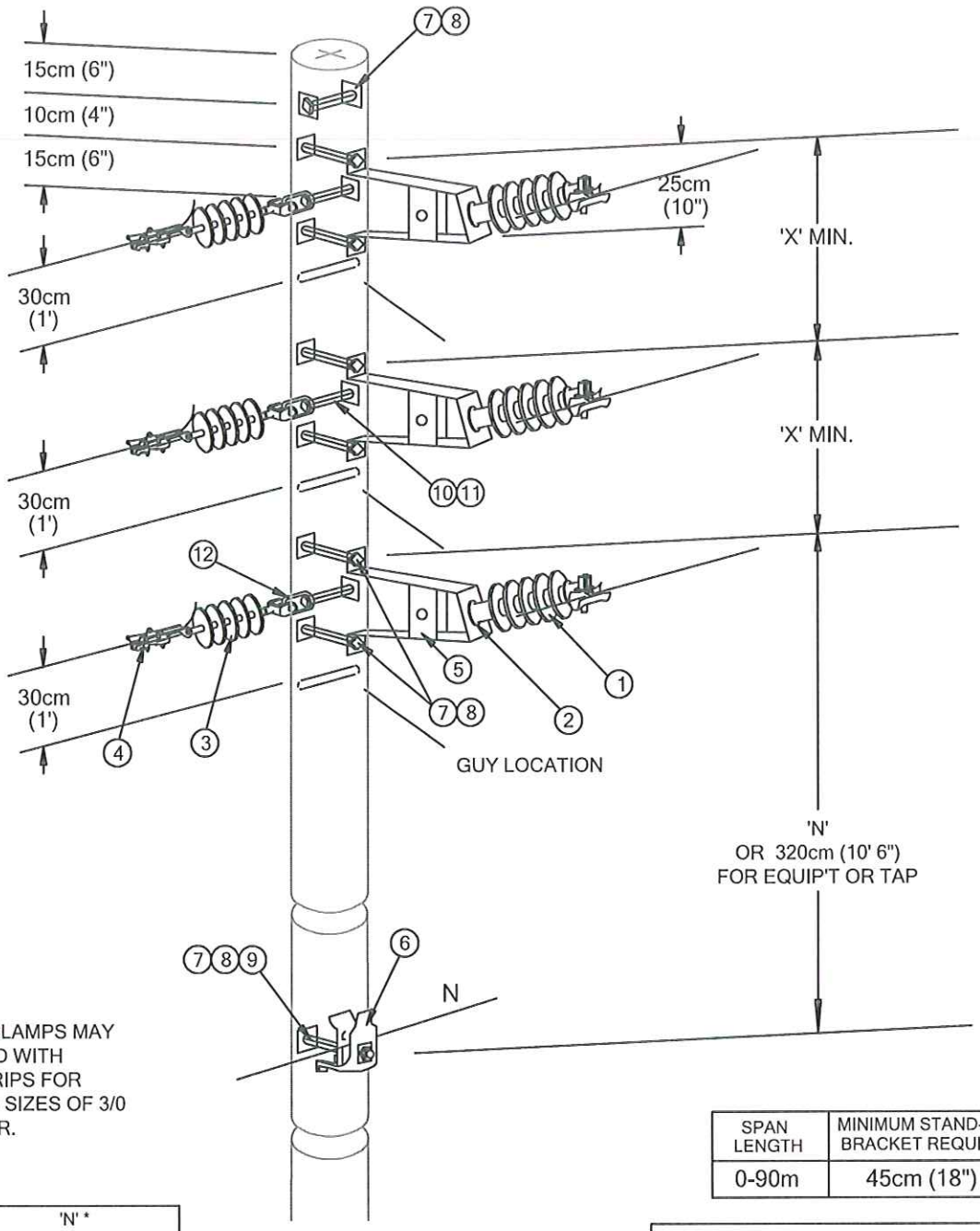
Utilities Standards Forum USF

Title: PRIMARY 3-PHASE VERTICAL DEADEND AND TANGENT
4.16 to 8.32kV, MAX SPAN 90m

SIZE	FILE NAME:	DWG NO.	REV
A	01-323.DWG	01-323	1

SCALE	DATE:	SHEET
NTS	2008-07-14	1

01-324



NOTE:
WAVESEAT CLAMPS MAY BE REPLACED WITH PREFORM GRIPS FOR CONDUCTOR SIZES OF 3/0 AND SMALLER.

SPAN LENGTH	MINIMUM STAND-OFF BRACKET REQUIRED
0-90m	45cm (18")

SECTION 1.6

SPAN LENGTH	'N' * MIN CLEARANCE
0-45m	1.5m (5')
46-60m	1.8m (6')
61-70m	2.1m (7')
71-90m	2.4m (8')

	'X'	
SYSTEM VOLTAGE	SPAN LENGTH 0-75m	SPAN LENGTH 76-90m
13.8kV	120cm (4')	150cm (5')
27.6kV	150cm (5')	180cm (6')

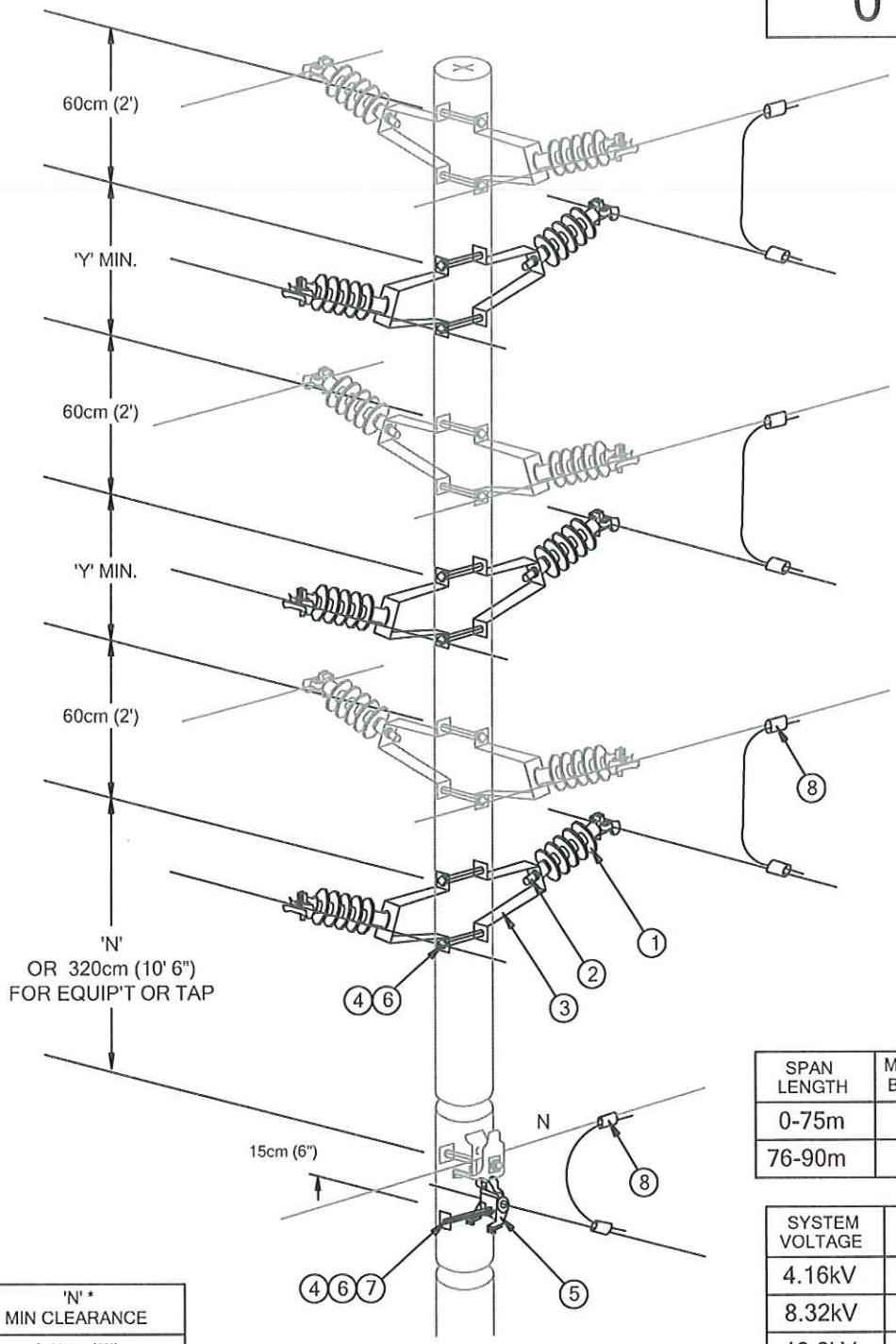
Utilities Standards Forum USF

Title: PRIMARY 3-PHASE VERTICAL DEADEND AND TANGENT
13.8 to 27.6kV, MAX SPAN 90m

SIZE	FILE NAME:	DWG NO.	REV
A	01-324.DWG	01-324	0

SCALE	DATE:	SHEET
NTS	2006-06-26	1

01-334



SPAN LENGTH	MINIMUM STAND-OFF BRACKET REQUIRED
0-75m	22.5cm (9")
76-90m	45cm (18")

SYSTEM VOLTAGE	'Y'
4.16kV	60cm (2')
8.32kV	60cm (2')
13.8kV	60cm (2')
27.6kV	70cm (2' 4")
34.5kV	80cm (2' 8")
44kV	90cm (3')

SECTION 1.6

SPAN LENGTH	'N' * MIN CLEARANCE
0-45m	1.5m (5')
46-60m	1.8m (6')
61-70m	2.1m (7')
71-90m	2.4m (8')

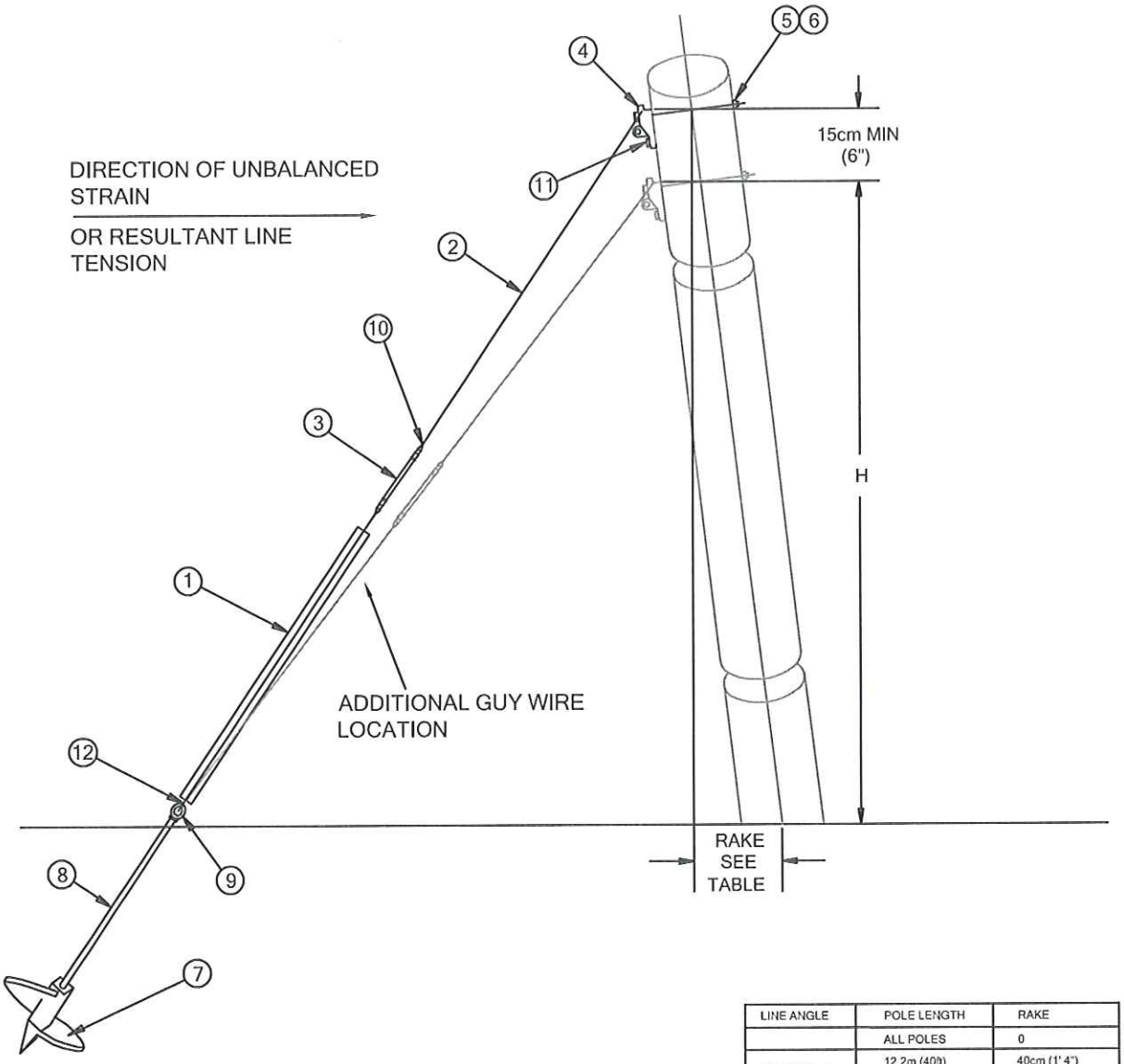
Utilities Standards Forum USF

Title: PRIMARY 3-PHASE 2-CCT CROSSOVER LINE TAP
4.16 to 44kV, MAX SPAN 90m

SIZE	FILE NAME:	DWG NO.	REV
A	01-334.DWG	01-334	1

SCALE	DATE:	SHEET
NTS	2008-07-14	1

06-100



LINE ANGLE	POLE LENGTH	RAKE
	ALL POLES	0
UP TO 15 °	12.2m (40ft)	40cm (1' 4")
	13.7m (45ft)	40cm (1' 4")
OVER 15 °	15.2m (50ft)	50cm (1' 8")
	16.8m (55ft)	50cm (1' 8")
	18.3m (60ft)	60cm (2' 0")
	19.8m (65ft)	60cm (2' 0")
	21.3m (70ft)	70cm (2' 3.5")
	22.9m (75ft)	70cm (2' 3.5")
	24.4m (80ft)	80cm (2' 7.5")

NOTE:
1. ANCHOR TYPE TO SUIT SOIL CONDITIONS SEE TABLE 06-12 OF SECTION 06.
2. ITEM 12 - CLAMP, GUY, 3-BOLT CAN BE SUBSTITUTED WITH ITEM 10 - GRIP, GUY WIRE, 3/8" (9mm)

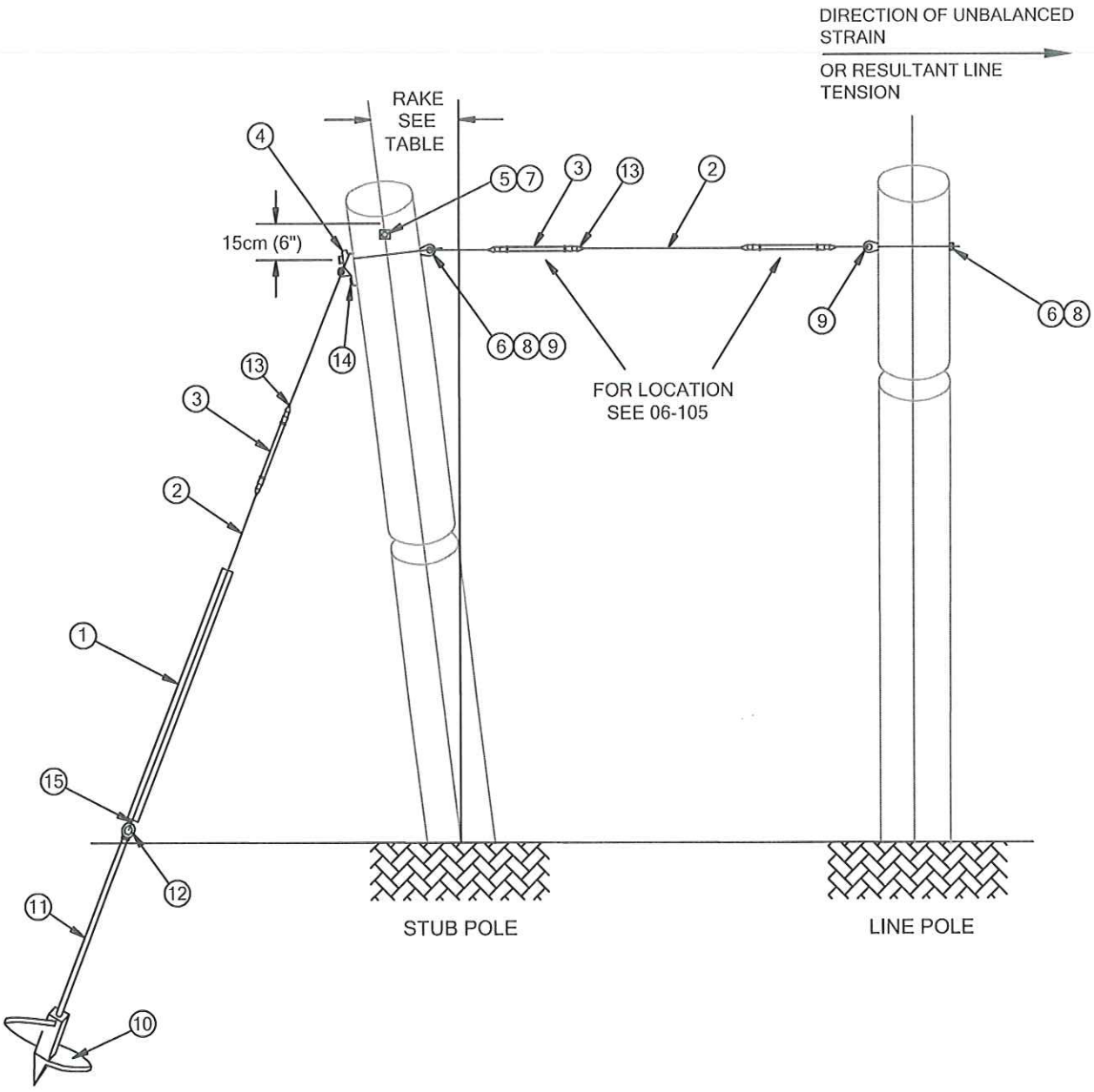
Utilities Standards Forum USF

Title: DOWN GUY(S)

SIZE	FILE NAME:	DWG NO.	REV
A	06-100.DWG	06-100	0

SCALE	DATE:	SHEET
NTS	2006-06-26	1

06-104



NOTE:
1. ANCHOR TYPE TO SUIT SOIL CONDITIONS SEE TABLE 06-12 OF SECTION 06.
2. ITEM 16 - CLAMP, GUY, 3-BOLT CAN BE SUBSTITUTED WITH ITEM 14 - GRIP, GUY WIRE, 3/8" (9mm)

STUB LENGTHS	RAKE
9.1m (30ft)	60cm (2' 0")
10.7m (35ft)	70cm (2' 3 1/2")
12.2m (40ft)	80cm (2' 7 1/2")

Utilities Standards Forum USF

Title: SPAN and ANCHOR GUY

SIZE	FILE NAME:	DWG NO.	REV
A	06-104.DWG	06-104	0

SCALE	DATE:	SHEET
NTS	2006-06-26	1

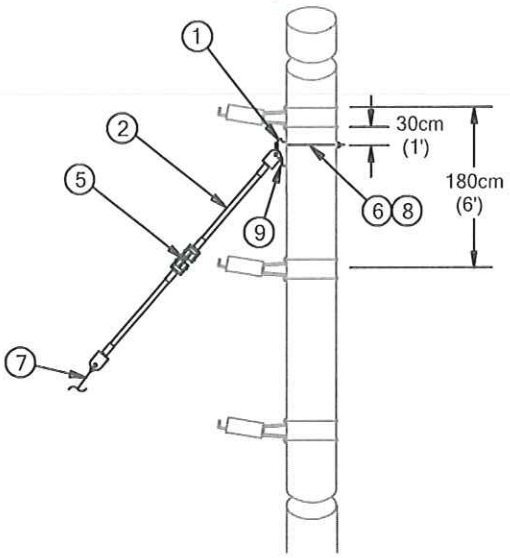


FIG. 1
GUYING DOUBLE CIRCUIT
BETWEEN PHASES

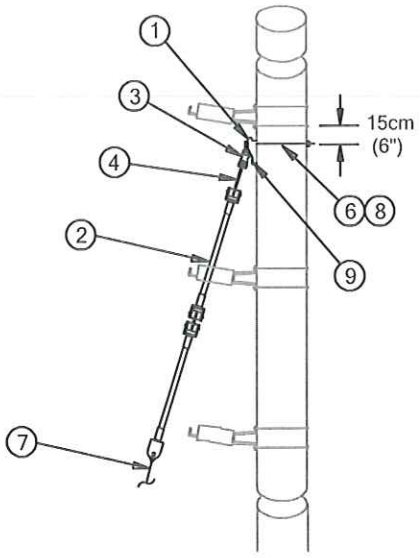


FIG. 2
GUYING DOUBLE CIRCUIT
BETWEEN PHASES

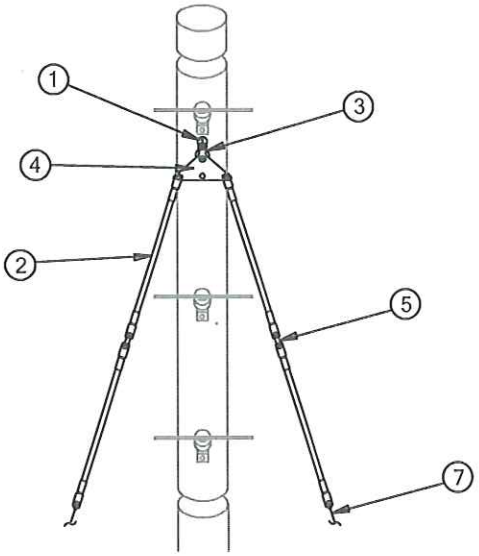


FIG. 3
GUYING TO TWO ANCHORS

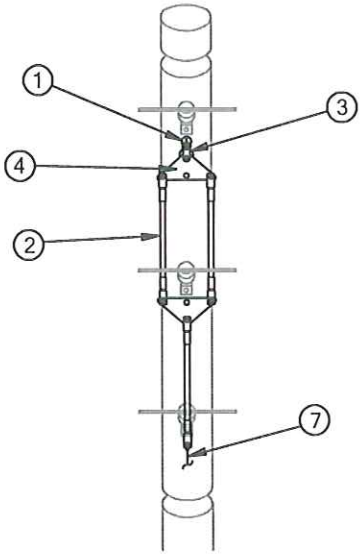


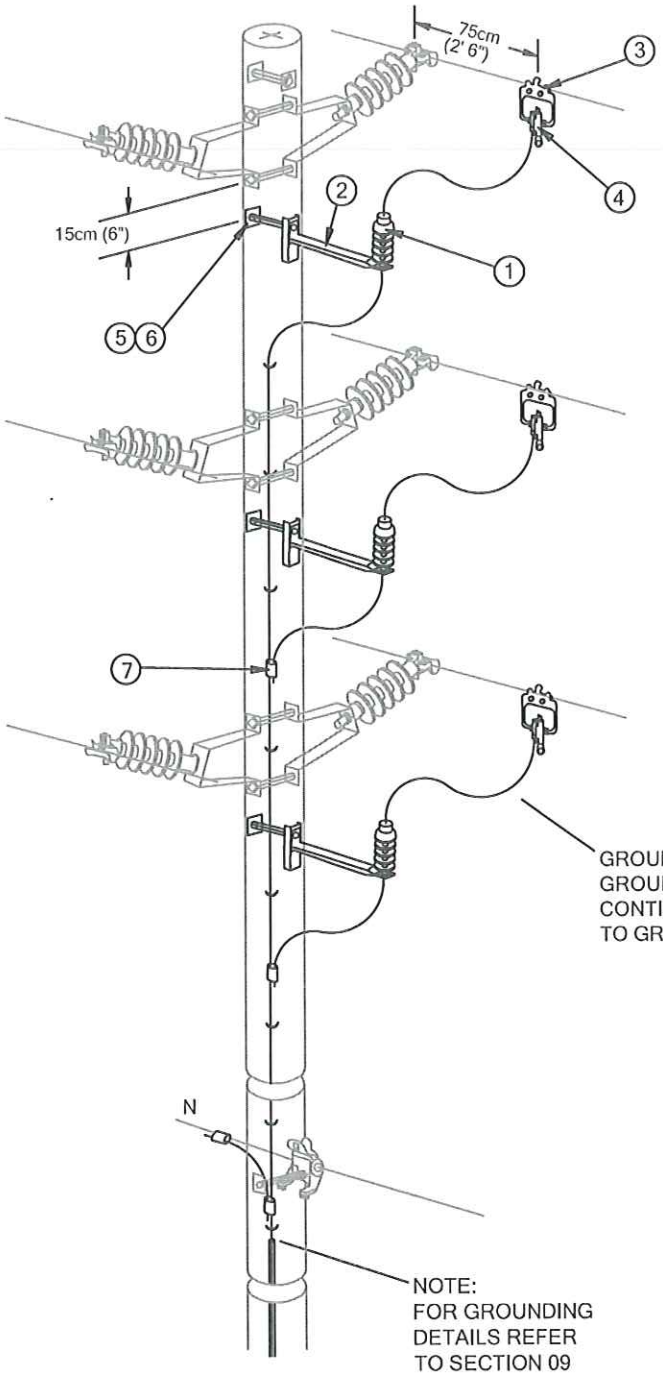
FIG. 4
GUYING TO ONE ANCHOR

Utilities Standards Forum USF

Title: ATTACHMENT of GUYS on 2-CCT ARMLESS

SIZE	FILE NAME:	DWG NO.	REV
A	06-108.DWG	06-108	0
SCALE NTS	DATE: 2006-06-26	SHEET 1	

07-302



GROUNDING NOTE:
GROUND WIRE MUST BE ONE CONTINUOUS PIECE FROM ARRESTER TO GROUND ROD

NOTE:
FOR GROUNDING DETAILS REFER TO SECTION 09

NOTES:
1. REFER TO THE LATEST ESC BULLETIN 36-8-X AND MANUFACTURER APPLICATION NOTES FOR LIGHTNING ARRESTER APPLICATIONS.

Utilities Standards Forum
USF

Title: ARRESTER INSTALLATION
3-PHASE (VERTICAL)
4.16 to 44kV

SIZE	FILE NAME:	DWG NO.	REV
A	07-302.DWG	07-302	1
SCALE NTS	DATE: 2007-09-19	SHEET 1	

08-100

SYSTEM VOLTAGE	'X'	'Y'	'Z'
2.4kV	75cm (2' 6")	105cm (3' 6")	320cm (10' 6")
4.8kV	75cm (2' 6")	105cm (3' 6")	320cm (10' 6")
8kV	75cm (2' 6")	105cm (3' 6")	320cm (10' 6")
16kV	75cm (2' 6")	105cm (3' 6")	320cm (10' 6")
*16kV	105cm (3' 6")	150cm (5')	410cm (13' 6")
20kV	105cm (3' 6")	150cm (5')	410cm (13' 6")

* 16kV HAS OPTIONAL FRAMINGS FOR USE WITH LARGER DISCONNECTS

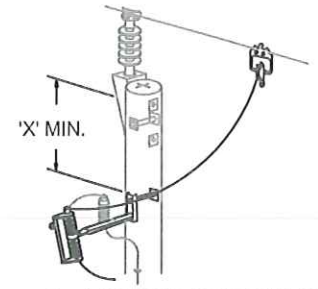


Figure A - 1-PHASE TANGENT FRAMING

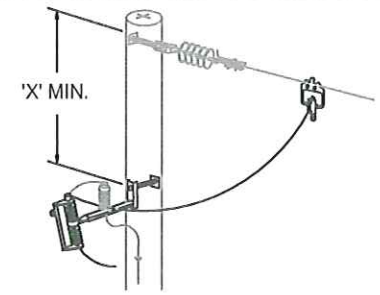


Figure B - 1-PHASE DEADEND FRAMING

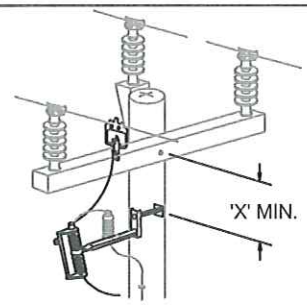


Figure C - 3-PHASE CROSSARM FRAMING

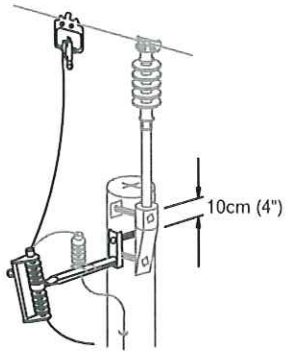
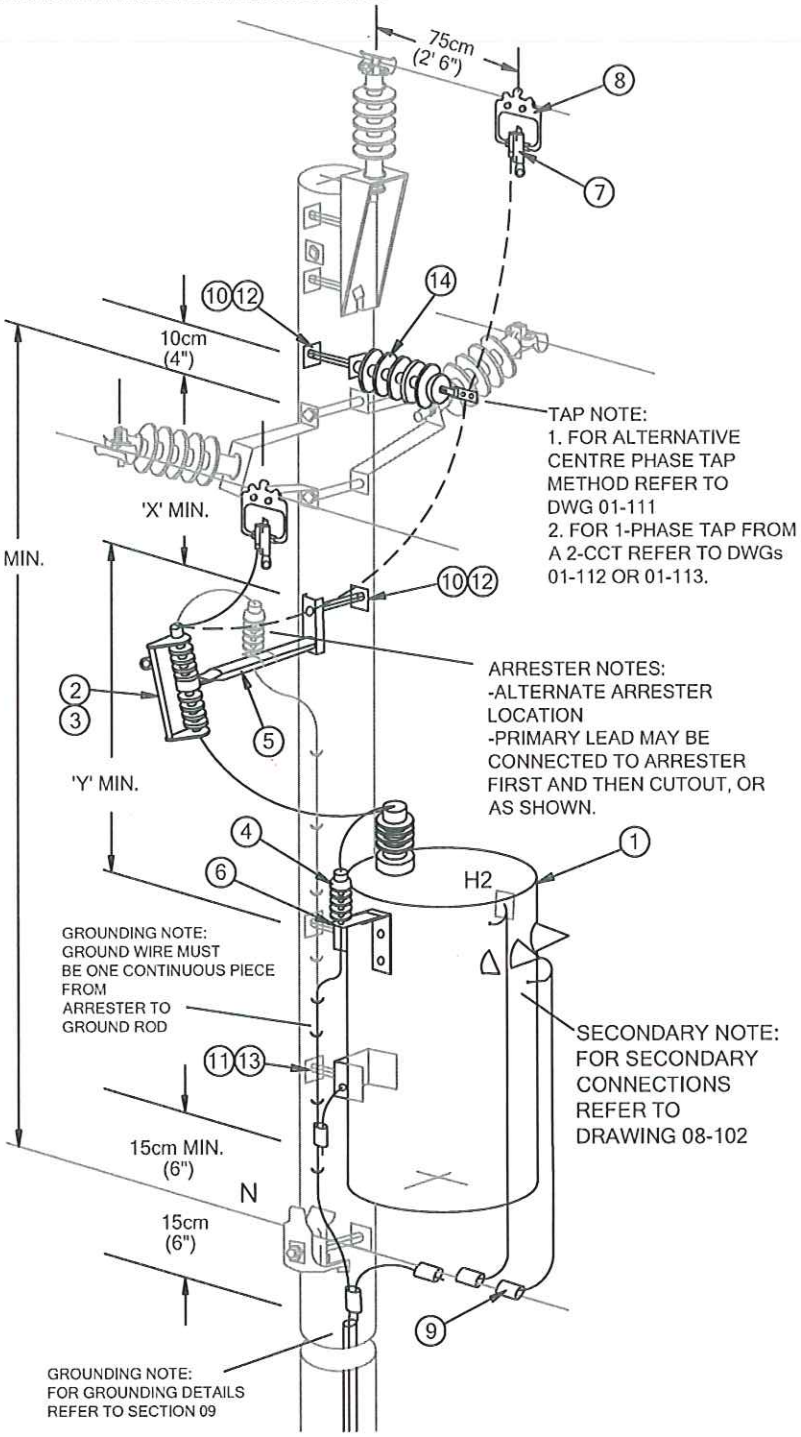


Figure D - 1-PHASE TANGENT FRAMING WITH POLE TOP EXTENSION



Utilities Standards Forum

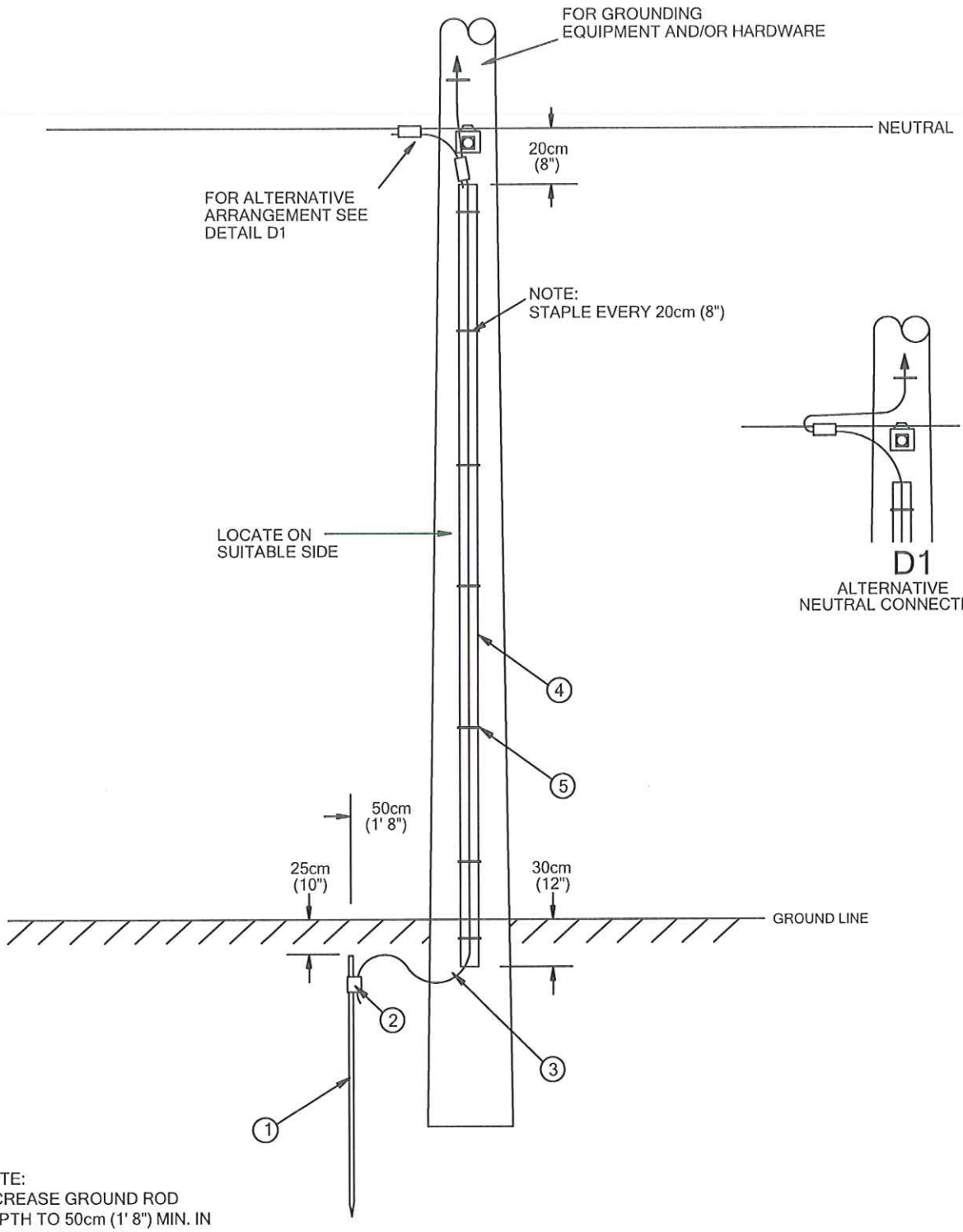
USF

Title: 1-PHASE TRANSFORMER INSTALLATION
(Utility Pole)
10 to 100kVA 2.4 to 20kV

SIZE	FILE NAME:	DWG NO.	REV
A	08-100.DWG	08-100	1

SCALE	DATE:	SHEET
NTS	2007-04-05	1

09-100



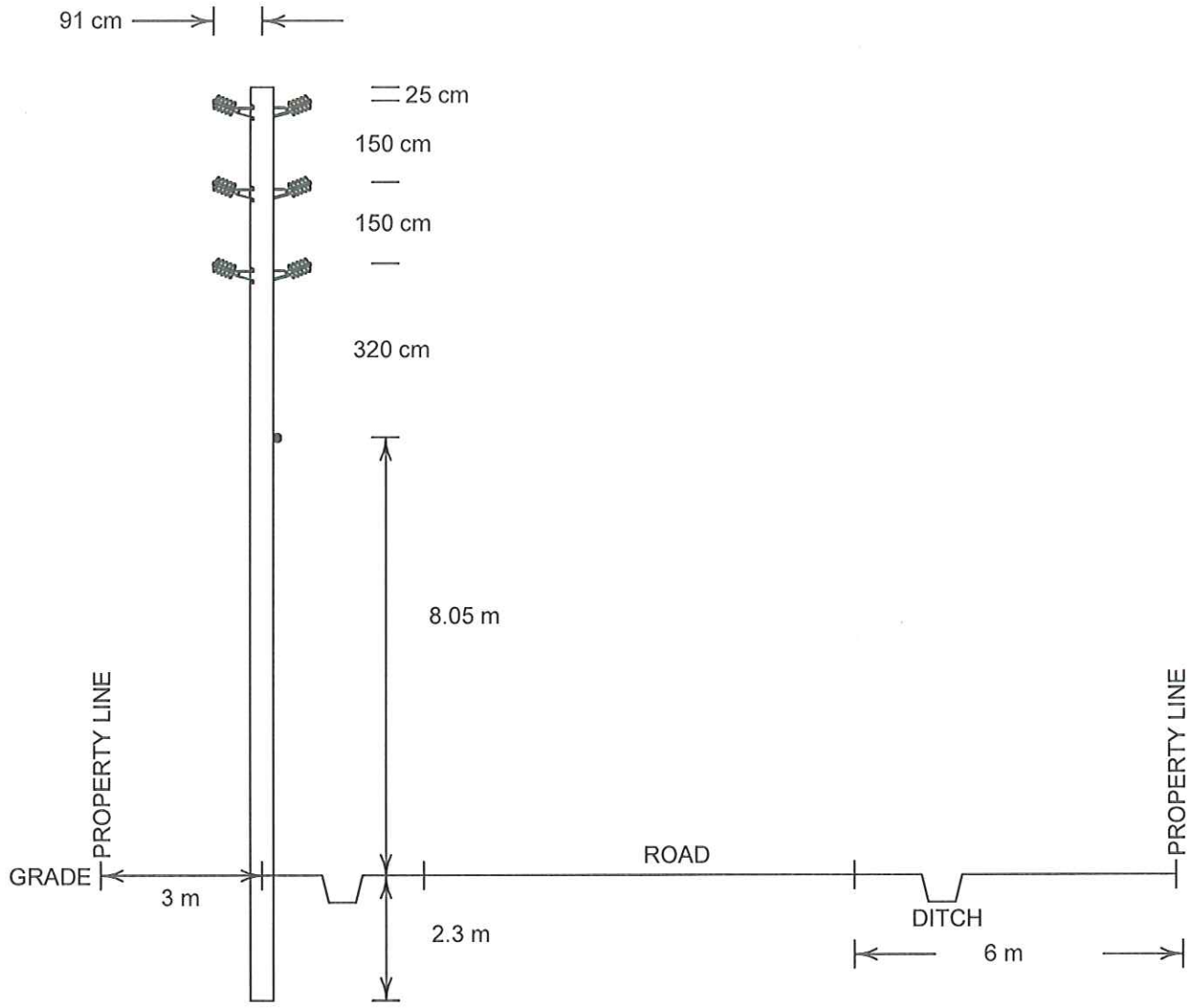
D1
ALTERNATIVE
NEUTRAL CONNECTION

NOTE:
INCREASE GROUND ROD
DEPTH TO 50cm (1' 8") MIN. IN
CULTIVATED LAND.

Utilities Standards Forum
USF

Title: GROUNDING FOR OVERHEAD INSTALLATIONS ON WOOD POLES

SIZE	FILE NAME:	DWG NO.	REV
A	09-100.DWG	09-100	2
SCALE NTS	DATE: 2008-03-18	SHEET 1	

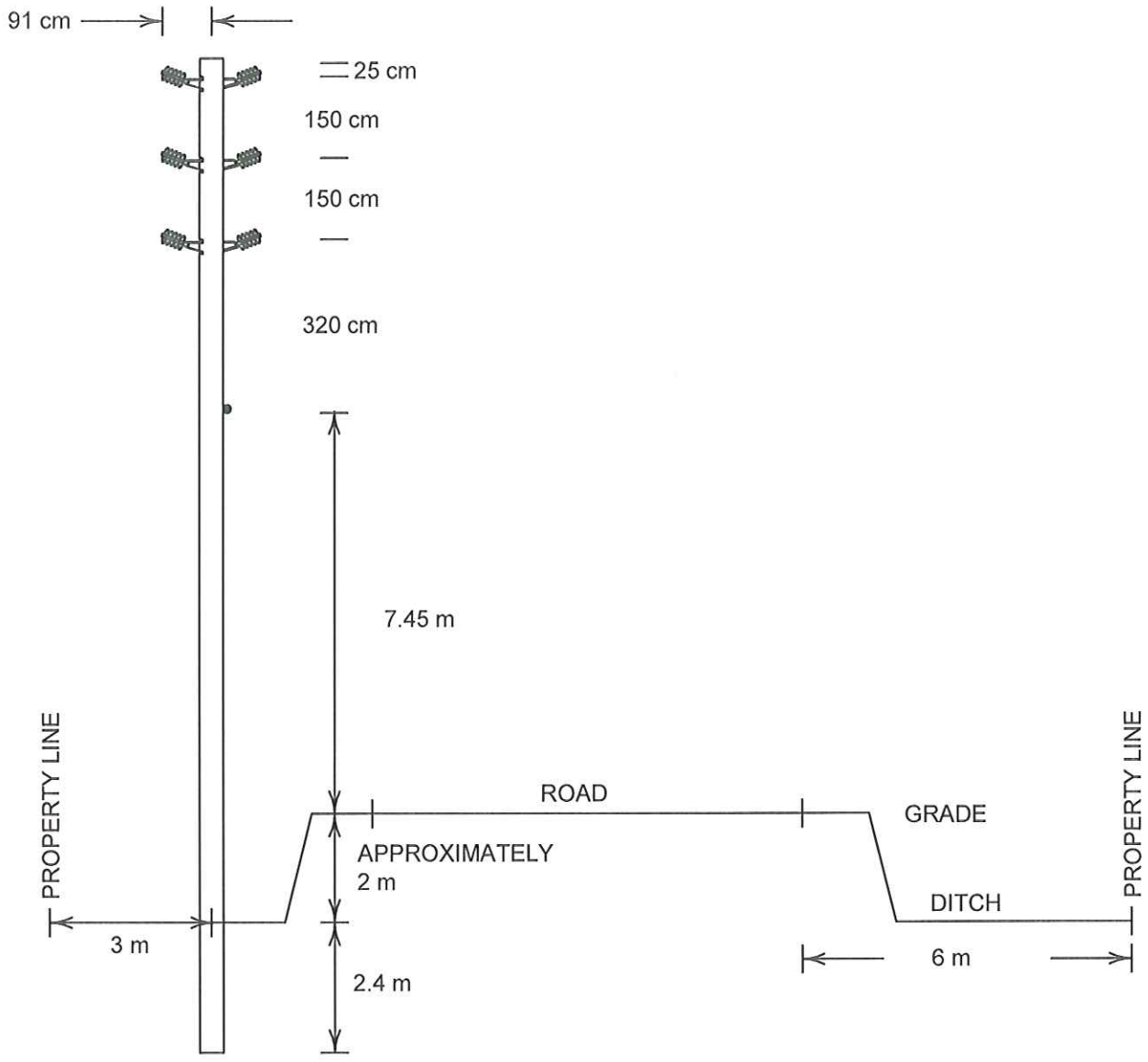


Haldimand County Hydro

Title:

CROSS SECTION "A" CONCESSION ROAD 5

APPROVED BY:	SIZE LET	FILE NAME: CROSS SECTION "A".DWG	DWG NO.	REV
DRAWN BY: J.L.	SCALE: NTS	DATE: JULY 7, 2011	SHEET 1 OF 1	

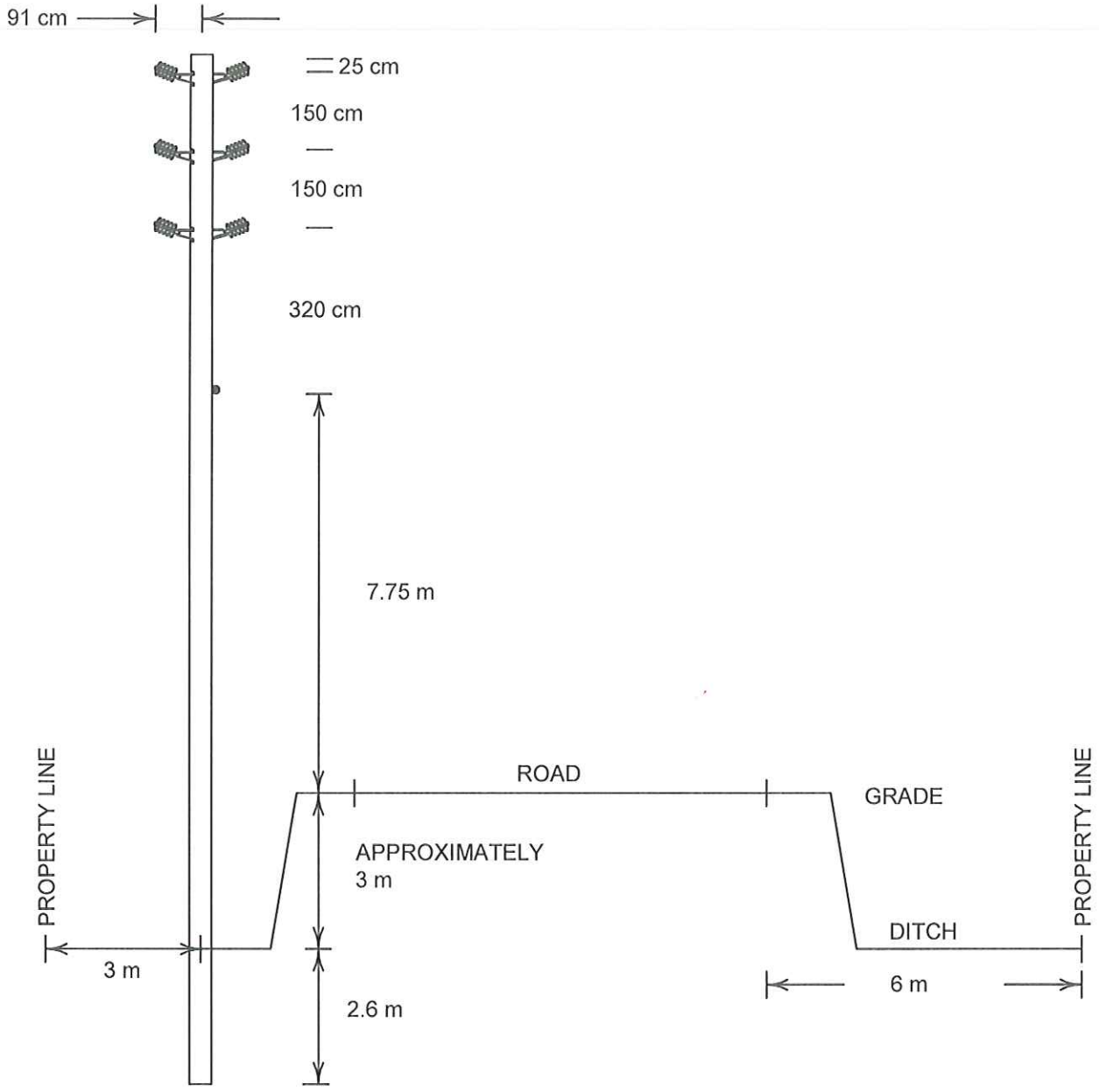


Haldimand County Hydro

Title:

CROSS SECTION "B" SANDUSK RD.

APPROVED BY:	SIZE LET	FILE NAME: CROSS SECTION "B".DWG	DWG NO.	REV
DRAWN BY: J.L.	SCALE: NTS	DATE: JULY 7, 2011	SHEET 1 OF 1	



Haldimand County Hydro

Title:

CROSS SECTION "C" CONCESSION ROAD 4

APPROVED BY:	SIZE LET	FILE NAME:	DWG NO.	REV
DRAWN BY: J.L.	SCALE: NTS	DATE: JULY 7, 2011	SHEET 1 OF 1	

APPENDIX B

TO DECISION AND ORDER

BOARD FILE NO. EB-2011-0027

DATED November 11, 2011

PROCEDURAL DETAILS

PROCEDURAL DETAILS

The Application was received on January 27, 2011 and the Board issued a Notice of Application and Written Hearing on February 24, 2011. The Applicant served and published the Notice as directed by the Board. In response to the Notice, six parties[1] requested and were granted intervenor status.

Procedural Order No.1 was issued on March 18, 2011 inviting and specifying dates for interrogatories, and for responses to be submitted by the Applicant. **Procedural Order No. 2**, issued on March 28, 2011, established a renewed schedule for interrogatories. Responses were received as specified in the Order.

Following issuance of **Procedural Order No. 3** on April 28, 2011, allowing for all parties to make submissions and for the Applicant to respond to any such submissions, the Board received a letter on April 29, 2011 from Haldimand County Hydro Inc. ("HCHI") requesting a delay from the schedule for submissions in order to further investigate issues raised during the interrogatory process. On May 4, 2011 the Applicant responded to HCHI's April 29 letter objecting to HCHI's request.

On April 29, 2011 HCHI also filed a Motion to defer the final decision in this proceeding, and another proceeding involving a leave to construct application for a wind farm (EB-2011-0063) to allow the Board to conduct a generic proceeding to decide issues of general application to the development of transmission lines in municipal rights-of-way.

On May 5, 2011 the Board issued **Procedural Order No. 4** that scheduled a technical conference ("TC") for May 16 and May 17, which was later moved to May 17 and May 18 by way of **Procedural Order No. 5**.

Procedural Order No.6 was issued on May 27, 2011 allowing for the filing of intervenor evidence on induction impacts and the filing of interrogatories and responses to these interrogatories. The order also allowed for submissions by the parties by June 22 and Summerhaven's reply by June 30.

[1] The Corporation of Haldimand County filed a letter on October 12, 2011 indicating its withdrawal from the proceeding.

On May 30, 2011 the Board issued its Decision and Order denying the HCHI Motion to defer the Decision in this proceeding until such time that a generic hearing is completed. The Board outlined its reasons for not proceeding with a generic hearing and further indicated that any issues related to the development of the proposed transmission lines by Summerhaven should be addressed within the context of this proceeding, as long as they are relevant and within the Board's jurisdiction to hear and determine.

On June 3, 2011 the Board received a letter from Capital Power requesting that it be allowed a right of reply to Summerhaven's reply should the applicant make any submission on the issue of a common connection point as per the IESO's System Impact Assessment ("SIA") recommendation. On June 10, 2011, Summerhaven submitted to the Board that its position on a common connection point had been fully stated during the TC and that there was therefore no reason to amend the procedural schedule. Capital Power's request for a right of reply was reiterated in a letter filed with the Board on June 17, 2011.

Procedural Order No. 7 was issued on June 22, 2011 to accommodate Capital Power's request to reply to Summerhaven by allowing for the filing of reply submissions by Capital Power, other intervenors and Board staff in the event that Summerhaven makes a submission on the common connection point.

On June 27, 2011 the Board received an Email from Capital Power referring to its June 17, 2011 letter and requesting that because of the unique circumstances of this case, it be permitted to reply not only to the submissions of the Applicant, but also to the submissions of Board staff and intervenors that may be adverse to the interests of Capital Power. The Board accommodated the request without delaying the original deadline of July 5, 2011 as set out in Procedural Order No.7, by issuing a letter dated June 27 to Summerhaven and all intervenors of record allowing for Capital Power the right to reply to the submissions of the Applicant, Board staff and intervenors that may be adverse to its interests, no later than Tuesday, July 5.

The Board received amendment requests to the schedule set out in Procedural Order No.7, first from Summerhaven on June 29, followed by a response request by HCHI on June 30 suggesting adjustment to Summerhaven's request, and finally Summerhaven's acceptance on July 4.

On July 5, 2011 the Board issued **Procedural Order No.8** with a reschedule by requiring that HCHI file its proposed design for the 27.6/16 kV distribution line by July 13, and Summerhaven to file its proposed final transmission line design by July 27. Procedural Order No.8 also required Intervenors and Board staff to who wish to make submissions in reply to Summerhaven's reply submission, or to submissions of other intervenors insofar as they are limited to matters related to the common connection point as outlined in the SIA report by August 3.

All submissions by Intervenors and Board staff, and reply argument by Applicant were delivered by the specified dates. On August 3, the record was completed being the deadline for submissions in reply to Summerhaven's reply submission, or to submissions of other intervenors insofar as they are limited to matters related to the common connection point.

On September 20, the Board issued a letter to Summerhaven and intervenors of record, seeking comments on draft Conditions of Approval ("COA") that were attached to the letter, by September 30, 2011. The Board indicated that once finalized, COA will form part of the Decision and Order as an Appendix. The Board also indicated that its preference is for Summerhaven and HCHI to, where possible, reach a consensus regarding any modifications to the draft COA. Summerhaven, HCHI and Capital Power sent their comments as directed by the Board.

TAB 8

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2011-0056

IN THE MATTER OF section 92 of *Ontario Energy Board Act*;

AND IN THE MATTER OF an application by Ontario Power Generation Inc. for an order or orders of the Board granting leave to construct transmission facilities in the Lower Mattagami region of Ontario.

BEFORE: Cathy Spoel
Presiding Member

Karen Taylor
Member

DECISION AND ORDER

1.0 THE APPLICATION

Ontario Power Generation Inc. (the "Applicant" or "OPG") filed an application with the Ontario Energy Board, (the "Board") dated May 12, 2011 pursuant to section 92 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15, Schedule B (the "*Act*") for an order or orders of the Board granting leave to construct a new double circuit 230 kV transmission line, approximately 3 km in length, in the Lower Mattagami region of Ontario (the "Proposed Line").

OPG filed the application on behalf of its wholly-owned and controlled entities LM Extension Inc. and Lower Mattagami Limited Partnership ("LMLP"). LMLP is a limited partnership in which OPG has a 99.9999 per cent limited partner interest and is the general partner. LM Extension Inc. is also a limited partner of LMLP

and has a 0.0001 per cent interest. Legal title to the proposed transmission line will be held by LMLP. All three entities are collectively referred to as OPG.

The Proposed Line will extend from the Smoky Falls Generating Station ("Smoky Falls GS") to Hydro One Network Inc.'s ("HONI") transmission system (230 kV circuits L20D/L22D) alongside an existing 115 kV transmission corridor.

The planned in-service date for the Proposed Line is February 1, 2013.

The Board has assigned File No. EB-2011-0056 to this application.

2.0 THE PROCEEDING

The Board issued a Notice of Application and Hearing on June 17, 2011. The Notice was published and served by OPG as directed by the Board. The IESO applied for and was granted intervenor status in this proceeding.

No party indicated a preference for an oral hearing and the Board proceeded by way of a written hearing.

Procedural Order No.1, issued on August 15, 2011, provided for an interrogatory process and submissions by the parties. The interrogatory process was completed on September 9, 2011 and OPG filed a submission on September 16, 2011. Neither the IESO nor Board staff made submissions in this proceeding.

3.0 THE LEGISLATION & PUBLIC INTEREST TEST

The Board derives its authority to deal with applications for leave to construct under section 92 (1) of the *Act* which states:

> *92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the board an order granting leave to construct, expand or reinforce such line or interconnection.*

Section 96(1) of the *Act* further states that:

> *96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.*

Section 96 (2) of the *Act* provides that, for an application under section 92 of the *Act*, the Board shall only consider the following when determining if a proposed work is in the public interest:

1. *The interests of consumers with respect to prices and the reliability and quality of electricity service.*
2. *Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.*

In the context of this Application, the main issues are:

- Is there a need for the Proposed Line?
- Have appropriate alternatives been considered?
- What impact will the Proposed Line have on transmission rates?
- What impact will the Proposed Line have on reliability of supply?
- Have the Environmental Assessment and other requirements been met?
- Have the land-related matters been addressed?

Each of these issues is considered below.

4.0 EVIDENCE AND BOARD FINDINGS

4.1 Project Need and Alternatives Considered

OPG submitted that the Proposed Line is part of a larger project to increase the capacity of four generating stations owned by OPG located along the Lower Mattagami River (the "LMR Project"). The LMR Project is included in the Ontario Government's Long Term Energy Plan released on November 23, 2010 (the "LTEP") as a project to meet Ontario's goal of 9,000 MW of hydroelectric capacity by 2018.

Smoky Fall GS is one of the four generating stations that is part of the LMR Project. As part of the LMR Project, the generation capacity at Smoky Falls GS will increase from the current 52 MW to 267 MW. OPG submitted that the Proposed Line is needed to accommodate the increased electricity generation at Smoky Falls GS.

OPG also submitted that the existing single circuit 115 kV S3S and S4S lines connecting Smoky Falls GS to the HONI transmission system cannot accommodate the additional generation. The maximum capacity that could be delivered from the

expanded Smoky Falls GS using the existing lines would be approximately 104 MW, resulting in a bottling of the majority of the planned additional generation.

The evidence indicates that OPG considered 5 alternatives to transmit the additional Smoky Falls GS generation to the HONI transmission system as summarized below:

Alternative 1: Do Nothing

Alternative 2: The Proposed Line

Alternative 3: Same as Alternative 2 except that this alternative includes the expansion of Little Long Substation.

Alternative 4: Build 7 km of single-circuit 230 kV line from Smoky Falls GS along a new transmission corridor to a significantly expanded Little Long Switching Station.

Alternative 5: Upgrade the existing HONI 115 kV Lines S3S and S4S.

OPG's evidence was that:

- Alternative 1 was rejected by OPG because it could not accommodate the increased electricity generation at Smoky Falls GS.
- Alternatives 3 and 4 were rejected by OPG for economic reasons, as the costs of these alternatives exceed that of the Alternative 2 - the Proposed Line.
- Alternative 5 was rejected because the existing 115 kV lines S3S and S4S are insufficient to carry the new Smoky Falls GS output and upgrading the lines was not considered technically feasible.

The Board accepts OPG's evidence that the Proposed Line is needed, that appropriate alternatives have been considered and that the proposed line is the preferred alternative to fulfill the need based on economic and technical grounds.

4.2 Impact on Transmission Rates

OPG's evidence is that the estimated cost of the Proposed Line is $ 6.6 million. OPG submitted that as it is not a rate regulated transmitter, it is not seeking recovery of the cost of the Proposed Line through transmission rates and, therefore, the cost of the Proposed Line has no impact on transmission rates.

OPG also submitted that the costs recovered for the overall LMR Project, including the Proposed Line, will impact consumers through the Global Adjustment. OPG explained that the electricity generated by the LMR Project is sold to the OPA through a contract between OPG and the OPA and that the calculation of the Global Adjustment takes into account payments made to generators contracted to the OPA. OPG further submitted that the cost of the Proposed Line and its impact on consumers is not material as it represents about 0.26% of the overall cost for the LMR Project, which is estimated to be approximately $2.5 billion.

The Board accepts OPG's evidence that the cost of the Proposed Line will not impact transmission rates and that the impact on consumers through the Global Adjustment will not be material.

4.3 Impact on Reliability of the IESO-Controlled Grid

4.3.1 System Impact Assessment ("SIA")

OPG filed the IESO's SIA report, dated March 31, 2010 entitled "System Impact Assessment Report: Lower Mattagami Generation Development". OPG also filed the IESO's Notification of Conditional Approval of the Connection Proposal dated March 31, 2010.

The IESO concluded that the LMR Project will not cause a material adverse impact on the reliability of the IESO-controlled grid provided the connection requirements set out in the SIA report are met.

OPG confirmed that it will fulfil the IESO's Requirements for Connection contained in the SIA report and will also ensure that the requirements specified for HONI and for OPG/ HONI will be completed on or before the connection of the Lower Mattagami generation.

4.3.2 Customer Impact Assessment ("CIA")

OPG filed HONI's CIA report, dated December 20, 2010 entitled "Customer Impact Assessment Report: Lower Mattagami Generation Connection Plan" with the Board.

In the CIA report, HONI recommends that customers connected in the area should review the fault levels at their connection points to confirm their equipment is capable of withstanding the increased fault and voltage levels.

OPG submitted that it has no direct information on the actions that customers took regarding the adequacy of their equipment. OPG stated that, based on information provided by HONI, the intention of the CIA report is to identify the impacts resulting from potential projects, and that as part of the assessment process, there is a customer review period where customers have an opportunity to comment on the assessment findings.

Area customers received a draft copy of the assessment and either provided comments that were incorporated in the final CIA or accepted the findings of the CIA. OPG is of the view that there are no outstanding requirements from HONI's CIA.

The Board accepts that there will be no impact on the IESO-controlled grid provided that the Requirements for Connections in the SIA are met. The Board directs OPG to ensure that the Requirements for Connections contained in the IESO's SIA report are met. The Board also directs OPG to ensure that the requirements of HONI's CIA are satisfied prior to energization of the Proposed Line.

4.3.3 Provincial Environmental Assessment ("EA")

OPG submitted that a Notice of Approval to Proceed and Order in Council providing approval to proceed with the LMR Project was issued by the Ministry of the Environment ("MOE") on December 15, 1994.

The EA identified the transmission line from Smoky Falls GS as a 7 km line to Little Long Sub-Station rather than the 3 km Proposed Line;

OPG filed a letter from the MOE to OPG, dated July 21, 2011, which provides official confirmation that the variance to the line route is considered minor and that no further consultation will be required.

4.3.4 Federal Environmental Assessment

OPG submitted that in 2006 it submitted a Project Description for the LMR Project to the Canadian Environmental Assessment Agency; and that an environmental

study was carried out in 2007-2009. A Comprehensive Study Report was also completed and was publicly posted for 30 day review on October 9, 2009.

OPG further submitted that on March 29, 2010, the Minister of the Environment (Canada) made an environmental decision regarding the LMR Project in which he stated that he is of the opinion that no additional information is necessary.

The Board is satisfied that relevant Environmental Assessment requirements have been met by OPG.

4.4 Aboriginal Peoples Consultations

OPG submitted that, as part of the process for consultation with Aboriginal Peoples, OPG and government agencies identified First Nations and Aboriginal organizations with a potential interest in the LMR Project. OPG states that it extended consultation opportunities to the groups identified and subsequent consultations with Aboriginal organizations took place in the period May 2007 to May 2009.

OPG believes that its consultation requirements have been fulfilled but, as part of OPG's policy, it will continue to work with the affected communities to appropriately address any additional concerns that Aboriginal Peoples may have.

In addition to the above-noted consultations, OPG stated that it has been in ongoing consultations with the Moose Cree First Nation ("MCFN") on the LMR Project since 2006. This has led OPG and MCFN to sign a Comprehensive Agreement identifying MCFN's interests associated with the LMR Project. Under the Comprehensive Agreement, MCFN has an opportunity to become an up to 25 per cent interest partner in the LMR Project.

OPG submitted that a confidential partnership agreement with the MCFN was completed and executed on September 2, 2011

OPG gave notice of this application to the affected aboriginal peoples and none intervened or made any comments on this application or raised any concerns about the adequacy of OPG's consultation with respect to the Proposed Line.

The Board is of the view that OPG's Aboriginal Peoples consultation requirements have been adequately fulfilled and notes OPG's commitment to continue to work with the affected communities to address any additional concerns that may arise.

4.5 Land - Related Matters

OPG submitted that:

- the Proposed Line will be located adjacent to the existing 115 kV lines S3S/S4S;
- approximately 1 km of the Proposed Line, out of Smoky Falls GS, will be located on OPG leased lands. The owner of the OPG leased lands is Her Majesty the Queen in the right of Ontario as represented by the Minister of Natural Resources ("MNR");
- the remaining 2 km of the Proposed Line will be located on Crown land; and
- there is no private ownership of the land required for the Proposed Line;

OPG further submitted that no approvals or permits are required to complete construction of the Proposed Line on the OPG leased lands and that certain approvals and permits from MNR will be obtained as needed.

The Board is satisfied that OPG has taken or will take appropriate measures to address any land-related matters associated with the Proposed Line.

5.0 CONCLUSION

Based on the evidence provided and the findings set out above, the Board has determined that the Project is in the public interest and that, in accordance with Section 96(1) of the *Act*, an order granting leave to construct the Project should be made.

THE BOARD THEREFORE ORDERS THAT:

Pursuant to section 92 of the *Ontario Energy Board Act*, Ontario Power Generation Inc. is granted leave to construct a new 230 kV double circuit transmission line, approximately 3 km in length, from Smoky Falls GS to the Hydro One Network Inc.'s transmission system in the Lower Mattagami region of Ontario, subject to the Conditions of Approval contained in Appendix A to this Decision and Order.

DATED at Toronto, October 28, 2011
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

TO BOARD DECISION AND ORDER

IN THE MATTER OF EB-2011-0056

DATED OCTOBER 28, 2011

CONDITIONS OF APPROVAL

CONDITIONS OF APPROVAL

EB-2011-0056

ONTARIO POWER GENERATION INC.

LOWER MATTAGAMI TRANSMISSION PROJECT

1.0 GENERAL REQUIREMENTS

1.1 Ontario Power Generation Inc. (“OPG”) shall construct the Proposed Line and restore the land in accordance with its application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

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

1.3 OPG shall obtain all necessary provincial and federal environmental assessment approvals and all other approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board’s request.

1.4 OPG shall satisfy the Independent Electricity System Operator (“IESO”) requirements and recommendations as reflected in the System Impact Assessment Report dated March 31, 2010, and such further and other conditions which may be imposed by the IESO.

1.5 OPG shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment document dated December 20, 2010, and such further and other conditions which may be found to be necessary.

1.6 OPG shall advise the Board's designated representative of any proposed material change in the Proposed Line, including but not limited to changes in: the proposed route; construction techniques; construction schedule; restoration procedures; or any other impacts of construction. OPG shall

not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

2.0 PROJECT AND COMMUNICATIONS REQUIREMENTS

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

2.2 OPG shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. OPG shall provide a copy of the Order and Conditions of Approval to the project engineer within ten (10) days of the Board's Order being issued

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

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

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

2.6 OPG shall furnish the Board's designated representative with two (2) copies of written confirmation of the completion of construction. This

written confirmation shall be provided within one month of the completion of construction.

3.0 MONITORING AND REPORTING REQUIREMENTS

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

3.2 The monitoring report shall confirm OPG's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Proposed Line. This report shall describe any outstanding concerns identified during construction of the Proposed Line, the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

TAB 9

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0115

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

AND IN THE MATTER OF an application by Detour Gold Corporation for an Order granting leave to construct a new transmission line and associated facilities for the Detour Lake Power Project (Phase II).

BEFORE: Paula Conboy
Presiding Member

Cynthia Chaplin
Member and Vice Chair

DECISION AND ORDER

Detour Gold Corporation ("Detour") filed an application with the Ontario Energy Board (the "Board") dated April 19, 2011 under sections 92 and 97 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15, Schedule B ("the Act"). Detour is seeking an order of the Board granting leave to construct a transmission line and associated facilities from Pinard TS to the Island Falls area (the "Project"), where it will connect to a previously approved transmission line supplying the Detour Lake Mine, located 180 km northeast of the Town of Cochrane. Detour also seeks an order approving the form of easement agreement provided in the application. The Board has assigned File No. EB-2011-0115 to the application.

The Board issued a Notice of Application and Written Hearing ("the Notice") on May 11, 2011. Detour served and published the Notice as directed by the Board. In the Notice, the Board indicated that it intended to proceed by way of a written hearing unless any

party satisfied the Board that there was a good reason for not proceeding by way of a written hearing.

The Taykwa Tagamou Nation ("TTN") and the Independent Electricity System Operator ("IESO") applied for intervenor status. TTN also requested eligibility for costs. TTN requested a written proceeding, and no other party indicated a preference for an oral hearing.

On June 8, 2011 the Board issued Procedural Order No. 1 granting intervenor status to the IESO and to TTN subject to certain conditions. The Board advised that it would proceed with a written hearing. The Procedural Order further provided for Interrogatories to be submitted by June 17, 2011 and responses by June 29, 2011, and for relevant intervenor evidence to be filed by July 8, 2011 if any party so wished.

Board staff submitted interrogatories and the Applicant provided responses by the specified date. No other party submitted interrogatories, and no intervenor evidence was submitted.

Evidence and Board Findings

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

- Project need
- System Impact Assessment and Customer Impact Assessment
- Land issues and form of Easement Agreement
- Environmental Assessment
- Project Costs and Impact on ratepayers

Project Need

Detour was granted leave to construct the Phase I transmission line in 2010, to allow for the initial development and construction of the Detour Gold mine in the spring of 2011 during which time it was projected that the project required approximately 20 MW of

power. In the initial application the Applicant indicated that a new application would be submitted for Phase II of the project which, if granted, would permit a 40 km extension of the 180 km Phase I line. In addition the Phase II initiative would allow for operation at 230kV and power delivery of 120 MW. The current application is generally consistent with the information provided at the Phase I stage although the power requirement has now been reduced to 100MW.

The Board has recently addressed the issue of project need in an application involving Goldcorp Canada Ltd. and Goldcorp Inc. (EB-2011-0106), in which the Board stated:

> In the Board's view, the need for a project is a matter to be determined in the context of the Board's review of the interests of consumers with respect to "price". That is, if there is going to be any impact on "price" (i.e., impact on transmission rates), the Board will review the evidence of the applicant with respect to the costs for the project and any rate impacts against the evidence advanced by the applicant with respect to the need for the project. If the evidence demonstrates that the project is needed, then the Board must determine whether the price and, therefore, the rate impacts, if any, are commensurate with need. In section 92 applications, where the proponent is paying for a facility, the issue of impacts on ratepayers with regard to price does not surface[1].

Because Detour is paying for the facilities, there will be no impact on transmission rates, and therefore the Board need not examine the issue of need in detail. The Board is satisfied that the need for the Phase II transmission line is established to the extent necessary.

System Impact Assessment and Customer Impact Assessment

The Board's filing requirements for transmission and distribution applications[2] specify that the Applicant is required to file a System Impact Assessment ("SIA") performed by the IESO and a Customer Impact Assessment ("CIA") performed by the relevant licensed transmitter, in this case Hydro One Networks Inc.

An IESO SIA for this project dated June 8, 2011 was included in the pre-filed evidence. The Board accepts the evidence provided in the SIA report which concludes that Phase

[1] EB-2011-0106 page 7
[2] Filing Requirements for Transmission and Distribution Applications, November 14, 2006, Section 4.3.8 (System Impact Assessment), and Section 4.3.9 (Customer Impact Assessment)

II of the proposed project would not have a negative impact on the reliability of the grid. The SIA includes a number of detailed recommendations and technical requirements relating to protection settings and information, operational matters, settings on equipment and tests to verify equipment capability and facilities.

Detour also submitted a CIA dated June 22, 2011 which concluded that there was no adverse impact on Hydro One customers from this project.

Detour confirmed its intention to abide by the requirements identified in the IESO SIA and the Hydro One CIA. The Board will require, as part of the Conditions of Approval, that the Applicant satisfy the requirements of the SIA and the CIA e.g. installation of the required load rejection and voltage control facilities, and participation in commissioning assessment tests, as well as further requirements and conditions which may be found to be necessary.

Subject to the above-noted requirements, the Board is satisfied that the Customer Impact and System Impact Assessments support the conclusion that there will be no adverse impacts on reliability of the Grid.

Land Issues and Form of Easement Agreement

Section 97 of the Act requires that the Board be satisfied that the Applicant has offered or will offer each landowner affected by the proposed route or location an agreement in a form approved by the Board. Detour filed a draft easement agreement (“Agreement to Grant an Easement to Detour Gold Corporation”) with its pre-filed evidence. The Board notes that there were no requests to vary the Draft Easement Agreement.

The evidence shows that Notice was properly served. There were no landowner requests for intervenor status. Detour commits that property rights will be obtained before entering upon the land for construction.

The Board finds the Draft Agreement to grant an Easement acceptable.

Environmental Assessment

The record of the Phase I application shows that draft and final Environmental Study Reports were made available for public review over the spring and summer of 2010 respectively. In the current application, Detour confirmed that the Environmental Assessment covered both Phase I and Phase II of the project and that it was approved in late 2010.

The Board does not have jurisdiction to determine issues related to the Environmental Assessment approval, but it is important to note that the order granting Leave to Construct will be conditioned on the implementation of the recommendations of the Environmental Assessment approval process.

Project Costs and Impact on Ratepayers

Detour's evidence and submissions are that the cost for the proposed facilities will be borne by Detour and the load will be relatively constant 24 hours per day and 7 days per week, and will improve the load factor and therefore mitigate the current surplus during off peak hours. The project will not have any adverse impact on the price of electricity in the wholesale market or on transmission rates.

The Board concludes that there will be no adverse impact on ratepayers as a result of this project.

Conclusion

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

The Board has previously determined that TTN is eligible for an award of costs. The schedule for the cost claim process is set out below.

THE BOARD ORDERS THAT:

1) Pursuant to section 92 of *Act*, Detour Gold Corporation is granted leave to construct a transmission line from Pinard TS to the Island Falls area (and associated facilities), where it will connect to a previously approved transmission line supplying the Detour Lake Mine, subject to the Conditions of Approval attached as Appendix A to this Order.

2) TTN's cost claim shall conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Detour by **Monday August 22, 2011**. Detour may file with the Board any objection to the cost claim and one copy must be served on the claimant by **Monday August 29, 2011**. TTN will have until **Friday September 2, 2011** to respond to any objections. A copy of any submissions must be filed with the Board and one copy is to be served on Detour.

All filings to the Board must quote file number EB-2011-0115, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All filings should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date. Parties must also include the Case Manager, Edik Zwarenstein at edik.zwarenstein@ontarioenergyboard.ca and Board Counsel, Ljuba Djurdjevic at ljuba.djurdjevic@ontarioenergyboard.ca in all electronic correspondence related to this case.

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Board Secretary

Filings: www.errr.ontarioenergyboard.ca
E-mail: boardsec@ontarioenergyboard.ca

Tel : 1-888-632-6273
Fax : 416-440-7656

ISSUED at Toronto on August 12, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A TO

Decision and Order

Conditions of Approval

Board File No: EB-2011-0115

DATED: August 12, 2011

Conditions of Approval for the
Detour Lake Power Project (Phase II) (the "Project")
EB-2011-0115

---

1 General Requirements

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

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

1.3 Detour shall implement all the recommendations of the Environmental Assessment Approval and any amendment thereto, and its own Environmental Screening Reports referred to in the pre-filed evidence, and such further and other conditions which may be imposed by environmental authorities.

1.4 Detour shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the System Impact Assessment document dated June 8, 2011, and such further and other conditions which may be imposed by the IESO.

1.5 Detour shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment document dated June 22, 2011, and such further and other conditions which may be found to be necessary.

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

1.7 Detour shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

2 Project and Communications Requirements

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

2.2 Detour shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. Detour shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

2.3 Detour shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. Detour shall submit five (5) copies of the construction plan to the Board's designated representative at least ten (10) days prior to the commencement of construction. Detour shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

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

2.5 Detour shall, in conjunction with Hydro One, Ontario Power Generation and the IESO, and other parties as required, develop an outage plan which shall detail how proposed outages will be managed. Detour shall provide five (5) copies of the outage plan to the Board's designated representative at least ten (10) days prior to the first outage. Detour shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

2.6 Detour shall furnish the Board's designated representative with five (5) copies of written confirmation of the completion of Project construction. This written confirmation shall be provided within one month of the completion of construction.

3 Monitoring and Reporting Requirements

3.1 Both during and for a period of twelve (12) months after the completion of construction of the Project, Detour shall monitor the impacts of construction, and shall file five (5) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Project. Detour shall attach to the monitoring report a log of all comments and complaints related to construction of the Project that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

3.2 The monitoring report shall confirm Detour's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the

rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

-- End of document --

TAB 10

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0217

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

AND IN THE MATTER OF an application by South Kent Wind LP for an Order or Orders pursuant to section 92 of the *Ontario Energy Board Act, 1998* (as amended) granting leave to construct transmission facilities in the Municipality of Chatham-Kent.

BEFORE: Paula Conboy
Presiding Member

Paul Sommerville
Member

DECISION AND ORDER

The Proceeding

South Kent Wind LP ("SKW") has filed an application with the Ontario Energy Board (the "Board") dated June 14, 2011 under section 92 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, Schedule B, for an order of the Board granting leave to construct the following transmission facilities (the "Project") in the Municipality of Chatham-Kent:

(i) Two 34.5 kV/230 kV step-up substations;

(ii) An approximately 27 km, 230 kV transmission line (the "Corridor Line") that will run between the two step-up substations;

(iii) An approximately 5.7 km, 230 kV transmission line that will run from a tie-point on the Corridor Line to the Chatham Switching Station owned by Hydro One Networks Inc.; and

(iv) A fenced-in metering station with two meters to be located adjacent to the Chatham Switching Station.

The Board has assigned File No. EB-2011-0217 to the application.

SKW is a limited partnership and its two limited partners are Pattern South Kent LP Holdings LP ("Pattern") and Samsung Renewable Energy Inc. ("Samsung"), each of which holds a 49.99% interest in SKW. South Kent Wind GP Inc., which is indirectly wholly owned by Samsung and affiliates of Pattern, is the general partner of SKW and holds a 0.02% interest in SKW.

The Board issued a Notice of Application and Hearing ("Notice") on June 28, 2011. SKW served and published the Notice as directed by the Board.

Following the publication of the Board's Notice, the Board received requests for intervenor status from the Kent Federation of Agriculture ("KFA"), the Independent Electricity System Operator ("IESO"), and a joint intervention from landowners, William and Mary Ann Machacek and William Alan and Anne English ("Machacek-English").

The Board granted intervenor status to all parties that requested such status. The Board also determined that the KFA and Machacek-English are eligible to apply for an award of costs under the Board's *Practice Directions on Cost Awards*. The Board stressed that cost eligibility shall be restricted to matters directly within the scope of this proceeding.

On August 3, 2011 the Board issued Procedural Order No. 1, which amongst other things, set out the list of approved intervenors and the schedule for the written hearing. Only Board staff and Machacek-English submitted interrogatories. SKW provided complete responses to all interrogatories on August 22, 2011. The Board received submissions from Machacek-English on September 6, 2011 and reply submissions from SKW on September 16, 2011.

Evidence and Board Findings

In the context of this application, the Board has considered the following categories of evidence in relation to its mandate:

- Project need
- System Impact Assessment and Customer Impact Assessment
- Land issues and form of Easement Agreement
- Environmental Assessment
- Project Costs and Impact on ratepayers

The Board considered the full record of the proceeding but has summarized the record only to the extent necessary to provide context to its findings.

Project Need

SKW stated that in January 2010, the Province of Ontario entered into a Green Energy Investment Agreement with Samsung C&T Corporation and Korea Electric Power Corporation (together the "Korean Consortium"). Under the terms of that agreement, the Korean Consortium agreed to develop 2,500 MW of wind and solar renewable generation projects in Ontario in five phases.

As part of the first phase of that commitment Samsung and Pattern are developing a 270 MW wind farm located within the Municipality of Chatham-Kent (the "Wind Farm"). The transmission facilities proposed in this application are needed to connect the Wind Farm to the IESO controlled grid.

SKW submitted that when determining if the proposed facilities are in the public interest, section 96(2) of the Act provides that the Board shall only consider the interests of consumers with respect to price, reliability and quality of electricity service, and where applicable and in a manner consistent with the Government of Ontario's policy to promote the use of renewable energy sources.

SKW stated that the proposed transmission facilities will enable the addition of 270 MW of clean, renewable energy to the electricity grid and in keeping with the provisions of section 96(2) SKW submitted that the Project is consistent with the government's policy objective to promote the use of renewable energy sources, and is therefore in the public

interest. SKW also filed a letter dated April 1, 2010, from the Minister of Energy and Infrastructure, which confirmed the agreement between the Korean Consortium and the Government of Ontario. The letter also directed the Ontario Power Authority "to hold in reserve 260 MW transmission capacity in Essex County and the Municipality of Chatham-Kent for the Korean Consortium or its Project Companies".[1] SKW further submitted that the cost of the Project will be paid for by SKW and will not impact electricity transmission rates in Ontario.

The Board has reviewed the evidence and is satisfied that the need for the Project has been established to the extent necessary.

System Impact Assessment and Customer Impact Assessment

The Board's filing requirements for transmission and distribution applications[2] specify that an Applicant is required to file a System Impact Assessment ("SIA") performed by the IESO and a Customer Impact Assessment ("CIA") performed by the relevant licensed transmitter, in this case Hydro One Networks Inc. ("Hydro One").

A SIA report dated May 5, 2011 was included in the pre-filed evidence and SKW confirmed that it had received a *Notification of Conditional Approval* from the IESO as part of the SIA. The SIA concluded that the proposed transmission facilities will not have a material adverse impact on the reliability of the IESO controlled grid. As noted in the SIA, final approval will be granted by the IESO during the IESO's Market Entry process and "the connection applicant will be required to demonstrate to the IESO that all requirements identified in this SIA report have been satisfied".[3]

SKW also submitted a CIA dated May 06, 2011. The CIA concluded that there was no material change in voltage performance or on short circuit levels for the majority of Chatham-Essex area customers from this project[4].

SKW confirmed its intention to comply with the recommendations in the SIA and CIA.

[1] Letter from Minister of Energy and Infrastructure, dated April 1, 2010, p3
[2] Filing Requirements for Transmission and Distribution Applications, November 14, 2006, Section 4.3.8 (System Impact Assessment), and Section 4.3.9 (Customer Impact Assessment)
[3] SIA Report, Paragraph 17, p. 7
[4] CIA Report, p.33

The Board accepts the evidence provided in the SIA and CIA that there will be no adverse impacts on the reliability of the integrated electricity grid. The Board will however require as part of the Conditions of Approval, that SKW satisfy the requirements of the SIA and the CIA as well as further requirements and conditions which the IESO and Hydro One may find to be necessary.

Land Issues and Form of Easement Agreement

Section 97 of the Act requires that the Board be satisfied that the Applicant has offered or will offer each landowner affected by the proposed route or location an agreement in a form approved by the Board. On July 27, 2011 SKW submitted Forms of Easement Agreement in relation to farm lands, municipal right-of-way and the corridor lands.

At Exhibit B/Tab 4, SKW provided a detailed description of the project route and the alternatives considered. SKW proposed to locate the 27 km Corridor Line within a 90-foot wide Canadian Southern Railway Company ("CSR") corridor. The Tie line is to be located along the properties of nine private landowners and on a municipal right-of-way.

With respect to agreements with the nine private landowners, SKW submitted that easements had been obtained from all but one landowner along the Tie-line. SKW does not anticipate any land-related issues and expects that the one remaining agreement will be executed by the end of September 2011.

With respect to the easement agreement in relation to the municipal right-of-way, SKW stated:

> SKW and the Municipality of Chatham-Kent have agreed in concept to the granting of a registered easement with respect to the Municipal ROW – an easement is currently under negotiation with the Municipality of Chatham-Kent and is expected to be executed in the coming weeks following completion of boundary and topographical surveys of the subject lands.[5]

With respect to the status of the agreements in relation to the corridor, SKW submitted:

> CKT [Chatham-Kent Transmission] has obtained a registered easement from CSR in respect of the western portion of the Corridor. This easement was

[5] Board staff interrogatory No. 2 (d)

> registered in favour of CKT on or about August 5, 2011. Further, SKW confirms that through an affiliate it has secured contractual rights with CKT with respect to, *inter alia*, the granting of an easement by CKT to SKW over the western and eastern portions of the Corridor. SKW confirms that the sub-easement and easement to be registered in favour of SKW in respect of the western and eastern portions, respectively, are currently under negotiation between CKT and SKW. SKW has no reason to believe that the execution of the necessary agreements will be delayed or not executed at all.[6]

Machacek-English raised three issues in relation to land matters. First, Machacek-English expressed concern over the state of the corridor and submitted that the neglect of these lands was negatively affecting the agricultural productivity of surrounding lands. Machacek-English submitted that matters related to the upkeep of the corridor should be addressed prior to the sale of the corridor. Second, Machacek-English submitted that the corridor lands should be used for agriculture and for the production of biodiesel or ethanol. Third, Machacek-English argued that the proposed hydro corridor would negatively impact the property values of adjacent lands.

SKW submitted that the issues raised by Machacek-English are "environmental" and were therefore beyond the scope of a section 92 leave to construct application. SKW further submitted that the matters related to the upkeep of the corridor lands was an issue for the owner of the corridor and not SKW, the lessee. With respect to the appropriate use for the corridor lands, SKW submitted that the Board did not have jurisdiction to rule on such matters. Lastly, with respect to the issue of negative impact on property values, SKW submitted that the claim was unsubstantiated and referred to the Board's Decision in EB-2005-0230 where the Board had stated: "It is clear, when section 96 is read, that the value of land or the potential devaluation of land of an abutting property owner does not fall within the scope of the Board's jurisdiction".[7]

As noted in the Board's Notice and elsewhere in this Decision, the Board's jurisdiction in a section 92 leave to construct application is strictly limited to the consideration of price, reliability and quality of electricity service and consistency with the Government of Ontario's policy to promote the use of renewable energy sources. In the Board's view the issues related to the state of the corridor and its impact on agricultural production of surrounding lands, the appropriate use for affected lands and the impact on land values,

[6] SKW Final Reply Submission, p. 5
[7] EB-2005-0230, Transcript Vol. 1, p.124

do not directly relate to the price, reliability or quality of electricity service or the promotion of the government policy and accordingly, are beyond the scope of the Board's jurisdiction, as prescribed in section 96(2) of the Act. Therefore, the Board does not have the authority to consider the issues raised by Machacek-English.

Further, the Board notes that the majority of the Project is located on a pre-existing railway corridor that has been used for industrial purposes for over 100 years. The Board also notes that SKW has successfully obtained a number of the easement agreements and is in the process of executing the remaining agreements. The Board is satisfied that the proposed route is the most efficient and least invasive of the alternatives available.

These factors, in addition to the finding made in EB-2005-0230, which is cited above, and with which we agree, leads us to conclude that, given the limits on the Board's jurisdiction, and the evidence in this case, the proposed route for the transmission facilities is acceptable and reasonable. The Board notes that there were no criticisms of the form of Easement Agreement proposed by the Applicant, and that it has formed the basis of agreement with all but one of the individual landowners affected. The Board finds that the Form of Easement Agreement is acceptable.

Environmental Assessment

The Applicant's evidence states that environmental approvals for the transmission facilities are being obtained in accordance with the Renewable Energy Approval ("REA") process as set out in Ontario Regulation 359/09 under the *Environment Protection Act*. In response to Board staff interrogatory No. 4 SKW provided a detailed description of the status of the on-going REA process and noted that final approval is expected by February 28, 2012.

The Board does not have jurisdiction to determine issues related to the Environmental Assessment approval, but it is important to note that the order granting Leave to Construct will be conditioned on the implementation of the recommendations of the REA.

Project Costs and Impact on Ratepayers

The estimated cost of the transmission facilities and the interconnection to Hydro One's system is $30 million. SKW stated that the proposed transmission facilities will be owned and constructed by SKW until they are commissioned, following which the facilities will be sold to Chatham Kent Transmission ("CKT"). The planned date for the transfer is January 2013.

SKW stated that the cost of the transmission facilities and the interconnection to Hydro One's Chatham Switching Station will be paid for by SKW and will have no impact on transmission rates in Ontario. In response to Board staff interrogatory No. 5 SKW stated:

> "Costs will not be socialized and an approved Ontario Energy Board tariff sheet is not being sought. Costs will be recovered directly from Pattern in the form of contributed capital and operational cost recoveries under the terms of a 20-year commercial agreement to be mutually agreed upon between the two parties."[8]

SKW also filed a letter from CKT, dated August 22, 2011, that confirmed the proposed sale of assets and cost recovery mechanism. CKT stated:

> "…it is CKTs intent (and that of SKW) that the charges be recovered directly from SKW and not form part of the provincial transmission cost pool. Rather, it is CKT's intent (and that of SKW) that the subject transmission service charges will be set out in a 20 year transmission services agreement between CKT and the SKW...."

Accordingly, the Board is satisfied that the Project will not have an adverse impact on transmission rates in Ontario.

Conclusion

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

[8] Chatham-Kent Transmission's Licence Application - EB-2010-0351

The Board has previously determined that Machacek-English and the KFA are eligible for an award of costs. The schedule for the cost claim process is set out below.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, SKW is granted leave to construct the proposed transmission facilities, in the Municipality of Chatham-Kent, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The Board had previously determined that Machacek-English and the KFA are eligible to apply for an award of costs. Claims in this regard should conform to the Board's *Practice Direction on Cost Awards*, and shall be filed with the Board and one copy served on SKW by **October 21, 2011**. SKW should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **October 28, 2011**. Parties will have until **November 4, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on SKW. SKW shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote the file number EB-2011-0217, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guidelines found at www.ontarioenergyboard.ca. If the web portal is not available you may e-mail your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

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

Toronto ON M4P 1E4
Attention: Board Secretary
Tel: 1-877-632-2727 (toll free)
Fax: 416-440-7656

ISSUED at Toronto, October 11, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

CONDITIONS OF APPROVAL

EB-2011-0217

DATED: OCTOBER 11, 2011

**Conditions of Approval for the
South Kent Wind LP ("SKW") Transmission Line and Associated Facilities (the "Project")
EB-2011-0217**

1 General Requirements

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

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

1.3 SKW shall implement all the recommendations of the Environmental Assessment Approval and any amendment thereto, and other conditions which may be imposed by environmental authorities.

1.4 SKW shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the System Impact Assessment report dated May 05, 2011, and such further and other conditions which may be imposed by the IESO.

1.5 SKW shall satisfy the Hydro One Networks Inc. ("Hydro One") requirements as reflected in the Customer Impact Assessment report dated May 06, 2011, and such further and other conditions which Hydro One finds to be necessary.

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

1.7 SKW shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

2 Project and Communications Requirements

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

2.2 SKW shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. SKW shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

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

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

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

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

3 Monitoring and Reporting Requirements

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

3.2 The monitoring report shall confirm SKW's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

-- End of document --

TAB 11

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2011-0394

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

AND IN THE MATTER OF an application for an Order granting leave to construct Transmission facilities for McLean's Mountain Wind LP.

BEFORE: Karen Taylor
Presiding Member

Cynthia Chaplin
Vice-Chair

DECISION AND ORDER
June 28, 2012

Application

McLean's Mountain Wind LP. ("McLean's") filed an application on November 22, 2011 with the Ontario Energy Board pursuant to section 92(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B for an order granting leave to construct transmission facilities for the connection of a wind farm to the Ontario electricity grid.

The proposed transmission facilities (the "Transmission Facilities") include a single circuit overhead transmission line, a 1 km section of submarine cable, a switching station, a transformer station, and associated facilities. The Transmission Facilities will connect a wind farm on Manitoulin Island to the IESO-controlled grid on Goat Island, a distance of approximately 10 km.

The Board assigned File No. EB-2011-0394 to the application.

The Board issued a Notice of Application and Hearing on December 19, 2011 and the applicant served and published the Notice as directed by the Board. In response to the Notice, five parties requested intervenor status in the proceeding: the Wikwemikong Unceded First Nation Elders and Youth, the Manitoulin Coalition for Safe Energy Alternatives ("MCSEA"), Wind Concerns Ontario, Lake Superior Action Research Conservation, and BayNiche Conservancy. There were also numerous letters of comment from interested persons.

MCSEA requested costs eligibility for the proceeding and "an honorarium recognizing individual efforts in preparing and presenting an intervention or submission" and the Board granted cost eligibility to MCSEA for matters directly within the scope of the proceeding, and indicated that an honorarium might also be considered by the Board at the end of the proceeding. Cost awards are further discussed later in this decision.

Procedural Matters

On January 23, 2012 a letter from Mr. Tom Adams on behalf of all the proposed intervenors mentioned above was received by the Board. The parties alleged deficiencies in the Notice and errors in a separate publication by the applicant, and requested clarification and the issuance of a new notice. On January 25, 2012, the applicant responded and asked the Board to reject the intervention requests of the five parties on the grounds that none of the issues identified in their respective letters of intervention related to matters that were within the scope of the proceeding.

Procedural Order No. 1 was issued on January 27, 2012. The Board determined that the Notice was sufficient and did not need to be re-issued. The Board also determined that the five parties would be granted intervenor status and reminded the parties concerning the scope of the Board's jurisdiction. The Board acknowledged a letter from Hydro One Networks Inc. ("Hydro One") which explained that the Notice erroneously indicated that the switchyard would be owned and operated by Hydro One, whereas it would be owned and operated by McLean's. The Board also responded to the numerous requests for an oral hearing on Manitoulin Island, indicating that it was concerned that many of the issues that had been raised might not fall within the scope

of the proceeding. The Board indicated that it would reconsider whether an oral hearing was required after the interrogatory phase of the proceeding. In Procedural Order No. 1 the Board also provided for intervenors and Board staff to file objections to a request by the applicant for confidentiality of certain documents, and for the applicant to reply, and for dates for interrogatories and responses to interrogatories.

In Procedural Order No. 2 issued on February 14, 2012 the Board granted intervenor status to Manitoulin Nature Club, North American Platform Against Wind and Canadian Pacific Railways ("CP Rail"), and, in light of late notification to CP Rail, extended the dates provided in Procedural Order No. 1. The Board also acknowledged that the applicant, in a letter dated February 9, 2012, withdrew four of five items in the list of documents over which it was claiming confidentiality.

The Board issued its Decision on Confidentiality and Procedural Order No. 3 on March 1, 2012 in which it ordered that a redacted version of the remaining document (Table of Lands Required for Transmission Facilities) be issued.

Procedural Order No. 4 extended the date for McLean's to respond to interrogatories including accommodating additional interrogatories submitted by MCSEA after the dates originally ordered by the Board. Subsequently, on April 9, 2012, MCSEA submitted additional interrogatories and McLean's sent a letter on April 11 indicating that it was prepared to respond to these additional interrogatories. Procedural Order No. 5 required McLean's to submit responses to the additional interrogatories by April 18, 2012 and invited parties to file submissions on the need for an oral hearing.

In Procedural Order No. 6, the Board decided that an oral hearing was not required with respect to the evidence of the applicant, but allowed that an oral hearing may be required with respect to any intervenor evidence. Procedural Order No. 6 also set a deadline for the filing of intervenor evidence.

MCSEA submitted evidence on May 4, 2012. In Procedural Order No. 7 the Board determined that MCSEA's evidence had little or no relevance to the Leave to Construct proceeding and that the issues raised could be dealt with in other processes (e.g. the REA process). The Board determined that the evidence would not be entered on the record, and that no oral hearing was required on the intervenor evidence. The Board established dates for argument-in-chief, intervenor and Board staff submissions, and reply submission. Argument in Chief was received on May 17, 2012, Board staff and

MCSEA made submissions on May 25, 2012 and McLean's Reply Argument was received on May 30, 2012.

Scope of the Proceeding

The Board's jurisdiction in this case arises from section 92 (1) of the OEB Act which states:

> *92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the board an order granting leave to construct, expand or reinforce such line or interconnection.*

In discharging its duties under section 92, the Board's jurisdiction is limited by section 96, which states:

> *96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.*
>
> *(2) In an application under section 92, the Board shall only consider the following when, under subsection 1, it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest*
>
> 1. *The interests of consumers with respect to prices and the reliability and quality of electricity service.*
> 2. *Where applicable and in a manner consistent with the policies of the government of Ontario the promotion of the use of renewable energy resources.*

The Board is only empowered to consider the interests of consumers with respect to prices and the reliability and quality of electricity service, and where applicable and in a manner consistent with the government's policies, the promotion of the use of renewable energy resources. The Board ensured at every opportunity that the parties had a clear understanding of the limits of the Board's jurisdiction.

Numerous concerns of the intervenors involve matters that fall outside of the Board's jurisdiction in considering this application. Particularly, some parties had an interest in the environmental impacts associated with the Transmission Facilities and the windfarm itself. Given the terms of Section 96 (2), those issues cannot be considered by the Board in its determination of the public interest. Those issues may be addressed in the environmental assessment process or other permitting-type processes associated with the Transmission Facilities or the windfarm itself. The Board is of the view that these issues fall outside of the Board's jurisdiction in the context of a leave to construct application.

In considering the public interest, within the limitations of section 96, the Board typically reviews a number of subject matters in determining whether the proposal made by the applicant is consistent with the public interest.

The Need for the Project

McLean's was awarded Feed in Tariff contracts by the Ontario Power Authority for the purchase of electricity generated by wind turbine facilities of 50 MW and 10 MW, through the Ontario Feed-in Tariff Program. McLean's stated that the Transmission Facilities are necessary to connect the contracted wind energy facilities to the Hydro One transmission grid. This evidence was not disputed.

Board Findings

In cases where an applicant will be seeking to recover the costs of a project through rates, the Board typically considers the issue of "need" through the lens of price – in other words, ensuring that customers are not responsible for costs associated with a project that is not actually needed. In this case, the evidence is that all of the costs of the Transmission Facilities will be borne by the applicant, and there will be no impact on the provincial uniform transmission rate.

The Board finds that the need for the proposed Transmission Facilities has been adequately demonstrated by McLean's. The evidence is clear that the Transmission Facilities are required for the purpose of connecting the contracted wind energy facilities to the IESO controlled transmission grid.

System Impact Assessment and Customer Impact Assessment

The System Impact Assessment and Customer Impact Assessment assist the Board in determining whether a proposed project will have an adverse impact on the quality and reliability of electricity service.

System Impact Assessments are conducted by the IESO to determine the implications for the system of the proposed Transmission Facilities. This is a technical document intended to provide a detailed review of the components of the proposal and its impacts on system operating voltage, system operating flexibility and the implications for other connections to deliver and withdraw power from the system.

A Final System Impact Assessment dated October 27, 2010, and a System Impact Assessment Addendum dated March 15, 2011 were filed by McLean's. These assessments document the IESO's review of the project, and its conclusion that, subject to the completion of various modifications, the Transmission Facilities will not adversely affect the reliability of the IESO controlled grid.

A Customer Impact Assessment, conducted by Hydro One, was also filed. It is designed to assess the implications of the project on other transmission customers. A Customer Impact Assessment – Final dated October 22, 2010 and an Addendum Customer Impact Assessment dated March 16, 2011 were filed by McLean's. The study found there would be no adverse impact on voltage performance to customers in the area, but that mitigation measures are required to limit fault levels at the Martindale Transformer Station Low Voltage bus. McLean's advised that current limiting reactors would be installed at the Martindale Transformer Station to resolve the problem.

Both the System and Customer Impact Assessments identified various requirements to be fulfilled for the project to be allowed to proceed to in-service, and McLean's evidence is that it will comply with these requirements.

Board Findings

The Board finds that, subject to the completion of the mitigating measures and specific and general requirements set out in the System Impact Assessment Reports of October 2010 and March 2011 and the Customer Impact Assessment Reports also of October 2010 and March 2011, the proposed Transmission Facilities can be accommodated on the grid without an adverse impact on the grid's reliability or other transmission customers. It will be a condition of the Board's order that McLean's comply with the requirements contained in these reports.

Environmental Issues

This project is subject to the Renewable Energy Approval ("REA") process. The REA process requires the applicant to screen the affected area for environmental and social economic features, identify any environmental effects of the facilities and any corresponding mitigation measures that are required, provide information respecting the route selection and evaluation, and to conduct outreach to the community. McLean's has provided evidence that it has engaged in consultation with affected communities through public information centres as well as meetings designed to address concerns. Evidence has been provided that the applicant is engaged in the REA process.

Board Findings

The Board notes that the applicant is engaged in the REA process, including the required matters of consultation with the public and First Nations. The Board agrees with the proposal of parties and Board staff that REA approval should be a condition of the Board's order granting leave to construct the Transmission Facilities. .

Land Matters

Section 97 of the Act provides:

> *In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.*

The applicant is seeking the Board's approval for the form of agreement to be offered to affected landowners.

The vast majority of the project runs along road allowances and easements and on private land where agreements have been secured with the landowner. McLean's has indicated that it has land use agreements concluded for all but the section of property on Goat Island which is land owned by CP Rail. Board staff indicated in its submission that the forms of agreement provided in evidence are acceptable and noted that there were no criticisms by intervenors of the forms provided.

Board staff proposed that the conditions of approval should include a requirement that an agreement be reached with CP Rail. CP Rail supported this proposal. Both CP Rail and McLean's submitted that a lease agreement is likely to be concluded in the near future. McLean's argued, however, that no specific condition should be included regarding an agreement between CP Rail and McLean's. McLean's was of the view that the Board's standard condition in respect of obtaining all easement rights was sufficient.

MCSEA submitted that the Board should hold McLean's to a commitment that there will be no expropriation. McLean's denied having made such a commitment, and although it expects that expropriation may not be required, expropriation remains available under the OEB Act in the event negotiations are not successful.

Board Findings

The Board approves the proposed form of land use agreement, and notes that no issues regarding the proposed agreement were raised.

The Board will not apply a specific condition regarding an agreement between McLean's and CP Rail. The standard condition requiring McLean's to obtain all necessary easement rights is sufficient.

The Board will also not prohibit McLean's from seeking land rights through expropriation. This alternative is provided for under the OEB Act and remains a part of the overall scheme for transmission projects.

Effect on Ratepayers

Evidence has been submitted that there will be no effect on the ratepayer from this application and that all costs of the Transmission Facilities, including the costs associated with certain mitigating measures, are to be borne by the applicant.

Board Findings

The Board concludes that the proposed Transmission Facilities will have no effect on transmission rates.

Issues Raised by MCSEA

MCSEA in its submission reiterated many of the concerns it has expressed at various points within the process. These concerns relate to the accuracy and adequacy of the Notice, the completeness and accuracy of the application, and the legitimacy of one of the partners, Mnidoo Mnising Power LP. The Board has already considered these matters and made its determinations. MCSEA's submissions seek to re-argue these issues and as such the Board will not address them further in this decision.

MCSEA concluded that if the Board were to approve the application, it should only do so if a final design is submitted, and that if the project does proceed, advises that the transformer station must be properly grounded.

Board Findings

The Board is satisfied that the route of the proposed Transmission Facilities is sufficiently defined for purposes of this application. It is appropriate that McLean's have some flexibility to address detailed routing issues which may arise through other permitting and approval processes without being required to re-apply for a Leave to Construct. If there are any material changes to the proposed Transmission Facilities, approval of the Board will be required.

With respect to the technical matters raised by MCSEA, the Board's approval of the proposed Transmission Facilities will be conditional on McLean's compliance with the Transmission System Code and associated standards.

Conclusion

For the reasons described above and subject to the Conditions appearing in Appendix A to this decision, the Board approves the application and grants McLean's leave to construct the proposed Transmission Facilities.

THE BOARD ORDERS THAT:

1. McLean's Mountain Wind LP. is granted leave, pursuant to section 92 of the Act, to construct approximately 10 km of overhead and submarine transmission line facilities, and the associated transformation and connecting assets described in its application, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The form of landowner agreement provided by McLean's Mountain Wind LP is approved.

3. McLean's Mountain Wind LP shall pay the Board's costs incidental to this proceeding immediately upon receipt of the Board's invoice.

4. MCSEA shall file its cost claim with the Board and forward it to McLean's within 21 calendar days of the date of this Decision and Order.

5. Any objections by McLean's to the claimed costs shall be filed with the Board and copied to MCSEA within 28 calendar days of the date of this Decision and Order.

6. If McLean's objects to MCSEA's cost claim, MCSEA may file with the Board and forward to McLean's any responses to that objection within 35 calendar days of the date of this Decision and Order.

All filings with the Board must quote the file number EB-2011-0394, and be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is

not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@ontarioenergyboard.ca.

DATED at Toronto on June 28, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Appendix A
To Decision and Order
EB-2011-0394
June 28, 2012

CONDITIONS OF APPROVAL

Definitions:

(1) “Transmission Facilities” means the single circuit overhead transmission line, a 1 km section of submarine cable, a switching station, a transformer station, and associated facilities, as defined in the Decision and Order.

(2) “Applicant” means McLean’s Mountain Wind LP

1 General Requirements

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

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate June 30, 2013 unless construction of the Transmission Facilities has commenced prior to that date.

1.3 The Applicant shall comply with the requirements of the Renewable Energy Approval regulations and any amendment thereto.

1.4 The Applicant shall satisfy the Independent Electricity System Operator (“IESO”) requirements as reflected in the System Impact Assessment Report dated March 15, 2011, and such further and other conditions which may be imposed by the IESO.

1.5 The Applicant shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment Report dated March 16, 2011 and such further and other conditions which may be imposed by Hydro One.

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

1.7 The Applicant shall obtain and comply with all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain

the Transmission Facilities, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board’s request.

2 Transmission Facilities and Communications Requirements

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

2.2 The Applicant shall designate a person as Transmission Facilities Manager and shall provide the name of the individual to the Board's designated representative. The Transmission Facilities Manager will be responsible for the fulfillment of the Conditions of Approval on the construction site. The Applicant shall provide a copy of the Order and Conditions of Approval to the Transmission Facilities Manager, within ten (10) days of the Board's Order being issued.

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

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

2.5 The Applicant shall, in conjunction with Hydro One and the IESO, and other parties as required, develop an outage plan for the construction period which shall detail how proposed outages will be managed.

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

3 Construction Impacts - Reporting Requirements

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

End of Document

TAB 12

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0420

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

AND IN THE MATTER OF an Application by White River Hydro LP and Gitchi Animki Energy Limited Partnership as joint venture partners for an Order granting leave to construct a new transmission line and associated facilities to connect two hydroelectric generating sites to the provincial transmission system.

BEFORE: Paul Sommerville
Presiding Member

Ken Quesnelle
Member

DECISION AND ORDER
May 10, 2012

DECISION

For reasons that follow in this decision the Board approves the application by White River Hydro LP and Gitchi Animki Energy Limited Partnership as joint venture partners for an Order granting leave to construct the transmission line and associated facilities as described in the December 6, 2011 application. This approval is subject to certain conditions which are attached to and form part of this Decision and Order.

APPLICATION AND PROCEEDING

White River Hydro LP and Gitchi Animki Energy Limited Partnership[1] (the "Applicants") have filed an application with the Ontario Energy Board (the "Board") dated December 6, 2011 under sections 92 and 96(2) of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15, Schedule B (the "Act"). The Applicants have applied for an order of the Board granting leave to construct an electricity transmission line as described below in item (i) and related facilities ("Transmission Facilities"), as described in items (ii), (iii) and (iv):

(i) A single 115 kV electricity transmission line (the "Transmission Line") approximately 23.5 kilometres in length, which will connect the two hydroelectric generating facilities (the Niiz Facility and the Bezhig Facility) on White River, to the Independent Electricity System Operator-controlled grid. The Transmission Line will begin at the downstream Niiz Facility, connect the Bezhig Facility and terminate at the interconnection point with Hydro One Networks' ("Hydro One") M2W 115 kV circuit;

(ii) A switching station located adjacent to the M2W circuit;

(iii) A switchyard located adjacent to the Niiz Facility powerhouse that will connect the Niiz Facility to the Transmission Line; and

(iv) A switchyard located adjacent to the Bezhig Facility powerhouse that will connect the Bezhig Facility to the Transmission Line.

The Transmission Line and Transmission Facilities were proposed to be located near the community of Pic Mobert and the Town of White River.

The Application has been assigned Board File No. EB-2011-0420.

[1] On February 25, 2012, the Applicants advised the Board that on December 7, 2011 Pic Mobert First Nation formed Gitchi Animki Energy Limited Partnership ("GAELP") and transferred its 35% interest in the Joint Venture. As a result, Pic Mobert First Nation, originally an applicant, holds its 35% interest in the Joint Venture indirectly via GAELP.

The Board issued a Notice of Application dated January 24, 2012, and directed the Applicants to serve and publish the Notice. The Board received requests for intervenor status from Pic River First Nation ("PRFN"), Innergex Renewable Energy Inc. ("Innergex") and the Independent Electricity System Operator ("IESO").

The Board issued Procedural Order No. 1 on February 23, granting intervention status to PRFN and eligibility to apply for an award of costs, as well as granting intervention status to Innergex and to the IESO.

On February 28, 2012, the Board received a letter from Carol L. Godby, counsel for PRFN, asking for an extension of the deadline for interrogatory submission to March 12 from the existing deadline of March 5 as stated in Procedural Order No.1, to allow for discussions to address outstanding issues between the Applicant and PRFN.

On March 2, 2012, the Board issued Procedural Order No. 2 granting approval for the requested extension, and revised the deadlines for the remaining procedural steps in Procedural Order No.1.

On March 9, counsel for PRFN filed a letter with the Board indicating that a settlement was reached with the Applicants, and requesting that the Board accept PRFN's withdrawal as an intervenor in this proceeding. On March 13, the Board approved PRFN's request.

On March 20, the Applicants filed responses to Board staff interrogatories as directed in Procedural Order No.2, and indicated that Hydro One Networks Inc. was asked to respond to interrogatory No. 7, which it did on March 22 by way of an email sent to the office of the Board Secretary.

On March 26, the Applicants filed the Argument in Chief and submitted[2] that approval of the Transmission Facility is in the public interest, and that price, reliability and quality of electricity will be maintained.

The Applicants further submitted that the approval of the Transmission Facility, its sole use being to connect the Project and which is being developed in part by Pic Mobert

[2] Applicants' Argument in Chief, February 26, 2011, paragraphs 33 & 34, page 7.

First Nation, is consistent with the promotion of the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario.

The Applicants therefore requested that the Board approve this application as proposed by the Applicants.

Board staff filed its submission on March 30 indicating that the Applicants' pre-filed evidence and the answers given to all the interrogatories clarifying key aspects of the Application, had shown that the construction of the transmission line is in the public interest. Board staff further submitted that the Applicants have shown that the proposed project meets the test articulated in section 96(2) of the Act; in particular, that the construction of the line is in the interests of consumers with respect to prices and the reliability and quality of electricity service, and is consistent with the promotion of the use of renewable energy sources in a manner consistent with the policies of the Government of Ontario.

In a letter filed with the Board on April 5, the Applicants indicated that no one other than Board staff filed submissions and that the Applicants would not be filing reply submissions.

THE PUBLIC INTEREST TEST

For any leave to construct application under section 92 of the Act, section 96(2) of the Act provides that when determining if a proposed work is in the public interest, the Board's jurisdiction is limited to consideration of:

- the interests of consumers with respect to prices and the reliability and quality of electricity service, and
- where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

The Board notes that the evidence[3] indicates that the Applicants will pay for the total cost of the proposed 23.5 km 115 kV transmission line, the two switchyards and the

[3] Applicants Response to Board staff Interrogatory 5, filed March 20, 2012, page 4.

switching station to connect to the M2W circuit owned by Hydro One Networks Inc. Consequently, provincial transmission rates will not be impacted.

The Board also notes that the proposed transmission facilities are needed to connect two renewable hydroelectric generation facilities, being the Bezhig Facility and the Niizh Facility, and that each has been awarded a power purchase agreement under Ontario's Feed-in-tariff Program. Subject to conformity with all conditions of approval, the Board is of the view that construction of this project would be consistent with the policies of the Government of Ontario, as it would promote the use of renewable energy sources.

EVIDENCE AND BOARD FINDINGS

Interests of Consumers in respect of Reliability and Quality of Electricity Service

The Board notes that the IESO's system impact assessment ("SIA") report,[4] which took into account both the Behzig and Niizh hydroelectric facilities totaling 20 MW capacity, indicated that there are no material negative impacts on the reliability of the IESO-controlled grid.

The Board also notes that the customer impact assessment ("CIA") study was performed by Hydro One taking into account both the Behzig and Niizh hydroelectric facilities totaling 20 MW capacity.[5] The CIA study indicated that the two hydroelectric facilities are connected to the Hydro One owned 115 kV M2W circuit through a single high voltage breaker and through a single line tap.[6] This arrangement will reduce the risk of increased interruptions without diminution of the reliability and performance of supply to existing Hydro One customers. The CIA study concluded[7] that after conducting load flow and short circuit analyses of the system, the simulation results confirm that incorporating the two proposed hydroelectric generation projects into Hydro One's transmission system at the proposed location will not cause any adverse impact on the system and customers.

[4] Exh. B/Tab 4/Sch. 2/pp. 6-11/FinalSystem Assessment Report, February 28, 2011.
[5] Exh. B/Tab 4/Sch. 3/Customer Impact Assessment ("CIA"), February 10, 2011.
[6] Ibid, page 5, section 2.1 Scope of the Study.
[7] Ibid, page 11, section 8.0.

The Applicants further confirmed[8] that all of the recommendations listed in the SIA reports and CIA will be met prior to connecting the Transmission Facility to the IESO-controlled grid.

The Board accepts the evidence of the SIA and CIA reports which conclude that the proposed project will not have a negative impact on the reliability of the IESO-controlled grid or service to other Hydro One transmission customers. The Board acknowledges the Applicants commitment to meet the requirements and recommendations of the SIA and CIA, and this is reflected in the Conditions of Approval.

Land Matters

Form of Easement Agreement

The Board notes that the Applicants' evidence indicates that the lands upon which the Transmission Facility will be built are entirely Crown lands, with the exception of a small portion of land that is privately owned by Canadian Pacific Rail, for which crossing permission has been obtained. In addition to being Crown lands, the affected lands are also provincial park lands. The evidence also indicates that the Applicants have obtained all necessary permits and approvals for the development of the Project within provincial park lands.[9] The Applicants submitted a form Crown lease as well as a form of Crown easement for the Board's review.

The Board is satisfied the Applicants have met the requirement of section 97 of the Act with respect to offering landowners affected by the proposed route or location an agreement in a form that is satisfactory to the Board, and is accordingly approved by the Board.

Environmental Assessment and Approval of Minor Route Modification

The Board notes that the Applicants' pre-filed evidence indicated that[10] the Project, including the Transmission Facility, is subject to the environmental screening process for hydro electric projects prescribed by *Ontario Regulation 116/01, Electricity Project*

[8] Argument In Chief, March 26, 2012. paragraph 19.
[9] Application, at par. 12.
[10] Exh. B/Tab 1/Sch. 5/p.1/parahraph 30.

Regulation. The Applicants further clarified in their Argument in Chief[11] that a Project Information Report ("PIR") for the Project was prepared and submitted pursuant to the Regulation. The public/agency review period ended on November 5, 2010 without any elevation requests being received. A statement of completion was subsequently filed with the Ministry of Environment. Following the filing of the Statement of Completion, the Applicants decided to consider a minor modification to the Transmission Line routing. Only the Niizh Portion was altered in the Modification, and that is the route proposed in this Application which follows the Forest Service Roads.[12]

The Board notes that the evidence provided by the Applicants[13] during the discovery phase indicates that both the Ministry of Natural Resources ("MNR") and the Ministry of Environment ("MOE") confirmed that the minor modification in the Transmission Line route i.e., the "Niizh Portion", would only require a formal amendment to the Project Information Report/Environmental Screening Review Report ("PIR"). This evidence also indicated that the MOE did not require the Applicants to issue a formal amendment to the PIR which would have required the Applicants to undertake public consultations on the amended project. The noted evidence included the Addendum Report[14] which was submitted for the PIR, an email to Laurie Brown of the MOE[15] evidencing that the MOE was aware of the noted change in the route, and a copy of the relevant excerpts of the PIR report.[16]

Based on the clarifications and evidence during the discovery phase noted above, the Board is satisfied that the route now proposed has been approved by the MOE.

Acceptance of the Revised Minor Route Modification by the Sustainable Forest Licence holder for the White River Forest

The Board notes that during the discovery phase the Applicants confirmed[17] that White River Forest Products Limited, the Sustainable Forest Licence ("SFL") holder for the White River Forest, has no objection to the use of the Forest Services Road Right Of Way (ROW) for the Transmission Line.

[11] Argument In Chief, March 26, 2012/p.5/paragraph 25.
[12] Exh. B/Tab 1/Sch. 5/p.1/parahraph 30.
[13] Applicants Response to Board staff Interrogatory 2, filed March 20, 2012, pages 1 -2 , questions (i) and (ii).
[14] Ibid, Schedule 'A' – ADDENDUM REPORT , submitted for the PIR.
[15] Ibid, Schedule 'B' – EMAIL TO MOE RE ADDENDUM REPORT.
[16] Ibid, Schedule 'C' – EXCERPT FROM PIR.
[17] Applicants Response to Board staff Interrogatory 3, filed March 20, 2012, pages 2 -3

The Board also notes the Applicants' further clarification in the Argument In Chief,[18] where it is indicated that the Forest Service Roads are owned by MNR, and have been licensed to White River Forest Products Ltd.[19] The Road Use Agreement permits the Joint Venture to use the Forest Service Roads for developing, constructing and operating the Project. Further, an amendment to the Road Use Agreement was entered into between the Applicants and the SFL holder on January 23, 2012 which also specified that the Transmission Line would be built along the ROW in such a way as not to interfere with the SFL holder's forest operations.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, White River Hydro LP and Gitchi Animki Energy Limited Partnership as joint venture partners are granted leave to construct an electricity transmission line and related facilities ("Transmission Facilities"), as described in the Application at paragraph 10 and in accordance with the contents of this Decision and Order, and subject to the Conditions of Approval attached as Appendix A to this Order.

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, White River Hydro LP and Gitchi Animki Energy Limited Partnership as joint venture partners shall pay the Board's costs of the proceeding immediately upon receipt of the Board's invoice.

ISSUED at Toronto on May 10, 2012
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

[18] Argument in Chief, March 26, 2012/p. 6/paragraph 28
[19] Exh. B/Tab 3/Sch. 1/p.1/paragraph 45

APPENDIX A

CONDITIONS OF APPROVAL

White River Hydro LP and Gitchi Animki Energy Limited
Transmission Line and Associated Transmission Facilities (the "Project")

Decision and Order
Board File NO. EB-2011-0420
Dated May 10, 2012

Definitions:

(1) "Project" means the Transmission Line and associated Transmission Facilities as defined in the Decision and Order.

(2) "Applicants" means White River Hydro LP and Gitchi Animki Energy Limited.

1 General Requirements

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

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate June 30, 2013 unless construction of the Project has commenced prior to that date.

1.3 The Applicants shall comply with the requirements of the Environmental Assessment Approval and any amendment thereto.

1.4 The Applicants shall satisfy the Independent Electricity System Operator ("IESO") requirements as reflected in the System Impact Assessment Report dated February 28, 2011, and such further and other conditions which may be imposed by the IESO.

1.5 The Applicants shall satisfy the Hydro One Networks Inc. requirements as reflected in the Customer Impact Assessment Report dated February 10, 2011.

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

1.7 The Applicants shall obtain and comply with all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

2 Project and Communications Requirements

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

2.2 The Applicants shall designate a person as Project Manager and shall provide the name of the individual to the Board's designated representative. The Project Manager will be responsible for the fulfillment of the Conditions of Approval on the construction site. The Applicants shall provide a copy of the Order and Conditions of Approval to the Project Manager, within ten (30) days of the Board's Order being issued.

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

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

2.5 The Applicants shall, in conjunction with Hydro One and the IESO, and other parties as required, develop an outage plan for the construction period which shall detail how proposed outages will be managed.

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

3 Construction Impacts - Reporting Requirements

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

-- End of document --

TAB 13

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0442

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

AND IN THE MATTER OF an application by Varna Wind Inc. for an order or orders pursuant to section 92 of the *Ontario Energy Board Act, 1998* granting leave to construct transmission facilities in the Municipalities of Bluewater and Huron East.

PROCEDURAL ORDER NO. 1

February 4, 2013

Varna Wind Inc. (the "Applicant") filed an application with the Ontario Energy Board (the "Board"), dated November 23, 2012, under sections 92 and 97 of the *Ontario Energy Board Act, 1998* (the "Act"). The Applicant has applied for an order of the Board granting leave to construct an electricity transmission line and related facilities for the Bluewater Wind Energy Centre ("BWEC"), a wind farm generation facility, and for Board approval of the form of agreements that have been or will be offered to landowners affected by the approved route. The Board has assigned file number EB-2012-0442 to this application.

The Board issued a Notice of Application and Written Hearing on December 12, 2012.

Interventions and Cost Eligibility Requests

Both the Independent Electricity System Operator ("IESO") and Hydro One Networks Inc. ("Hydro One") requested intervenor status. The IESO and Hydro One did not request eligibility to apply for cost awards. The intervention requests for the IESO and Hydro One are granted.

The Board received a late intervention request from the Municipality of South Huron. The Board will grant the late intervention request.

The Corporation of the Municipality of Bluewater ("Bluewater") requested intervenor status and eligibility to apply for cost awards for participating in this proceeding. The Applicant objected to Bluewater's request for cost eligibility on the basis that section 3.05(i) of the Board's *Practice Direction on Cost Awards* provides that municipalities are excluded from eligibility for cost awards. While the Board will grant Bluewater's request for intervenor status, the Board agrees with the Applicant that Bluewater is not eligible for a cost award pursuant to section 3.05(i) of the Board's *Practice Direction on Cost Awards*.

A group of landowners (the "Group") has requested intervenor status and eligibility to apply for a cost award. The Board also received individual requests for intervenor status from the following persons J.R. McLachlan, Brian and Helen Oldfield, Gerhard and Heather Ritzema and Jeff Allan.

The Board grants intervenor status to the Group and also to those who have applied as intervenors individually. The Board also grants the Group eligibility to apply for a cost award for counsel or a consultant that may be retained, noting that cost awards are restricted to matters directly within the scope of the Board's proceeding.

The Board requires the Group to appoint a representative (a member of the Group or counsel) to act as a single point of contact for the purposes of this proceeding. The Board requires the Group to file the name and contact information of its representative with the Board, and deliver a copy to the Applicant and other intervenors, within **10 days** from the date of this Procedural Order. While not mandatory, it will be of assistance to the Board if the appointed representative has internet and e-mail access.

A list of intervenors is attached as Appendix A to this Order.

Request for Oral Hearing

Bluewater, Gerhard and Heather Ritzema, and J.R. McLachlan have requested that the Board proceed by way of oral hearing. The Applicant has objected to the request for an

oral hearing. The Board will consider this issue after the interrogatory phase of the proceeding is completed.

Scope of the Board's Jurisdiction

The Applicant has submitted that some of the intervention requests raised matters that were outside of the Board's jurisdiction and requested that the Board clarify the scope of the proceeding.

In this proceeding, the Board is required to consider only the public interest, which is defined as follows by subsection 96(2) of the Act:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

Board approval of the form of easement agreements is within the scope of the Board's jurisdiction pursuant to section 97 of the Act.

The Board does not have the power to consider any other issues.

Parties requesting intervenor status have indicated a broad range of interests in this proceeding. However, the Board notes that the following types of issues are **not** within its jurisdiction: environmental issues; issues related to matters of health; land-use issues; issues relating to the BWEC wind farm; policy and other issues concerning the Ontario Power Authority's feed in tariff program; and the Ontario government's renewable energy policy. It is important to note that, in addition to the Board's proceeding, the BWEC project is subject to a separate Renewable Energy Approval ("REA") process, which is conducted by the Ministry of the Environment. Generally speaking, environmental issues are considered in the REA process.

Timing of REA Approval

The Board disagrees with the submission of Bluewater that this application is premature on grounds that the REA process has not concluded and that it is not known if any

conditions will be attached to that approval. The Board notes that although it has no role in the REA process, any approval of the leave to construct application would ordinarily be conditional on the Applicant receiving all necessary permits and authorizations, including a completed REA.

Parties need to be aware that time spent on issues that are outside the scope of the Board's jurisdiction will not be eligible for any cost award.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. Board staff and intervenors who wish information and material from the Applicant in relation to the application that is in addition to the Applicant's pre-filed evidence with the Board, and that is relevant to the hearing, shall request it by written interrogatories filed with the Board and delivered to the Applicant on or before **February 18, 2013**. Where possible, the questions should specifically reference the pre-filed evidence.
2. The Applicant shall, on or before **March 04, 2013**, file with the Board and deliver to all intervenors a complete response to each of the interrogatories.
3. Board staff and intervenors shall, on or before **March 08, 2013**, indicate if it is their intention to file evidence. The Board will issue further procedural orders setting out the schedule for testing of intervenor evidence, if any party indicates an intention to file such evidence.

All filings to the Board must quote the file number, EB-2012-0442, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet

access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, February 4, 2013
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX "A"

Varna Wind Inc.

Leave to Construct Application

Board File No. EB-2012-0442

Dated: February 4, 2013

LIST OF INTERVENORS

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

APPLICANT	**Rep. and Address for Service**
Varna Wind, Inc.	**Nicole Geneau** Varna Wind, Inc. 390 Bay Street Suite 1720 Toronto ON M5H 2Y2 Tel: 416 364-9714 Fax: 416 364-2533 nicole.geneau@nexteraenergy.com

APPLICANT COUNSEL

Kerri Lui
McCarthy Tétrault LLP
Toronto Dominion Centre
Box 48, Suite 5300
66 Wellington St. W.
Toronto ON M5K 1E6
Tel: 416-601-7619
Fax: 416-868-0673
klui@mccarthy.ca

George Vegh
McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Box 48, Suite 4700
Toronto ON M5K 1E6
Tel: 416-601-7709
Fax: 416-868-0673
gvegh@mccarthy.ca

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

INTERVENORS	Rep. and Address for Service
GROUP OF INTERVENORS - EB-2012-0442	**Al and Frances Wynja** R.R. #4 74494 Hannah Line Seaforth ON N0K 1W0 Tel: 519-522-0711 Fax: Not Provided afwynja@tcc.on.ca
	John and Mary Van Miltenburg R.R. #1 Hensall ON N0M 1X0 Tel: 519-235-4315 Fax: 519-235-4315 FAX/COURIER ONLY
	Tom Nolan R.R. #4 Seaforth ON N0K 1W0 Tel: 519-522-1648 Fax: Not Provided COURIER ONLY
	Beth Cooper R.R. #3 Exeter ON N0M 1S5 Tel: 519-235-4593 Fax: Not Provided b.cooper@quadro.net

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

GROUP OF INTERVENORS - EB-2012-0442

Tony Van Miltenburg

R.R. #3
41572 Staffa Road
Kippen ON N0M 2E0
Tel: 519-522-2109
Fax: 519-522-0582
Not Provided

Matt and Elaine Haney
R.R. #4
43076 Front Road
Seaforth ON N0K 1W0
Tel: 519-522-1375
Fax: Not Provided
mattane@tcc.on.ca

Chris and Angela Maloney
R.R. #4
Seaforth ON N0K 1W0
Tel: 519-522-0449
Fax: Not Provided
amaloney@tcc.on.ca

Darin and Julie McKenzie
R.R. #3
Kippen ON N0M 2E0
Tel: 519-522-0086
Fax: Not Provided
dewju@tcc.on.ca

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

GROUP OF INTERVENORS - EB-2012-0442

Bill and Carol Stephenson

74362 Parr Line
R.R. #1
Varna ON N0M 2R0
Tel: 519-263-5324
Fax: Not Provided
hollywoodstar40@hotmail.com

Ron and Ann Thompson
R.R. #1
Brucefield ON N0M 1J0
Tel: 519-263-2319
Fax: Not Provided
annthompson@tcc.on.ca

Arnold Van Miltenburg
R.R. #4
Seaforth ON N0K 1W0
Tel: 519-522-0580
Fax: Not Provided
vanmilt@tcc.on.ca

Ben and Rose Van Miltenburg
R.R.#4
42651 Centennial Road
Seaforth ON N0K 1W0
Tel: 519-522-2113
Fax: Not Provided
benrose@tcc.on.ca

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

GROUP OF INTERVENORS - EB-2012-0442	**Ed and Sue Anne Van Miltenburg** R.R. #4 42680 Centennial Road Seaforth ON N0K 1W0 Tel: 519-522-1853 Fax: Not Provided edsue4@hotmail.com
Hydro One Inc.	**Jamie Waller** Hydro One Networks Inc. 483 Bay Street 8th Floor - South Tower Toronto ON M5G 2P5 Tel: 416-345-6498 Fax: 416-345-5866 Regulatory@hydroone.com
Independent Electricity System Operator	**Paula Lukan** Senior Regulatory Analyst Independent Electricity System Operator 655 Bay Street, Suite 410 Toronto ON M5G 2K4 Tel: 416-506-2831 Fax: 416-506-2847 paula.lukan@ieso.ca
Independent Participants	**Jeff and Stephanie Allan** R.R. #1 74654 London Road Brucefield ON NOM 1J0 Tel: 519-233-8946 Fax: Not Provided jsallan@tcc.on.ca

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

Independent Participants

Heather and Gerhard Ritzema
R.R. #4
42372 Centennial Road
Seaforth ON N0K 1W0
Tel: 519-522-0127
Fax: 519-441-7320
Not Provided

Name of Counsel *to be provided*
Cohen Highly LLP
255 Queens Avenue
London ON N6A 5RB
Tel: 519-672-9330
Email to be advised

Brian and Helen Oldfield
R.R. #4
Seaforth ON N0K 1W0
Tel: 519-522-1438
Fax: Not Provided
centuryacres@tcc.on.ca

J. R. McLachlan
R.R. #3
Kippen ON N0K 1W0
Tel: 519-522-1870
Fax: Not Provided
jmclachlan@tcc.on.ca

Varna Wind, Inc.
EB-2012-0442

APPLICANT & LIST OF INTERVENORS

February 4, 2013

Municipality of Bluewater	**Stephen McAuley** Chief Administrative Officer Municipality of Bluewater 14 Mill Avenue P. O. Box 250 c/o Ms. Arlene Parker Zurich ON N0M 2T0 Tel: 519-236-4351 Ext: 235 Fax: 519-236-4329 planninginfo@town.bluewater.on.ca
Municipality of South Huron	**Michael Di Lullo** Manager of Corporate Services/Clerk Municipality of South Huron 322 Main Street South P.O. Box 759 Exeter ON N0M 1S6 Tel: 519-235-0310 Ext: 227 Fax: 519-235-3304 m.dilullo@southhuron.ca

TAB 14

Her Majesty The Queen *Appellant*

v.

Chikmaglur Mohan *Respondent*

INDEXED AS: R. *v.* MOHAN

File No.: 23063.

1993: November 9; 1994: May 5.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence — Admissibility — Expert evidence — Nature of expert evidence — Expert evidence as to disposition — Pediatrician charged with sexual assault of patients — Expert witness called to testify that character traits of accused not fitting psychological profile of putative perpetrator of offences — Whether expert's testimony admissible.

Criminal law — Expert evidence — Nature of expert evidence — Expert evidence as to disposition — Pediatrician charged with sexual assault of patients — Expert witness called to testify that character traits of accused not fitting psychological profile of putative perpetrator of offences — Whether expert's testimony admissible.

Respondent, a practising pediatrician, was charged with four counts of sexual assault on four female patients, aged 13 to 16 at the relevant time, during medical examinations conducted in his office. His counsel indicated that he intended to call a psychiatrist who would testify that the perpetrator of the alleged offences would be part of a limited and unusual group of individuals and that respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The psychiatrist testified in a *voir dire* that the psychological profile of the perpetrator of the first three complaints was likely that of a pedophile, while the profile of the perpetrator of the fourth complaint that of a sexual psychopath. The psychiatrist intended to testify that the respondent did not fit the profiles but the evidence was ruled inadmissible at the conclusion of the *voir dire*.

Respondent was found guilty by the jury and appealed. The Court of Appeal allowed respondent's

Sa Majesté la Reine *Appelante*

c.

Chikmaglur Mohan *Intimé*

RÉPERTORIÉ: R. *c.* MOHAN

N° du greffe: 23063.

1993: 9 novembre; 1994: 5 mai.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Preuve — Admissibilité — Preuve d'expert — Nature de la preuve d'expert — Preuve d'expert quant à la prédisposition — Pédiatre accusé d'agression sexuelle sur des patientes — Expert appelé à témoigner que les traits de caractère de l'accusé ne répondent pas au profil psychologique de l'auteur putatif des infractions — Le témoignage d'expert est-il admissible?

Droit criminel — Preuve d'expert — Nature de la preuve d'expert — Preuve d'expert quant à la prédisposition — Pédiatre accusé d'agression sexuelle sur des patientes — Expert appelé à témoigner que les traits de caractère de l'accusé ne correspondent pas au profil psychologique de l'auteur putatif des infractions — Le témoignage d'expert est-il admissible?

L'intimé, un pédiatre, fait face à quatre chefs d'accusation d'agression sexuelle commise sur quatre patientes, âgées à l'époque de 13 à 16 ans, pendant leur examen médical dans le bureau de l'intimé. Son avocat a exprimé l'intention d'appeler un psychiatre qui témoignerait que l'auteur des infractions alléguées appartenait à un groupe limité et inhabituel d'individus et que l'intimé ne faisait pas partie de cette catégorie restreinte parce qu'il n'en possédait pas les caractéristiques propres. Le psychiatre a témoigné au voir-dire que le profil psychologique de l'auteur des trois premières agressions alléguées était probablement celui d'un pédophile alors que celui de la quatrième était celui d'un psychopathe sexuel. Le psychiatre avait l'intention de témoigner que l'intimé ne correspondait pas à ces profils, mais son témoignage a été jugé inadmissible à l'issue du voir-dire.

Déclaré coupable par le jury, l'intimé a interjeté appel. La Cour d'appel a accueilli l'appel de l'intimé,

appeal, quashed the convictions and ordered a new trial. The Court of Appeal therefore found it unnecessary to deal with the Crown's sentence appeal. At issue here was the determination of the circumstances in which expert evidence is admissible to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. Resolution of this issue involved an examination of the rules relating to (i) expert evidence, and (ii) character evidence.

Held: The appeal should be allowed.

The evidence should be excluded.

Expert Evidence

Admission of expert evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. Relevance is a threshold requirement to be decided by the judge as a question of law. Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate with its value or if it can influence the trier of fact out of proportion to its reliability. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence. Expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact-finding process, or will confuse the jury.

Expert evidence, to be necessary, must likely be outside the experience and knowledge of a judge or jury and must be assessed in light of its potential to distort the fact-finding process. Necessity should not be judged by too strict a standard. The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts.

Expert evidence can be excluded if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

annulé les déclarations de culpabilité et ordonné un nouveau procès. La Cour a ainsi conclu qu'il n'était pas nécessaire d'entendre l'appel du ministère public contre la sentence. Il faut déterminer en l'espèce les circonstances dans lesquelles la preuve d'expert est admissible pour démontrer que des traits de caractère d'un accusé ne répondent pas au profil psychologique de l'auteur putatif des infractions reprochées. La résolution de la question passe par l'examen des règles en matière (i) de preuve d'expert, et (ii) de preuve de moralité.

Arrêt: Le pourvoi est accueilli.

La preuve est exclue.

Preuve d'expert

L'admission de la preuve d'expert repose sur l'application des critères suivants: a) la pertinence; b) la nécessité d'aider le juge des faits; c) l'absence de toute règle d'exclusion; et d) la qualification suffisante de l'expert. La pertinence est une exigence liminaire déterminée par le juge comme question de droit. La preuve logiquement pertinente peut être exclue si sa valeur probante est surpassée par son effet préjudiciable, si elle exige un temps excessivement long qui est sans commune mesure avec sa valeur ou si son effet sur le juge des faits est disproportionné par rapport à sa fiabilité. Le facteur fiabilité-effet revêt une importance particulière dans l'appréciation de l'admissibilité de la preuve d'expert. La preuve d'expert ne devrait pas être admise si elle risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits, ou de dérouter le jury.

Pour être nécessaire, la preuve d'expert doit, selon toute vraisemblance, dépasser l'expérience et la connaissance d'un juge ou d'un jury et être évaluée à la lumière de la possibilité qu'elle fausse le processus de recherche des faits. La nécessité ne devrait pas être jugée selon une norme trop stricte. La possibilité que la preuve ait un impact excessif sur le jury et le détourne de ses tâches peut souvent être contrecarrée par des directives appropriées. Les experts ne doivent toutefois pas pouvoir usurper les fonctions du juge des faits, ce qui pourrait réduire le procès à un simple concours d'experts.

La preuve d'expert peut être exclue si elle contrevient à une règle d'exclusion de la preuve, distincte de la règle applicable à l'opinion. La preuve doit être présentée par un témoin dont on démontre qu'il ou elle a acquis des connaissances spéciales ou particulières grâce à des études ou à une expérience relatives aux questions visées dans son témoignage.

In summary, expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Expert Evidence as to Disposition

The Crown cannot lead expert evidence as to disposition in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. The accused, however, can adduce evidence as to disposition, but this evidence is generally limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testimony may also rely on specific acts of good conduct. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories. A further exception, however, has developed that is limited in scope. Although the exception has been applied to abnormal behaviour usually connoting sexual deviance, its underlying rationale is based on distinctiveness.

Before an expert's opinion as to disposition is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. A finding that the scientific community has developed a standard profile for the offender who commits this type of crime will satisfy the criteria of relevance and necessity. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

En résumé, la preuve d'expert qui avance une nouvelle théorie ou technique scientifique est soigneusement examinée pour déterminer si elle satisfait à la norme de fiabilité et si elle est essentielle en ce sens que le juge des faits sera incapable de tirer une conclusion satisfaisante sans l'aide de l'expert. Plus la preuve se rapproche de l'opinion sur une question fondamentale, plus l'application de ce principe est stricte.

Preuve d'expert quant à la prédisposition

Le ministère public ne peut produire une preuve d'expert quant à la prédisposition que si elle est pertinente et n'est pas utilisée comme simple preuve de la prédisposition. L'accusé peut en revanche produire une preuve quant à la prédisposition, mais cette preuve se limite, en règle générale, à la preuve de la réputation de l'accusé au sein de la collectivité relativement aux traits de caractère concernés. L'accusé peut aussi invoquer dans son propre témoignage des actes particuliers de bonne conduite. Le témoignage d'un expert indiquant qu'en raison de sa constitution mentale ou de son état mental, l'accusé serait incapable de commettre le crime ou ne pourrait être prédisposé à le commettre, ne correspond à aucune de ces catégories. Cependant, une autre exception de portée limitée a été créée. Bien que cette exception ait été appliquée à des comportements anormaux liés usuellement à une déviance sexuelle, sa raison d'être est le caractère distinctif.

Avant d'admettre en preuve l'opinion d'un expert sur la prédisposition, le juge du procès doit être convaincu, en droit, que l'auteur du crime ou l'accusé possède des caractéristiques de comportement distinctives de sorte que la comparaison de l'un avec l'autre aidera considérablement à déterminer l'innocence ou la culpabilité. Bien que cette décision repose sur le bon sens et l'expérience, elle n'est pas prise dans le vide. Le juge du procès devrait considérer, d'une part, l'opinion de l'expert et, d'autre part, si ce dernier exprime simplement une opinion personnelle ou si le profil de comportement qu'il décrit est couramment utilisé comme indice fiable de l'appartenance à un groupe distinctif. La conclusion que la profession scientifique a élaboré un profil type du délinquant qui commet ce genre de crime satisfera aux critères de pertinence et de fiabilité. La preuve sera considérée comme une exception à la règle d'exclusion relative à la preuve de moralité à condition que le juge soit convaincu que l'opinion proposée se situe dans le domaine d'expertise du témoin expert.

Application to This Case

Nothing in the record supported a finding that the profile of a paedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, it could not be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury.

The similarities detailed by the judge dealt with the perpetrator's *modus operandi* of the acts subject to the individual counts. These were not matters to which the expert evidence related. Moreover, whether a crime is committed in a manner that identifies the perpetrator by reason of striking similarities in the method employed in the commission of other acts is something that a jury can, generally, assess without the aid of expert evidence.

Cases Cited

Considered: *R. v. Lupien*, [1970] S.C.R. 263; *R. v. Chard* (1971), 56 Cr. App. R. 268; *Lowery v. The Queen*, [1974] A.C. 85; *R. v. Turner*, [1975] Q.B. 834; **referred to:** *R. v. Robertson* (1975), 21 C.C.C. (2d) 385; *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, aff'd [1977] 2 S.C.R. 824; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. French* (1977), 37 C.C.C. (2d) 201; *R. v. Taylor* (1986), 31 C.C.C. (3d) 1; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. B.(G.)*, [1990] 2 S.C.R. 30; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348; *R. v. Bourguignon*, [1991] O.J. No. 2670 (Q.L.); *R. v. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.); *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672; *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193, leave to appeal refused [1981] 1 S.C.R. xi; *Thompson v. The King*, [1918] A.C. 221; *R. v. Garfinkle* (1992), 15 C.R. (4th) 254.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 693.

Application à l'espèce

Rien dans le dossier ne permettait de conclure que le profil du pédophile ou du psychopathe a été normalisé au point où on pourrait soutenir qu'il correspond au profil présumé du délinquant décrit dans les accusations. Les profils de groupes décrits par l'expert n'ont pas été considérés suffisamment fiables pour être utiles. En l'absence de ces indices de fiabilité, on ne pouvait pas dire que la preuve serait nécessaire au sens où elle clarifierait utilement une question qui serait autrement inaccessible, ou que la valeur qu'elle pourrait avoir ne serait pas surpassée par la possibilité qu'elle induise le jury en erreur ou le détourne de ses tâches.

Les similitudes, expliquées par le juge, portaient sur le *modus operandi* de l'auteur des actes qui étaient l'objet de chefs spécifiques. La preuve d'expert ne visait pas ces questions. De plus, la question de savoir si le crime est commis d'une manière qui identifie l'auteur, en raison de similitudes frappantes dans la méthode utilisée pour perpétrer d'autres actes, peut être appréciée en général par un jury sans l'aide de la preuve d'expert.

Jurisprudence

Arrêts examinés: *R. c. Lupien*, [1970] R.C.S. 263; *R. c. Chard* (1971), 56 Cr. App. R. 268; *Lowery c. The Queen*, [1974] A.C. 85; *R. c. Turner*, [1975] Q.B. 834; **arrêts mentionnés:** *R. c. Robertson* (1975), 21 C.C.C. (2d) 385; *R. c. McMillan* (1975), 23 C.C.C. (2d) 160, conf. par [1977] 2 R.C.S. 824; *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. French* (1977), 37 C.C.C. (2d) 201; *R. c. Taylor* (1986), 31 C.C.C. (3d) 1; *R. c. C. (M.H.)*, [1991] 1 R.C.S. 763; *R. c. Lyons*, [1987] 2 R.C.S. 309; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. B.(G.)*, [1990] 2 R.C.S. 30; *Morris c. La Reine*, [1983] 2 R.C.S. 190; *R. c. Béland*, [1987] 2 R.C.S. 398; *R. c. Melaragni* (1992), 73 C.C.C. (3d) 348; *R. c. Bourguignon*, [1991] O.J. No. 2670 (Q.L.); *R. c. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.); *Kelliher (Village of) c. Smith*, [1931] R.C.S. 672; *Director of Public Prosecutions c. Jordan*, [1977] A.C. 699; *R. c. Marquard*, [1993] 4 R.C.S. 223; *R. c. Morin*, [1988] 2 R.C.S. 345; *R. c. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193, autorisation de pourvoi refusée [1981] 1 R.C.S. xi; *Thompson c. The King*, [1918] A.C. 221; *R. c. Garfinkle* (1992), 15 C.R. (4th) 254.

Lois et règlements cités

Code criminel, L.R.C. (1985), ch. C-46, art. 693.

Authors Cited

Beven, Thomas. *Negligence in Law*, 4th ed. By William James Byrne and Andrew Dewar Gibb. London: Sweet & Maxwell, 1928.
Cross, Rupert, Sir. *Cross on Evidence*, 7th ed. By Sir Rupert Cross and Colin Tapper. London: Butterworths, 1990.
McCormick, Charles Tilford. *McCormick on Evidence*, 3rd ed., Lawyer's ed. By Edward W. Cleary, general editor. St. Paul, Minn.: West Publishing Co., 1984.
Mewett, Alan W. "Character as a Fact in Issue in Criminal Cases" (1984-85), 27 *Crim. L.Q.* 29.
Pattenden, Rosemary. "Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia", [1986] *Crim. L.R.* 92.
Rimm, David C. and John W. Sommervill. *Abnormal Psychology*. New York: Academic Press, 1977.

APPEAL from a judgment of the Ontario Court of Appeal (1992), 8 O.R. (3d) 173, 55 O.A.C. 309, 71 C.C.C. (3d) 321, 13 C.R. (4th) 292, allowing an appeal from convictions by Berstein J. sitting with jury and ordering a new trial. Appeal allowed.

Jamie C. Klukach, for the appellant.

Brian H. Greenspan and *Sharon E. Lavine*, for the respondent.

The judgment of the Court was delivered by

SOPINKA J. — In this appeal we are required to determine under what circumstances expert evidence is admissible to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. Resolution of this issue involves an examination of the rules relating to expert and character evidence.

I. Facts

A. *The Events*

The respondent, a practising pediatrician in North Bay, was charged with four counts of sexual assault on four of his female patients, aged 13 to

Doctrine citée

Beven, Thomas. *Negligence in Law*, 4th ed. By William James Byrne and Andrew Dewar Gibb. London: Sweet & Maxwell, 1928.
Cross, Rupert, Sir. *Cross on Evidence*, 7th ed. By Sir Rupert Cross and Colin Tapper. London: Butterworths, 1990.
McCormick, Charles Tilford. *McCormick on Evidence*, 3rd ed., Lawyer's ed. By Edward W. Cleary, general editor. St. Paul, Minn.: West Publishing Co., 1984.
Mewett, Alan W. «Character as a Fact in Issue in Criminal Cases» (1984-85), 27 *Crim. L.Q.* 29.
Pattenden, Rosemary. «Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia», [1986] *Crim. L.R.* 92.
Rimm, David C. and John W. Sommervill. *Abnormal Psychology*. New York: Academic Press, 1977.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1992), 8 O.R. (3d) 173, 55 O.A.C. 309, 71 C.C.C. (3d) 321, 13 C.R. (4th) 292, qui a accueilli un appel des déclarations de culpabilité prononcées par le juge Berstein, siégeant avec jury, et ordonné un nouveau procès. Pourvoi accueilli.

Jamie C. Klukach, pour l'appelante.

Brian H. Greenspan et *Sharon E. Lavine*, pour l'intimé.

Version française du jugement de la Cour rendu par

LE JUGE SOPINKA — Nous sommes appelés à déterminer en l'espèce les circonstances dans lesquelles la preuve d'expert est admissible pour démontrer que des traits de caractère d'un accusé ne répondent pas au profil psychologique de l'auteur putatif des infractions reprochées. La résolution de la question passe par l'examen des règles en matière de preuve d'expert et de moralité.

I. Les faits

A. *Les événements*

L'intimé, un pédiatre exerçant à North Bay, fait face à quatre chefs d'accusation d'agression sexuelle sur quatre de ses patientes, âgées à

16 at the relevant time. The alleged sexual assaults were perpetrated during the course of medical examinations of the patients conducted in the respondent's office. The complainants had been referred to the respondent for conditions which were, in part, psychosomatic in nature.

Evidence relating to each complaint was admitted as similar fact evidence with respect to the others. The complainants did not know one another. Three of them came forth independently. Following a mistrial, which was publicized, the fourth victim came forward, having heard about the other charges. Three of the four complainants had been victims of prior sexual abuse. With respect to two of them, the respondent knew about their sexual abuse at the hands of others. The alleged assaults consisted of fondling of the girls' breasts and digital penetration and stimulation of their vaginal areas, accompanied by intrusive questioning of them as to their sexual activities. All of the complainants testified that the respondent did not wear gloves while examining them internally. The respondent, who testified in his own defence, denied the complainants' evidence.

At the conclusion of the respondent's examination in chief, counsel for the respondent indicated that he intended to call a psychiatrist who would testify that the perpetrator of the offences alleged to have been committed would be part of a limited and unusual group of individuals and that the respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The Crown sought a ruling on the admissibility of that evidence. The trial judge held a *voir dire* and ruled that the evidence tendered on the *voir dire* would not be admitted.

The jury found the respondent guilty as charged on November 16, 1990. He was sentenced to nine months' imprisonment on each of the four counts, to be served concurrently, and to two years' probation. The respondent appealed his convictions and the Crown appealed the sentence. The Court of Appeal allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal found it was not neces-

l'époque de 13 à 16 ans. Les agressions sexuelles auraient été commises pendant l'examen médical des patientes dans le bureau de l'intimé. Les plaignantes lui avaient été référées pour des problèmes qui, en partie, étaient de nature psychosomatique.

La preuve relative à chaque plainte a été admise comme preuve de faits similaires à l'égard des autres. Les plaignantes ne se connaissaient pas. Trois d'entre elles ont porté plainte de façon indépendante. Après l'annulation d'un procès rendu public, la quatrième victime, ayant pris connaissance des accusations, s'est fait connaître. Des quatre plaignantes, trois avaient auparavant été victimes d'abus sexuels. En outre, l'intimé savait que deux d'entre elles l'avaient été par d'autres. Les agressions alléguées consistaient à avoir caressé les seins des filles et avoir pénétré et stimulé la région vaginale avec les doigts, et à leur avoir posé des questions indiscrètes sur leurs activités sexuelles. Toutes les plaignantes ont témoigné que l'intimé ne portait pas de gants pendant l'examen interne. L'intimé, qui a témoigné pour sa propre défense, a nié les témoignages des plaignantes.

À l'issue de l'interrogatoire principal de l'intimé, l'avocat de ce dernier a exprimé l'intention d'appeler un psychiatre qui témoignerait que l'auteur des infractions alléguées appartenait à un groupe limité et inhabituel d'individus et que l'intimé ne faisait pas partie de cette catégorie restreinte parce qu'il n'en possédait pas les caractéristiques propres. Le ministère public a demandé au juge du procès de se prononcer sur l'admissibilité de cette preuve. Ce dernier a tenu un voir-dire, à la suite duquel il a conclu à l'inadmissibilité de la preuve présentée au voir-dire.

Le 16 novembre 1990, le jury a déclaré l'intimé coupable des infractions reprochées. Il a été condamné à neuf mois d'emprisonnement relativement à chacun des quatre chefs, à purger concurremment, et à deux années de probation. L'intimé a interjeté appel des déclarations de culpabilité et le ministère public a interjeté appel de la sentence. La Cour d'appel a accueilli l'appel de l'intimé, annulé les déclarations de culpabilité et ordonné un

sary to deal with the Crown's sentence appeal and refused the Crown leave to appeal.

The appellant sought leave to appeal to this Court against the decision of the Ontario Court of Appeal pursuant to s. 693 of the *Criminal Code*, R.S.C., 1985, c. C-46. On December 10, 1992 leave to appeal was granted by this Court, [1992] 3 S.C.R. viii.

B. *The Excluded Evidence*

In the *voir dire*, Dr. Hill, the expert, began his testimony by explaining that there are three general personality groups that have unusual personality traits in terms of their psychosexual profile perspective. The first group encompasses the psychosexual who suffers from major mental illnesses (*e.g.*, schizophrenia) and engages in inappropriate sexual behaviour occasionally. The second and largest group contains the sexual deviation types. This group of individuals shows distinct abnormalities in terms of the choice of individuals with whom they report sexual excitement and with whom they would like to engage in some type of sexual activity. The third group is that of the sexual psychopaths. These individuals have a callous disregard for people around them, including a disregard for the consequences of their sexual behaviour towards other individuals. Another group would include pedophiles who gain sexual excitement from young adolescents, probably pubertal or post-pubertal.

Dr. Hill identified pedophiles and sexual psychopaths as examples of members of unusual and limited classes of persons. In response to questions hypothetically encompassing the allegations of the four complainants, the expert stated that the psychological profile of the perpetrator of the first three complaints would likely be that of a pedophile, while the profile of the perpetrator of the fourth complaint would likely be that of a sexual psychopath. Dr. Hill also testified that, if but one perpetrator was involved in all four complaints described in the hypothetical questions, he would

nouveau procès. Elle a ainsi conclu qu'il n'était pas nécessaire d'entendre l'appel de la sentence interjeté par le ministère public, et a refusé à ce dernier l'autorisation d'appeler.

L'appelante a demandé à notre Cour l'autorisation de se pourvoir contre la décision de la Cour d'appel de l'Ontario conformément à l'art. 693 du *Code criminel*, L.R.C. (1985), ch. C-46. Le 10 décembre 1992, notre Cour a accordé l'autorisation, [1992] 3 R.C.S. viii.

B. *Les éléments de preuve écartés*

Lors du voir-dire, le Dr Hill, l'expert, a d'abord expliqué qu'il existait trois groupes généraux de personnalité possédant des traits de personnalité inhabituels du point de vue de leur profil psychosexuel. Le premier groupe comprend le psychosexuel qui souffre de maladie mentale grave (par exemple, la schizophrénie) et qui adopte à l'occasion un comportement sexuel inapproprié. Le deuxième groupe, le plus large, inclut les personnes ayant des déviations sexuelles. Les individus appartenant à ce groupe présentent des anomalies marquées quant au choix des personnes auxquelles ils relient l'excitation sexuelle et avec lesquelles ils aimeraient avoir une certaine forme d'activité sexuelle. Le troisième groupe comprend les psychopathes sexuels. Ils sont totalement insensibles à l'égard des gens qui les entourent, et indifférents aux conséquences de leur comportement sexuel envers autrui. Les pédophiles formeraient un quatrième groupe. Ils sont sexuellement excités par de jeunes adolescents qui sont vraisemblablement à l'âge pubertaire ou postpubertaire.

Le Dr Hill a qualifié les pédophiles et les psychopathes sexuels d'exemples d'individus membres d'une catégorie inhabituelle et restreinte de personnes. En réponse à des questions hypothétiques réunissant les allégations des quatre plaignantes, l'expert a déclaré que le profil psychologique de l'auteur des trois premières infractions serait probablement celui d'un pédophile, alors que le profil de l'auteur de la quatrième infraction serait probablement celui d'un psychopathe sexuel. Le Dr Hill a également témoigné que, si un seul auteur était impliqué relativement aux quatre

uniquely categorize that perpetrator as a sexual psychopath. He added that such a person would belong to a very small, behaviourally distinct category of persons. Dr. Hill was asked whether a physician who acted in the manner described in the hypothetical questions would be a member of a distinct group of aberrant persons. His answer was that such behaviours could only flow from a significant abnormality of character and would be part of an unusual and limited class. In cross-examination, Dr. Hill said: "You bring an extra abnormal, extra component for the abnormality when you talk about a physician in his or her office." According to Dr. Hill, physicians who were also sexual offenders would be a small group because not only would they be breaking the usual norms of society, but they would also be breaking out against the norms of the medical profession which are very strict given the intimate contact necessary to treat patients. It was contemplated that Dr. Hill would go on to testify "to the effect that Doctor Mohan does not have the characteristics attributable to any of the three groups in which most sex offenders fall."

II. Judgments Below

A. *High Court of Justice* (Ruling on *Voir Dire*) (Bernstein J.)

In ruling on the admissibility of Dr. Hill's evidence, the trial judge stated the issues as follows:

> One: Did the offences alleged to have been committed by the accused have unusual features which would indicate that anyone who committed them was a member of a limited and distinguishable group?
>
> Two: Did the psychiatrist have the necessary qualifications and expertise to venture an opinion on the first issue so as to be helpful to the jury?

The trial judge noted that Dr. Hill had personally interviewed and treated three doctors who engaged in criminal sexual misconduct with their patients. He also noted that Dr. Hill admitted that

plaintes décrites dans les questions hypothétiques, il le qualifierait de psychopathe sexuel uniquement. Il a ajouté qu'une telle personne appartiendrait à un groupe très restreint de personnes distinctes du point de vue de leur comportement. On a demandé au Dr Hill si un médecin agissant de la manière décrite dans les questions hypothétiques ferait partie d'un groupe distinct de personnes anormales. Il a répondu que de tels comportements ne pouvaient que découler d'une grave anomalie du caractère et feraient partie d'une catégorie inhabituelle et restreinte. En contre-interrogatoire, le Dr Hill a dit: [TRADUCTION] «Vous apportez une anomalie supplémentaire, un élément supplémentaire d'anomalie lorsque vous parlez d'un médecin dans son bureau.» Selon le Dr Hill, les médecins qui sont également des délinquants sexuels seraient peu nombreux parce que non seulement ils violent les normes ordinaires de la société, mais aussi les normes de la profession médicale, qui sont très strictes étant donné le contact intime inhérent au traitement des patients. On prévoyait que le Dr Hill témoignerait ensuite [TRADUCTION] «que le Dr Mohan ne possède pas les caractéristiques attribuables à l'un des trois groupes auxquels appartiennent la plupart des délinquants sexuels.»

II. Les juridictions inférieures

A. *La Haute Cour de Justice* (décision relativement au voir-dire) (le juge Bernstein)

En se prononçant sur l'admissibilité du témoignage du Dr Hill, le juge du procès a formulé ainsi les questions en litige:

[TRADUCTION]

> (1) Les infractions imputées à l'accusé avaient-elles des caractéristiques inhabituelles indiquant que quiconque les a commises appartient à un groupe restreint et distinctif?
>
> (2) Le psychiatre possédait-il les compétences et l'expérience nécessaires pour exprimer sur la première question une opinion qui soit utile au jury?

Le juge du procès a signalé que le Dr Hill avait lui-même interrogé et traité trois médecins ayant eu un comportement sexuel criminel avec leurs patients. Il a également signalé que le Dr Hill avait

he was not aware of any scientific study or literature related to the psychiatric make-up of doctors who sexually abuse their patients and that his experience with three admitted offenders who were doctors was not a sufficient basis to allow him to make any generalizations on the subject. Dr. Hill acknowledged that he, as a psychiatrist, is unable to diagnose individuals as having the distinct characteristics of a pedophile or of a homosexual until the patient has performed an overt act which suggests the existence of the characteristic.

admis qu'il ne connaissait aucune étude ou documentation scientifique relative au portrait psychiatrique des médecins qui abusent sexuellement de leurs patients, et que son expérience acquise auprès des trois délinquants reconnus, qui étaient des médecins, ne lui permettait pas de faire des généralisations sur le sujet. Le Dr Hill a reconnu qu'à titre de psychiatre, il n'était pas en mesure de diagnostiquer chez des individus les caractéristiques distinctes d'un pédophile ou d'un homosexuel, tant que le patient n'avait pas commis d'acte manifeste pouvant indiquer l'existence de la caractéristique.

The trial judge reviewed the case law in which the use of such psychiatric evidence had been discussed (*i.e., R. v. Lupien*, [1970] S.C.R. 263; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 (Ont. C.A.); *R. v. McMillan* (1975), 23 C.C.C. (2d) 160 (Ont. C.A.); *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.); *R. v. Taylor* (1986), 31 C.C.C. (3d) 1 (Ont. C.A.)). From these cases, the trial judge concluded that the use of psychiatric evidence has been greatly expanded since *R. v. Lupien*. He cited the following words of Martin J.A. in *R. v. Robertson* (at p. 423):

Le juge du procès a passé en revue la jurisprudence dans laquelle l'utilisation de la preuve psychiatrique a été analysée (p. ex., *R. c. Lupien*, [1970] R.C.S. 263; *R. c. Robertson* (1975), 21 C.C.C. (2d) 385 (C.A. Ont.); *R. c. McMillan* (1975), 23 C.C.C. (2d) 160 (C.A. Ont.); *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. French* (1977), 37 C.C.C. (2d) 201 (C.A. Ont.); *R. c. Taylor* (1986), 31 C.C.C. (3d) 1 (C.A. Ont.)). Fort de ces arrêts, le juge du procès a conclu que l'utilisation de la preuve psychiatrique a considérablement été élargie depuis l'arrêt *R. c. Lupien*. Il a repris les propos suivants du juge Martin de la Cour d'appel dans l'arrêt *R. c. Robertson* (à la p. 423):

> Evidence that the offence has distinctive features which identified the perpetrator as a person possessing unusual personality traits constituting him a member of an unusual and limited class of persons would render admissible evidence that the accused did not possess the personality characteristics of the class of persons to which the perpetrator of the crime belonged.

> [TRADUCTION] La preuve que l'infraction présente des caractéristiques distinctives qui identifient l'auteur du crime comme une personne possédant des traits de personnalité inhabituels, qui le rattachent ainsi à une catégorie inhabituelle et restreinte de personnes, rendrait admissible la preuve que l'accusé ne possédait pas les traits de personnalité propres à la catégorie à laquelle l'auteur du crime appartient.

The trial judge also relied on the following passage of *R. v. McMillan* (at p. 175):

Le juge du procès a également invoqué le passage suivant de l'arrêt *R. c. McMillan* (à la p. 175):

> I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible.

> [TRADUCTION] Je laisse ouverte, jusqu'à ce qu'elle doive être tranchée, la question de savoir, lorsqu'un crime, comme le viol, est présumé être commis par des personnes normales, si la preuve psychiatrique est admissible pour établir que l'accusé fait partie d'un groupe anormal possédant des caractéristiques en raison desquelles il est peu probable qu'il ait commis l'infraction, comme le fait qu'il soit un homosexuel ayant une aversion pour les relations hétérosexuelles. Je suis toutefois disposé à penser qu'une telle preuve est admissible.

After relying on *R. v. McMillan*, the trial judge held:

Doctor Hill is of the opinion that sexual assault is a crime committed by a distinguishable group. As I read the cases, I came to the conclusion that it is the size and the degree of distinctiveness of the "unusual and limited class of persons" which determines whether expert opinion will be helpful in defining the class and categorizing accused persons within or without the group. These days it is trite to say that a large number of men from all walks of life commit sexual offences on young women. While all may have some type of character disorder, I doubt that expert evidence regarding the normality of any given accused would be of assistance to a trier of fact absent some more distinguishing within the wide spectrum of sexual assault.

The evidence of Doctor Hill is not sufficient, I believe, to establish that doctors who commit sexual assaults on patients are in a significantly more limited group in psychiatric terms than are other members of society. There is no scientific data available to warrant that conclusion. A sample of three offenders is not a sufficient basis for such a conclusion. Even the allegations of the fourth complainant . . . are not so unusual, as sex offenders go, to warrant a conclusion that the perpetrator must have belonged to a sufficiently narrow class.

I conclude that if the evidence was received as proposed, it would merely be character evidence of a type that is inadmissible as going beyond evidence of general reputation, and does not fall within the proper sphere of expert evidence.

B. *Ontario Court of Appeal* (1992), 8 O.R. (3d) 173

It was apparent for Finlayson J.A., who wrote the court's judgment, that the trial judge's conclusions were based on a misapprehension of the evidence of Dr. Hill. Finlayson J.A. stated that Dr. Hill did not base his opinion on case studies of the three physicians he had as patients who were accused of sexual crimes. Rather, Finlayson J.A. was of the view at p. 177 that, in concluding that the perpetrators in the hypothetical examples would fall into an unusual and limited class of persons, and that, if the perpetrator were a physician, the class into which he would fall would be even

Après avoir invoqué l'arrêt *R. c. McMillan*, le juge du procès a déclaré:

[TRADUCTION] Selon le Docteur Hill, l'agression sexuelle est un crime commis par un groupe distinctif. Compte tenu de la jurisprudence, je conclus que c'est l'importance et le degré de distinction de la «catégorie inhabituelle et restreinte de personnes» qui détermine si l'opinion d'un expert contribuera à définir la catégorie et à inclure les accusés dans ce groupe ou à les en exclure. Il va sans dire qu'un grand nombre d'hommes de tous les milieux commettent des infractions sexuelles sur de jeunes femmes. S'il se peut que tous souffrent d'une forme de désordre mental, je doute que la preuve d'expert portant sur la normalité d'un accusé soit utile au juge des faits en l'absence d'un élément plus distinctif se situant à l'intérieur du large spectre de l'agression sexuelle.

À mon avis, le témoignage du Docteur Hill ne suffit pas à établir que les médecins qui agressent sexuellement leurs patients forment un groupe beaucoup plus restreint sur le plan psychiatrique que les autres membres de la société. Aucune donnée scientifique ne justifie cette conclusion. Un échantillon de trois délinquants ne suffit pas comme fondement à une telle conclusion. Même les allégations de la quatrième plaignante [. . .] ne sont pas inhabituelles, en ce qui concerne les délinquants sexuels, au point de justifier la conclusion que l'auteur du crime devait appartenir à une catégorie suffisamment restreinte.

Je conclus que, si la preuve proposée était admise, elle ne serait qu'une preuve de moralité sous une forme inadmissible puisqu'elle excède la preuve de la réputation générale, et qu'elle n'entre pas dans la sphère de la preuve d'expert.

B. *La Cour d'appel de l'Ontario* (1992), 8 O.R. (3d) 173

Il était évident pour le juge Finlayson, qui s'est prononcé au nom de la cour, que le juge du procès avait tiré des conclusions fondées sur une mauvaise compréhension du témoignage du Dr Hill. Le juge Finlayson a déclaré que l'opinion du Dr Hill ne reposait pas sur le cas des trois médecins qu'il avait traités et qui avaient été accusés de crimes sexuels. Au contraire, le juge Finlayson s'est dit d'avis, à la p. 177, que pour conclure que les auteurs, dans les exemples hypothétiques, tomberaient dans une catégorie inhabituelle et restreinte de personnes et que, si l'auteur du crime était un

narrower, Dr. Hill based his opinion on all of his experience:

With respect, I think the learned trial judge was in error, in that he ruled on the sufficiency of the evidence of Dr. Hill, not its admissibility. It was up to the jury to consider what weight should be given to the expert opinion. Crown counsel suggested on appeal that the trial judge was ruling on the qualifications of the expert witness to give the opinion that he did. I do not think that is a correct interpretation of the trial judge's reasons. Dr. Hill's qualifications are outstanding and no attempt was made at trial to challenge them. I think the trial judge was saying that Dr. Hill's personal experience in dealing with sex-offending physicians and the lack of scientific literature specific to such physicians did not justify Dr. Hill giving the opinion that he did. In my opinion, in restricting his interpretation of Dr. Hill's testimony to "doctors who commit sexual assaults on patients", the trial judge misapprehended the opinion of Dr. Hill and the broad psychiatric experience upon which it was based.

Finlayson J.A. went on to say that the evidence of Dr. Hill was admissible on two bases. On the first basis, given that similar fact evidence was admitted showing that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, Dr. Hill's testimony was admissible to show that the offences alleged were unlikely to have been committed by the same person (*R. v. C. (M.H.)*, [1991] 1 S.C.R. 763).

On the second basis, it was admissible to show that the respondent was not a member of either of the unusual groups of aberrant personalities which could have committed the offenses alleged. Referring to *R. v. Lupien*, *supra*, at pp. 275-78, *R. v. Robertson*, *supra*, at p. 425, and *R. v. McMillan*, *supra*, Finlayson J.A. held that it is settled law that opinion evidence showing that the accused did or did not possess the distinguishing characteristics of an abnormal group is admissible in a criminal case, where it would appear that the perpetrator of the crime alleged is a person with an abnormal propensity or disposition which stamps him or her as being a member of that special and extraordi-

médecin, la catégorie à laquelle il appartiendrait serait encore plus restreinte, le Dr Hill a fondé son opinion sur son expérience générale:

[TRADUCTION] Avec égards, j'estime que le juge du procès a commis une erreur puisqu'il s'est prononcé sur la suffisance du témoignage du Dr Hill et non sur son admissibilité. Il appartenait au jury d'apprécier la valeur de l'opinion d'expert. Le ministère public a donné à entendre en appel que le juge du procès se prononçait sur les compétences du témoin expert pour exprimer l'opinion en cause. Je ne crois pas qu'il s'agisse là d'une interprétation juste des motifs du juge du procès. Les compétences du Dr Hill sont remarquables et personne n'a tenté de les contester au procès. À mon avis, le juge du procès affirmait que l'expérience personnelle du Dr Hill acquise auprès des médecins auteurs d'infractions sexuelles, d'une part, et l'absence de documentation scientifique sur de tels médecins, d'autre part, ne permettaient pas au Dr Hill d'exprimer l'opinion en cause. À mon avis, en restreignant aux «médecins qui agressent sexuellement leurs patients» son interprétation de l'opinion du Dr Hill, le juge du procès a mal interprété celle-ci et la grande expérience psychiatrique sur laquelle elle est fondée.

Le juge Finlayson a ensuite ajouté que le témoignage du Dr Hill était admissible pour deux motifs. D'une part, étant donné que la preuve de faits similaires admise démontre que les actes comparés sont si inhabituels et d'une similitude si frappante qu'on ne peut attribuer celle-ci à la coïncidence, le témoignage du Dr Hill était admissible pour démontrer qu'il était peu probable que les infractions alléguées aient été commises par la même personne (*R. c. C. (M.H.)*, [1991] 1 R.C.S. 763).

Par ailleurs, il était admissible pour démontrer que l'intimé n'était pas membre des groupes inhabituels de personnalités anormales qui auraient pu commettre les infractions alléguées. Invoquant les arrêts *R. c. Lupien*, précité, aux pp. 275 à 278; *R. c. Robertson*, précité, à la p. 425 et *R. c. McMillan*, précité, le juge Finlayson a conclu qu'il est établi en droit que le témoignage d'opinion qui démontre que l'accusé possédait ou ne possédait pas les caractéristiques distinctives d'un groupe anormal est admissible dans une affaire criminelle lorsqu'il appert que l'auteur du crime reproché a une propension ou une prédisposition anormale qui indique qu'il est membre de cette catégorie (ou

nary class (or group). In this case, the psychiatrist showed that pedophiles and sexual psychopaths are members of special and extraordinary classes. Considering also the issues put to the jury in the case at bar (complex psychological issues, testimonial trustworthiness), Finlayson J.A. held that evidence of persons with professional psychiatric experience in dealing with sexual offences would be of assistance (based on: *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee*, *supra*; *R. v. B.(G.)*, [1990] 2 S.C.R. 30).

The court allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal refused leave to the Crown's sentence appeal.

III. Analysis

The admissibility of the rejected evidence was analyzed in argument under two exclusionary rules of evidence: (1) expert opinion evidence, and (2) character evidence. I have concluded that, on the basis of the principles relating to exceptions to the character evidence rule and under the principles governing the admissibility of expert evidence, the limitations on the use of this type of evidence require that the evidence in this case be excluded.

(1) *Expert Opinion Evidence*

Admission of expert evidence depends on the application of the following criteria:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule;

(d) a properly qualified expert.

(a) Relevance

Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it

groupe) spéciale et extraordinaire. En l'espèce, le psychiatre a démontré que les pédophiles et les psychopathes sexuels appartiennent à des catégories spéciales et extraordinaires. Tenant compte également des questions soumises au jury en l'espèce (questions psychologiques complexes, fiabilité du témoignage), le juge Finlayson a conclu que le témoignage de personnes dotées d'une expérience psychiatrique professionnelle dans le domaine des infractions sexuelles serait utile (fondé sur: *R. c. Lyons*, [1987] 2 R.C.S. 309; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. Lavallee*, précité; *R. c. B.(G.)*, [1990] 2 R.C.S. 30).

La cour a accueilli l'appel de l'intimé, annulé les déclarations de culpabilité et ordonné un nouveau procès. Elle n'a donc pas autorisé le ministère public à en appeler de la sentence.

III. Analyse

L'admissibilité de la preuve écartée a été analysée en plaidoirie au regard de deux règles d'exclusion de la preuve: (1) le témoignage d'opinion d'un expert et (2) la preuve de moralité. Compte tenu des principes qui gouvernent les exceptions à la règle en matière de preuve de moralité et de ceux qui gouvernent l'admissibilité de la preuve d'expert, j'ai conclu que les restrictions imposées à l'utilisation de ce type de preuve exigent d'écarter le témoignage en l'espèce.

(1) *Témoignage d'opinion d'un expert*

L'admission de la preuve d'expert repose sur l'application des critères suivants:

a) la pertinence;

b) la nécessité d'aider le juge des faits;

c) l'absence de toute règle d'exclusion;

d) la qualification suffisante de l'expert.

a) La pertinence

Comme pour toute autre preuve, la pertinence est une exigence liminaire pour l'admission d'une preuve d'expert. La pertinence est déterminée par le juge comme question de droit. Bien que la preuve soit admissible à première vue si elle est à

tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

ce point liée au fait concerné qu'elle tend à l'établir, l'analyse ne se termine pas là. Cela établit seulement la pertinence logique de la preuve. D'autres considérations influent également sur la décision relative à l'admissibilité. Cet examen supplémentaire peut être décrit comme une analyse du coût et des bénéfices, à savoir «si la valeur en vaut le coût.» Voir *McCormick on Evidence* (3e éd. 1984), à la p. 544. Le coût dans ce contexte n'est pas utilisé dans le sens économique traditionnel du terme, mais plutôt par rapport à son impact sur le procès. La preuve qui est par ailleurs logiquement pertinente peut être exclue sur ce fondement si sa valeur probante est surpassée par son effet préjudiciable, si elle exige un temps excessivement long qui est sans commune mesure avec sa valeur ou si elle peut induire en erreur en ce sens que son effet sur le juge des faits, en particulier le jury, est disproportionné par rapport à sa fiabilité. Bien qu'elle ait été fréquemment considérée comme un aspect de la pertinence juridique, l'exclusion d'une preuve logiquement pertinente, pour ces raisons, devrait être considérée comme une règle générale d'exclusion (voir *Morris c. La Reine*, [1983] 2 R.C.S. 190). Qu'elle soit traitée comme un aspect de la pertinence ou une règle d'exclusion, son effet est le même. Ce facteur fiabilité-effet revêt une importance particulière dans l'appréciation de l'admissibilité de la preuve d'expert.

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348, in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific

La preuve d'expert risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite. Comme le juge La Forest l'a dit dans l'arrêt *R. c. Béland*, [1987] 2 R.C.S. 398, à la p. 434, relativement au témoignage sur les résultats d'un détecteur de mensonges produits par l'accusé, une telle preuve ne devrait pas être admise en raison de «la faillibilité humaine dans l'évaluation du poids à donner à la preuve empreinte de la mystique de la science». On a appliqué ce principe dans des décisions comme *R. c. Melaragni* (1992), 73 C.C.C. (3d) 348, dans laquelle le juge Moldaver a appliqué un

technique or body of scientific knowledge". Moldaver J. also mentioned two other factors, *inter alia*, which should be considered in such circumstances (at p. 353):

(1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?

(2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

A similar approach was adopted in *R. v. Bourguignon*, [1991] O.J. No. 2670 (Q.L.), where, in ruling upon a *voir dire* concerning the admissibility of D.N.A. evidence, Flanigan J. admitted most of the evidence but excluded statistical evidence about the probability of a match between the DNA contained in samples taken from the accused and those taken from the scene of a crime. The learned judge explained:

This Court does not think that the criminal jurisdiction of Canada is yet ready to put such an additional pressure on a jury, by making them overcome such fantastic odds and asking them to weigh it as just one piece of evidence to be considered in the overall picture of all the evidence presented. There is a real danger that the jury will use the evidence as a measure of the probability of the accused's guilt or innocence and thereby undermine the presumption of innocence and erode the value served by the reasonable doubt standard. As said in the Schwartz case: "dehumanize our justice system".

I would therefore, rule admissible the D.N.A. testing evidence but not the statistic probabilities. This restriction can be easily overcome by evidence that "such matches are rare" or "extremely rare" or words to the same effect, which will put the jury in a better position to assess such evidence and protect the right of the accused to a fair trial.

It should be noted that, subsequently, other courts have rejected the distinction drawn by Flanigan J. and have admitted both DNA evidence and the evi-

critère préliminaire de fiabilité à ce qu'il a qualifié de [TRADUCTION] «nouvelle technique ou discipline scientifique» (p. 353). Le juge Moldaver a également mentionné deux facteurs, entre autres, qui devraient être considérés dans de telles circonstances (à la p. 353):

[TRADUCTION]

(1) La preuve est-elle susceptible de faciliter la tâche de recherche des faits du jury, ou susceptible de l'embrouiller et de le dérouter?

(2) Le jury est-il susceptible d'être écrasé par l'«infaillibilité mystique» de la preuve, ou sera-t-il capable de garder l'esprit ouvert et d'en apprécier objectivement la valeur?

Un point de vue semblable a été adopté dans la décision *R. c. Bourguignon*, [1991] O.J. No. 2670 (Q.L.) où, se prononçant sur un voir-dire concernant l'admissibilité de la preuve d'ADN, le juge Flanigan a admis la plus grande partie de la preuve en excluant toutefois les statistiques sur la probabilité que l'ADN prélevé sur des échantillons recueillis sur l'accusé concorde avec celui prélevé sur la scène du crime. Le juge s'est exprimé ainsi:

[TRADUCTION] Notre Cour ne croit pas que la juridiction criminelle au Canada soit prête à imposer une pression supplémentaire aux membres du jury en exigeant d'eux qu'ils surmontent des obstacles aussi énormes et qu'ils la pondèrent comme un simple élément de preuve à examiner dans le cadre de l'ensemble de la preuve produite. Il y a un danger réel que le jury utilise la preuve comme une mesure de la probabilité de la culpabilité ou de l'innocence de l'accusé et que cela mine la présomption d'innocence et la valeur que présente la norme du doute raisonnable. Comme on l'a dit dans l'affaire Schwartz, «déshumaniser notre système de justice».

Je déclarerais par conséquent admissible la preuve de l'analyse d'A.D.N., mais pas les probabilités statistiques. Cette restriction peut facilement être surmontée par la preuve qu'«une telle concordance est rare» ou «extrêmement rare» ou par une formulation de ce genre, ce qui permettra au jury de mieux apprécier la preuve en question et protégera le droit de l'accusé à un procès équitable.

Il y a lieu de signaler que, par la suite, d'autres tribunaux ont rejeté la distinction établie par le juge Flanigan et ont admis tant la preuve d'ADN que la

dence regarding statistical probabilities of a match. (See, *e.g.*, *R. v. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.)). I rely on *R. v. Bourguignon*, *supra*, simply to illustrate the mode of approach adopted there and leave the specific issue decided by Flanigan J. to be considered when it arises.

(b) Necessity in Assisting the Trier of Fact

In *R. v. Abbey*, *supra*, Dickson J., as he then was, stated, at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R. v. Lavallee*, *supra*, the above passages from *Kelliher* and *Abbey* were applied to admit expert

preuve relative aux probabilités statistiques d'une concordance. (Voir, p. ex., *R. c. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.)). Je m'appuie sur l'arrêt *R. c. Bourguignon*, précité, seulement pour illustrer la méthode adoptée dans cette affaire et je laisse la question précise tranchée par le juge Flanigan à considérer quand elle sera soulevée.

b) La nécessité d'aider le juge des faits

Dans l'arrêt *R. c. Abbey*, précité, le juge Dickson, plus tard Juge en chef, a dit à la p. 42:

> Quant aux questions qui exigent des connaissances particulières, un expert dans le domaine peut tirer des conclusions et exprimer son avis. Le rôle d'un expert est précisément de fournir au juge et au jury une conclusion toute faite que ces derniers, en raison de la technicité des faits, sont incapables de formuler. [TRADUCTION] «L'opinion d'un expert est recevable pour donner à la cour des renseignements scientifiques qui, selon toute vraisemblance, dépassent l'expérience et la connaissance d'un juge ou d'un jury. Si, à partir des faits établis par la preuve, un juge ou un jury peut à lui seul tirer ses propres conclusions, alors l'opinion de l'expert n'est pas nécessaire» (*Turner* (1974), 60 Crim. App. R. 80, à la p. 83, le lord juge Lawton).

Cette condition préalable est fréquemment reprise dans la question de savoir si la preuve serait utile au juge des faits. Le mot «utile» n'est pas tout à fait juste car il établit un seuil trop bas. Toutefois, je ne jugerais pas la nécessité selon une norme trop stricte. L'exigence est que l'opinion soit nécessaire au sens qu'elle fournit des renseignements «qui, selon toute vraisemblance, dépassent l'expérience et la connaissance d'un juge ou d'un jury»: cité par le juge Dickson, dans *Abbey*, précité. Comme le juge Dickson l'a dit, la preuve doit être nécessaire pour permettre au juge des faits d'apprécier les questions en litige étant donné leur nature technique. Dans l'arrêt *Kelliher (Village of) c. Smith*, [1931] R.C.S. 672, à la p. 684, notre Cour, citant *Beven on Negligence* (4e éd. 1928) à la p. 141, a déclaré que la preuve d'expert était admissible si [TRADUCTION] «l'objet de l'analyse est tel qu'il est peu probable que des personnes ordinaires puissent former un jugement juste à cet égard sans l'assistance de personnes possédant des connaissances spéciales». Plus récemment, dans

evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699, at p. 718:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue.

l'arrêt *R. c. Lavallee*, précité, les passages précités des arrêts *Kelliher* et *Abbey* ont été appliqués pour admettre une preuve d'expert sur l'état d'esprit d'une femme «battue». On a souligné qu'il s'agissait là d'un domaine que la personne ordinaire ne comprend pas.

Comme la pertinence, analysée précédemment, la nécessité de la preuve est évaluée à la lumière de la possibilité qu'elle fausse le processus de recherche des faits. Comme le lord juge Lawton l'a remarqué dans l'arrêt *R. c. Turner*, [1975] Q.B. 834, à la p. 841, qui a été approuvé par lord Wilberforce dans l'arrêt *Director of Public Prosecutions c. Jordan*, [1977] A.C. 699, à la p. 718:

[TRADUCTION] «L'opinion d'un expert est recevable pour donner à la cour des renseignements scientifiques qui, selon toute vraisemblance, dépassent l'expérience et la connaissance d'un juge ou d'un jury. Si, à partir des faits établis par la preuve, un juge ou un jury peut à lui seul tirer ses propres conclusions, alors l'opinion de l'expert n'est pas nécessaire. Dans un tel cas, si elle est exprimée dans un jargon scientifique, elle rend la tâche de juger plus difficile. Le seul fait qu'un témoin expert possède des qualifications scientifiques impressionnantes ne signifie pas que son opinion sur les questions de la nature et du comportement humains dans le cadre de la normalité est plus utile que celle des jurés eux-mêmes; ces derniers risquent toutefois de croire qu'elle l'est.»

La possibilité que la preuve ait un impact excessif sur le jury et le détourne de ses tâches peut souvent être contrecarrée par des directives appropriées.

Il y a également la crainte inhérente à l'application de ce critère que les experts ne puissent usurper les fonctions du juge des faits. Une conception trop libérale pourrait réduire le procès à un simple concours d'experts, dont le juge des faits se ferait l'arbitre en décidant quel expert accepter.

Ces préoccupations sont le fondement de la règle d'exclusion de la preuve d'expert relativement à une question fondamentale. Bien que la règle ne soit plus d'application générale, les préoccupations qui la sous-tendent demeurent. En raison de ces préoccupations, les critères de pertinence et de nécessité sont à l'occasion appliqués strictement

Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquard*, [1993] 4 S.C.R. 223, *per* McLachlin J.

(c) The Absence of any Exclusionary Rule

Compliance with criteria (a), (b) and (d) will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. For example, in *R. v. Morin*, [1988] 2 S.C.R. 345, evidence elicited by the Crown in cross-examination of the psychiatrist called by the accused was inadmissible because it was not shown to be relevant other than as to the disposition to commit the crime charged. Notwithstanding, therefore, that the evidence otherwise complied with the criteria for the admission of expert evidence it was excluded by reason of the rule that prevents the Crown from adducing evidence of the accused's disposition unless the latter has placed his or her character in issue. The extent of the restriction when such evidence is tendered by the accused lies at the heart of this case and will be discussed hereunder.

(d) A Properly Qualified Expert

Finally the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

pour exclure la preuve d'expert sur une question fondamentale. La preuve d'expert sur la crédibilité ou la justification a été exclue pour ce motif. Voir l'arrêt *R. c. Marquard*, [1993] 4 R.C.S. 223, les motifs du juge McLachlin.

c) L'absence de toute règle d'exclusion

Le respect des critères a), b) et d) n'assurera pas l'admissibilité de la preuve d'expert si celle-ci contrevient à une règle d'exclusion de la preuve, distincte de la règle applicable à l'opinion. Ainsi, dans l'arrêt *R. c. Morin*, [1988] 2 R.C.S. 345, la preuve obtenue par le ministère public en contre-interrogatoire du psychiatre cité par l'accusé a été jugée inadmissible parce qu'il n'avait pas été établi qu'elle était pertinente autrement que relativement à la propension à commettre le crime reproché. En dépit du fait que la preuve respectait par ailleurs les critères d'admissibilité de la preuve d'expert, elle a donc été exclue sur le fondement de la règle qui interdit au ministère public de produire une preuve de la propension de l'accusé à moins que ce dernier n'ait mis sa moralité en jeu. La portée de la restriction, lorsqu'une telle preuve est produite par l'accusé, est au cœur même de la présente affaire, et sera analysée ci-après.

d) La qualification suffisante de l'expert

Enfin, la preuve doit être présentée par un témoin dont on démontre qu'il ou elle a acquis des connaissances spéciales ou particulières grâce à des études ou à une expérience relatives aux questions visées dans son témoignage.

En résumé, il ressort donc de ce qui précède que la preuve d'expert qui avance une nouvelle théorie ou technique scientifique est soigneusement examinée pour déterminer si elle satisfait à la norme de fiabilité et si elle est essentielle en ce sens que le juge des faits sera incapable de tirer une conclusion satisfaisante sans l'aide de l'expert. Plus la preuve se rapproche de l'opinion sur une question fondamentale, plus l'application de ce principe est stricte.

(2) *Expert Evidence as to Disposition*

In order to decide what principles should govern the admissibility of this kind of evidence, it is necessary to consider the limitations imposed by the rules relating to character evidence, having regard to the restrictions imposed by the criteria in respect of expert evidence.

I have already referred to *R. v. Morin*, wherein an unanimous court decided that the Crown cannot lead such evidence in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. As I stated, at p. 371:

> In my opinion, in order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the crime. The trait must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. The judgment of Lord Hailsham in *Boardman*, quoted above, provides one illustration of the kind of evidence that would be relevant.
>
> . . .
>
> Conversely, the fact that the accused is a member of an abnormal group some of the members of which have the unusual behavioural characteristics shown to have been possessed by the perpetrator is not sufficient. In some cases it may, however, be shown that all members of the group have the distinctive unusual characteristics. If a reasonable inference can be drawn that the accused has those traits then the evidence is relevant subject to the trial judge's obligation to exclude it if its prejudicial effect outweighs its probative value. The greater the number of persons in society having these tendencies, the less relevant the evidence on the issue of identity and the more likely that its prejudicial effect predominates over its probative value.

When, however, the evidence is tendered by the accused, other considerations apply. The accused is permitted to adduce evidence as to disposition both in his or her own evidence or by calling witnesses. The general rule is that evidence as to character is limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testi-

(2) *Preuve d'expert quant à la prédisposition*

Pour déterminer les principes qui devraient gouverner l'admissibilité de ce genre de preuve, il faut considérer les restrictions imposées par les règles relatives à la preuve de moralité, eu égard aux restrictions imposées par les critères relatifs à la preuve d'expert.

J'ai cité plus haut l'arrêt *R. c. Morin* dans lequel notre Cour unanime a décidé que le ministère public ne peut produire une telle preuve en premier lieu que si elle est pertinente et n'est pas utilisée comme simple preuve de la prédisposition. Comme je l'ai mentionné, à la p. 371:

> À mon avis, pour être pertinente relativement à la question de l'identité, la preuve doit tendre à démontrer que l'accusé partageait avec l'auteur du crime un trait de comportement distinctif inhabile. Le trait doit être distinctif au point d'agir presque comme une étiquette ou une marque qui identifie l'auteur du crime. L'extrait précité des motifs de lord Hailsham dans l'arrêt *Boardman* donne un exemple du genre de preuve qui serait pertinente.
>
> . . .
>
> Inversement, l'appartenance de l'accusé à un groupe anormal dont certains membres présentent des caractéristiques de comportement inhabituelles que possédait l'auteur du crime, n'est pas suffisante. Dans certains cas, cependant, il peut être démontré que tous les membres du groupe ont les caractéristiques distinctives inhabituelles. Si on peut raisonnablement en déduire que l'accusé possède ces traits, la preuve est alors pertinente sous réserve de l'obligation du juge du procès de l'exclure si son effet préjudiciable l'emporte sur sa valeur probante. Plus le nombre de personnes dans la société présente ces tendances, moins la preuve est pertinente relativement à la question de l'identité et plus il est vraisemblable que son effet préjudiciable soit supérieur à sa valeur probante.

Néanmoins, lorsque la preuve est celle de l'accusé, d'autres facteurs entrent en jeu. L'accusé peut produire une preuve sur la prédisposition tant par son propre témoignage que par celui d'autres témoins. Suivant la règle générale, la preuve de moralité se limite à la preuve de la réputation de l'accusé au sein de la collectivité relativement au trait de caractère concerné. L'accusé peut toutefois

mony, however, may rely on specific acts of good conduct. See *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193, at p. 348; leave to appeal refused, [1981] 1 S.C.R. xi. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories. A further exception, however, has developed that is limited in scope. I propose to examine the extent of this exception.

In England, with the exception of non-insane automatism, expert psychiatric and psychological evidence is not admissible to show the accused's state of mind unless it is contended that the accused is abnormal in the sense of suffering from insanity or diminished responsibility. In *R. v. Chard* (1971), 56 Cr. App. R. 268, the trial judge refused to allow medical evidence that the accused who was not alleged to be suffering from a disease of the mind lacked the necessary *mens rea*. In the Court of Appeal, Roskill L.J. stated at p. 271 that it was "not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind — assum[ing] a normal mind — operated at the time of the alleged crime . . . ."

In *Lowery v. The Queen*, [1974] A.C. 85 (P.C.), such evidence was admitted when tendered by one co-accused against another. It was a case involving the sadistic murder of a young girl. Lowery and King were both charged, and it was obvious that one, the other, or both of them were guilty. In this context, King sought to prove that he feared Lowery and that Lowery dominated him. The Privy Council held that the trial judge acted properly in allowing King to call a psychiatrist to swear that he was less likely to have committed the crime than Lowery. That is, character evidence tendered by a psychiatrist was held to be admissible. Lord

invoquer dans son propre témoignage des actes particuliers de bonne conduite. Voir *R. c. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193, à la p. 348; autorisation de pourvoi refusée, [1981] 1 R.C.S. xi. Le témoignage d'un expert indiquant qu'en raison de sa constitution mentale ou de son état mental, l'accusé serait incapable de commettre le crime ou ne pourrait être prédisposé à le commettre, ne correspond à aucune des catégories concernées. Une autre exception de portée limitée a toutefois été créée. Je propose d'en examiner l'étendue.

En Angleterre, à l'exception de l'automatisme non fondé sur l'aliénation mentale, la preuve d'expert psychiatrique et psychologique n'est pas admissible pour démontrer l'état d'esprit de l'accusé, sauf si on fait valoir qu'il est anormal parce qu'il souffre d'aliénation mentale ou de responsabilité amoindrie. Dans l'arrêt *R. c. Chard* (1971), 56 Cr. App. R. 268, le juge du procès a refusé d'accueillir la preuve médicale portant que l'accusé, dont on n'alléguait pas qu'il souffrait d'une maladie mentale, n'avait pas la *mens rea* requise. En Cour d'appel, le lord juge Roskill a déclaré, à la p. 271, qu'il était [TRADUCTION] «interdit de citer un témoin, quelle que soit son expérience personnelle, simplement pour dire au jury comment il pense que l'esprit de l'accusé — en suppos[ant] qu'il ait un esprit normal — fonctionnait à l'époque du crime reproché . . .»

Dans l'arrêt *Lowery c. The Queen*, [1974] A.C. 85 (C.P.), un témoignage semblable, rendu par un coaccusé contre l'autre, a été admis. L'affaire portait sur le meurtre sadique d'une jeune fille. Lowery et King étaient tous deux accusés, et il était évident que l'un ou l'autre, ou les deux, étaient coupables. C'est dans ce contexte que King a cherché à établir qu'il craignait Lowery et que ce dernier exerçait sur lui sa domination. Le Conseil privé a conclu que le juge du procès avait agi correctement en permettant à King d'appeler un psychiatre pour témoigner sous serment qu'il était moins susceptible d'avoir commis le crime que Lowery. La preuve de moralité produite par un psychiatre a ainsi été jugée admissible. Lord

Morris of Borth-y-Gest of the Privy Council stated, at p. 103:

Lowery and King were each asserting that the other was the completely dominating person at the time Rosalyn Nolte was killed: each claimed to have been in fear of the other. In these circumstances it was most relevant for King to be able to show, if he could, that Lowery had a personality marked by aggressiveness whereas he, King, had a personality which suggested that he would be led and dominated by someone who was dominant and aggressive . . . . Not only however was the evidence which King called relevant to this case: its admissibility was placed beyond doubt by the whole substance of Lowery's case.

Moreover, in *R. v. Turner, supra*, the accused unsuccessfully pleaded provocation in answer to a charge of murder of his girlfriend whom he alleged that he had killed in a fit of rage caused by her sudden confession of infidelity. He appealed on the grounds that the trial judge had wrongly refused to admit the evidence of a psychiatrist. That psychiatrist was to testify to the effect that the accused was not mentally ill, that he had a great affection toward the victim and that he deeply regretted his act of murder. The evidence was rejected on the basis that it was not the proper subject of expert evidence. As for *Lowery v. The Queen*, it was confined to its own facts.

C. Tapper in *Cross on Evidence* (7th ed. 1990), at p. 492, reconciled *Lowery v. The Queen* and *R. v. Turner* using a principled approach:

Juries do not need to be told that normal men are liable to lose control of themselves when their women admit to infidelity, but they require all the expert assistance they can get to help them determine which of two accused has the more aggressive personality.

Tapper then proceeded to reconcile the two cases using a more technical approach:

Another way of reconciling the cases would be to treat the fact that Lowery had put his character in issue as crucial to the decision of the Privy Council, the psychiatric evidence then being admissible to impugn the credibility of his testimony. Unfortunately we are left with-

Morris of Borth-y-Gest du Conseil privé a dit, à la p. 103:

[TRADUCTION] Lowery et King ont tous deux fait valoir que l'autre était le dominateur absolu à l'époque du meurtre de Rosalyn Nolte: tous deux ont soutenu avoir craint l'autre. Dans ces circonstances, il était tout à fait opportun pour King de pouvoir démontrer, s'il en était capable, que Lowery avait une personnalité marquée par l'agressivité alors que lui-même, King, avait une personnalité indiquant qu'il serait mené et dominé par une personne dominante et agressive [. . .] Toutefois, non seulement la preuve que King a produite était-elle pertinente quant à la présente affaire, mais son admissibilité a été placée au-dessus de tout doute par la substance de la preuve de Lowery.

En outre, dans l'arrêt *R. c. Turner*, précité, l'accusé a plaidé sans succès la provocation en défense à l'accusation du meurtre de son amie qu'il alléguait avoir tuée dans un excès de rage provoqué par sa confession inattendue d'infidélité. Il a interjeté appel pour le motif que le juge du procès avait refusé à tort d'admettre le témoignage d'un psychiatre. Ce dernier devait témoigner que l'accusé n'était pas mentalement malade, qu'il ressentait une grande affection à l'endroit de la victime et qu'il regrettait sincèrement d'avoir commis le meurtre. Le témoignage a été rejeté sur le fondement qu'il ne relevait pas de la preuve d'expert. Quant à l'affaire *Lowery c. The Queen*, elle a été confinée à ses propres faits.

C. Tapper dans *Cross on Evidence* (7e éd. 1990), à la p. 492, a concilié les arrêts *Lowery c. The Queen* et *R. c. Turner*, en s'aidant d'une conception fondée sur les principes:

[TRADUCTION] Il n'est pas nécessaire de dire aux jurés que des hommes normaux peuvent perdre leur maîtrise de soi lorsque leurs femmes avouent leur infidélité, mais il convient de leur fournir toute l'aide experte possible afin de déterminer lequel des deux accusés est le plus agressif.

Tapper a ensuite concilié les deux affaires en recourant à une conception plus technique:

[TRADUCTION] On peut concilier les deux affaires également en faisant du fait que Lowery a mis sa moralité en jeu un élément déterminant de la décision du Conseil privé, la preuve psychiatrique étant alors admissible pour attaquer la crédibilité de son témoignage. Malheu-

out any guidance on the subject from the Court of Appeal who contented themselves with saying that *Lowery*'s case was decided on its special facts.

With respect to the development of the exception in Canada, *R. v. Lupien, supra,* is a good starting point. It involved a respondent who was convicted of attempting to commit an act of gross indecency, and whose defence was that he lacked the requisite intent to commit the act because he thought his companion was a woman. He sought to prove his "lack of intent" by tendering psychiatric evidence which showed that he reacted violently against any type of homosexual activity and, therefore, could not have knowingly engaged in an act of gross indecency. Ritchie J. concluded, at pp. 277-78, that the evidence was admissible for the following reasons:

> I am far from saying that as a general rule psychiatric evidence of a man's disinclination to commit the kind of crime with which he is charged should be admitted, but the present case is concerned with gross indecency between two men and I think that crimes involving homosexuality stand in a class by themselves in the sense that the participants frequently have characteristics which make them more readily identifiable as a class than ordinary criminals. See *Reg. v. Thompson* [(1917), 13 Cr. App. R. 61 at 81]. In any event, it appears to me that the question of whether or not a man is homosexually inclined or otherwise sexually perverted is one upon which an experienced psychiatrist is qualified to express an opinion and that if such opinion is relevant it should be admitted at a trial such as this even if it involves the psychiatrist in expressing his conclusion that the accused does not have the capacity to commit the crime with which he is charged.

It is this passage that created the abnormal group exception which is often sought to be applied to various contexts other than the homosexual context.

The Ontario Court of Appeal, and specifically Martin J.A., further looked into this exception of proving the disposition of the accused through psychiatric evidence in the following two cases: *R. v. McMillan, supra,* aff'd [1977] 2 S.C.R. 824, and *R. v. Robertson, supra.*

reusement, nous sommes laissés sans autre assistance à cet égard que la simple déclaration de la Cour d'appel portant que l'affaire *Lowery* a été décidée en fonction de ses faits propres.

L'arrêt *R. c. Lupien,* précité, est un bon point de départ de l'évolution de l'exception au Canada. Déclaré coupable d'avoir tenté de commettre un acte de grossière indécence, l'intimé plaidait qu'il n'avait pas l'intention requise pour commettre l'acte, parce qu'il croyait que son compagnon était une femme. Il a tenté d'établir son «absence d'intention» en produisant une preuve psychiatrique démontrant qu'il réagissait violemment à tout genre d'activité homosexuelle et que, par conséquent, il ne pouvait avoir sciemment commis un acte de grossière indécence. Le juge Ritchie a conclu à l'admissibilité de la preuve pour les motifs suivants (aux pp. 277 et 278):

> Je suis loin de poser comme règle générale que la preuve psychiatrique des prédispositions d'une personne à ne pas commettre le genre de crime dont il est accusé doit être admise, mais dans cette affaire-ci il s'agit de grossière indécence entre deux hommes et je pense que les crimes relatifs à l'homosexualité sont dans une catégorie à part, en ce sens que leurs auteurs possèdent souvent des caractéristiques qui les rendent collectivement plus facilement identifiables que les criminels ordinaires. Voir *Regina v. Thompson* [(1917), 13 Cr. App. R. 61 à 81]. De toute façon, il me paraît qu'un psychiatre est qualifié pour exprimer un avis sur la question de savoir si un homme est prédisposé à l'homosexualité, ou autrement sexuellement perverti. Si un tel avis est pertinent, il doit être recevable dans un procès comme celui-ci, même s'il amène le psychiatre à exprimer l'avis que l'inculpé ne possède pas la capacité de commettre le crime dont il est accusé.

C'est ce passage qui a créé l'exception relative au groupe anormal que l'on tente fréquemment d'appliquer dans des contextes autres que celui de l'homosexualité.

La Cour d'appel de l'Ontario, et en particulier le juge Martin, a examiné plus amplement l'exception qui consiste à démontrer la prédisposition de l'accusé à l'aide de la preuve psychiatrique, dans les deux affaires suivantes: *R. c. McMillan,* précité, conf. par [1977] 2 R.C.S. 824, et *R. c. Robertson,* précité.

R. v. McMillan involved an accused who was charged with the murder of his infant child and whose defence was that it was in fact his wife and not he who killed the child. The trial judge allowed the accused to call a psychiatrist who testified that the accused's wife had a psychopathic personality disturbance with brain damage. This psychiatric evidence showed that a third party, the accused's wife, was more likely to have committed the crime because of her abnormal personality/disposition. Martin J.A., speaking for the Court, found that disposition to commit a crime is generally relevant since it goes to the probability/propensity of the person doing or not doing the act charged. He then referred to *R. v. Lupien*, at p. 169, as creating the following exception:

> One of the exceptions to the general rule that the character of the accused, in the sense of disposition, when admissible, can only be evidenced by general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.

After having noted the applicability of *R. v. Lupien*, Martin J.A. engaged in a lengthy discussion of the exception and in fact extended *R. v. Lupien*. This extension, at pp. 173-75 of *R. v. McMillan*, was affirmed by the Supreme Court of Canada:

> I do not consider that, because the crime under consideration was not one that could only be committed by a person with a special or abnormal propensity, psychiatric evidence with respect to Mrs. McMillan's disposition, was, therefore, inadmissible, in the circumstances of this case.

All evidence to be admissible must, of course, be relevant to some issue in the case. Psychiatric evidence with respect to the personality traits or disposition of a person, whether of the accused or another, may be admissible for different purposes. While those purposes are not mutually exclusive, evidence which is relevant for one purpose may not be for another.

Dans l'affaire *R. c. McMillan*, l'accusé était inculpé du meurtre de son jeune enfant. Il plaidait que c'était en fait sa femme, et non lui, qui avait tué l'enfant. Le juge du procès a permis à l'accusé d'appeler un psychiatre qui a témoigné que l'épouse de l'accusé souffrait d'un trouble psychopathique de la personnalité et de lésions cérébrales. Cette preuve psychiatrique a démontré qu'un tiers, l'épouse de l'accusé, était plus susceptible d'avoir commis le crime en raison de sa personnalité et de sa prédisposition toutes deux anormales. Exprimant l'opinion de la Cour, le juge Martin a conclu que la prédisposition à commettre un crime est généralement pertinente puisqu'en ce qui concerne la perpétration de l'acte reproché, elle vise la propension et la probabilité. Il a ensuite indiqué que l'arrêt *R. c. Lupien*, à la p. 169, créait l'exception suivante:

> [TRADUCTION] L'une des exceptions à la règle générale suivant laquelle, lorsqu'elle est admissible, la moralité de l'accusé (dans le sens de la prédisposition) ne peut être démontrée que par la preuve de la réputation générale, porte sur l'admissibilité de la preuve psychiatrique lorsque la prédisposition ou la propension en question est propre à un groupe anormal, dont les caractéristiques relèvent de l'expertise du psychiatre.

Après avoir noté l'applicabilité de cet arrêt, le juge Martin a longuement analysé l'exception et il a en fait élargi la portée de l'arrêt *R. c. Lupien*. Cette expansion, aux pp. 173 à 175 de l'arrêt *R. c. McMillan*, a été confirmée par la Cour suprême du Canada:

> [TRADUCTION] Je ne considère pas que, du fait qu'il ne s'agit pas d'un crime qui n'aurait pu être commis que par une personne dotée d'une propension particulière ou anormale, la preuve psychiatrique relative à la prédisposition de M^me^ McMillan était par conséquent inadmissible dans les circonstances de l'espèce.

Pour être admissible, toute preuve doit évidemment être pertinente relativement à certaines questions soulevées dans l'affaire. La preuve psychiatrique relative aux traits de caractère ou à la prédisposition d'une personne, qu'il s'agisse ou non de l'accusé, peut être admissible à différentes fins. Si ces fins ne sont pas mutuellement exclusives, la preuve pertinente quant à une fin peut ne pas l'être quant à une autre.

Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:

(a) the evidence is relevant to some issue in the case;

(b) the evidence is not excluded by a policy rule;

(c) the evidence falls within the proper sphere of expert evidence.

One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime.

Where the offence is of a kind that is committed only by members of an abnormal group, for example, offences involving homosexuality, psychiatric evidence that the accused did or did not possess the distinguishing characteristics of that abnormal group is relevant either to bring him within, or to exclude him from, the special class of which the perpetrator of the crime is a member. In order for psychiatric evidence to be relevant for that purpose, the offence must be one which indicates that it was committed by a person with an abnormal propensity or disposition which stamps him as a member of a special and extraordinary class.

Psychiatric evidence with respect to the personality traits or disposition of the accused, or another, if it meets the three conditions of admissibility above set out, is also admissible, however, as bearing on the *probability* of the accused, or another, having committed the offence.

It would appear that it was upon this latter ground that the psychologist's evidence was held to be admissible in *Lowery v. The Queen, supra*, although the features of the offence in that case were sufficiently indicative of the possession of an abnormal propensity by the perpetrator, that the expert evidence might have been relevant to the issue of identity as well. Since in that case the evidence was offered by the accused King, it was not excluded by the policy rule which prevents the prosecution from introducing evidence to prove that the accused by reason of his criminal propensities is likely to have committed the crime charged. Both accused in *Lowery v. The Queen* had psychopathic personalities (although the features of King's psychopathic personality were

La preuve psychiatrique relative aux traits de caractère ou à la prédisposition d'une personne, qu'il s'agisse ou non de l'accusé, est admissible à trois conditions:

a) la preuve est pertinente quant à une question soulevée dans l'affaire;

b) la preuve n'est exclue par aucune règle de principe;

c) la preuve entre dans le domaine de la preuve d'expert.

La preuve psychiatrique peut être admise entre autres pour établir l'identité lorsque cet élément est soulevé dans l'affaire, puisque des caractéristiques tant psychiques que physiques peuvent être pertinentes relativement à l'identification de l'auteur du crime.

Lorsque l'infraction est de celles qui sont commises uniquement par les membres d'un groupe anormal, par exemple les infractions relatives à l'homosexualité, la preuve psychiatrique que l'accusé possédait ou non les caractéristiques distinctives de ce groupe anormal est pertinente relativement à son inclusion dans la catégorie particulière dont l'auteur du crime fait partie, ou à son exclusion. Pour que la preuve psychiatrique soit pertinente quant à cette fin, l'infraction doit indiquer qu'elle a été commise par un individu doté d'une propension ou d'une prédisposition anormale qui le désigne comme faisant partie d'une catégorie spéciale et extraordinaire.

Si elle satisfait aux trois conditions d'admissibilité énoncées ci-dessus, la preuve psychiatrique relative aux traits de caractère ou à la prédisposition d'une personne, qu'il s'agisse ou non de l'accusé, est toutefois également admissible comme portant sur la *probabilité* que l'accusé ou une autre personne ait commis l'infraction en cause.

Il semble que ce soit pour ce dernier motif que le témoignage du psychologue a été jugé admissible dans l'arrêt *Lowery c. The Queen*, précité, bien que les caractéristiques de l'infraction dans cette affaire aient suffisamment indiqué une propension anormale de l'auteur du crime pour que la preuve d'expert ait pu être pertinente relativement à la question de l'identité également. Puisque dans cette affaire la preuve a été produite par l'accusé King, elle n'a pas été exclue par la règle de principe qui interdit à la poursuite d'introduire une preuve pour établir qu'en raison de sa propension criminelle, l'accusé est susceptible d'avoir commis le crime reproché. Les deux accusés dans l'affaire *Lowery c. The Queen* ayant des personnalités de psychopathes (bien que les caractéristiques de la personnalité psychopathique de King soient moins marquées que celles de

less severe than Lowery's) and hence their personality traits fell within the proper sphere of expert evidence.

. . .

Where the crime under consideration does not have features which indicate that the perpetrator was a member of an abnormal group, psychiatric evidence that the accused has a normal mental make-up but does not have a disposition for violence or dishonesty or other relevant character traits frequently found in ordinary people is inadmissible. The psychiatric evidence in the circumstances postulated is not relevant on the issue of identity to exclude the accused as the perpetrator any more than the possession of violent or dishonest tendencies by the accused or a third person would be admissible to identify the accused or the third person as the perpetrator of the crime.

"So common a characteristic is not a recognisable mark of the individual." (*Per* Lord Sumner in *Thompson v. Director of Public Prosecutions* (1918), 26 Cox C.C. 189 at p. 199.)

While such evidence is relevant as bearing on the probability of the accused having committed the crime, the psychiatric evidence proffered in such circumstances really amounts to an attempt to introduce evidence of the accused's good character, as a normal person, through a psychiatrist. Such evidence does not fall within the proper sphere of expert evidence and is subject to the ordinary rule applicable to character evidence which, in general, requires the character of the accused to be evidenced by proof of general reputation.

I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible. [Emphasis in original.]

The evidence of the psychiatrist was held to be admissible.

Martin J.A. elaborated on the reasoning set out above in *R. v. Robertson*, *supra*. That case involved a 16-year-old accused charged with bru-

Lowery), leurs traits de caractère entraient dans le domaine de la preuve d'expert.

. . .

Lorsque le crime en cause ne présente aucune caractéristique indiquant que l'auteur faisait partie d'un groupe anormal, la preuve psychiatrique que l'accusé a une constitution mentale normale, mais qu'il n'a pas de prédisposition à la violence ou à la malhonnêteté ou d'autres traits de caractère pertinents que possèdent fréquemment les personnes ordinaires, est inadmissible. Dans les circonstances énoncées, la preuve psychiatrique n'est pas plus pertinente relativement à la question de l'identité en vue de déterminer que l'accusé n'est pas l'auteur du crime que ne serait admissible la preuve que l'accusé ou un tiers a une tendance violente ou malhonnête en vue de déterminer que l'accusé ou le tiers est l'auteur du crime.

«Une caractéristique si courante ne constitue pas une marque reconnaissable de l'individu.» (Les motifs de lord Sumner dans l'arrêt *Thompson c. Director of Public Prosecutions* (1918), 26 Cox C.C. 189, à la p. 199.)

Si une telle preuve est pertinente parce qu'elle porte sur la probabilité que l'accusé ait commis le crime, la preuve psychiatrique produite dans de telles circonstances équivaut réellement à une tentative d'introduire une preuve de la bonne moralité de l'accusé, comme une personne normale, par l'entremise d'un psychiatre. Une telle preuve n'entre pas dans le domaine de la preuve d'expert. Elle est assujettie à la règle ordinaire en matière de preuve de moralité qui, en général, requiert que la moralité de l'accusé soit démontrée au moyen de la preuve de sa réputation générale.

Je laisse ouverte, jusqu'à ce qu'elle doive être tranchée, la question de savoir, lorsqu'un crime, comme le viol, est présumé être commis par des personnes normales, si la preuve psychiatrique est admissible pour établir que l'accusé fait partie d'un groupe anormal possédant des caractéristiques en raison desquelles il est peu probable qu'il ait commis l'infraction, comme le fait qu'il soit un homosexuel ayant une aversion pour les relations hétérosexuelles. Je suis toutefois disposé à penser qu'une telle preuve est admissible. [En italique dans l'original.]

Le témoignage du psychiatre a été jugé admissible.

Le juge Martin a commenté le raisonnement énoncé ci-dessus dans l'arrêt *R. c. Robertson*, précité, où l'accusé de 16 ans était inculpé d'avoir tué

tally murdering a nine-year-old girl by kicking her. The defence sought to introduce expert psychiatric evidence to show that a propensity for violence or aggression was not a part of the accused's psychological make-up. This tended to rebut evidence led by the Crown as to the accused's violent character. Martin J.A. summed up, at p. 426:

While the judgment of Ritchie, J., deals only with the admissibility of psychiatric evidence with respect to disposition in offences involving homosexuality, there would appear to be no logical reason why such evidence should not be admitted on the same principle in other cases where there is evidence tending to show that, by reason of the nature of the offence, or its distinctive features, its perpetrator was a person who, in the language of Lord Sumner, was a member of "a specialized and extraordinary class", and whose psychological characteristics fall within the expertise of the psychiatrist, for the purpose of showing that the accused did not possess the psychological characteristics of persons of that class. Obviously, where such evidence is adduced by the accused, the prosecution is entitled to call psychiatric evidence in order to rebut the evidence introduced by the defence.

In my view, however, the judgment of Ritchie, J., in *R. v. Lupien, supra*, provides no support for a conclusion that, in the case of ordinary crimes of violence, psychiatric evidence is admissible to prove that the accused's psychological make-up does not include a tendency or disposition for violence.

Martin J.A. further stated, at pp. 429-30:

In my view, psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes a characteristic feature of an abnormal group falling within the range of study of the psychiatrist, and from whom the jury can, therefore, receive appreciable assistance with respect to a matter outside the knowledge of persons who have not made a special study of the subject. A *mere* disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused. [Emphasis in original.]

brutalement à coups de pied une fille de neuf ans. La défense avait tenté d'introduire une preuve psychiatrique d'expert pour démontrer que la constitution psychologique de l'accusé n'indiquait aucune propension à la violence ou à l'agression. Cette preuve visait à réfuter la preuve introduite par le ministère public au sujet de la nature violente de l'accusé. Le juge Martin a résumé à la p. 426:

[TRADUCTION] Si les motifs du juge Ritchie ne portent que sur l'admissibilité de la preuve psychiatrique relative à la prédisposition à commettre des infractions relatives à l'homosexualité, il ne paraît exister aucune raison logique de ne pas admettre une telle preuve en se fondant sur le même principe dans d'autres affaires où la preuve tend à démontrer qu'en raison de la nature de l'infraction ou de ses caractéristiques distinctives, son auteur faisait partie, dans les termes de lord Sumner, d'une «catégorie spéciale et extraordinaire», dont les caractéristiques psychologiques relèvent du domaine d'expertise du psychiatre, dans le but de démontrer que l'accusé ne possédait pas les caractéristiques psychologiques propres aux personnes de cette catégorie. De toute évidence, lorsqu'une telle preuve est produite par l'accusé, la poursuite peut produire une preuve psychiatrique pour la réfuter.

À mon avis, toutefois, l'opinion du juge Ritchie dans *R. c. Lupien*, précité, n'offre aucun appui à la conclusion que, dans le cas de crimes ordinaires de violence, la preuve psychiatrique est admissible pour démontrer que la constitution psychologique de l'accusé n'inclut aucune tendance ou prédisposition à la violence.

Le juge Martin a ajouté aux pp. 429 et 430:

[TRADUCTION] À mon avis, la preuve psychiatrique relative à la prédisposition ou à son absence est admissible pour le compte de la défense si elle est pertinente relativement à une question soulevée dans l'affaire, lorsque la prédisposition en question constitue un élément caractéristique d'un groupe anormal qui entre dans le domaine d'étude du psychiatre, et duquel le jury peut donc recevoir une aide appréciable à l'égard d'une question qui se situe à l'extérieur de la connaissance des personnes qui n'ont pas étudié le sujet. Une *simple* prédisposition à la violence n'est toutefois pas inhabituelle au point de constituer un élément caractéristique d'un groupe anormal qui entre dans le domaine particulier d'étude du psychiatre et qui permet que la preuve psychiatrique de l'absence d'une telle prédisposition chez l'accusé soit produite. [En italique dans l'original.]

Given this reasoning, Martin J.A. concluded that the crime was not specially marked and so the conditions for the admissibility of psychiatric evidence were not met.

Suivant ce raisonnement, le juge Martin a conclu que le crime n'était pas spécialement marqué, et que les conditions d'admissibilité de la preuve psychiatrique n'étaient donc pas remplies.

A useful summary of the principles that emerge from the cases is made by Alan W. Mewett, "Character as a Fact in Issue in Criminal Cases" (1984-85), 27 *Crim. L.Q.* 29, at pp. 35-36, of his article where he points out the various contexts in which an accused can tender character evidence by way of an expert:

Alan W. Mewett, dans un article intitulé «Character as a Fact in Issue in Criminal Cases» (1984-85), 27 *Crim. L.Q.* 29, aux pp. 35 et 36, résume utilement les principes qui ressortent de la jurisprudence. Il souligne les différents contextes dans lesquels un accusé peut produire une preuve de moralité par l'entremise d'un expert:

There are thus three basic requirements that must be met before such psychiatric evidence can even be considered as potentially admissible. First, it must be relevant to an issue. Second, it must be of appreciable assistance to the trier of fact and third, it must be evidence that would otherwise be unavailable to the ordinary layman without specialized training, but these requirements only set forth the general requirements for the admissibility of expert testimony.

[TRADUCTION] Il faut donc satisfaire à trois exigences fondamentales pour que la preuve psychiatrique puisse même être considérée comme peut-être admissible. Premièrement, elle doit être pertinente relativement à une question en litige. Deuxièmement, elle doit apporter une aide appréciable au juge des faits et troisièmement, elle ne pourrait être obtenue autrement par le profane ordinaire qui ne possède aucune formation spécialisée. Ces conditions ne font toutefois qu'énoncer les exigences générales d'admissibilité du témoignage d'expert.

Once these hurdles have been passed, a number of different scenarios may be postulated. The crime may be an "ordinary" one (which I take to mean a crime for which no special mental characteristics on the part of the perpetrator would be required) and the accused is an "ordinary" person; the crime may be an "ordinary" one, but the accused an "extraordinary" person (*i.e.*, having some peculiar mental make-up that would tend to show that he would not commit that "ordinary" crime); the crime may be "extraordinary", but the accused "ordinary"; or the crime may be "extraordinary" and the accused "extraordinary", in a different direction.

Une fois surmontés ces obstacles, différents scénarios peuvent être posés. Le crime peut être «ordinaire» (ce qui à mon avis signifie un crime pour lequel aucune caractéristique mentale particulière ne serait requise chez l'auteur du crime) et l'accusé, une personne «ordinaire»; le crime peut être «ordinaire», et l'accusé, une personne «extraordinaire» (c'est-à-dire que sa constitution mentale particulière tendrait à démontrer qu'il ne commettrait pas ce crime «ordinaire»); le crime peut être extraordinaire, mais l'accusé «ordinaire»; ou le crime et l'accusé peuvent tous deux être «extraordinaires», dans un sens différent.

In the first scenario, the evidence is irrelevant because it is simply not probative of anything. In the second it is probative and admissible but only if the extraordinary characteristic of the accused tends to show that he would not commit an ordinary crime of that nature (such as a homosexual being charged with a heterosexual offence). In the third, if it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess, it would be admissible. In the last scenario, the situation is the same provided that the difference in the abnormalities tends to exclude the accused from the probable group of perpetrators.

Dans le premier scénario, la preuve n'est pas pertinente parce qu'elle ne prouve simplement rien. Dans le second, elle n'est probante et admissible que si la caractéristique extraordinaire de l'accusé tend à établir qu'il ne commettrait pas un crime ordinaire de cette nature (comme l'homosexuel accusé relativement à une infraction de nature hétérosexuelle). Dans le troisième, s'il est démontré que le crime est tel qu'il ne pourrait être ou, selon toutes les probabilités, ne serait commis que par une personne ayant des caractéristiques identifiables que l'accusé ne possède pas, elle serait admissible. Dans le dernier scénario, la situation est identique, pour autant que la différence entre les éléments anormaux tende à exclure l'accusé du groupe probable d'auteurs.

I question whether use of the terms "abnormal" and "normal" is the best way to describe the concept that underlies their use. The term "abnormal" is derived from the English cases in which it usually connotes the mental state of insanity or diminished responsibility. See *R. v. Chard*, *supra*, at p. 270. The basic rationale of these cases is that "normal" human behaviour is a matter which a judge or jury can assess without the assistance of expert evidence. Canadian cases have extended the exception to include what has been described as sexually deviant behaviour. See Rosemary Pattenden, "Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia", [1986] *Crim. L.R.* 92, at p. 100. The rationale underlying this extension is the relevance of the evidence based on the distinctiveness of the behavioural traits of either the putative perpetrator of the crime or the accused. This distinctiveness tends to exclude the accused from the category of persons that could or would likely commit the crime.

There are other reasons why the use of the term "abnormal" is no longer satisfactory. Even in medical circles there are differing views as to what constitutes abnormality. See Pattenden, *supra*, at p. 100, and David C. Rimm and John W. Sommervill, *Abnormal Psychology* (1977), at pp. 31 and 32. Moreover, it imports a value judgment on the lifestyle of some groups in society. This is aptly illustrated by considering the statement of Lord Sumner in *Thompson v. The King*, [1918] A.C. 221, at p. 235:

> The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a housebreaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a

Je me demande si les termes «anormal» et «normal» sont la meilleure façon de décrire le concept qui sous-tend leur utilisation. Le terme «anormal» découle des affaires survenues en Angleterre, et dans lesquelles il dénote ordinairement l'état mental d'aliénation mentale ou de responsabilité amoindrie. Voir l'arrêt *R. c. Chard*, précité, à la p. 270. Selon le raisonnement qui sous-tend ces affaires, le comportement humain «normal» est une question que le juge ou le jury peut apprécier sans l'aide de la preuve d'expert. Au Canada, on a étendu l'exception pour y inclure ce qui a été qualifié de comportement sexuel déviant. Voir Rosemary Pattenden, «Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia», [1986] *Crim. L.R.* 92, à la p. 100. Cet élargissement est motivé par la pertinence de la preuve fondée sur le caractère distinctif des traits de comportement soit de l'auteur putatif du crime, soit de l'accusé. Ce caractère distinctif tend à exclure l'accusé de la catégorie de personnes qui pourraient commettre le crime ou qui seraient susceptibles de le commettre.

Il existe d'autres raisons pour lesquelles l'utilisation du terme «anormal» n'est plus satisfaisante. Même dans les milieux médicaux, il existe des opinions contradictoires quant à ce qui constitue l'anormalité. Voir Pattenden, *op. cit.*, à la p. 100, et David C. Rimm et John W. Sommervill, *Abnormal Psychology* (1977), aux pp. 31 et 32. En outre, le terme en question implique un jugement de valeur sur le style de vie de certains groupes de la société. Cela est bien illustré dans la déclaration de lord Sumner dans l'arrêt *Thompson c. The King*, [1918] A.C. 221, à la p. 235:

> [TRADUCTION] La preuve tend à attacher à l'accusé une caractéristique qui, bien que n'étant pas purement physique, peut, à mon avis, être reconnue comme portant à juste titre ce nom. L'expérience tend à démontrer que ces infractions contraires à la nature dénotent une inversion de caractéristiques normales qui, bien qu'elles commandent une punition parce qu'elles offensent la moralité sociale, tiennent également d'une propriété physique anormale. Le voleur, le tricheur, le faux monnayeur ou le cambrioleur n'est qu'un modèle particulier du genre escroc, et bien qu'il ne fasse pas de doute que chacun tend à s'en tenir à son propre domaine, ils possèdent tous la caractéristique mentale aucunement extraor-

characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.

The difficulty in defining what is abnormal was recently referred to by McCarthy J.A. in *R. v. Garfinkle* (1992), 15 C.R. (4th) 254. At pages 256-57, speaking for the court, he stated:

What dispositions are to be classified as abnormal, as outside ordinary human experience, for the purpose of admitting psychiatric evidence may be a difficult question. A disposition for sadism is clearly abnormal. Dispositions for violence (short of sadism or something akin thereto), or for dishonesty, are clearly too common to be classified as abnormal. In sexual offences, classification is less easy. However, it seems to me that, whether it be called pedophilia or something else, a disposition in an adult to use boys of 10 and 11 for sexual gratification must be classified as abnormal. Accordingly, in the present case, psychiatric evidence is admissible to show that Garfinkle does not have such a disposition.

In my opinion, the term "distinctive" more aptly defines the behavioural characteristics which are a pre-condition to the admission of this kind of evidence.

How should the criteria for the admission of this type of evidence be applied? I find the following statement of Professor Mewett, *supra*, at p. 36, to be an apt characterization of the nature of the decision which the trial judge must make:

The categorization of crimes into the "ordinary" and the "extraordinary" is therefore a legal question to be determined by the judge, as is the "normality" or "abnormality" of the accused — to the despair, no doubt, of psychiatrists. But admissibility of evidence is a legal question and depends primarily upon relevance, that is, upon its

dinaire qu'ils se proposent d'une façon ou d'une autre de gagner leur vie malhonnêtement. Une caractéristique si courante ne constitue pas une marque reconnaissable de l'individu. Toutefois, les auteurs des infractions qui sont en cause en l'espèce recherchent la gratification habituelle d'une certaine luxure pervertie, qui non seulement les exclut de la catégorie des hommes ordinaires qui se sont écartés du droit chemin, mais indique également qu'ils appartiennent à une catégorie spéciale et extraordinaire, tout autant que si leur corps était marqué par un trait physique particulier.

La difficulté à déterminer ce qui est anormal a récemment été mentionnée par le juge McCarthy de la Cour d'appel dans l'arrêt *R. c. Garfinkle* (1992), 15 C.R. (4th) 254. Aux pages 256 et 257, s'exprimant au nom de la cour, il a déclaré:

[TRADUCTION] La question de savoir quelles prédispositions doivent être qualifiées d'anormales, d'étrangères à la nature humaine ordinaire, dans le but d'admettre la preuve psychiatrique, peut être difficile à trancher. Une prédisposition au sadisme est manifestement anormale. Les prédispositions à la violence (sauf le sadisme ou quelque chose de semblable) ou à la malhonnêteté sont manifestement trop communes pour être qualifiées d'anormales. Les infractions sexuelles sont plus difficiles à classer. Toutefois, qu'on l'appelle pédophilie ou autre, il me semble que la prédisposition chez un adulte à utiliser des garçons de 10 et 11 ans pour obtenir une gratification sexuelle doit être qualifiée d'anormale. En conséquence, en l'espèce, la preuve psychiatrique est admissible pour démontrer que Garfinkle n'a pas une telle prédisposition.

À mon avis, le terme «distinctif» définit mieux les caractéristiques de comportement qui sont une condition préalable à l'admission de cette forme de preuve.

Comment les critères d'admission de cette preuve devraient-ils être appliqués? À mon avis, les propos suivants du professeur Mewett, précité, à la p. 36, qualifient bien la nature de la décision que le juge du procès doit prendre:

[TRADUCTION] La classification des crimes comme «ordinaires», ou «extraordinaires», est donc une question de droit, comme l'est la «normalité» ou l'«anormalité» de l'accusé — au désespoir, sans doute, des psychiatres. Mais, l'admissibilité de la preuve est une question de droit et dépend principalement de sa perti-

assistance to the trier of fact in his inference-drawing process, and this is governed, not by expertise, but by common sense and experience; words like "ordinary", "extraordinary" or "abnormal" are not meant to be scientific expressions but assessments of relevance and are thus clearly within the domain of the judge.

Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

(3) *Application to This Case*

I take the findings of the trial judge to be that a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioural characteristics that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences charged. Moreover,

nence, c'est-à-dire de l'aide qu'elle apporte au juge des faits en lui permettant de tirer des conclusions. Cette question repose non pas sur l'expertise, mais sur le bon sens et l'expérience; des mots tels «ordinaire», «extraordinaire» ou «anormal» ne sont pas destinés à être des expressions scientifiques, mais plutôt des appréciations de la pertinence. Par conséquent ils relèvent clairement du domaine du juge.

Avant d'admettre en preuve l'opinion d'un expert, le juge du procès doit être convaincu, en droit, que l'auteur du crime ou l'accusé possède des caractéristiques de comportement distinctives de sorte que la comparaison de l'un avec l'autre aidera considérablement à déterminer l'innocence ou la culpabilité. Bien que cette décision repose sur le bon sens et l'expérience, comme le professeur Mewett l'indique, elle n'est pas prise dans le vide. Le juge du procès devrait considérer, d'une part, l'opinion de l'expert et, d'autre part, si ce dernier exprime simplement une opinion personnelle ou si le profil de comportement qu'il décrit est couramment utilisé comme indice fiable de l'appartenance à un groupe distinctif. En d'autres termes, la profession scientifique a-t-elle élaboré un profil type du délinquant qui commet ce genre de crime? Une conclusion affirmative sur ce fondement satisfera aux critères de pertinence et de fiabilité. Non seulement la preuve d'expert tendra à prouver un fait en litige, mais elle offrira aussi au juge des faits l'aide dont il a besoin. Une telle preuve aura satisfait au critère préliminaire de la fiabilité qui fera généralement en sorte que le juge des faits ne lui accorde pas plus de poids qu'elle ne le mérite. La preuve sera considérée comme une exception à la règle d'exclusion relative à la preuve de moralité à condition bien sûr que le juge du procès soit convaincu que l'opinion exprimée se situe dans le domaine d'expertise du témoin expert.

(3) *Application à l'espèce*

À mon sens, le juge du procès a conclu qu'on ne peut dire de la personne qui a commis des agressions sexuelles sur de jeunes femmes qu'elle appartient à un groupe possédant des caractéristiques de comportement suffisamment distinctives pour faciliter l'identification de l'auteur des infrac-

the fact that the alleged perpetrator was a physician did not advance the matter because there is no acceptable body of evidence that doctors who commit sexual assaults fall into a distinctive class with identifiable characteristics. Notwithstanding the opinion of Dr. Hill, the trial judge was also not satisfied that the characteristics associated with the fourth complaint identified the perpetrator as a member of a distinctive group. He was not prepared to accept that the characteristics of that complaint were such that only a psychopath could have committed the act. There was nothing to indicate any general acceptance of this theory. Moreover, there was no material in the record to support a finding that the profile of a pedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these *indicia* of reliability, it cannot be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury. Given these findings and applying the principles referred to above, I must conclude that the trial judge was right in deciding as a matter of law that the evidence was inadmissible.

tions reprochées. En outre, le fait que l'auteur allégué du crime est un médecin n'a pas facilité la question parce qu'il n'existe aucune preuve acceptable indiquant que les médecins qui commettent des agressions sexuelles tombent dans une catégorie distinctive à laquelle se rattachent des caractéristiques identifiables. En dépit de l'opinion du Dr Hill, le juge du procès n'était pas non plus convaincu que les caractéristiques reliées à la quatrième plainte identifiaient l'auteur comme membre d'un groupe distinctif. Il n'était pas disposé à accepter que les caractéristiques de cette plainte étaient telles que seul un psychopathe pouvait avoir commis l'acte. Rien ne démontre que cette théorie soit généralement acceptée. Par ailleurs, aucun document dans le dossier ne permettait de conclure que le profil du pédophile ou du psychopathe a été normalisé au point où on pourrait soutenir qu'il correspond au profil présumé du délinquant décrit dans les accusations. Les profils de groupes décrits par l'expert n'ont pas été considérés suffisamment fiables pour être utiles. En l'absence d'indices de fiabilité, on ne pouvait pas dire que la preuve serait nécessaire au sens où elle clarifierait utilement une question qui serait autrement inaccessible, ou que la valeur qu'elle pourrait avoir ne serait pas surpassée par la possibilité qu'elle induise le jury en erreur ou le détourne de ses tâches. Compte tenu de ces conclusions, et appliquant les principes mentionnés ci-dessus, je dois conclure que le juge du procès a conclu à juste titre que, du point de vue juridique, la preuve était inadmissible.

The Court of Appeal also supported the admissibility of the evidence on the basis that Dr. Hill's evidence tended to rebut alleged similarities between the evidence on the respective counts. On this point, Finlayson J.A. stated at p. 178:

> Where, as here, the Crown alleges that the probative value of the similar fact evidence arises from the circumstance that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, the defence is equally entitled to lead evidence as to features of the alleged acts which demonstrate dissimilarities . . . .

La Cour d'appel avait aussi conclu à l'admissibilité de la preuve pour le motif que le témoignage du Dr Hill tendait à réfuter les similitudes alléguées entre la preuve relative aux divers chefs. À cet égard, le juge Finlayson a dit à la p. 178:

> [TRADUCTION] Lorsque, comme en l'espèce, le ministère public allègue que la valeur probante de la preuve de faits similaires naît du fait que les actes comparés sont si inhabituels et d'une similitude si frappante que cette similitude ne peut être attribuée à la coïncidence, la défense a elle aussi le droit de produire une preuve relative aux caractéristiques des actes allégués qui démontrent des différences . . .

The judgment of the Court of Appeal was not supported on this ground either in the respondent's factum or in the oral argument.

The use to which the jury could put the evidence was explained by the trial judge in his charge to the jury. The key passage in the charge in this respect was the following:

> If you conclude when considering any of the specific counts that evidence relating to any or all of the other counts is so similar that common sense dictates the relevancy of such evidence to one or more of the issues I mentioned earlier, then you may not must, draw the inferences to which I have referred. [Emphasis added.]

The similarities, which were detailed by the judge, were with respect to the *modus operandi* of the perpetrator of the acts which were the subject of the individual counts. No objection was taken to this aspect of the charge. This use of the similar fact evidence relates to a different issue from the subject matter of the proposed evidence of Dr. Hill. As discussed above, the dissimilarities addressed in Dr. Hill's proposed evidence are not as to *modus operandi* but rather with respect to the comparative psychological make-up of the respondent on the one hand and the alleged perpetrator of the acts charged, on the other. Furthermore, whether a crime is committed in a manner that identifies the perpetrator by reason of striking similarities in the method employed in the commission of other acts is something that a jury can, generally, assess without the aid of expert evidence. As stated by the trial judge, it is a matter of common sense.

I would allow the appeal, set aside the judgment of the Court of Appeal, restore the convictions and remit the matter to the Court of Appeal for disposition of the sentence appeal.

Appeal allowed.

Solicitor for the appellant: The Ministry of the Attorney General, Toronto.

Le jugement de la Cour d'appel n'a pas été appuyé à cet égard ni dans le mémoire de l'intimé, ni dans les débats.

Dans son exposé au jury, le juge du procès a expliqué l'utilisation que le jury pouvait faire de la preuve. Le passage clé de l'exposé à cet égard est le suivant:

> [TRADUCTION] Si vous déterminez, après avoir considéré un des chefs d'accusation, que la preuve relative à un ou à l'ensemble des autres chefs est semblable au point que le bon sens commande la pertinence d'une telle preuve quant à l'une ou plusieurs questions que j'ai mentionnées précédemment, vous pouvez alors tirer les conclusions que j'ai mentionnées. [Je souligne.]

Les similitudes, expliquées par le juge, portaient sur le *modus operandi* de l'auteur des actes qui étaient l'objet de chefs spécifiques. Aucune objection n'a été soulevée sur cet aspect de l'exposé. Cette utilisation de la preuve de faits similaires porte sur une question différente de l'objet du témoignage proposé du Dr Hill. Comme cela est indiqué plus haut, les différences dont traitait la preuve proposée par le Dr Hill ne concernaient pas le *modus operandi* mais plutôt la constitution psychologique du requérant comparée à celle de l'auteur des actes allégués. En outre, la question de savoir si le crime est commis d'une manière qui identifie l'auteur, en raison de similitudes frappantes dans la méthode utilisée pour perpétrer d'autres actes, peut être appréciée en général par un jury sans l'aide de la preuve d'expert. Comme le juge du procès l'a dit, c'est une question de bon sens.

Je suis d'avis d'accueillir le pourvoi, d'infirmer le jugement de la Cour d'appel, de rétablir les déclarations de culpabilité et de renvoyer l'affaire à la Cour d'appel pour qu'elle tranche l'appel de la sentence.

Pourvoi accueilli.

Procureur de l'appelante: Le ministère du Procureur général, Toronto.

Solicitors for the respondent: Greenspan, Humphrey, Toronto.

Procureurs de l'intimé: Greenspan, Humphrey, Toronto.

TAB 15

2011 CarswellOnt 12407, 2011 ONSC 6571, 209 A.C.W.S. (3d) 760

Williams v. Canon Canada Inc.

James Williams, Kathleen Schatz and Rafael Lipner, Plaintiffs/Moving Parties and Canon Canada Inc. and Canon Inc., Defendants/Respondents

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: September 12-14, 2011
Judgment: November 8, 2011
Docket: 07-CV-335257CP

Counsel: Henry Juroviesky, Kevin Caspersz, for Plaintiffs

Joseph D'Angelo, Paul Martin, for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Digital camera at times displayed error message, which plaintiff claimed was defect — Plaintiff originally stated that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceedings — Motion dismissed — Coherent and identifiable plaintiff class not shown — Qualification for class membership was ownership of one of several camera models which were not necessarily those owned by representative plaintiff.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Digital camera at times displayed error message, which plaintiff claimed was defect — Plaintiff originally stated that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceed-

ings — Motion dismissed — Insufficient common issues to warrant class proceedings — Fundamental question regarding common issues was whether plaintiffs established design defect, common to all cameras — Not shown that error message was in fact defect or that any defect applied to all class members' cameras in same manner — Plaintiffs on consent order were prevented from obtaining camera schematics and had not conclusively found source of defect.

Evidence --- Opinion — Experts — Qualification of expert — Miscellaneous

Digital camera at times displayed error message, which plaintiff claimed was defect — Web analyst did searches through popular website to ascertain scope of problems, and engineer also provided evidence as product failure expert — Plaintiff originally stated that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceedings — Motion dismissed — Evidence of web analyst not admitted — Insufficient evidence that web analysis was proper area of specialized expertise — Purported expert did not have accredited background in statistics — Possibility existed that research conducted by purported expert was flawed, and there was no way of testing reliability of some proffered evidence — Engineer did not have experience to be product failure expert — Engineer did not have training in cameras, had only examined relevant brand of camera by purchasing them over internet, and had acquired no expertise with cameras — Plaintiff's experts had prepared previous reports they refused to disclose — Defendant's experts were not required to deliver form regarding expert's duty.

Commercial law --- Sale of goods — Buyer's remedies — Consumer protection legislation — Applicability of legislation

Digital camera at times displayed error message, which plaintiff claimed was defect — Plaintiff originally stated that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceedings — Motion dismissed — Prospective plaintiffs purchased cameras from retailers not manufacturer and thus had difficulty establishing breach of contract — No claim for breach of contract existed, as no contract existed except for warranty, which was for repair not sale — Supply of services under warranty did not make manufacturer supplier of camera as good under Consumer Protection Act, and prohibition on unfair practices under Act did not apply — No representation by manufacturer had been made which could breach s. 52 of Competition Act.

Commercial law --- Agency — General principles

Digital camera at times displayed error message, which plaintiff claimed was defect — Plaintiff originally stated that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceedings — Motion dismissed — Agency of retailers had been pleaded as conclusion of law and was ordered struck.

Contracts --- Parties to contract — Privity — General principles

Digital camera at times displayed error message, which plaintiff claimed was defect — Plaintiff originally stated

that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceedings — Motion dismissed — Negligence had not been pleaded — Prospective plaintiffs purchased cameras from retailers not manufacturer and thus had difficulty establishing breach of contract — No claim for breach of contract existed, as no contract existed except for warranty, which was for repair not sale.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — Deprivation corresponding to enrichment

Digital camera at times displayed error message, which plaintiff claimed was defect — Web analyst did searches through popular website to ascertain scope of problems, and engineer also provided evidence as product failure expert — Plaintiff originally stated that error was caused by failure in algorithm of camera's computer, but had abandoned this theory and not offered new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act and breach of Competition Act and unjust enrichment — Plaintiff brought motion for certification of class proceedings — Motion dismissed — No cause of action existed for unjust enrichment, as manufacturer received no direct benefit from defective cameras.

Cases considered by *G.R. Strathy J.*:

Aronowicz v. EMTWO Properties Inc. (2010), 98 O.R. (3d) 641, *(*sub nom. *Aronowicz v. Emtwo Properties Inc.)* 258 O.A.C. 222, 2010 CarswellOnt 598, 2010 ONCA 96, *(*sub nom. *Aronowicz v. Emtwo Properties Inc.)* 316 D.L.R. (4th) 621, 64 B.L.R. (4th) 163 (Ont. C.A.) — referred to

Bank of Montreal v. ACS Precision Components Partnership (2011), 75 C.B.R. (5th) 229, 2011 ONSC 700, 2011 CarswellOnt 1168 (Ont. S.C.J.) — referred to

Benning v. Volkswagen Canada Inc. (2006), 2006 CarswellBC 2117, 2006 BCSC 1292 (B.C. S.C.) — considered

Bondy v. Toshiba of Canada Ltd. (2006), 2006 CarswellOnt 2525, 35 C.P.C. (6th) 293 (Ont. S.C.J.) — considered

Bondy v. Toshiba of Canada Ltd. (2007), 39 C.P.C. (6th) 339, 2007 CarswellOnt 1419 (Ont. S.C.J.) — referred to

Boulanger v. Johnson & Johnson Corp. (2003), 2003 CarswellOnt 2129, 174 O.A.C. 44 (Ont. C.A.) — followed

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — referred to

Campbell v. Flexwatt Corp. (1996), 25 B.C.L.R. (3d) 329, 50 C.P.C. (3d) 290, 1996 CarswellBC 1478 (B.C. S.C.) — referred to

Campbell v. Flexwatt Corp. (1997), 15 C.P.C. (4th) 1, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343, 1997 CarswellBC 2439, 98 B.C.A.C. 22, 161 W.A.C. 22 (B.C. C.A.) — referred to

Campbell v. Flexwatt Corp. (1998), 228 N.R. 197 (note), 120 B.C.A.C. 80 (note), 196 W.A.C. 80 (note)

(S.C.C.) — referred to

Canadian National Railway v. Norsk Pacific Steamship Co. (1992), 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289, 137 N.R. 241, 1992 A.M.C. 1910, *(*sub nom. *Norsk Pacific Steamship Co. c. Cie des Chemins de Fer nationaux du Canada)* [1991] R.R.A. 370, [1992] 1 S.C.R. 1021, 1992 CarswellNat 168, 53 F.T.R. 79, 1992 CarswellNat 655 (S.C.C.) — referred to

Canon Cameras, Re (2006), 237 F.R.D. 357 (U.S. Dist. Ct. S.D. N.Y.) — referred to

Carten v. Canada (2009), 358 F.T.R. 118 (Eng.), 2009 CarswellNat 4192, 2009 FC 1233 (F.C.) — referred to

Chace v. Crane Canada Inc. (1996), 32 C.C.L.T. (2d) 316, 5 C.P.C. (4th) 292, 26 B.C.L.R. (3d) 339, 1996 CarswellBC 1541 (B.C. S.C. [In Chambers]) — considered

Chace v. Crane Canada Inc. (1997), 44 B.C.L.R. (3d) 264, 1997 CarswellBC 2832, 164 W.A.C. 32, 101 B.C.A.C. 32, 14 C.P.C. (4th) 197 (B.C. C.A.) — referred to

Chartrand v. General Motors Corp. (2008), 2008 BCSC 1781, 2008 CarswellBC 3050, 84 M.V.R. (5th) 57, 75 C.P.C. (6th) 221 (B.C. S.C.) — referred to

CIBC Mortgages Inc. v. Vieira (2011), 2011 CarswellOnt 767, 2011 ONSC 775 (Ont. S.C.J.) — considered

Cloud v. Canada (Attorney General) (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — referred to

Denis v. Bertrand & Frere Construction Co. (2000), 2000 CarswellOnt 6190 (Ont. S.C.J.) — referred to

Ducharme v. Solarium de Paris Inc. (2010), 98 C.P.C. (6th) 386, 2010 CarswellOnt 7852, 2010 ONSC 5667 (Ont. S.C.J.) — referred to

Dulong v. Merrill Lynch Canada Inc. (2006), 2006 CarswellOnt 1843, 23 C.P.C. (6th) 172, 80 O.R. (3d) 378 (Ont. S.C.J.) — considered

Dumoulin v. Ontario (2005), 2005 CarswellOnt 4544, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72 (Ont. S.C.J.) — referred to

Ernewein v. General Motors of Canada Ltd. (2004), 2004 CarswellBC 2732, 2004 BCSC 1462 (B.C. S.C.) — referred to

Ernewein v. General Motors of Canada Ltd. (2005), 260 D.L.R. (4th) 488, 46 B.C.L.R. (4th) 234, 218 B.C.A.C. 177, 359 W.A.C. 177, 2005 BCCA 540, 2005 CarswellBC 2592, 19 C.P.C. (6th) 253 (B.C. C.A.) — considered

Ernewein v. General Motors of Canada Ltd. (2006), 2006 CarswellBC 680, 2006 CarswellBC 681, 353 N.R. 197 (note), 233 B.C.A.C. 320 (note), 386 W.A.C. 320 (note) (S.C.C.) — referred to

Forensic Support Services Inc. v. Out of the Cold Resource Centre Inc. (2005), 2005 CarswellOnt 2794 (Ont. Master) — referred to

Fresco v. Canadian Imperial Bank of Commerce (2009), 2009 C.L.L.C. 210-032, 84 C.C.E.L. (3d) 161, 71 C.P.C. (6th) 97, 2009 CarswellOnt 3481 (Ont. S.C.J.) — considered

Gardner v. Ontario (1984), 45 O.R. (2d) 760, 7 D.L.R. (4th) 464, [1984] 3 C.N.L.R. 72, 1984 CarswellOnt 909 (Ont. H.C.) — referred to

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — followed

Grant v. Canada (Attorney General) (2009), 81 C.P.C. (6th) 68, 2009 CarswellOnt 7642 (Ont. S.C.J.) — considered

Griffin v. Dell Canada Inc. (2009), 72 C.P.C. (6th) 158, 2009 CarswellOnt 560 (Ont. S.C.J.) — distinguished

Griffin v. Dell Canada Inc. (2009), 2009 CarswellOnt 4742 (Ont. Div. Ct.) — referred to

Harrington v. Dow Corning Corp. (2000), 2000 CarswellBC 2183, 2000 BCCA 605, 144 B.C.A.C. 51, 236 W.A.C. 51, 193 D.L.R. (4th) 67, [2000] 11 W.W.R. 201, 82 B.C.L.R. (3d) 1, 47 C.P.C. (4th) 191, 2 C.C.L.T. (3d) 157 (B.C. C.A.) — referred to

Harrington v. Dow Corning Corp. (2001), 2001 CarswellBC 1873, 2001 CarswellBC 1874, 276 N.R. 200 (note), [2001] 2 S.C.R. vii (S.C.C.) — referred to

Harris v. GlaxoSmithKline Inc. (2010), 78 C.C.L.T. (3d) 52, 106 O.R. (3d) 661, 272 O.A.C. 214, 2010 ONCA 872, 2010 CarswellOnt 9696 (Ont. C.A.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), *(*sub nom. *Hollick v. Toronto (City))* 56 O.R. (3d) 214 (headnote only), *(*sub nom. *Hollick v. Toronto (City))* 205 D.L.R. (4th) 19, *(*sub nom. *Hollick v. Toronto (City))* [2001] 3 S.C.R. 158, *(*sub nom. *Hollick v. Toronto (City))* 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — referred to

ITV Technologies Inc. v. WIC Television Ltd. (2003), 2003 FC 1056, 2003 CarswellNat 2744, 29 C.P.R. (4th) 182, 2003 CarswellNat 4812, 239 F.T.R. 203, 2003 CF 1056 (F.C.) — followed

ITV Technologies Inc. v. WIC Television Ltd. (2005), 332 N.R. 1, 2005 FCA 96, 2005 CarswellNat 664, 2005 CAF 96, 2005 CarswellNat 2645, 38 C.P.R. (4th) 481, 251 D.L.R. (4th) 208 (F.C.A.) — referred to

Koubi v. Mazda Canada Inc. (2010), 2010 CarswellBC 1122, 2010 BCSC 650 (B.C. S.C.) — followed

Lambert v. Guidant Corp. (2009), 2009 CarswellOnt 2535, 72 C.P.C. (6th) 120 (Ont. S.C.J.) — referred to

LeFrancois v. Guidant Corp. (2009), 2009 CarswellOnt 3415 (Ont. S.C.J.) — referred to

LeFrancois v. Guidant Corp. (2009), 2009 CarswellOnt 6005 (Ont. Div. Ct.) — referred to

MacDonald v. Sun Life Assurance Co. of Canada (2005), 2005 CarswellOnt 9910 (Ont. S.C.J.) — referred

to

Maynes v. Allen-Vanguard Technologies Inc. (2011), 274 O.A.C. 229, 2011 CarswellOnt 792, 2011 ONCA 125 (Ont. C.A.) — referred to

McCracken v. Canadian National Railway (2010), 3 C.P.C. (7th) 81, 2010 C.L.L.C. 210-044, 2010 CarswellOnt 5919, 2010 ONSC 4520 (Ont. S.C.J.) — followed

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331, 1995 CarswellOnt 994 (Ont. Gen. Div.) — referred to

Olsen v. Behr Process Corp. (2003), 2003 CarswellBC 1976, 17 B.C.L.R. (4th) 315, 2003 BCSC 1252 (B.C. S.C. [In Chambers]) — referred to

Paradis v. Vaillancourt (1943), [1943] O.W.N. 359, 1943 CarswellOnt 200 (Ont. H.C.) — referred to

Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée (2006), 35 C.P.C. (6th) 264, 2006 CarswellOnt 7317 (Ont. S.C.J.) — considered

Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée (2008), (sub nom. *Poulin v. Ford Motor Co. of Canada Ltd.)* 301 D.L.R. (4th) 610, 65 C.P.C. (6th) 247, 2008 CarswellOnt 6184, (sub nom. *Poulin v. Ford Motor Co. of Canada Ltd.)* 242 O.A.C. 209 (Ont. Div. Ct.) — referred to

R. c. J. (J.-L.) (2000), 2000 SCC 51, 2000 CarswellQue 2310, 2000 CarswellQue 2311, 261 N.R. 111, 37 C.R. (5th) 203, (sub nom. *R. v. J. (J-L.))* 192 D.L.R. (4th) 416, (sub nom. *R. v. J. (J-L.))* 148 C.C.C. (3d) 487, [2000] 2 S.C.R. 600 (S.C.C.) — considered

R. v. K. (A.) (1999), 27 C.R. (5th) 226, 45 O.R. (3d) 641, 125 O.A.C. 1, 67 C.R.R. (2d) 189, 137 C.C.C. (3d) 225, 176 D.L.R. (4th) 665, 1999 CarswellOnt 2806 (Ont. C.A.) — considered

R. v. Khan (1990), 113 N.R. 53, 79 C.R. (3d) 1, 41 O.A.C. 353, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 1990 CarswellOnt 108, 1990 CarswellOnt 1001 (S.C.C.) — referred to

R. v. Khelawon (2006), 355 N.R. 267, 274 D.L.R. (4th) 385, 220 O.A.C. 338, [2006] 2 S.C.R. 787, 42 C.R. (6th) 1, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, 2006 SCC 57, 215 C.C.C. (3d) 161 (S.C.C.) — referred to

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — followed

R. v. Smith (1992), 139 N.R. 323, 94 D.L.R. (4th) 590, 1992 CarswellOnt 997, 15 C.R. (4th) 133, 75 C.C.C. (3d) 257, [1992] 2 S.C.R. 915, 55 O.A.C. 321, 1992 CarswellOnt 103 (S.C.C.) — referred to

*Re*Collections Inc. v. Toronto Dominion Bank* (2010), 5 C.P.C. (7th) 214, 2010 ONSC 6560, 2010 CarswellOnt 9950 (Ont. S.C.J.) — referred to

Reid v. Ford Motor Co. (2003), 2003 BCSC 1632, 2003 CarswellBC 2672 (B.C. S.C.) — referred to

Rice v. Sockett (1912), 23 O.W.R. 602, 1912 CarswellOnt 673, 27 O.L.R. 410, 8 D.L.R. 84 (Ont. Div. Ct.) — considered

Ring v. Canada (Attorney General) (2010), 918 A.P.R. 86, 297 Nfld. & P.E.I.R. 86, 86 C.P.C. (6th) 8, 72 C.C.L.T. (3d) 161, 2010 NLCA 20, 2010 CarswellNfld 86 (N.L. C.A.) — referred to

Schick v. Boehringer Ingelheim (Canada) Ltd. (2011), 10 C.P.C. (7th) 167, 2011 CarswellOnt 24, 2011 ONSC 63 (Ont. S.C.J.) — referred to

Serhan Estate v. Johnson & Johnson (2004), 49 C.P.C. (5th) 283, 2004 CarswellOnt 2809, 11 E.T.R. (3d) 226, (sub nom. *Serhan (Estate Trustee) v. Johnson & Johnson)* 72 O.R. (3d) 296 (Ont. S.C.J.) — referred to

Singer v. Schering-Plough Canada Inc. (2010), 87 C.P.C. (6th) 276, 2010 ONSC 42, 2010 CarswellOnt 79 (Ont. S.C.J.) — followed

Singer v. Schering-Plough Canada Inc. (2010), 7 C.P.C. (7th) 344, 2010 CarswellOnt 9273, 2010 ONSC 6776 (Ont. S.C.J.) — referred to

Sorotski v. CNH Global N.V. (2006), 28 C.P.C. (6th) 45, 2006 CarswellSask 260, 2006 SKQB 168, 281 Sask. R. 212 (Sask. Q.B.) — referred to

Sorotski v. CNH Global N.V. (2006), 285 Sask. R. 125, 378 W.A.C. 125, 2006 SKCA 77, 2006 CarswellSask 418, 30 C.P.C. (6th) 363 (Sask. C.A. [In Chambers]) — referred to

Sorotski v. CNH Global N.V. (2007), 2007 CarswellSask 567, 47 C.P.C. (6th) 32, [2008] 1 W.W.R. 386, 2007 SKCA 104, 413 W.A.C. 83, 304 Sask. R. 83 (Sask. C.A.) — referred to

Sparkes v. Imperial Tobacco Canada Ltd. (2008), 2008 NLTD 207, 2008 CarswellNfld 346, 868 A.P.R. 177, 282 Nfld. & P.E.I.R. 177, 67 C.P.C. (6th) 152 (N.L. T.D.) — referred to

Sparkes v. Imperial Tobacco Canada Ltd. (2010), 911 A.P.R. 267, 295 Nfld. & P.E.I.R. 267, 84 C.P.C. (6th) 63, 2010 NLCA 21, 2010 CarswellNfld 87 (N.L. C.A.) — referred to

Stewart v. General Motors of Canada Ltd. (2007), 2007 CarswellOnt 3736 (Ont. S.C.J.) — considered

Stone v. Galaxy Motors Inc. (January 30, 1991), Doc. Victoria 800/89 (B.C. S.C.) — referred to

Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379, 1998 CarswellOnt 5216 (Ont. Gen. Div.) — referred to

Telus Communications Co. v. Bell Mobility Inc. (2007), 2007 BCSC 518, 2007 CarswellBC 786 (B.C. S.C. [In Chambers]) — referred to

Thorpe v. Honda Canada Inc. (2010), 2010 CarswellSask 78, 2010 SKQB 39, 352 Sask. R. 78 (Sask. Q.B.) — followed

Thorpe v. Honda Canada Inc. (2011), [2011] 8 W.W.R. 529, 373 Sask. R. 71, 9 C.P.C. (7th) 103, 2011 SKQB 72, 2011 CarswellSask 114 (Sask. Q.B.) — referred to

Tiboni v. Merck Frosst Canada Ltd. (2008), 60 C.P.C. (6th) 65, 2008 CarswellOnt 4523, 295 D.L.R. (4th) 32 (Ont. S.C.J.) — considered

Tompkins v. Alberta Wheat Pool (1997), 1997 CarswellAlta 323, 201 A.R. 93 (Alta. Master) — referred to

Walls v. Bayer Inc. (2005), 2005 MBQB 3, 2005 CarswellMan 5, 6 C.P.C. (6th) 79, 189 Man. R. (2d) 262, [2006] 4 W.W.R. 720 (Man. Q.B.) — referred to

Walls v. Bayer Inc. (2005), 2005 CarswellMan 279, 2005 MBCA 93, 257 D.L.R. (4th) 435, 195 Man. R. (2d) 293, 351 W.A.C. 293, 15 C.P.C. (6th) 377, [2006] 4 W.W.R. 711 (Man. C.A. [In Chambers]) — referred to

Walls v. Bayer Inc. (2005), 349 N.R. 394 (note), 389 W.A.C. 318 (note), 212 Man. R. (2d) 318 (note), 2005 CarswellMan 497, 2005 CarswellMan 498 (S.C.C.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton (2001), *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. (1995), 18 C.L.R. (2d) 1, [1995] 1 S.C.R. 85, 23 C.C.L.T. (2d) 1, 43 R.P.R. (2d) 1, [1995] 3 W.W.R. 85, 1995 CarswellMan 19, 176 N.R. 321, 1995 CarswellMan 249, 74 B.L.R. 1, 50 Con. L.R. 124, 100 Man. R. (2d) 241, 91 W.A.C. 241, 121 D.L.R. (4th) 193 (S.C.C.) — referred to

Wuttunee v. Merck Frosst Canada Ltd. (2007), 2007 CarswellSask 6, 2007 SKQB 29, 291 Sask. R. 161, 45 C.C.L.T. (3d) 38, [2007] 4 W.W.R. 309 (Sask. Q.B.) — referred to

Wuttunee v. Merck Frosst Canada Ltd. (2008), 2008 SKQB 78, 312 Sask. R. 162, 2008 CarswellSask 406 (Sask. Q.B.) — referred to

Wuttunee v. Merck Frosst Canada Ltd. (2008), 2008 SKQB 229, 2008 CarswellSask 336, 312 Sask. R. 265 (Sask. Q.B.) — referred to

Wuttunee v. Merck Frosst Canada Ltd. (2008), 2008 SKCA 79, 2008 CarswellSask 394 (Sask. C.A.) — referred to

Wuttunee v. Merck Frosst Canada Ltd. (2009), 2009 SKCA 43, 2009 CarswellSask 191, 69 C.P.C. (6th) 60, 324 Sask. R. 210, 451 W.A.C. 210, [2009] 5 W.W.R. 228 (Sask. C.A.) — referred to

Wuttunee v. Merck Frosst Canada Ltd. (2009), 401 N.R. 399 (note), 494 W.A.C. 318 (note), 359 Sask. R. 318 (note), 2009 CarswellSask 681, 2009 CarswellSask 682 (S.C.C.) — referred to

Zidaric v. Toshiba of Canada Ltd. (2000), 2000 CarswellOnt 4611, 5 C.C.L.T. (3d) 61 (Ont. S.C.J.) — referred to

578115 Ontario Inc. v. Sears Canada Inc. (2010), 2010 ONSC 4571, 2010 CarswellOnt 7016, 325 D.L.R. (4th) 343 (Ont. S.C.J.) — followed

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2009), 70 C.P.C. (6th) 27, 2009 CarswellOnt 2533, 96 O.R. (3d) 252, 250 O.A.C. 87 (Ont. Div. Ct.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(b)-5(1)(e) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 23 — considered

s. 23(a) — considered

s. 23(b) — considered

s. 24 — referred to

Competition Act, R.S.C. 1985, c. C-34

Pt. V — referred to

Pt. VI — referred to

s. 36 — considered

s. 36(1) — referred to

s. 52 — considered

s. 52(1) — considered

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A

Generally — referred to

Pt. I — referred to

Pt. II — referred to

Pt. III — referred to

s. 1 "consumer" — considered

s. 1 "consumer agreement" — considered

s. 1 "consumer transaction" — considered

s. 1 "goods" — considered

s. 1 "payment" — considered

s. 1 "services" — considered

s. 1 "supplier" — considered

s. 3 — considered

s. 9 — considered

s. 9(1) — considered

s. 9(2) — considered

s. 9(3) — considered

s. 14(1) — considered

s. 14(2) — considered

s. 14(2) ¶ 1 — considered

s. 14(2) ¶ 2 — considered

s. 14(2) ¶ 14 — considered

s. 17(1) — considered

s. 18 — considered

s. 18(3) — referred to

s. 18(15) — referred to

s. 92 — referred to

s. 94 — referred to

s. 98 — referred to

s. 98(3) — considered

s. 100 — referred to

s. 101 — referred to

Sale of Goods Act, R.S.O. 1990, c. S.1

Generally — referred to

Rules considered:

Federal Rules of Civil Procedure, 28 U.S.C., Appendix

R. 23 — considered

R. 23(a) — considered

R. 23(b) — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 4.06(2) — referred to

R. 4.1.01(1) [en. O. Reg. 438/08] — referred to

R. 21 — referred to

R. 25.06(2) — considered

R. 26.01 — considered

R. 39.01(4) — considered

R. 52.03 — considered

R. 53 — considered

R. 53.03 — considered

R. 53.03(1) — considered

R. 53.03(2) — considered

R. 53.03(2.1) ¶ 7 [en. O. Reg. 438/08] — considered

R. 53.03(2.1) ¶ 7 [en. O. Reg. 438/08] — considered

R. 53.03(3) — considered

Forms considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Form 53 — referred to

MOTION by plaintiff for certification of proceedings as summary judgment.

***G.R. Strathy J.*:**

I. Introduction

1 The plaintiffs move to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*") on behalf of a class of owners of cameras manufactured by the defendant Canon Inc. and distributed in Canada by the defendant Canon Canada Inc. (collectively, "Canon").

2 The plaintiffs' claim relates to 20 models in the "PowerShot" line of cameras sold by Canon between July 30, 2005 and the present ("the "Cameras").[FN1] The Cameras allegedly have a common defect, referred to as the "E18 Error," which allegedly causes the Cameras to shut down and to remain inoperable. The first version of the statement of claim pleaded that this defect was an error in the "algorithm" used by the Cameras' internal computer. That allegation has now been abandoned and it is alleged that the E18 Error is a "design deficiency" that "renders the Cameras prone to the unexpected manifestation of the E18 Error message."

3 The plaintiffs plead that the E18 Error is caused by a defect in the design or manufacture of the Cameras that makes the Cameras unmerchantable and unfit for their intended use. They say that this is an ideal case for a class action, because it will bring access to justice to thousands of consumers who have a common complaint, will promote greater care and attention on the part of manufacturers, and will achieve the goal of judicial economy by aggregating numerous claims in one proceeding — claims that would not otherwise be realized in individual actions.

4 For the reasons that follow, I have concluded that this action is not appropriate for certification, primarily because there is no factual basis for the assertion that the plaintiffs' cameras share a defect that is common to all the Cameras.

II. Background Facts

A. The E18 Error Message

5 Like many digital cameras, PowerShot digital cameras have a liquid crystal display ("LCD") screen on the back of the camera, facing the user. When a user frames a picture, the LCD shows the image of the object on which the camera is focused. After the picture is taken, the image may be displayed on the LCD screen. In addition, the camera uses the LCD screen to display function settings and messages and to guide the user through various operational steps.

6 The E18 Error message appears on a PowerShot digital camera's LCD screen when the camera senses a problem with the movement of its lens barrel. This could be caused by the "start" button being pushed when the camera is still in its case, or in a pocket, or by the user's hand obstructing the movement of the barrel, or by dirt, sand or other material on the exterior or interior of the lens barrel, impeding its movement. It could also be caused by physical damage to the camera, which could distort the alignment of the interconnecting tubes of the lens barrel, preventing a smooth opening.

7 When the camera's lens barrel extends or retracts, the camera's computer monitors whether the movement is completed within a specified time. If the lens barrel does not complete the movement within that time, the computer assumes that there is a problem, displays an E18 Error message on the LCD screen and shuts down the camera. The purpose of the shut-down is to avoid permanent damage to the lens mechanism due to stress on the lens barrel. The purpose of the E18 Error message is to alert the user that there is a problem and, hopefully, to send him or her to the owner's manual to find out the reason.

8 This is an important point, because the display of the E18 Error message and the automatic shut-down is an intentionally designed safety feature of the Cameras. The display of the E18 Error on the LCD screen is not necessarily an indication that the camera is malfunctioning — it may well be functioning exactly as it is supposed to, in order to prevent the camera from sustaining further damage. While the display of this cryptic message, and the inability to use the camera, may be frustrating to the user, the problem may be resolved by restarting the camera with the obstruction removed, by checking the user manual for other instructions, or by sending the camera for a repair under warranty (if the one-year warranty is still in effect) or taking it to a camera repair shop.

B. The Plaintiffs' Evidence

1. The Representative Plaintiffs

9 This action was originally commenced with only one proposed representative plaintiff, Hillel Berkovits. By order dated October 6, 2010, Mr. Berkovits was permitted to withdraw and James Williams, Kathleen Schatz and Raphael Lipner were added as plaintiffs. Mr. Williams now wishes to withdraw for personal reasons, and, for reasons set forth below, an order will issue to that effect.

10 The plaintiff Kathleen Schatz lives in British Columbia. In about May 2005, she bought a Canon "S500 Digital Elph" camera in Alberta for approximately $440. The camera came with a one year warranty. She affirms that the camera worked until November 2006, when an E18 Error message was displayed after she turned on the camera. Her camera has not worked since that time. She says that she did not abuse the camera in any way. She says that she has been told that it would cost more to repair her camera than to replace it.

11 The plaintiff Raphael Lipner lives in Ontario. He bought a Canon "PowerShot SX100" camera in Toronto in 2008 for about $300. Shortly after the one-year warranty expired, he tried to turn the camera on and it displayed a message stating "Lens error, restart camera."[FN2] At the suggestion of Canon, he had the camera repaired for about $100. The camera worked for a while, but about six months later, the same problem occurred. He had the camera repaired again, and it worked again for a while. Again the problem occurred. He had the camera repaired a third time. A short while later, the "Lens error, restart camera" message appeared and the camera would not work. He decided to buy a new camera. He swears that he did not misuse or abuse his camera in any way.

12 The defendants' evidence, which I will discuss shortly, is that the cameras of Mr. Lipner and Ms. Schatz had suffered abuse that likely caused the E18 Error message to be displayed.

2. The Plaintiffs' Experts

13 I will briefly summarize the expert evidence tendered by the plaintiffs. For the reasons set out later, I have concluded that two of the witnesses put forward by the plaintiffs as experts, Mr. Atkins and Mr. Joffe, are

not qualified to give expert evidence and their evidence will be struck. As their evidence is critical to the propositions that there is a basis in fact for the plaintiffs' claims and that these claims give rise to common issues capable of advancing this proceeding as a class action, the result is that the action cannot be certified.

Christopher Atkins

14 Mr. Atkins was put forward by the plaintiffs as an expert in "consumer product failure." I will discuss his qualifications later in these reasons. He attended the inspection carried out on the plaintiffs' cameras by the defendants' expert, Mr. Hieber. Oddly enough, Mr. Atkins himself did not personally inspect the plaintiffs' cameras to determine why they may have displayed the E18 Error message. He did examine some 50 other "exemplar" Canon cameras and lens units that he had purchased on eBay, but he refused to bring them to his cross-examination in spite of defendants' counsel requesting that he do so. It was admitted that the majority of the "exemplar" cameras he examined (7 out of 11) are models that are not at issue in this action. It is also admitted that some of the cameras he inspected disclosed E18 Error messages, but he was unable to say which cameras demonstrated the error or why they did so. He did not investigate the cause of the E18 Error messages on those cameras.

15 The substance of Mr. Atkins' opinion is contained in his "Executive Conclusions" at the outset of his report as follows:

> It is our opinion that the "E-18" or "Lens Error Restart" message in the subject cameras was consistent with a design deficiency in the optical unit of the cameras, described later in this report.
>
> It is also our opinion that the design deficiency in the optical unit is due to its intricate and highly complicated nature and the subsequent lack of the mechanism to possess prevention features to guard against the even minimal amount of dust and debris. Under typical usage and normal conditions, the subject cameras are vulnerable to fail and produce the "E-18" or "Lens Error Restart".

16 Mr. Atkins testified on cross-examination that the occurrence of the E18 Error message was "consistent with" a design deficiency in the Cameras, but he acknowledged that it could be consistent with other things, such as impact damage or debris inside the camera. He also admitted that the camera is programmed to display the E18 Error message and that it can be triggered for many reasons.

Josh Joffe

17 Mr. Joffe is proffered as an expert in "web analytics" and "statistics." He was retained by the plaintiffs' counsel to determine whether the E18 Error is a statistically significant problem based on "its internet presence and the level of 'web chatter' on the topic." He was also asked to review Canon's expert reports and to determine the statistical value and accuracy of their opinions.

18 Mr. Joffe produced a report entitled "Canon E18 Project - Efficacy of Claims/Preliminary Findings: A Technical Review Using Web Analytics and Statistics." He states in the "Background" section of his report that:

> The objective of this report is to provide an analysis of the prevalence of the E18 Error and related "Lens Error/Restart (Camera)" error using web analytics and statistical procedures, as well as critique the approach used in documents related to this case.

19 Mr. Joffe never does define what "web analytics" is, although it appears to involve analysis of the occur-

rence of certain expressions on the internet. He says that "Given Google's dominance, it is well accepted that the frequency of [the occurrence of] a search term is directly proportional to the popularity or use of that search term on the internet." He describes different forms of searches, such as using quotation marks around a string of words, so that Google indexes only the exact wording, and also using related searches, such as "E18 error" in conjunction with "camera lens error."

20 Mr. Joffe carried out "Google" searches on the internet on the "E18 Error" or "Lens Error Restart" and similar terms. He typed in certain keywords, or combinations of words, and observed the number of hits to identify "complaints". From these hits, and comparing them to complaints about other brands of cameras, he concluded that:

(a) "[T]he E18 Error is either the largest or one of the largest most frequently occurring complaints about digital cameras on the internet."

(b) "[W]with regards to lens errors, there is meaningfully more 'chatter' on the internet with respect to Canon than other digital camera brands."

(c) Canon's expert witnesses had failed to provide an accurate or complete analysis of the frequency of the E18 Error in the population of Canon digital camera users.

(d) There are significantly more internet complaints relating to the E18 Error than are reflected in Canon's service reports, suggesting that Canon has failed to adequately respond to customers' complaints.

Paul Mandel

21 Mr. Mandel is a partner with the accounting firm of Collins Barrow Toronto LLP, specializing in business valuation and litigation support. He concludes, based on certain factual assumptions, that all class members have sustained economic damages due to the E18 Error and that these damages are capable of being calculated on an aggregate basis.

C. The Defendants' Evidence

22 Canon Inc. is a Japanese company that designs and manufactures electronic products, including the PowerShot line of digital cameras. PowerShot digital cameras are assembled at factories owned by Canon Inc. subsidiaries.

23 Canon Inc. does not market or sell PowerShot digital cameras directly to retailers or consumers. Rather, it distributes the cameras through sales subsidiaries located around the world. Canon Canada, Inc. ("Canon Canada") is the Canon Inc. sales subsidiary responsible for sales in Canada to third party retailers who, in turn, sell directly to consumers.

1. The Defendants' Fact Witnesses

Henrique Teixeira

24 Mr. Teixeira is the Manager of Service Planning and Quality Assurance of Canon Canada. He has been with Canon Canada since 1996 with responsibilities for technical support, consumer service, and quality assurance. Among other things, he manages the technical support network for Canon Canada.

25 Mr. Teixeira states that the plaintiffs' allegations that there is a defect in the Cameras at issue are "false." In particular, he states that "there is no malfunction in any algorithm used by Canon Inc. in the digital camera models at issue" in this litigation and notes that the plaintiff has not offered any evidence of such a malfunction or other defect.

26 Mr. Teixeira explains that the E18 Error message identifies a problem with the movement of the camera's lens barrel. An internal computer in the camera is programmed to determine whether the lens barrel extends or retracts within a specified time. If it fails to do so, the computer displays the E18 Error code and shuts the camera down in order to avoid potential damage to the lens mechanism or stress to the lens barrel.

27 The causes of the underlying problem — the inability of the lens barrel to move properly — are potentially numerous, including:

- the consumer inadvertently holding the lens barrel or obstructing its movement;
- the camera being powered up while still in its case;
- obstruction of the movement of the lens barrel by sand or liquids;
- impact damage;
- damage to the mechanical drive or gear teeth;
- flaws in workmanship or materials.

28 Mr. Teixeira analyzed the sales and repair databases of Canon Canada for the period January 2000 to April 2009 for the camera models referred to in the statement of claim. He concluded that during this period a total of 977,085 Cameras were sold and, of these, some 88,615 (or 9.07%) were repaired for any reason. The number of Cameras of the models at issue that were repaired because they displayed the E18 Error code was 5,829 or 0.60% of the total sold. He concludes from this that the "vast majority of the cameras which were repaired were repaired for reasons that had nothing to do with the E18 Error code message."

29 Mr. Teixeira adds that some 5,380 Cameras of the models referred to (or 0.55% of the total sold) were repaired to address an issue involving the display of the E18 Error code caused by reasons other than customer misuse or abuse. He claims that these statistics are "completely inconsistent with the notion that there is a common defect in the PowerShot digital camera models at issue that causes the E18 Error code message to appear on the LCD screen and the Cameras to become inoperable."

30 It is Mr. Teixeira's conclusion that Canon's repair records do not establish the existence of any "common defect" in the Cameras at issue.

Hideo Nagumo

31 Mr. Nagumo is the Deputy Senior General Manager of the Image Communication Products Quality Assurance Centre for Canon Inc. in Tokyo, Japan. He has had over 25 years of experience in quality assurance and technical support for video cameras and digital imaging products.

32 Mr. Nagumo's department monitors the quality of products, including the PowerShot product line, after

they have been released onto the market. The department monitors, in Japan, the number of units sold, the number of units returned for repair, the types of repairs performed, and the number of repairs that are not caused by customer abuse or misuse. Where a repair trend is detected, an investigation will be made to determine whether a particular model has a performance problem.

33 Mr. Nagumo deposes that, contrary to the allegations made in the statement of claim, the camera models at issue in this litigation do not share a common defect caused by a malfunction in the algorithm used by the camera's internal process. He says that the purpose of the error code is to avoid permanent damage to the lens mechanism due to stress to the lens barrel. He notes that in some cases, the E18 Error message can be corrected by turning the camera off and on, which resets the camera's software. If the obstruction is removed — for example, by taking the camera out of its case or removing the operator's hand from the lends area — the lens should extend and function properly, thereby resolving the error message. If, however, the lens barrel has been damaged, in such a way as to affect the internal mechanism, the lens barrel may stop functioning — in that event, the camera will require professional inspection and repair. Determining whether the condition was created by customer abuse, or by other circumstances, will require an internal inspection.

34 Mr. Nagumo denies that the Cameras have a common material defect. He notes, as did Mr. Texeira, that less than 1% of all the cameras sold by Canon Canada in the period January 2000 to April 2009 were repaired as a result of the display of the E18 Error message.

2. The Defendants' Experts

35 The plaintiffs have objected to the admissibility of the evidence of the defendants' expert witnesses on the ground that they have failed to file an acknowledgment of expert's duty in Form 53, as prescribed by Rule 53.03(2.1).7 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194. For reasons set out later, I find that it is not necessary to file a Form 53 where the expert's evidence is tendered for use on a motion.

Richard Hieber

36 Mr. Hieber is a Technical Support Engineer employed at Canon U.S.A., Inc. He has approximately 15 years experience as a digital camera technician and has been with Canon since 2000. He now trains other Canon technicians. He examined the cameras of the three representative plaintiffs on December 7, 2010. He had previously conducted an examination of eight allegedly defective Canon PowerShot digital cameras in May 2006, in connection with class action litigation in the United States.

37 Mr. Hieber's conclusions were, in brief summary, as follows:

- The lens barrel on Mr. Lipner's camera would not extend and a "lens error" message was displayed on the LCD screen — he attributed this to "customer abuse or misuse, most likely by impact to the lens unit area, which has caused the lens barrel to sit out of alignment."

- Ms. Schatz's camera had a similar problem, with the lens barrel failing to extend and an E18 Error message appearing. He observed a "dent" on the camera, which he attributed to a "strong impact." He also found some grains of sand inside the camera body and concluded that these could adversely affect lens movement, thereby causing the E18 Error message. It was his conclusion that "the alleged malfunction of Ms. Schatz's camera was caused by customer abuse or misuse, specifically impact damage to the front cover and/or the presence of sand inside the camera."

• Mr. Williams' camera did not display an "E-18" message, but it had an entirely unrelated problem, related to the shutter button, which in his opinion was due to "customer abuse."

38 It was Mr. Hieber's conclusion that all three of the plaintiffs' cameras were capable of being repaired and restored to good working order.

39 A controversy arose on the motion, initially in the context of the plaintiff's motion to amend the statement of claim, concerning the transcript of Mr. Hieber's cross-examination. Counsel for the plaintiffs, Mr. Juroviesky, submitted that the reason for the plaintiff moving to amend the statement of claim, at a late stage, to plead (in paragraphs 17-19), that the Cameras were not designed to withstand "typical" or "prototypical use," was that Mr. Hieber had admitted, on his cross-examination on April 18, 2011, that the Cameras were not designed to withstand the "sand tests" and the "drop tests" to which they were submitted during testing.

40 Mr. Hieber swore in his affidavit that the Cameras were tested for their resistance to sand at the factory. He testified that he had never observed the testing of cameras and that he had no manuals, books, checklists or other technical literature from Canon concerning testing at the production stage. After testifying that sand within the optical unit could, depending on its location, cause a malfunction that would generate an E18 Error, and that the same could happen if sand got caught between the collapsing barrels on the exterior of the lens, he was asked how many grains of sand would be required as the "threshold amount" to trigger the malfunction, he replied, in response to Q. 484:

I wouldn't know.

41 He was then asked whether certain tests were done at the production stage. He replied that a "drop test" was done. When asked whether a sharp impact was used to test the Cameras at that stage, he replied, "I know they do an impact test or drop test, but I do not know the actual test." He went on to state that he was not sure of the nature of the test.

42 The contentious answer, as recorded in the transcript, was then given to the following question:

> 490. Q. So we've talked about the sand resistance test and the drop test at the production confirmation stage for Canon PowerShot cameras, would you agree that the Canon PowerShot cameras are then designed to resist the amount of sand and the type of drops indicated in these tests?
>
> A. I wouldn't, no.

43 The questioning then continued:

> Q. Would you agree that a certain degree of sand and impacts due to drops are thereby typical of normal usage in the hands of a consumer?
>
> A. Based on my experience, what I have seen, impact and sand damage are very common issues with consumer products.

44 In the course of his submissions on the motion to amend the statement of claim, Mr. Juroviesky stated that the plaintiffs relied on Mr. Hieber's answer to question 490, as an admission that Canon's cameras were not designed to withstand the sand and dropping to which they were exposed during routine testing at the factory. There was an immediate objection by counsel for Canon, who stated that the transcript was clearly in error and

that the answer was in fact, like the witness's earlier answer at Q. 484:

A. I wouldn't know.

45 Mr. Juroviesky noted that the answer had never been corrected by the witness and that reference had been made to this evidence in the plaintiff's original factum and in his reply factum, so his position could not have been a surprise to defendants' counsel.

46 Counsel for the defendants arranged to obtain the recording of the examination. A copy was provided to me. Each side claims that the recording supports its interpretation.

47 I have listened to the recording. It is impossible to tell from the sound whether the word is "know" or "no", as they both sound the same. There was a slight pause between the word "wouldn't" and "no" or "know" and it appears that the reporter, who was dictating in parallel with the recording, gave the typist an instruction to insert a comma between the two words. Taken in context, however, particularly considering Mr. Hieber's answer to Q. 484 and his lack of personal knowledge of the testing procedures actually carried out at the factory, it is much more likely that his answer was "I wouldn't know." Since he had no personal involvement in either the design or testing of the cameras, he would clearly not know whether the cameras were designed to resist the amount of sand and drops to which they were subjected.

48 Reading the questions that followed question 490, it does not appear to me that counsel for the plaintiffs regarded Mr. Hieber's answer as an admission that the cameras were not designed to meet the testing to which they were subjected at the factory. I do not regard it as an admission to that effect.

R. David Etchells

49 Mr. Etchells is the Publisher and Editor-in-Chief of The Imaging Resource, a website founded in 1998, that offers information concerning, and reviews of, the wide range of digital cameras available in the market-place. Mr. Etchells has extensive experience in the digital photography field and has supervised or conducted in-depth testing and analysis of over 600 digital camera models. In broad summary, his opinion is:

- Canon digital cameras have enjoyed outstanding, and growing, sales success in the market place and since 2005 Canon has been the world leading digital camera manufacturer, based on sales — its cameras routinely dominated the most popular models on his website;

- Canon cameras are, in general, well-designed and well-constructed products that have a reputation in the industry for consistent quality and consumer satisfaction;

- Consumer publications such as *Consumer Reports* and *PC Magazine* have consistently rated Canon digital cameras, including PowerShot cameras, at or near the top of the industry in terms of quality, reliability and customer satisfaction;

- Canon cameras routinely win positions on his web site's assessment of the best cameras on the market;

- Canon's written one-year warranty is quite standard in the digital camera industry;

- The manner in which digital camera owners care for their cameras varies greatly;

• Consumer postings on the internet are heavily skewed to the negative and are not an accurate reflection of consumer experience with a particular brand or model of digital camera.

50 Mr. Etchells was also retained by the defendants to review and comment on the report prepared by Mr. Joffe.

51 Mr. Etchells challenges the integrity of the data relied upon by Mr. Joffe and questions his methodology. His conclusions can be summarized in the following comment:

> The E18 Error is not, as Plaintiff's expert Mr. Joffe claims 'either the largest or one of the largest most frequently occurring complaints about digital camera on the internet.' Mr. Joffe's data showing this to be the case is based on false data, a lack of understanding of sampling error in statistical measurements, his discounting of valid data demonstrating the contrary, and careless, inattentive analysis of the data he does examine.

52 He continues:

> Overall, Mr. Joffe has completely failed to show any elevated incidence of E18-associated failure among cameras named in the litigation as compared to lens problems in other manufacturer's cameras. His 'statistical' analysis is based on data which is either demonstrably (and very obviously) false and artificial, or data selected with clear, inherent sampling errors that artificially bias results towards evidence of E18 prevalence.

David L. Trumper

53 Mr. Trumper is a professor of Mechanical Engineering at Massachusetts Institute of Technology. His expertise is in the area of design, development, manufacture and testing of electromechanical systems and devices, including devices that are as sophisticated or more sophisticated than digital cameras. He was retained by the defendants to review an expert report, since withdrawn by the plaintiffs, of James Hood, who had expressed an opinion that the E18 Error was a significant defect in Canon cameras that affected a large portion of, if not all, product owners. Mr. Hood was apparently the president and editor of a consumer affairs website. As Mr. Hood's report is not part of the evidentiary record, this aspect of Mr. Trumper's evidence is irrelevant.

54 In a second report, Mr. Trumper reviewed Mr. Joffe's report. He describes the report as meaningless, inaccurate and misleading, based on false assumptions and incorrect data. He says that Mr. Joffe has misused statistical models and has failed to apply logical reasoning. Among other criticisms, Mr. Trumper points out that the number of initial "hits" identified on a Google search is not reflective of the number of times the results actually appear on web pages and still less reflective of the underlying content of the particular pages. Moreover, the fact that there are a number of "hits" in response to the query "Canon Digital Camera Error" does not tell one anything about the underlying truth of the assertions made on the web pages.

III. Preliminary Motions and Objections

55 In this section, I will address several preliminary procedural matters, as well as objections made by each party to the expert evidence tendered by the other party.

A. Motion to Amend Statement of Claim

56 The plaintiffs brought a motion, at the opening of the hearing, for leave to deliver an "Amended Amended Amended Fresh as Amended Statement of Claim." This proposed pleading, which is the sixth iteration of the statement of claim, was delivered on August 16, 2011, only a few weeks before the hearing and after all the certification records had been delivered and cross-examinations completed. The defendants have not delivered a statement of defence.

57 The defendants opposed the motion. Their primary complaint was that the definition of the "Defect" had changed, to mean "a design deficiency that renders the Cameras prone to the unexpected manifestation of the E18 Error message (shown as the 'Lens Error Restart' in the case of SX 100 IS)." This is coupled with new allegations, at paragraphs 15-17 of the statement of claim, that the lens in particular and the Cameras in general cannot withstand "typical use" or "prototypical use." There are also new allegations, at paragraphs 57-59 of the statement of claim, that the retailers who sell the cameras are agents of the defendants. The defendants objected that neither the pleadings at paras. 15 to 17, nor the pleadings at paras. 57 to 59, are supported by adequate particulars and that the latter pleadings are essentially pleadings of law that are unsupported by material facts, contrary to Rule 25.06(2).

58 The defendants relied, in particular, on a consent order made October 6, 2010, which, among other things, permitted the plaintiffs to deliver an amended statement of claim. It was agreed, and included in the order, that the definition of "Defect" would be confined to the "unexpected display" of the "E18 Error" message and, in the case of Mr. Lipner's SX100IS camera, the "Lens Error Restart" message.

59 That order also provided, and the parties expressly agreed, that the plaintiffs reserved the right to seek future amendments of the statement of claim and the defendants reserved the rights to oppose same.

60 The defendants objected that the plaintiffs' complaints about the Cameras have been a moving target and the proposed amendments violated the consent order, particularly because they inject a new theory into the action — namely that the Cameras cannot withstand typical use.

61 The obligation of the court under Rule 26.01 is to grant an amendment to pleadings, at any stage, on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment. At this stage of the proceedings, notwithstanding the several prior amendments, there is no reason not to permit an amendment. I asked defendants' counsel whether they wished an adjournment and they replied, quite understandably, that as the matter has been delayed more than once, their clients wished to proceed with the motion. No other real prejudice had been identified. Accordingly, the amendments were permitted.

B. Motion to Remove Mr. Williams as a Representative Plaintiff

62 The plaintiffs also brought a motion, returnable at the hearing, to remove Mr. Williams as one of the representative plaintiffs. He deposes that, since putting himself forward as a representative plaintiff, his circumstances have changed and he is unable to continue. On cross-examination, he made it clear that he did not want to make any claim at all against Canon. The motion was opposed by the defendants, who say that neither Mr. Hieber nor Mr. Atkins observed any E18 Error issue with Mr. Williams' camera and that Mr. Williams has acted as nothing more than a mere "placeholder" in this litigation. Those complaints, if made out, would be a good reason to remove Mr. Williams as a representative plaintiff, not a reason to keep him in.

63 I conclude that there is no reason to refuse Mr. Williams' request to withdraw as a representative plaintiff, and he is permitted to do so, without prejudice to the rights of the defendants to claim costs against him

with respect to the period of time he acted as representative plaintiff. The pleading will also be amended to delete any other references to Mr. Williams.

C. Motion to Strike Plaintiffs' Expert Evidence

64 The defendants brought a motion to strike the evidence of Mr. Atkins and Mr. Joffe on the ground that they are not properly qualified experts and their evidence therefore fails to meet the test established by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 (S.C.C.). That test requires that expert evidence satisfy the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert.

1. Applicable Legal Principles

65 While the evidentiary burden on a certification motion is the low, "basis in fact" test, that burden must be discharged by admissible evidence. The evidence tendered on a certification motion must meet the usual criteria for admissibility: *Schick v. Boehringer Ingelheim (Canada) Ltd.*, [2011] O.J. No. 17, 2011 ONSC 63 (Ont. S.C.J.) at para. 13; *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, 2005 BCCA 540 (B.C. C.A.) at para. 31, leave to appeal to SCC dismissed, (2006), [2005] S.C.C.A. No. 545 (S.C.C.).

66 This applies to all forms of evidence, including expert evidence: *Schick v. Boehringer Ingelheim (Canada) Ltd.* at para. 14. In *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319, 158 A.C.W.S. (3d) 193 (Ont. S.C.J.), Cullity J. observed at para. 19:

> I accept, also, [counsel's] submission that the fact that only a minimum evidential foundation need be provided for each of the statutory requirements for certification - other than that in section 5(1)(a) - does not mean that the standards for admissibility can properly be ignored, or are to be relaxed for this purpose. However, insistence that the general rules of admissibility are applicable to expert evidence filed on motions for certification does not entail that the nature and amount of investigation and testing required to provide a basis for preliminary opinions for the purpose of such motions will necessarily be as extensive as would be required for an opinion to be given at trial.

67 This means that expert evidence tendered on a certification motion must meet the test of admissibility but, once found admissible, the quality of evidence required to establish a "basis in fact" is not the same as would be required for proof "on a balance of probabilities" at a trial on the merits.

68 While much of the recent discussion of expert evidence has taken place in the context of criminal cases, the principles apply equally to civil proceedings. The court has an important gate-keeping role with respect to the admissibility of evidence and it is not appropriate or fair to shirk that responsibility by saying "let it in, and the objections will go to weight rather than admissibility." This approach was expressly rejected by Binnie J. in *R. c. J. (J.-L.)*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 (S.C.C.) at p. 613.

69 I will begin with first principles. Expert evidence is only admissible where the trier of fact would be unable to draw conclusions from proven facts, because the subject matter is not within the ordinary experience of a lay person and requires the opinion of someone with specialized knowledge. In *R. v. K. (A.)* (1999), 45 O.R. (3d) 641, [1999] O.J. No. 3280 (Ont. C.A.), the Court of Appeal described this aspect of the opinion rule as follows, at para. 71:

> The opinion rule is a general rule of exclusion. Witnesses testify as to facts. As a general rule, they are not allowed to give any opinion about those facts. Opinion evidence is generally inadmissible. Opinion evidence is generally excluded because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form his or her opinions on the issues in the case. Hence, as will be discussed below, it is only when the trier of fact is unable to form his or her own conclusions without help that an exception to the opinion rule may be made and expert opinion evidence admitted. It is the expert's precise function to provide the trier of fact with a ready-made inference from the facts which the judge and jury, due to the nature of the facts, are unable to formulate themselves: *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 at 409.

70 The Court of Appeal continued, summarizing the rule at para. 75, as follows:

> In a nutshell, the opinion rule can be stated as follows: Opinion evidence is generally inadmissible unless it meets all four [of the *Mohan*] criteria set out above. A consideration of the first two criteria, relevance and necessity requires a balancing of the probative value of the proposed evidence against its potential prejudicial effect. The Supreme Court in *Mohan* identifies a number of factors that should be considered in this balancing process. The proposed evidence will only be admissible if its probative value exceeds its prejudicial effect. The third criterion involves a consideration of other applicable rules of evidence. Even if the proposed evidence is sufficiently probative to warrant admission, it may be subject to some other exclusionary rule and further inquiry may be required. Finally, the last criterion requires that expert opinion evidence be adduced solely through a properly qualified expert.

71 The starting point for considering the reception of expert evidence is to determine whether it is relevant. The next question is whether the subject is one in which the trier of fact needs the assistance of an expert. If so, and if there is no other applicable exclusionary rule, it must then be shown that the expert is duly qualified to give the evidence in question — as stated in *Mohan* at para. 27, "the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." In *R. v. K. (A.)*, Charron J.A., as she then was, stated at para. 103:

> This criterion is usually not difficult to apply. However, it must not be overlooked. Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject-matter that the average trier of fact does not already have. If the witness's "special" or "peculiar" knowledge on a subject-matter is minimal, he or she should not be qualified as an expert with respect to that subject.

72 In *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378, [2006] O.J. No. 1146 (Ont. S.C.J.), Ducharme J. observed at paras. 20 and 21 that it must be established that the witness does have "special" or "peculiar" knowledge. That knowledge can, however, be acquired in a variety of ways:

> How the witness acquired that "special" or "peculiar" knowledge is not the central issue at this point. Rather the issue is whether the witness does, in fact, have the "special" or "peculiar" knowledge. Thus one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter. [...]
>
> When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness's professional qualifications, actual experience, participation or membership in professional associations, the nature and extent of his or her publications, involvement in teaching, involvement in courses or conferences in the field and efforts to keep current with the literature in the field and whether or

not the witness has previously been qualified to testify as an expert in the area.

73 Ducharme J. referred to the "old hunter" example given by Falconbridge C.J. in *Rice v. Sockett*, [1912] O.J. No. 49, 27 O.L.R. 410 (Ont. Div. Ct.) at paras. 21-22:

> Dr. John D. Lawson, in "*The Law of Expert and Opinion Evidence*", 2nd ed., p. 74, lays dawn as rule 22: "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible;" citing numerous authorities and illustrations.
>
> "The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith:" *State v. Davis* (1899), 33 S.E. Repr. 449, 55 So. Car. 339, cited in *Words and Phrases Judicially Defined*, vol. 3, p. 2595.

74 Particular caution needs to be exercised where the proposed expert seeks to advance a novel scientific theory or a novel technique. The risk is obvious — the very novelty of the theory or method makes it untested and potentially unreliable. In *Mohan*, Sopinka J. observed, at para. 28:

> [...] expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

75 Binnie J. commented on this requirement in *R. c. J. (J.-L.)*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 (S.C.C.), at para. 33:

> **Novel Scientific Theory or Technique**
>
> *Mohan* kept the door open to novel science, rejecting the "general acceptance" test formulated in the United States in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993). While *Daubert* must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):
>
> (1) whether the theory or technique can be and has been tested...
>
> (2) whether the theory or technique has been subjected to peer review and publication...
>
> (3) the known or potential rate of error or the existence of standards; and
>
> (4) whether the theory or technique has been generally accepted.

76 The application of these factors will assist the court in the exercise of its "gatekeeper" role of determin-

ing whether the evidence is reliable and deserving of any weight.

2. Application of the Principles in this Case

77 The defendants say that the evidence of Mr. Joffe and of Mr. Atkins fails to satisfy any of the *Mohan* criteria. They say that the most significant failing is that Mr. Atkins and Mr. Joffe are not properly qualified experts and their reports should be excluded for that reason alone. Second, they say that neither report is relevant to establishing that there is a defect in the PowerShot line of cameras that causes the E18 Error message in circumstances when it should not be displayed. They say that Mr. Joffe's report is based on inadmissible hearsay and is simply a survey of internet "chatter" that does not establish the existence of a defect and Mr. Atkins simply acknowledges that the display of the E18 Error message could be "consistent with a design deficiency." They also say that Mr. Atkins has prepared a previous report, which he has failed to produce and, at a minimum, the court should draw an adverse inference from his failure to do so.

Evidence of Mr. Joffe

78 I have set out Mr. Joffe's general conclusions earlier in these reasons. He purports to be an expert in "web analytics and statistics." The plaintiffs say that they rely on his evidence primarily for the proposition that there is a basis in fact that the defect resulting in the E18 Error is a statistically significant problem based on its presence on the internet. They say that this establishes a basis in fact for the existence of a class of two or more persons who would be "interested" in the resolution of the common issues.

79 As a starting point, there is no evidence at all to establish that "web analytics" is an accepted area of expertise, with recognized and proven standards, quality controls, methodologies and practices. There is no evidence to establish that any of the factors identified by Binnie J. in *R. c. J. (J.-L.)* have been satisfied, so as to give assurance to the Court that the technique employed by Mr. Joffe is sound and reliable. I have been unable to locate any case in Canada in which a witness has been qualified as an expert in web analytics. Nor has either party identified such a case.

80 Moreover, there is no evidence to establish the underlying reliability of this technique. The defendants' experts have pointed out that Google searches can be corrupted by malicious software (known as "malware"), which can seed the internet with false information. Mr. Joffe admitted on cross-examination that he made no attempt to verify any complaints on the internet about the E18 Error and he failed to explain how, if at all, his methodology screened out or differentiated scurrilous and malicious postings from genuine postings. He acknowledged that "you could spread false rumours on the internet" and "there is false information on the internet." Mr. Joffe himself claimed to have been the victim of a "Google Bomb," which spread malicious rumours about him on the internet. It has not been established that there are accepted methods to screen out such information or that Mr. Joffe followed any such procedures. There is no evidence of any standards, error rates or testing methods. There is no evidence that "web analytics" has been generally accepted as a research technique. There is no evidence that one can extrapolate factual conclusions from the number of occurrences of a particular search phrase on Google.

81 It follows from this that, on the evidentiary record before me, I am not satisfied that the field of "web analytics" is one in which expert evidence would be admissible.

82 In any case, I find that Mr. Joffe is not qualified as an expert in either statistics or web analytics and his evidence is inadmissible for that reason as well. I will examine his qualifications.

83 Mr. Joffe is a consultant who provides consulting services on, among other things, "land use, water systems and resources." He has a Master's degree in Environmental Engineering and a Bachelor of Science in Civil Engineering. His company provides environmental consulting services, among other things. He is registered as a PEng in Pennsylvania and is a member of the American Society of Civil Engineers and the American Water Works Association.

84 He claims in his report to have "published numerous papers and given presentations related to statistics for environmental engineering applications, including modeling, benefit costs analyst [sic] and risk assessment." He also claims that with his company, from 1999 to the present, he has been "heavily involved with keyword analytics (including geocoding, semantics, statistics, etc) for search engine exposure for internet projects."

85 Mr. Joffe says in his CV that his work in the past 12 years has included "web analytics," "search engine optimization," "paid search submissions," "campaign management and optimization," "lead generation," "demographic research" and "keyword analysis." His CV indicates that he has participated in some internet conferences and internet workshops, but the dates are not identified. He does not show any publications in the area of internet research and all of his publications, the most recent of which was in 1998, are in the area of water works and water quality. He shows no qualifications in statistics — no degrees, no courses, no papers, no professional affiliations, no teaching.

86 In my view, Mr. Joffe lacked the necessary requirement of having acquired special or peculiar knowledge through study or experience in respect of the matters on which he undertook to testify. His alleged expertise was entirely self-bestowed. He has no degrees, certificates or professional qualifications in either statistics or web analytics. He has not published any papers or research on either subject. He belongs to no professional organization having to do with either subject. He has received no recognition by his peers in relation to either subject. He has never testified as an expert witness in relation to either statistics or web analytics.

87 When it was pointed out to Mr. Joffe that his own website did not identify statistics as an area of his expertise, his response was:

> A. I think it is... there is analytics in there, which implies statistics, so I don't really agree with the question. It is pretty implicit that I have strong analytical skills which one could very easily interpret as statistics. I am not a PhD statistician, as I have outlined in the report. Two of my academic advisors, who I maintain relationships with, have both published statistics... applied statistics book for engineering.
>
> Q. Well, good for them sir, but...
>
> A. I have done published research with them, sir, with my name on it.
>
> Q. But you don't have, as you say, an advanced degree in statistics, do you.
>
> A. No, but neither do they. My degrees are in engineering. You cannot, you know, get a degree in everything and live one life. It is hard. I have tried. It doesn't work.
>
> . . .
>
> Q. But you are aware, though, that there are people who consider themselves almost a professional calling in statistics?

A. Absolutely, but as I indicated to you, two of my advisors who are the top of their fields are not... again, they don't have degrees in statistics, they have degrees in engineering and sciences, yet they have published statistics... applied statistics textbooks.

Q. I heard you say that, sir. They don't work for Tranztek [Mr. Joffe's company], do they?

A. No, they don't. Tranztek is me.

Q. They didn't review your report, did they?

A. No, they did not. That doesn't mean it cannot be done though.

88 Mr. Joffe's description of his expertise in "web analytics" was along similar lines. He described it as a "very very new field" and was not aware of any professional association in the area. He did not describe any professional standards or accreditations in the area. On cross-examination, the following exchange occurred:

Q. Well, you make some reference to this concept known as web analytics.

A. Yes.

Q. You don't have any diploma in web analytics, do you sir?

A. There hardly exists such a diploma.

Q. There does not exist such a diploma, does there?

A. There actually might be some colleges that actually do offer an SCO track, a web analytics track.

Q. Not one you took?

A. No, I only done my own. I am answering you very directly. Google... as I have always been doing. Google, the company which rules the internet, as you know, does offer a certification process, just like Microsoft and Oracle have certification for their products. Google does offer some sort of certification for some of their products. I do... I am, you know, more of an entrepreneur. I learn these things on my own. I did not receive such certification on web analytics, however, Google does... grants for their products some type of certification.

Q. But you don't have that.

A. No, I do not. But I have worked with Google, I have corresponded with a company. I know people there, you know.

Q. I search Google, too.

A. No, no, much more than that.

Q. Is there...

A. Can I...

> Q. Tell me other certifications you don't have.
>
> A. Okay. I don't know what you are... I am trying to understand what you are getting at. My brother worked... I am not using... I am not digressing here, I am just giving you an example to understand your question. My brother worked for Oracle. He performed well there. He is now a supplier of Oracle solutions to other big companies in Silicon Valley. He never got one of those licences, but if I understand what you are trying to get at, that doesn't mean that he is bad at what he did, it means that he is way above the layman level, in fact, and didn't even bother with it. So some people are experts. Let's make a distinction between a diploma and some of these layman's courses for software products such as Microsoft, Oracle, Google, etcetera. Some people are very, very good at this and they just never even bother because they are doing very advanced work, creating their own advanced customized tools for these companies, so I... it doesn't mean that... the decision to not get certified can mean that it is... I am working at a different level where it is just not necessary. It doesn't mean that I don't work in the areas where the certification is given.
>
> Q. Or it could mean that you didn't take the course and you are not qualified?
>
> A. In theory it could mean that, but it doesn't necessarily mean that is the case.

89 The last exchange between Mr. Joffe and counsel highlights the inadequacy of Mr. Joffe's qualifications. The fact that Mr. Joffe "works in the area" of statistics and web analytics and thinks he is good at it does not mean that he has the necessary expertise to testify before the court as an expert. That is why courts usually demand independent confirmation of the witness's qualifications. A "do-it-yourselfer" generally won't do. While it is true that there are some areas where on-the-job training or long experience, such as that of the "old hunter" may qualify as expertise, depending on the nature of the inquiry, statistics is not such an area. There are really good statisticians and there are undoubtedly really bad ones. I have no way of knowing which category Mr. Joffe falls into.

90 Reading Mr. Joffe's resumé and his cross-examination, one is left with the firm impression that, to use the expression employed by counsel for Canon, he is a Jack-of-all-trades, rather than an expert.

91 The defendants raise the additional objection that Mr. Joffe's report contains inadmissible hearsay — that is, the web pages identified in the Google searches are nothing more than unconfirmed hearsay. Mr. Joffe admitted that he made no effort to obtain independent verification of the underlying truth of the web postings.

92 The plaintiffs say that Mr. Joffe's report is not based on hearsay, because the purpose of the report is not to prove the definitive existence of a defect but rather to show that there is a "trend" or "chatter" or "propensity" on the internet relating to the Cameras at issue and the E18 Error. They say that if it is hearsay, it is admissible in any event because:

(a) there is a lower evidentiary threshold on a certification motion;

(b) the so-called "Rule in *Thorpe v. Honda*";

(c) Rule 39.01(4);

(d) the principled approach to exceptions to the hearsay rule.

93 In support of the first proposition, the plaintiffs rely on the observations of Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418, 72 C.P.C. (6th) 158 (Ont. S.C.J.), leave to appeal to Div. Ct. ref'd, [2009] O.J. No. 3438 (Ont. Div. Ct.), at para. 76, referring to *Stewart v. General Motors of Canada Ltd.*:

> The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.)
>
> [emphasis added].

94 I do not regard this as lowering the threshold for the admissibility of the evidence. It simply means that, if the evidence is admissible, the weight of the evidence may be less than what would be required at trial.

95 In support of the second proposition, the plaintiffs rely on the decision of the Saskatchewan Court of Queen's Bench in *Thorpe v. Honda Canada Inc.*, [2010] S.J. No. 77, 2010 SKQB 39 (Sask. Q.B.), which in turn followed the decision of the Trial Division of the Federal Court in *ITV Technologies Inc. v. WIC Television Ltd.*, [2003] F.C.J. No. 1335, 2003 FC 1056 (F.C.), aff'd. [2005] F.C.J. No. 438, 2005 FCA 96 (F.C.A.).

96 In *Thorpe v. Honda Canada Inc.*, the plaintiff had commenced a proposed class action against Honda, claiming a defect in her vehicle. As part of her affidavit in support of certification, she appended the results of searches she had conducted on the internet, including postings from discussion forums in which complaints similar to hers had been made. Another affidavit, filed by an employee of the plaintiff's lawyers, reported on responses the firm had received on its web site from persons complaining about issues similar to those raised by the plaintiff. Both affiants tendered the evidence based on their "information and belief," relying on a rule similar to Ontario Rule 39.01(4). Honda moved to strike those affidavits.

97 In striking the affidavits, Popescul J. relied upon the decision of Tremblay-Lamer J. in *ITV Technologies Inc.* at paras. 16-18:

> With regard to the reliability of the Internet, I accept that in general, official web sites, which are developed and maintained by the organization itself, will provide more reliable information than unofficial web sites, which contain information about the organization but which are maintained by private persons or businesses.
>
> In my opinion, official web sites of well-known organisations can provide reliable information that would be admissible as evidence, the same way the Court can rely on Carswell or C.C.C. for the publication of Court decisions without asking for a certified copy of what is published by the editor. For example, it is evident that the official web site of the Supreme Court of Canada will provide an accurate version of the decisions of the Court.
>
> As for unofficial web sites, I accept Mr. Carroll's opinion that the reliability of the information obtained from an unofficial web site will depend on various factors which include careful assessment of its sources,

independent corroboration, consideration as to whether it might have been modified from what was originally available and assessment of the objectivity of the person placing the information on-line. When these factors cannot be ascertained, little or no weight should be given to the information obtained from an unofficial web site.

98 The Federal Court of Appeal dismissed an appeal, finding that it was unnecessary to consider the issue of the admissibility of evidence taken from the internet.

99 Returning to *Thorpe v. Honda Canada Inc.*, after considering the decision in *ITV Technologies*, Popescul J. continued, at paras. 21-27:

The internet is an abundant source of information. Some of the information available is impeccably accurate, while other information is pure garbage. It does not make sense, on the one hand, to conclude that any and all information pulled from the world-wide web is inherently unreliable and ought to be given zero weight; on the other hand, it makes equally little sense to open the door to admitting into court absolutely anything placed on the internet by anybody.

The approach taken by the Federal Court Trial Division has logical appeal. Even though the appellate court declined to endorse the analysis and conclusion, I agree with the essence of the ruling: internet information may be admissible in court proceedings depending upon a variety of circumstances relating to reliability which include, but are not limited to:

- whether the information comes from an official website from a well known organization;
- whether the information is capable of being verified;
- whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

Where the threshold of "admissibility" is met, it is still up to the triers of fact to weigh and assess the information to determine what significance, if any, such information would have on the issues to be decided.

If the internet-based evidence tendered does not contain sufficient badges of reliability, it ought be rejected as worthless and, hence, inadmissible.

In the case before me, Ms. Thorpe has pulled information from the internet complaints about Honda automobiles posted to various web pages by unknown and anonymous persons. As pointed out by Honda Canada, who, when and under what circumstances, these postings have been made is not apparent. Although Ms. Thorpe swears that she believes the postings to be true in the generic opening paragraph of her affidavit, she provides no basis for such belief. How can she "know", for example, that "Kim R." is telling the truth about his/her 2006 Honda Civic? While it may be true that Ms. Thorpe has no reason to believe the information is not true, she likewise has disclosed nothing in her affidavits that would tend to suggest that such information is true, accurate, reliable and/or unaltered.

Likewise, the information retrieved from Ms. Thorpe's law firm's web page is similarly unreliable. Anonymous complaint submissions received in this fashion have little or no probative value.

Accordingly, I find that affidavit evidence, "on information and belief", including information taken from

> the internet, is potentially admissible in interlocutory applications, such as a class action certification application, and may be admitted "under special circumstances" where the "grounds for such information and belief" are adequately disclosed and the information is reliable. Here, the subjective basis for the reliability of the information has not been disclosed and, furthermore, there is no objective basis to believe that the various postings have any degree of reliability.

100 I respectfully adopt these observations and this approach. The plaintiff says that the information in Mr. Joffe's searches is reliable because it is taken from Google, unquestionably the largest and most recognized internet search engine. The problem, however, is that the Google searches are simply agglomerations of hundreds or thousands or millions of individual postings, the authenticity and reliability of which is entirely unknown. There is no way of testing the underlying truth of the postings and it is clear from the evidence of Mr. Joffe that he made no attempt to do so. The defendants have adduced evidence to show that the reliability of some of the individual postings is open to serious question.

101 Common sense tells us that simply because there are several million responses on Google to "Elvis is alive" or "I have been abducted by aliens" does not mean that these statements are true, either as individual observations or as collective proof of the facts. Nor do hundreds of thousands or even millions of responses to "E18 Lens Error" mean that hundreds of thousands or millions of people have experienced an E18 Error message. There is in this case no objective basis to determine that the results of the Google searches are reliable, and there is, in fact, evidence to the contrary.

102 For these reasons, the decision in *Thorpe v. Honda Canada Inc.* is of no assistance to the plaintiffs. Nor is Rule 39.01(4). That rule provides that an affidavit for use on a motion may contain statements of the deponent's information and belief "if the source of the information and the fact of the belief are specified in the affidavit." I agree with the conclusion of Popescul J. that in order for information from the internet to be admissible, there would have to be some objective basis for a conclusion that the information is reliable. Mr. Joffe having made no personal attempt to obtain confirmation of the reliability of the information, and there being no objective basis to conclude that the underlying information is reliable, it is inadmissible.

103 Finally, the plaintiff relies on the "principled exception to the hearsay rule": *R. v. Khan*, [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81 (S.C.C.); *R. v. Smith*, [1992] 2 S.C.R. 915, [1992] S.C.J. No. 74 (S.C.C.) at paras. 30-38; *R. v. Khelawon*, [2006] 2 S.C.R. 787, [2006] S.C.J. No. 57 (S.C.C.) at para. 42. The evidence in this case does not have sufficient indicia of reliability to fall within that exception and, for that reason, it is inadmissible.

104 Mr. Joffe is not a qualified expert and his evidence is inadmissible. His evidence is also inadmissible, in my opinion, because his conclusion that the "E18 Error" is a "statistically significant problem" is irrelevant because it has not been established that the display of the E-18 Error reflects a defect in the Cameras.

Evidence of Mr. Atkins

105 Mr. Atkins purports to give an opinion on the design of digital cameras, the circumstances under which such cameras may produce an E18 Error or "Lens Error Restart" message, and the preventative features that should be installed in such cameras in order to prevent the entry of dust, sand, and debris that may cause such messages. I have summarized his evidence earlier in these reasons.

106 Turning to Mr. Atkins' qualifications:

- he was 32 years old at the time he gave his opinion;
- he obtained a Bachelor of Applied Science degree in Mechanical Engineering in 2001 and obtained his PEng. designation in 2007;
- he had no particular experience or expertise in cameras and had never designed or repaired a camera;
- he is not a member of any relevant professional association other than the Association of Professional Engineers;
- he has not published, taught or taken courses on the subject of camera design, construction or repair;
- he has no relevant practical experience or training in the field of cameras in general or digital cameras in particular;
- he has never testified as an expert witness on any subject, let alone camera design, construction or repair.

107 Prior to joining Walters Forensic Engineering ("Walters") in 2007, Mr. Atkins was employed by Canadian Tire from 2001 to 2007 in the quality engineering area and was involved in developing specifications for and inspecting, testing and conducting design modifications of consumer products, such as bicycles, lawn mowers, weed trimmers and hand tools. His work with Walters, though it involves some consumer products, seems to have been focused on accident reconstruction, automotive systems and human factors.

108 Mr. Atkins admitted that he did not have expertise in camera design to enable him to give an opinion about what specific design features would have to be incorporated in the Cameras to prevent the occurrence of the E18 Error message.

109 The plaintiffs seek to qualify Mr. Atkins as a "consumer product failure expert." His main qualification, prior to becoming a consultant, seems to be his work at Canadian Tire. To conclude that Mr. Atkins is a "product failure expert" and is therefore qualified to express opinions on the failure of a digital camera because he has experience in inspecting, testing and developing specifications for lawnmowers, bicycles and weed whackers is a leap of faith that is not supported by any evidence. I cannot conclude that his work experience with power tools, lawnmowers and the like qualifies him to give an opinion about the alleged failure of what he himself describes as an "intricate and highly complicated" optical unit of a camera, which has its own internal computer mechanism, or about the design features that should have been installed in the camera to prevent a failure, the cause of which he does not even identify. Never having examined a camera other than the Canon cameras he bought over the internet and having had no training or experience in camera inspection, repair and design, he can have no way of knowing what is, or is not, appropriate design.

110 Like Mr. Joffe, Mr. Atkins' expertise is entirely self-conferred. There is no independent evidence that he is qualified to give an opinion on digital camera design or failure. He has no experience whatsoever with camera products and has done nothing to acquire any expertise.

111 In my view, Mr. Atkins is not qualified to give the opinion that he purports to give. His opinion is, therefore, inadmissible.

112 During the course of the cross-examination of Mr. Atkins, it was disclosed that he had delivered a prior report, which has not been produced to the defendants and which plaintiffs' counsel objects to producing. Mr.

Atkins did not acknowledge the existence of this report when he was asked to list the contents of his file. In effect, the plaintiffs want to put before the court some, but not all, of the expert's opinion. This is arguably an interference with the proper function of an expert witness: see *MacDonald v. Sun Life Assurance Co. of Canada* (2005), [2006] O.J. No. 4977 (Ont. S.C.J.). The failure to produce this report supports an inference that it would not assist the plaintiffs. As I have concluded that Mr. Atkins' evidence is inadmissible, I need say nothing further on this point.

113 For these reasons, I find that the evidence of Mr. Joffe and Mr. Atkins is inadmissible and their affidavits will be struck.

D. Objection to Defendants' Expert Evidence

114 Counsel for the plaintiffs raised an objection that the reports of the defendants' expert witnesses did not include an acknowledgment of the expert's duty (Form 53), as required by Rule 53.03(2.1).7. As the issue had not been directly addressed, either by way of motion or in the factums, I gave the plaintiffs' counsel an opportunity to make written submissions on the issue and defendants' counsel an opportunity to respond.

115 The main threads of the plaintiffs' argument are as follows:

- Rule 53 must be read in the context of other rules, including the duty of an expert, set out in rule 4.1.01(1), to provide evidence that is "fair, objective and non-partisan";

- Rule 4.06(2) provides that an affidavit must be confined to "statements of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court...";

- Rule 53.03(1) provides that a party who intends to call an expert witness [at trial] must follow the requirements of rule 53.03(2.1).7, including the delivery of Form 53;

- thus, for an expert to provide an affidavit in a motion, the affidavit must only contain evidence that the expert would be permitted to give in court, because an expert must execute Form 53 before being allowed to give evidence in court, an expert must execute Form 53 before giving evidence on a motion.

116 I do not accept this argument. It overlooks the fact that Rule 53 is expressly concerned with evidence *at trial*. The rule states, in part:

> (1) A party who intends to call an expert witness at trial shall [serve a report signed by the expert not less than 90 days before the pre-trial conference...];
>
> (2) a party who intends to call an expert witness at trial to respond to the expert witness of another party, shall [serve a report signed by the expert not less than 60 days before the pre-trial conference...];
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information.
>
> . . .
>
> 7. An acknowledgement of expert's duty (Form 53) signed by the expert.
>
> [emphasis added].

117 Rule 53.03(3) provides that an expert witness whose report has not been served under the rule may not testify, except with leave of *the trial judge*.

118 Rule 4.06(2), which the plaintiffs rely on, simply limits affidavit evidence to evidence that the deponent could give if testifying as a witness in court, whether on a motion or at trial.

119 As Cullity J. noted in *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (Ont. S.C.J.) at para. 20, Rule 53.03 applies only to reports for the purpose of trial. While this observation was made prior to the amendment of the rule in 2010, requiring the execution of Form 53 acknowledging the expert's duty, the point is the same — Rule 52.03, by its express terms, deals only with expert reports prepared for the purpose of trial.

120 While one could make the case that it would be good practice on a motion to include the matters set out in Rule 53.03(2.1) in the expert's report or that the *Rules* should be amended to require it, there is no express requirement in the current rules to do so. This may well be because there is an opportunity to cross-examine an expert prior to a motion and any issues as to the expert's qualifications, impartiality, instructions and opinions can be explored at that time.

121 I therefore conclude that the defendants' experts were not required to deliver a Form 53. If I have reached the wrong conclusion, I would grant leave under Rule 53.03(3) as there has been no prejudice to the plaintiffs. They have cross-examined Mr. Hieber and they had an opportunity to cross-examine the other experts, had they wished to do so. In the further alternative, the plaintiffs acknowledge that the failure to deliver a Form 53 may go to the weight of the experts' opinions. There is no basis on which I could conclude that the defendants' experts failed to provide evidence that is fair, objective and non-partisan or that they have provided evidence that was outside their areas of expertise or that they otherwise breached their duty to the Court.

122 I turn now to the test for certification.

IV. The Test for Certification

A. Introduction

123 Section 5(1)(a) of the *C.P.A.* requires that the court shall certify an action as a class proceeding if:

> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

124 In *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571, [2010] O.J. No. 3921 (Ont. S.C.J.), I adopted the following principles applicable to motions for certification, at para. 30:

(a) The *C.P.A.* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) and by the Supreme Court of Canada are: judicial efficiency; improved access to the courts; and, behaviour modification, or the generation of "a sharper sense of obligation to the public by those whose actions affect large numbers of people": *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report* (Toronto: The Committee, 1990) at 16-18 and 20; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 (S.C.C.) at paras. 27-29.

(b) The *C.P.A.* is entirely procedural. The certification stage is not meant to be a test of whether the plaintiff's claim will succeed. In the event that subsections (a) through (e) of s. 5(1) of the *C.P.A.* are satisfied, certification of the action by the court is mandatory: *C.P.A.* s. 5(1), *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 at para. 39 (Gen. Div.).

(c) The *C.P.A.* provides the courts with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and often-intertwined legal issues, some of which are common and some of which are not: *Hollick v. Metropolitan Toronto (Municipality)*, above, at paras. 14 and 15; *Bendall v. McGhan Medical Corp.*, above, at para. 40.

(d) Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order, and it may be amended, varied or set aside at any time: *C.P.A.* ss. 5(5), 10(1) and 10(2); *Bendall v. McGhan Medical Corp.*, above, at para. 42; *Hollick v. Metropolitan Toronto (Municipality)*, above, at para. 16, above, at para. 16; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report*, above, at 30-33.

(e) The court has no discretion to refuse to certify a proceeding as a class proceeding solely on the ground that one or more of the following are present: (i) the relief claimed would require individual damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; (iv) the number or identity of class members is not known; (v) the identified class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members: *C.P.A.* s. 6; *Anderson v. Wilson* (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 at para. 18 (Gen. Div.); varied (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671 (Div. Ct.); rev'd, certification order varied (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494, (C.A.), leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. No. 476, 185 D.L.R. (4th) vii.

(f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical: *Hollick v. Metropolitan Toronto (Municipality)*, above, at paras. 29 and 30; *Bendall v. McGhan Medical Corp.*, above, at para. 48; *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 (Ont. S.C.J.) at para. 48 (S.C.J.).

(g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order". It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick v. Metropolitan Toronto (Municipality)*, above, at paras. 22 and 25.

(h) *"Some basis in fact"* is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial: *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 (Ont. S.C.J.) at para. 15 (S.C.J.).

125 In many respects, consumer claims relating to defective or substandard products are ideal candidates for class action treatment, because proof of the product's defect need only be made once, and can be applied with confidence to the entire class of purchasers, thereby providing access to justice where it would be impractical to take individual proceedings: *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 (Ont. S.C.J.) referring to *Chace v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292 (B.C. S.C. [In Chambers]), affirmed (1997), 14 C.P.C. (4th) 197 (B.C. C.A.) and *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331, [1995] O.J. No. 2592 (Ont. Gen. Div.); *Walls v. Bayer Inc.*, 2005 MBQB 3, [2005] M.J. No. 4 (Man. Q.B.) at paras. 52-53, leave to appeal ref'd, [2005] M.J. No. 286 (Man. C.A. [In Chambers]), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 409 (S.C.C.); *Harrington v. Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67, [2000] B.C.J. No. 2237 (B.C. C.A.) at para. 67, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21 (S.C.C.).

126 A number of product liability cases have been found appropriate for certification: *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72, [2011] S.J. No. 107 (Sask. Q.B.); *Ducharme v. Solarium de Paris Inc.*, 2010 ONSC 5667, [2010] O.J. No. 4436 (Ont. S.C.J.); *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, [2010] B.C.J. No. 838 (B.C. S.C.); *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 (Ont. S.C.J.); *Sorotski v. CNH Global N.V.*, 2007 SKCA 104, [2007] S.J. No. 531 (Sask. C.A.), rev'g [2006] S.J. No. 258 (Sask. Q.B.), leave to appeal granted [2006] S.J. No. 417 (Sask. C.A. [In Chambers]); *Olsen v. Behr Process Corp.*, 2003 BCSC 1252, [2003] B.C.J. No. 1887 (B.C. S.C. [In Chambers]); *Reid v. Ford Motor Co.*, 2003 BCSC 1632, [2003] B.C.J. No. 2489 (B.C. S.C.); *Denis v. Bertrand & Frere Construction Co.*, [2000] O.J. No. 5783 (Ont. S.C.J.); *Chace v. Crane Canada Inc.*, [1997] B.C.J. No. 2862 (B.C. C.A.), aff'g [1996] B.C.J. No. 1606 (B.C. S.C. [In Chambers]); *Campbell v. Flexwatt Corp.*, [1997] B.C.J. No. 2477 (B.C. C.A.), aff'g [1996] B.C.J. No. 1487 (B.C. S.C.), leave to appeal ref'd [1998] S.C.C.A. No. 13 (S.C.C.).

127 On the other hand, as was observed by Newbury J.A., giving the judgment of the British Columbia Court of Appeal in *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, [2005] B.C.J. No. 2370 (B.C. C.A.), rev'g [2004] B.C.J. No. 2411 (B.C. S.C.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.), at para. 33, not all product cases are appropriate for certification:

I reach this conclusion notwithstanding the fact that product liability claims are often cited as an example of the type of action particularly suited to class action proceedings. Since earlier cases such as *Chace v. Crane Canada Inc.* (1997) 44 B.C.L.R. (3d) 264 (B.C.C.A.) and *Campbell v. Flexwatt Corp.* (1997) 44 B.C.L.R. (3d) 343 (B.C.C.A.), experience has shown that not all product liability cases lend themselves to certification. In some, the complexities inherent in problems of proof of the applicable duty of care over a long period of time, changing manufacturing techniques, or multi-party involvement in the product delivery chain, have made the formulation of a common question problematic: see *Bittner v. Louisiana-Pacific Corp.*

(1997) 43 B.C.L.R. (3d) 324 (B.C.S.C.), *Caputo*, *supra*, and *Gariepy v. Shell Oil Co.* (2002) 23 C.P.C. (5th) 360 (Ont. Sup. Ct. J.), aff'd [2004] O.J. No. 5309 (Ont. Sup. Ct. J. (Div. Ct.)). In each instance, the question must be determined "contextually" - i.e., not on the basis of a blanket assumption regarding product liability cases but in light of all the evidence concerning the specific case before the court. In the case at bar, the plaintiffs failed to establish an evidentiary basis; i.e., to adduce admissible evidence, for the proposition that the determination of the real common issues - whether the fuel system design(s) employed by the defendants breached the applicable standard(s) of care and created an unreasonable risk of harm to the plaintiffs - would advance the litigation in a meaningful way. I conclude that the certification order must therefore be set aside.

128 For these and other reasons, a number of product cases have been found inappropriate for certification: *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (Ont. S.C.J.) (settlement in which action dismissed and appeal abandoned without costs approved: 2010 ONSC 6776 (Ont. S.C.J.)); *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, [2009] S.J. No. 179 (Sask. C.A.), rev'g [2007] S.J. No. 7 (Sask. Q.B.) and [2008] S.J. No. 101 (Sask. Q.B.) and [2008] S.J. No. 324 (Sask. Q.B.), leave to appeal to C.A. granted [2008] S.J. No. 378 (Sask. C.A.), leave to appeal to S.C.C. ref'd (2009), [2008] S.C.C.A. No. 512 (S.C.C.); *Sparkes v. Imperial Tobacco Canada Ltd.*, 2008 NLTD 207, [2008] N.J. No. 379 (N.L. T.D.), aff'd [2010] N.J. No. 108 (N.L. C.A.); *Chartrand v. General Motors Corp.*, 2008 BCSC 1781, [2008] B.C.J. No. 2520 (B.C. S.C.); *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée* (2006), 35 C.P.C. (6th) 264, [2006] O.J. No. 4625 (Ont. S.C.J.) at para. 100, aff'd [2008] O.J. No. 4153 (Ont. Div. Ct.); *Benning v. Volkswagen Canada Inc.*, 2006 BCSC 1292, [2006] B.C.J. No. 1956 (B.C. S.C.).

Comparative Cases

129 It will be of assistance to examine, for comparative purposes, some of the defective product cases that have been considered for certification. I will begin with several claims that have been certified for class treatment and will then examine several claims that have not been.

Certification Granted

130 *Chace v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292 (B.C. S.C. [In Chambers]), affirmed (1997), 14 C.P.C. (4th) 197, [1997] B.C.J. No. 2862 (B.C. C.A.) involved defective toilets that had cracked and caused water damage to the plaintiffs' homes. It was acknowledged by the defendant that toilet tanks manufactured at one of its plants had an unusually large failure rate - a rate of about 2% of the toilet tanks produced. The plaintiffs' expert expressed the opinion that the tanks had not been adequately fired at the kiln and that they absorbed excessive amounts of water, increasing the stress on the tanks and resulting in fractures. The defendant denied negligence, but it acknowledged that there had been an unusually high failure rate.

131 The motion judge certified a cause of action in negligence and found that a common issue as to liability in negligence would advance the proceeding. It was found that issues of causation would be capable of routine and summary disposition, notwithstanding the defendant's argument that each tank would have to be examined in order to determine the cause of failure. The class action was certified.

132 The British Columbia Court of Appeal affirmed the lower court's ruling. It described a defective product case as ideally suited to class action treatment — at para. 16:

This court recently observed that in a product liability case a determination that the product in question is

> defective or dangerous as alleged will advance the claims to an appreciable extent: *Tiemstra v. I.C.B.C.*, [1997] B.C.J. No. 1628, (7 July 1997), Vancouver Registry No. CA21870 (B.C.C.A.). I agree with the chambers judge that is the situation here. The respondents are alleging an inherent defect that results in tanks suddenly cracking. This seems exactly the type of question for which a class action is ideally suited and remarkably similar to that concerning faulty heart pacemaker leads that was certified by the Ontario Court (General Division) in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995) 25 O.R. (3d) 331.

133 It is noteworthy that in *Chace v. Crane Canada Inc.*, there was an admittedly high failure rate at the kiln in question, and, significantly, the plaintiff had produced an expert report that the failure was caused by a deficiency in the manufacturing process. This provided a sufficient evidentiary basis for the existence of a defect in the plaintiff's product and for the proposition that conclusions about the plaintiff's claim could be applied on a class-wide basis.

134 In *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 (Ont. S.C.J.), Justice Brockenshire certified a class action involving allegedly defective laptop computers. The causes of action and common issues included negligence, negligent misrepresentation and breach of warranty.

135 It was alleged that the computers would unexpectedly and spontaneously shut down or fail to operate at full capacity. The defendants argued, among other things, that the dissatisfaction experienced by two or three users did not establish that several thousand purchasers had the same problem. They also argued, as have the defendants in this case, that the plaintiffs did not have reliable evidence to establish a design or manufacturing defect on a class wide basis and that to establish that any particular computer was affected by the issue would require individual expert examination.

136 Brockenshire J. found that the claim disclosed several causes of action and certified a class of purchasers of the computer model in question. As to the common issue of negligence, Brockenshire J. noted that the plaintiff's expert had expressed the opinion that the design of the notebook was defective, because the cooling system did not effectively dissipate the heat produced by the high-powered processor, resulting in the system overheating and slowing down or shutting down. The expert opined that this defect, by its very nature, would be common to all the notebooks and would be objectively measureable on a class-wide basis. Brockenshire J. concluded, at paras. 37 and 38, that a common issue of negligence would advance the proceeding:

> What I have before me is some evidence, over and above the pleading itself, that the cooling system in this Notebook was deficient, that that resulted in the CPU overheating, and that resulted in the Notebook throttling or shutting down, and further, because this was a design error in the cooling system, it would be found in all of the Notebooks. From that information alone, if it withstands the test of the trial, it could be inferred that the defendants had been negligent in designing the cooling system, or perhaps negligent in manufacturing the cooling system, and being negligent in testing the Notebook to ensure that it would not only work, but work as the "ultimate multimedia machine" it was held out to be.
>
> As there is evidence, apparently, from the experts on both sides that these Notebooks might well have performed the usual day to day operations expected of ordinary run-of-the-mill laptops, to succeed, the class would have to be able to show that when the Notebooks were called upon to repeatedly perform complex and difficult operations, they would slow down or stop. The litigation would be materially advanced by proving this once, and a class proceeding would avoid each class member having to individually prove this. The concept of determining once if a product is defective, has been accepted in, among others, *Chase v.*

> *Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292, affirmed 14 C.P.C. (4th) 197 (B.C.C.A.) and *Nantais v. Telectronics* (1995), 25 O.R. (3d) 331 (Gen. Div.), with the appellate court commenting in *Crane* that "This seems exactly the type of question for which a class action is ideally suited..."

137 Brockenshire J. also certified common issues of negligent misrepresentation, breach of section 52 of the *Competition Act*, R.S.C., 1985, c. C-34, breach of warranty, damages and other subsidiary issues.

138 Once again, there was admissible expert evidence that the deficiency in the plaintiff's computer resulted from a failure of the design and that the deficiency was common to all other computers of the same type.

139 *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418, 72 C.P.C. (6th) 158 (Ont. S.C.J.), leave to appeal to Div. Ct. ref'd, [2009] O.J. No. 3438 (Ont. Div. Ct.), a decision of Justice Lax, is a particularly interesting case, also involving computers — five different models of the "Inspiron" notebook computer sold by Dell over approximately a two-year period. It was alleged that the computers were prone to unexpected shut-downs, were unable to "boot up" and that the battery was unable to hold a charge. The circumstances were different from both *Bondy* and this case, because Dell sold directly to the public, both online and over the telephone.

140 The evidence relied on by the plaintiff on certification included affidavits from each of the three representative plaintiffs as well as from a lawyer in the plaintiffs' law firm, who filed a database kept by the law firm concerning the experience of over 400 putative class members with the notebook computers at issue. In addition, the plaintiff relied on expert evidence of an engineer and consultant who had examined the computers of six would-be class members.

141 Justice Lax found that the negligence claim was adequately pleaded, but she noted that, as the claim was for purely economic loss, the only available category would be the claim for "negligent supply of shoddy goods or structures," referred to in *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [1992] S.C.J. No. 40 (S.C.C.). She found that, on the current state of the law, it was an open question as to whether there could be recovery in relation to non-dangerous defects: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, [1995] S.C.J. No. 2 (S.C.C.). She therefore certified a cause of action in negligence as well as breach of contract at common law and under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, and waiver of tort and unjust enrichment. She found that a claim under s. 36(1) and section 52(1) of the *Competition Act* had not been properly pleaded but gave leave to amend.

142 With respect to the class, Justice Lax noted at para. 70 that:

> In products liability cases, the scope of the proposed class should not normally be in dispute as the relationship between the class and the common issues is clear from the facts: *Hollick* at para. 20. I believe it is clear in this case.

143 She dismissed the defendant's objection that the class was over-inclusive, because it would include persons whose computers never failed and who would have no claim against Dell. In support of this holding, Justice Lax noted the observation of Cullity J. in *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996, 295 D.L.R. (4th) 32 (Ont. S.C.J.) at para. 78, that the fact that some class members may not have suffered damages is not a bar to the claim.

144 For the purpose of this action, Justice's Lax's observations and analysis of the common issue of negligence is of particular interest. The proposed common issue was whether the defendant owed the plaintiff and the

class a duty of care to ensure that the computers were merchantable, free from defects and fit for their ordinary use. The plaintiffs' expert, having inspected a sampling of computers of class members, testified that the shutdowns and other problems were manufacturing defects that were common to the Inspiron computer models at issue. His evidence was summarized by Lax J. at para. 74:

> He concluded that the computers' problems of unexpected shutdowns, inability to boot up and inability of the battery to hold a charge are a result of two common manufacturing defects: (a) inferior soldering quality; and (b) poor design of the case that permits excessive flexing and leads to premature breaking of the solder joints. He produced photographs of the disassembled computers that appear to show inadequacies in the soldering techniques and explained how this would cause the operational problems described by class members. There is uncontradicted evidence that laptop computers are more vulnerable to impact issues due to the stress of mobile use and the flexion of the keyboard from pressing on the unit. Mr. Fowler's evidence is that Dell did not manufacture a system robust enough to withstand the stress of the computer's intended and normal mobile use.

145 In that case, as here, the defendants challenged the qualifications of the plaintiffs' experts. As I have pointed out, Lax J. noted, at para. 76, the Court's "gatekeeper" role with respect to expert evidence on certification motions, but said that if the opinion passes the threshold for admissibility, a lower level of scrutiny is permitted for the purpose of establishing a "basis in fact."

146 Justice Lax found that, although there were some issues about the witness's misstatement of his qualifications, the expert witness had sufficient "special knowledge or experience" to give an opinion on solder integrity as a result of "many years of engineering experience that involves design, manufacturing and maintenance of electronic components for process machinery and electronic devices and failure analysis of major systems and printed circuits, including component, wiring and solder failures": *Griffin v. Dell Canada Inc.* para. 81. The expert testified that the computers had a common manufacturing defect and that, as all the computers were manufactured in accordance with a standard manufacturing process, it was reasonable to extrapolate his findings to all the other Inspiron computer models at issue.

147 Even without the expert's evidence, Justice Lax concluded that the plaintiffs would have met their "minimum evidentiary burden" by virtue of the extensive database of consumer complaints kept by plaintiff's counsel (the admissibility of which defendants did not contest). She found that the vast majority of complaints were consistent with the problems described by the representative plaintiffs and with the observations of the expert when he operated the computers in his laboratory. She found that the persistence and remarkable similarity of the complaints in relation to each of the five models across a large group of users amounted to "some evidence" that there was reason to believe that there was a common defect affecting the normal operation of the computers.

148 Lax J. therefore certified common issues of whether Dell owed a duty of care, whether it breached the duty and whether the computers were merchantable, free of defects and fit for their purpose. She also certified issues relating to disgorgement, punitive damages and pre-judgment interest. She did not certify common issues based on breach of warranty or s. 52 of the *Competition Act*.

Certification Not Granted

149 In *Chartrand v. General Motors Corp.*, 2008 BCSC 1781, [2008] B.C.J. No. 2520 (B.C. S.C.), the plaintiff sought to represent a class composed of owners of various models of automatic transmission pickups and utility vehicles manufactured by General Motors between 1999 and 2002. It was alleged that a spring clip on

the parking brake was defective, rendering the brake less effective and potentially dangerous. From 2003 forward, GM had modified the design of the parking brake on both the manual transmission and the automatic transmission vehicles to include a new spring clip. Service bulletins sent out by GM in 2002 to 2005 made the newly-designed spring clip available for both manual and automatic vehicles.

150 In 2005, GM recalled the manual transmission vehicles produced from 1999 to 2002 in order to replace the original spring clips with different clips. The automatic transmission vehicles, like the plaintiff's, were not recalled.

151 The potentially faulty spring clips had been investigated by an agency of the Department of Transportation in the United States, which found that the issue of "rollaway" (which presumably refers to a vehicle moving in spite of the application of the parking brake), was confined to the manual transmission vehicles. The "rollaway rate" in the GM automatic transmission vehicles was found to be comparable to the rates experienced by other vehicles. Accordingly, no recall was ordered for the automatic transmission models.

152 The evidence also established that no concerns had been expressed by Transport Canada. There had been only three complaints to Transport Canada regarding the parking brakes of GM trucks, none of which related to vehicles in the proposed class. There was evidence that the braking system met the applicable safety standards in both the United States and Canada. The evidence of a GM witness was that there was no safety concern with respect to the automatic transmission vehicles.

153 A motion to certify the action as a class proceeding was dismissed. It was conceded that the pleading disclosed a cause of action based on negligent manufacture of a defective product that poses a real and substantial danger: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193 (S.C.C.). That was the same case Lax J. had relied on in *Griffin v. Dell Canada Inc.*, concluding that it was an open question as to whether the case extended to non-dangerous products.

154 The real impediment to certification in *Chartrand v. General Motors Corp.*, however, was the absence of any "air of reality" to the assertion of a relationship between the proposed class and the common issues. Martinson J. found that not only was there no evidence that there was an identifiable class of two or more people with complaints about the vehicles,

> There is no air of reality to the assertion that there is a relationship between the proposed class, being the owners of the automatics in question, and the proposed common issues that arise in Ms. Chartrand's negligence and unjust enrichment claims. [at para. 68]

155 I take this to mean that there was no basis in fact for the proposition that the plaintiff's vehicle and the vehicles of all other class members shared a common defect and that the defendant's liability for that defect could be determined on a class-wide basis. That is precisely the situation before me.

156 *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée* (2006), 35 C.P.C. (6th) 264, [2006] O.J. No. 4625 (Ont. S.C.J.) at para. 100, aff'd [2008] O.J. No. 4153 (Ont. Div. Ct.) was also a defective vehicle case. The plaintiff alleged that the door latch mechanisms in certain Ford vehicles were defective and failed to meet the minimum regulatory standards in Canada and the United States.

157 The defendant adduced evidence that although they had some common components, the design and manufacture of the door latch mechanisms in the vehicles at issue were different and would require individual

investigation of the alleged defects. As a result, findings in relation to a particular vehicle could not be extrapolated to other vehicles.

158 In refusing to certify a common issue about whether the door latch mechanism was "defective and unreasonably unsafe," MacKenzie J. observed at para. 67:

> The plaintiff has failed to establish on the evidentiary record that the different door latch mechanisms on the Affected Vehicles are of no consequence. Both the plaintiff and the defendants have put forward evidence in respect of their positions. In the circumstances, the issue framed above cannot be described or characterized as a common issue within the meaning of the case law. Accordingly, a resolution of this issue relating to the plaintiff's vehicle does not resolve the question of whether other Affected Vehicles having a different door latch mechanism have a defective or unsafe door latch mechanism.

159 Thus, the absence of an evidentiary basis to show commonality between the door latch mechanism on the plaintiff's vehicle and the mechanisms of the vehicles of all other class members made the question unsuitable as a common issue.

160 In *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, [2005] B.C.J. No. 2370 (B.C. C.A.), rev'g [2004] B.C.J. No. 2411 (B.C. S.C.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.), the British Columbia Court of Appeal reversed the decision of the B.C. Supreme Court to certify a proposed class action on behalf of owners of trucks manufactured by General Motors. The Court of Appeal found that there was no evidentiary basis for the proposed common issues. The plaintiffs sought to recover damages based on the alleged diminution in value of their vehicles as a result of the allegedly dangerous location of their fuel tanks.

161 The plaintiff, a GM truck owner, had commenced the action after hearing of a similar proceeding in the United States. In support of the certification motion, plaintiff's counsel had filed, attached to one of the lawyer's affidavits, a report of the United States National Highway Traffic Safety Administration, which essentially stated that the fuel tanks on certain GM trucks were in a dangerous location. Attached to the same affidavit was a settlement agreement relating to a class action suit in Louisiana. The certification motion judge held that the report was not evidence. There was no evidence that there had been any recall in either Canada or the United States.

162 For its part, GM introduced evidence that the trucks at issue, which were from four different series, had a number of different fuel systems designs, which had been changed at various times during the eighteen year class period.

163 The certification motion judge, although finding that the Safety Administration report was "not evidence," concluded that at the certification stage, it could be presumed to be true. The Court of Appeal found that he fell in error in doing so and made the following observation at para. 31:

> Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants: see the discussion at paras. 31-52 of *Epstein v. First Marathon Inc.* (2000) 41 C.P.C. (4th) 159 (Ont. Sup. Ct.

J.).

164 The Court of Appeal found that without this report, there was no evidentiary basis for the proposition that the location of the fuel tank of the plaintiff's vehicle raised a question common to all the class members, the resolution of which would significantly advance the litigation. It continued, at para. 32:

> Rather, the only evidence is that of the defendants' expert, Mr. Sinke, to the effect that because the C/K pick-ups between 1973 and 1991 incorporated "a number of unique fuel system designs", one cannot "generalize on how such vehicles will perform in particular crashes beyond stating that all the designs are reasonably safe and meet all applicable federal safety standards." The ability to generalize, or extrapolate, from one plaintiff's vehicle to another, is crucial to the existence of a common issue. As Huddart J.A. stated for the majority in *Harrington v. Dow Corning Corp.*, supra:
>
> > More important to a determination of common issues is the requirement that they be "common" but not necessarily "identical." In the context of the Act, "common" means that the resolution of the point in question must be applicable to all who are to be bound by it. I agree with the appellants that to be applicable to all parties, the answer to the question must, at least, be capable of extrapolation to each member of the class or subclass on whose behalf the trial of the common issue is certified for trial by a class proceeding. As the appellants note, this requirement will, of necessity, require that the answer be capable of extrapolation to all defendants who will be bound by it.
> >
> > [para. 24; emphasis added.]
>
> Having provided no "evidentiary basis", the plaintiffs did not meet this requirement in this case.

165 In setting aside the certification order, the Court of Appeal continued further, at para. 33:

> ... In the case at bar, the plaintiffs failed to establish an evidentiary basis; i.e., to adduce admissible evidence, for the proposition that the determination of the real common issues - whether the fuel system design(s) employed by the defendants breached the applicable standard(s) of care and created an unreasonable risk of harm to the plaintiffs - would advance the litigation in a meaningful way. I conclude that the certification order must therefore be set aside.

166 Put another way, the plaintiff had failed to establish a basis in fact for the proposition that the answer to the common issue could be applied to the claims of all members of the class.

167 In *Benning v. Volkswagen Canada Inc.*, 2006 BCSC 1292, [2006] B.C.J. No. 1956 (S.C.), the plaintiff asserted that there was a defect in the locking system of the Volkswagen Jetta and other Volkswagen and Audi vehicles using the same system. He sought certification of a class action on behalf of owners or lessees of such vehicles.

168 The plaintiff had experienced two break-ins to his Volkswagen vehicle. In both cases, there was damage to the door lock mechanism. An expert metallurgical engineer, with specific expertise in the field of failure analysis and fracture mechanics, expressed the opinion that there was a design flaw in the lock assembly which made it particularly vulnerable to a break-in. Another expert witness for the plaintiff, a mechanical engineer specializing in mechanical and material failures, carried out testing of the door lock mechanism, including destructive testing. He concluded that the design of the lock mechanism made it easy to dislodge and easily opened. He

examined, and opined upon, door locks of vehicles of other manufacturers, and concluded that their design prevented them from being opened by a thief armed only with a hammer and a screwdriver.

169 Gropper J. of the British Columbia Supreme Court declined to certify the action as a class proceeding. She found that it would be impossible to extrapolate the results of the analysis of the fitness of the lock on the plaintiff's vehicle to other vehicles in the class because the nature of the attack would vary from vehicle to vehicle.

170 Interestingly enough, in a subsequent case, also involving allegedly defective vehicle locks, Dardi J., also of the British Columbia Supreme Court, certified the proceeding: *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, [2010] B.C.J. No. 838 (S.C.). In that case, however, the manufacturer had addressed the problem by introducing a reinforcement to the lock and further changes in the design and manufacture of the door lock mechanism. As well, it had sent a letter to owners of the affected vehicles advising them of the availability of the reinforcement for the door lock mechanism and offering them $100 towards the purchase of a shock sensor alarm. The court held that it could be inferred from these facts that there was a commonality in the alleged defect.

Conclusions on Comparative Cases

171 This brief review demonstrates the need for the plaintiff to demonstrate on certification some factual basis for the proposition that the product owned by the plaintiff shares a common defect with the products owned by all members of the class. The plaintiff need not establish that the defendant is liable for the defect, but it must be shown that the defendant's liability to the class can be extrapolated from a finding in relation to the representative plaintiff.

172 Thus, in *Chase v. Crane Canada Inc.*, there was evidence of an unusually high failure rate amongst toilet tanks manufactured at a particular plant and expert evidence linking the failure to the process employed at that plant. In *Bondy v. Toshiba of Canada Ltd.* and *Griffin v. Dell Canada Inc.*, there was evidence that the plaintiffs' computers were shutting down or otherwise failing to perform in normal operating conditions and there was expert evidence linking those failures to deficiencies in design that were shared with other computers in the class. In both cases, there was a factual foundation for the proposition that findings concerning the plaintiffs' computers could be extrapolated to all the computers at issue. In *Koubi v. Mazda Canada Inc.*, the actions taken by the manufacturer, which applied to the entire class, helped to establish that there was a defect and that it was common to all the vehicles at issue.

173 On the other hand, in the cases that were not certified, the evidentiary record did not establish a basis in fact for the common issues. In *Chartrand v. General Motors Corp.*, the defect in the plaintiff's vehicle had not been established and there had been no recall of automatic transmission vehicles, which met all relevant standards. There was no evidence that the alleged defect could be determined on a class-wide basis. Similar conclusions were reached in *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée* and *Ernewein v. General Motors of Canada Ltd.*

174 The evidence to establish that the product is defective and that liability can be determined on a class-wide basis, may vary from case to case. In some cases, evidence that the defendant or regulatory authority has made a product recall may be sufficient. In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

175 I now turn to the test for certification under s. 5(1) of the *C.P.A.*

B. Section 5(1)(a): Cause of Action

176 Section 5(1)(a) of the *C.P.A.* requires that the pleadings disclose a cause of action. The plaintiffs have set out a number of principles applicable to this requirement, all of which I accept:

- the certification stage is not meant to be a test of the merits of the action;
- the question is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action;
- the proper approach to the section 5(1)(a) requirement is to apply the "plain and obvious" test that is applied on a motion to strike a statement of claim under Rule 21, for failing to disclose a cause of action;
- no evidence is admissible for the purpose of determining the section 5(1)(a) criterion;
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- the pleadings will only be struck if it is *plain and obvious* and beyond doubt that the plaintiff cannot succeed and the action is certain to fail;
- the novelty of the cause of action will not militate against sustaining the plaintiff's claim;
- matters of law which are not fully settled by the jurisprudence must be permitted to proceed;
- the pleadings must be read generously to allow for drafting inadequacies or frailties and the plaintiff's lack of access to many key documents and discovery information;
- there is a very low threshold to prove the existence of a cause of action.

177 The plaintiffs plead:

(a) breach of contract;

(b) breach of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A;

(c) breach of section 52 of the *Competition Act*, R.S.C. 1985, c. C-34;

(d) unjust enrichment; and

(e) waiver of tort.

178 The plaintiffs have two fundamental pleading problems. The first is that they purchased their cameras from retailers, not from Canon. This immediately distinguishes this case from *Griffin v. Dell Canada Inc.*, where Dell sold directly to the public. The plaintiffs have therefore struggled to find some way of establishing contractual privity with the defendants. They have done this by pleading that the warranty that came with their Cameras puts them in a relationship of privity with Canon. They have also pleaded that the retailers who sold to them were Canon's agents. I will discuss these pleadings below.

179 The plaintiffs' second problem is that there is no pleading in negligence. I was advised that this was a deliberate decision on the part of plaintiffs' counsel, I assume due to concerns about the recoverability of pure economic loss in the case of allegedly "shoddy" but non-dangerous goods — see *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590, 5 C.C.L.T. (3d) 61 (Ont. S.C.J.). On the other hand, in *Griffin v. Dell Canada Inc.*, above, Lax J. found that the availability of that cause of action was an "open question". Similarly, on a pleadings motion prior to certification in *Bondy v. Toshiba of Canada Ltd.*, [2006] O.J. No. 1665, 35 C.P.C. (6th) 293 (Ont. S.C.J.), Brockenshire J. found that it was not "plain and obvious" that a claim of negligence in design and manufacture was bound to fail, particularly when coupled with a claim for negligent misrepresentation and allegations of a direct relationship between the consumer and the manufacturer.

180 These problems have forced the plaintiffs to engage in creative and imaginative pleading. I approach the cause of action issue, however, bearing in mind that the principles set out earlier in this section, particularly the direction that the pleadings should be read generously and that the novelty of the cause of action is not a bar to the action proceeding.

1. Breach of Contract

181 The plaintiff pleads that the standard one-year warranty (referred to in the statement of claim as the "Warranty-Contract") included with the Cameras is a contract between Canon and each class member.

182 In assessing whether the pleading discloses a cause of action for breach of contract, I am entitled to consider contractual documents (in this case, the warranty) that are referred to in the pleading and that form an integral part of the plaintiff's claim: see *Re*Collections Inc. v. Toronto Dominion Bank*, 2010 ONSC 6560, [2010] O.J. No. 5686 (Ont. S.C.J.) at para. 107 and cases referred to therein.

183 The warranty states:

> Your PowerShot Digital Camera when delivered to you in new condition in its original container, is warranted against defects in materials or workmanship as follows: for a period of one (1) year from the date of original purchase, defective parts or a defective PowerShot Digital Camera returned to Canon U.S.A. or Canon Canada, or their authorized PowerShot Digital Camera service providers, as applicable, and proven to be defective upon inspection, will be repaired with new or comparable rebuilt parts or exchanged for a refurbished PowerShot Digital Camera, as determined by Canon U.S.A or Canon Canada, or the authorized PowerShot Digital Camera service provider, in their sole discretion.

184 The warranty provides that the agreement is between the original purchaser and Canon Canada Inc. It continues:

> No implied warranty, including any implied warranty of merchantability or fitness for a particular purpose, applies to the PowerShot Camera after the applicable period of the express limited warranty stated above, and no other express warranty or guaranty, except as mentioned above, given by any person or entity with respect to the PowerShot Digital camera shall bind Canon U.S.A or Canon Canada. (some states and provinces do not allow limitations on how long an implied warranty lasts, so, the above limitation may not apply to you).

185 The plaintiffs plead that the defendants owe the plaintiffs a duty of good faith in the performance of the "Warranty-Contracts" and that they breached the duty of good faith:

> [...] by failing to act honestly and reasonably in the exercise of their Warranty-Contracts with the Plaintiffs because the Defendants knew or had reason to know of the Defect, that the Cameras were and are susceptible to the Defect, and the Defendants did not disclose same to the Plaintiffs.

186 The plaintiffs also plead that because they and other class members did not have a chance to see the warranty prior to the purchase of their cameras, since they did not receive it until they opened the box, the defendants cannot rely on the warranty. As a result, they say that the "unfair terms" of the warranty must be struck, including (a) the waiver of the implied warranties of merchantability and fitness for purpose; (b) the loss of protection under the warranty in the event of misuse; and (c) the one-year limitation of the warranty. This causes me to query how the plaintiffs can rely on the warranty if it has been struck, but it is not necessary to resolve that question.

187 The pleading with respect to breach of contract is devoid of content. There is no pleading of any contract between Canon and the plaintiffs, other than the warranty, but the warranty is not a contract of sale, it is a contract to repair or replace defective cameras, under certain defined conditions, within one year. The plaintiffs have not pleaded facts that could be a breach of warranty and there is no allegation that the warranty itself has been breached.

188 It seems to me that the claim based on the warranty must be struck, based on simple contract law. The claim in this action is not based on the warranty — it is based on an alleged defect in the camera itself.

2. Breach of Consumer Protection Act, 2002

189 The plaintiffs claim that Canon breached the *Consumer Protection Act, 2002*, and that they are entitled to damages or, alternatively, a refund of the purchase price paid for their Cameras, under s. 98(3) and s. 100 of the *Consumer Protection Act, 2002*. I will begin by summarizing the pleading and will then analyze it in more detail in order to determine whether a cause of action has been pleaded.

190 One of the difficulties the plaintiffs have, in pleading the *Consumer Protection Act, 2002*, is a previous decision of mine (in which the same counsel acted for the plaintiff) to the effect that the *Consumer Protection Act, 2002*, does not apply to claims by a consumer against a manufacturer: see *Singer v. Schering-Plough Canada Inc.* (2010), 87 C.P.C. (6th) 276, [2010] O.J. No. 113 (Ont. S.C.J.).

The Pleading

191 The plaintiffs plead that the "Warranty-Contract" given by Canon Canada Inc. is both a "consumer transaction" and a "consumer agreement" within the meaning of the *Consumer Protection Act, 2002*, and that both defendants are "suppliers" for the purpose of the definition of "consumer agreement" in s. 1 of that statute, "by virtue of the fact that Defendants engage in the sale of goods, namely Cameras and the provision of services under a warranty." They refer in particular to s. 3 of the *Consumer Protection Act, 2002*, which provides:

> ... [i]n determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

192 The plaintiffs say that although a "consumer agreement" requires payment, the definition of "payment" under s. 1 is "consideration of any kind" and they plead that "payment" in this case includes the purchase price paid by the plaintiffs to Canon's authorized retailers and any remuneration paid by the retailers to Canon. They

plead that the purchase of the Cameras by class members is "consideration."

193 In the alternative, the plaintiffs plead that in substance, the relationship between the defendants and the class members is one of supplier-consumer and therefore the defendants, "through the intervening Authorized Retailers, which are acting as agents for Canon" are deemed to be supplying the Cameras to class members.

194 The plaintiffs also plead that the defendants have breached the *Consumer Protection Act, 2002*, by engaging in unfair practices by making false and misleading representations or failing to disclose material facts. The alleged false and misleading representations were:

(a) Non-disclosure of the defect to consumers;

(b) Canon's slogan "you always get your shot" is a misrepresentation as to the quality of the Cameras, "warranting a level of reliability which cannot be attained due to the built-in Defect"; and

(c) Canon's provision of a standard one-year limited warranty "implies that no inherent Defects were presently known by Canon."

195 The plaintiffs say that these were unfair practices and in breach of section 17(1) of the *Consumer Protection Act, 2002*, and were false, misleading and deceptive under s. 14(1) and (2). They say that, as a result of these breaches, they are entitled to a refund under s. 98(3) of the *Consumer Protection Act, 2002*. They plead that the retailers who sold the Cameras were agents of Canon or, alternatively, that the consideration paid by the retainers to Canon was "payment" for the purpose of section 98(3) of the *Consumer Protection Act, 2002*.

196 They rely on s. 18 of the *Consumer Protection Act, 2002*, which provides that an agreement entered into after a person has engaged in an unfair practice may be rescinded by the consumer and ask that the Court grant an order dispensing with the requirement of notice, under s. 18(15).

197 The plaintiffs also rely on s. 9(2) of the *Consumer Protection Act, 2002*, which extends the implied conditions and warranties under the *Sale of Goods Act* to goods supplied under a consumer agreement. They plead that Canon breached the implied warranties of merchantability and fitness for purpose and plead that the disclaimer of any such warranties in the "Warranty-Contract" is void under s. 9(3) of the *Consumer Protection Act, 2002*.

198 They plead that this warranty is a contract between the defendants and each purchaser and that the contract contains both express and implied terms. They plead that the warranties of merchantability and fitness for purpose are implied by law and cannot be waived. They argue that "the law in respect of privity is still developing, it is, thus, not plain and obvious that a consumer cannot maintain a suit directly against a manufacturer under the implied warranties of merchantability and fitness."

199 The plaintiffs also plead that the duty of good faith and fair dealing are implied terms of the warranty and that, due to the breach of that duty, the exclusionary terms of the warranty should be struck out.

Analysis

200 The terms of the Canon warranty (the "Warranty-Contract") are set out above. It is a warranty against defects in materials and workmanship for a period of one year.

201 The first question is whether the warranty is a "consumer transaction" and a "consumer agreement" within the meaning of the *Consumer Protection Act, 2002*, and whether the defendants are "suppliers" for the purpose of the definition of "Consumer agreement" in s. 1 of that statute, "by virtue of the fact that Defendants engage in the sale of goods, namely Cameras and the provision of services under a warranty."

202 The following statutory definitions are pertinent (s. 1):

> "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;
>
> "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;
>
> "consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;
>
> "goods" means any type of property;
>
> "payment" means consideration of any kind, including an initiation fee;
>
> "services" means anything other than goods, including any service, right, entitlement or benefit;
>
> "supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier.

203 It is certainly arguable, and not plainly and obviously wrong, that by providing the warranty to purchasers of the Cameras, Canon was engaged in a "consumer transaction," since it was dealing with a consumer.

204 It is also arguable, and not plainly wrong, that by providing the warranty, Canon was supplying services, namely repair and replacement of defective cameras, and that the consideration for such services was the consumer's purchase of the camera and that the warranty was a "consumer agreement."

205 It is also arguable, and not plainly wrong, that Canon is a supplier of services, to the extent it supplies warranty services.

206 However, the fact that Canon is a supplier of services under its warranty does not make it a supplier of goods, within the meaning of the *Consumer Protection Act, 2002*, in its dealings with consumers such as the plaintiff and the Class. The plaintiffs plead that they purchased their cameras from retailers and not from Canon. There is no "consumer agreement" with Canon for the purchase and sale of the plaintiffs' cameras. This has a direct impact on the remedies available to the plaintiffs under the *Consumer Protection Act, 2002*. If there is no agreement with Canon for the purchase of the cameras, there is no agreement to rescind and the alternative remedies under the statute are not available either.

207 The next question is whether the plaintiffs have properly pleaded a breach of the *Consumer Protection Act, 2002*.

208 Section 17(1) of the statute provides that "[N]o person shall engage in an unfair practice." Section 14(1)

provides that it is an unfair practice to make a "false, misleading or deceptive representation." Section 14(2) identifies certain representations that are false and misleading, "[W]ithout limiting the generality of what constitutes a false, misleading or deceptive representation..." The plaintiffs rely on the following sub-paragraphs of s. 14(2):

> 1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
>
> . . .
>
> 2. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not...
>
> 14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

209 As noted earlier, the plaintiffs plead that Canon has made false and misleading representations by virtue of: (a) failing to disclose the defect; (b) its slogan "you always get your shot"; and (c) the one-year warranty implies that no inherent defects are known to Canon.

210 Reading the statute purposefully and with a view to the protection of the public, it is concerned with unfair practices in relation to the goods or services supplied under the "consumer agreement." Vis-à-vis the plaintiffs, Canon is not a supplier of goods under its warranty, it is a supplier of services. The prohibition against unfair practices is in relation to the goods or services provided by the supplier. It is not a general prohibition in relation to goods that are supplied to an intermediary, namely the retailer.

211 Even if I found that the unfair practice could apply to representations relating to the Cameras or that the retailers were, as pleaded, agents of Canon, I would conclude that: (a) there is no positive and general obligation in the statute to disclose defects in the goods; (b) the "slogan", even if it was properly pleaded, which it has not been, is not a representation, it is an advertising pitch; (c) one cannot reasonably read the warranty as implying the absence of inherent defects — it simply says that if there are defects, Canon will repair them; (d) there is no express representation pleaded that fails to state a material fact. I agree with the submission of the defendants that s. 14(2).14 requires that there be a pleading of an express representation and no such representation has been pleaded.

212 The final question is whether the pleading discloses a cause of action based on the *Sale of Goods Act* implied conditions and warranties that are incorporated into consumer agreements pursuant to section 9 of the *Consumer Protection Act, 2002*.

213 Section 9 provides:

> (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.
>
> (2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.

> (3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.
>
> (4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing an intent that the deemed or implied warranty or condition does not apply.

[emphasis added]

214 In this case, I would be prepared to find, for the purpose of testing the pleadings, that the warranty was a "consumer agreement" for the supply of warranty services. Where the warranty services resulted in the supply of a replacement camera, it might also be possible to say that it was an agreement for the supply of goods — namely, that replacement camera. But the Cameras of the plaintiffs and the Class members were not supplied under the consumer agreement and the warranty is not an agreement for the sale or supply of goods.

215 Canon concedes that the deemed warranty under s. 9(1) of the *Consumer Protection Act, 2002* applies to services rendered pursuant to its warranty, but the claim in this action does not relate to those services, it relates to the goods. I would be prepared to find, were it relevant, that Canon's attempt to exclude the implied warranties is void by virtue of section 9(3) of the *Consumer Protection Act, 2002*, but — as I have said — the warranty given by Canon is not in relation to the sale of goods.

216 For these reasons, I would not find that the plaintiffs have pleaded a cause of action for breach of s. 9 of the *Consumer Protection Act, 2002*, or indeed any cause of action under that statute.

The Pleading of Agency

217 In the context of the pleading of the *Consumer Protection Act, 2002*, the plaintiffs plead that the substance of the relationship between Class members and Canon is that of supplier and consumer and Canon is therefore "deemed to be supplying the Cameras to the Class Members, through the intervening Authorized Retailers, which are acting as agents for Canon" (para. 47). Similar pleadings are made in paras. 57 and 58 of the statement of claim, in which the plaintiffs claim that the purchase price paid to retailers was received as agents and the Class members are entitled to a refund under s. 98(3) of the *Consumer Protection Act, 2002*.

218 The defendants submit that these pleadings of agency are pleadings of law, which offend rule 25.06(2), because no material facts are pleaded. Rule 25.06(2) provides:

> A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

219 I agree with this submission: see *Gardner v. Ontario* (1984), 7 D.L.R. (4th) 464, [1984] O.J. No. 3162 (Ont. H.C.), referring to *Paradis v. Vaillancourt*, [1943] O.W.N. 359 (Ont. H.C.); *Forensic Support Services Inc. v. Out of the Cold Resource Centre Inc.*, [2005] O.J. No. 2758 (Ont. Master); *Carten v. Canada*, 2009 FC 1233, [2009] F.C.J. No. 1511 (F.C.) at paras. 38-40; *Tompkins v. Alberta Wheat Pool*, [1997] A.J. No. 300 (Alta. Master). I recognize that in *CIBC Mortgages Inc. v. Vieira*, 2011 ONSC 775, [2011] O.J. No. 530 (Ont. S.C.J.), Bielby J. found that such a pleading was not a pleading of law, but there is no indication that these authorities were brought to his attention.

220 There being no material facts to support the pleading, it should be struck. In other circumstances, I would give the plaintiffs leave to amend to plead particulars and the defendants an opportunity to make submissions on the amended pleading. In view of the conclusions I have reached, it is not necessary to do so.

3. Breach of Section 52 of the Competition Act

221 The plaintiffs plead that Canon has made false or misleading representations to the public concerning the Cameras and has therefore committed an offence under s. 52 of the *Competition Act.* These misrepresentations were, the plaintiffs plead:

> (a) Canon's failure to disclose the "Defect" to consumers;
>
> (b) Canon's slogan "you always get your shot" is a misrepresentation in its advertisements as to the quality of the Cameras, warranting a level of reliability which cannot be attained due to the built-in Defect; and
>
> (c) Canon provided a standard one-year limited warranty, which implies that no inherent Defects were presently known by Canon.

222 The plaintiffs say that these were false and misleading representations contrary to section 52 of the *Competition Act* and that it is not necessary to establish that any consumer actually relied on these representations.

223 Section 52(1) provides:

> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.

224 Section 52 is contained in Part VI of the *Competition Act*, entitled "Offences in Relation to Competition." It is a regulatory offence and not, in and of itself, a cause of action.

225 Section 36 of the *Competition Act* contained in Part V, entitled "Special Remedies," provides a civil cause of action for a person who has suffered loss or damage as a result of conduct contrary to Part VI, such as a breach of s. 52.

226 The plaintiffs do not plead a cause of action under section 36, presumably due to issues associated with proof of common representations on a class-wide basis. Instead, they assert that the violation of section 52, when taken together with the so-called doctrine of waiver of tort, gives rise to a cause of action. In the words of the plaintiffs' factum:

> ... the violation of Section 52 of the *Competition Act* may be utilized in the context of Waiver of Tort, and, when taken together (a statutory violation with Waiver of Tort) constitutes a cause of action. That is to say, a monetary remedy is available under Waiver of Tort by virtue of the pleaded violation of Section 52 of the *Competition Act*.

Referring to: *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296, [2004] O.J. No. 2904 (Ont. S.C.J.), at paras. 35-38; and *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Ont. Div. Ct.) at paras. 46-48.

227 Section 52 requires that there be a "representation." The failure to disclose the alleged defect cannot be a "representation." Nor would it be a "representation" if one could infer from the warranty that Canon knew of no inherent defects in the Cameras — an inference that cannot reasonably be drawn in any event. Finally, what the plaintiffs claim is a "slogan" — "You always get your shot" — which is not pleaded with any particularity, is nothing more than puffery and not an actionable representation: see *Telus Communications Co. v. Bell Mobility Inc.*, 2007 BCSC 518 (B.C. S.C. [In Chambers]) at para. 19 ("on the most powerful network in Western Canada"); *Stone v. Galaxy Motors Inc.*, [1991] B.C.J. No. 334 (B.C. S.C.) ("best car on the lot"). I am simply unable to find that any of the pleaded misrepresentations is capable of sustaining a cause of action.

4. Unjust Enrichment

228 The plaintiff pleads that Canon has been unjustly enriched by its failure to disclose the "Defect," because, had the defect been disclosed, Canon would have sold fewer cameras or the cameras would have been sold for less. They plead that consumers have suffered a deprivation, in the form of damages arising out of the defect or because the cameras were purchased at a price that exceeded their true value. They plead that there is no juristic reason for the enrichment and that it would be inequitable for Canon to retain the revenues that it received from its wrongful conduct.

229 The plaintiffs refer to the well-known test for unjust enrichment set out in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21 (S.C.C.) at para. 30: There must be (a) an enrichment of the defendant; (b) a corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment.

230 In *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 2218, 174 O.A.C. 44 (Ont. C.A.), the plaintiff brought a proposed class action against a drug manufacturer for health problems suffered as a result of an allegedly defective drug. As part of her claim, she sought reimbursement of the price she had paid for the drug when she bought it from the retailer. The Court of Appeal held that her claim for unjust enrichment had been properly struck, because the purchase price for the drug had been paid to the retailer and not to the manufacturer. Any "enrichment" of the manufacturer was therefore indirect. The Court of Appeal stated, at para. 20:

> Third, the appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery. In *Peel (Regional Municipality) v. Canada*; *Peel (Regional Municipality) v. Ontario*, [1992] 3 S.C.R. 762, McLachlin J. said this at para. 58:
>
> > To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit

> (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. [Citations omitted.] It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. *The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant*, such as the services rendered for the defendant or money paid to the defendant
>
> [emphasis added in original quotation].

231 This decision is directly applicable to the case before me. To the extent that Canon may have been "enriched" by the purchase of cameras by the plaintiffs, the enrichment was indirect.

232 Moreover, the existence of a valid contract between the plaintiffs and the retailers, and between the retailers and Canon, is a valid juristic reason for any enrichment: *Bank of Montreal v. ACS Precision Components Partnership*, 2011 ONSC 700, [2011] O.J. No. 857 (Ont. S.C.J.) at para. 43; *Maynes v. Allen-Vanguard Technologies Inc.*, 2011 ONCA 125, [2011] O.J. No. 644 (Ont. C.A.) at paras. 49-52.

233 I therefore conclude that the pleading does not disclose a cause of action for unjust enrichment.

5. Waiver of Tort

234 The plaintiffs assert the right, at the common issues trial, to waive entitlement to tort damages and to have damages assessed based on a disgorgement remedy:

> As a result of the Defendants' conduct and breach of the aforementioned statutory provisions, the Plaintiffs reserve to themselves the right to elect at the trial of the common issues to waive all relevant pleaded torts, and to have damages assessed in an amount equal to the gross revenues earned by the Defendants, or the net income received by the Defendants from the sale of the Cameras.

235 The claim appears to be expressed, therefore, on the basis that waiver of tort is a remedy, as opposed to a cause of action. If that is the claim, it is not necessary for me to determine whether the plaintiff has pleaded a tenable cause of action and the issue of entitlement to a disgorgement remedy, if one exists, could simply be left to the common issues judge.

236 I propose to leave the issue on that basis. In light of my conclusions on the other causes of action, the claim in waiver of tort, if asserted as a cause of action, would fail for lack of an predicate wrongdoing: see *Aronowicz v. EMTWO Properties Inc.* (2010), 98 O.R. (3d) 641, 2010 ONCA 96 (Ont. C.A.) at para. 82; *Harris v. GlaxoSmithKline Inc.* (2010), 272 O.A.C. 214, 2010 ONCA 872 (Ont. C.A.) at paras. 58-59.

6. Summary on cause of action

237 In summary, the plaintiffs have not pleaded a cause of action in either contract or under the *Consumer Protection Act, 2002*, because they do not — and cannot — plead that they purchased their cameras from Canon. The warranty they received from Canon is not a contract for the sale of their cameras and they do not assert a claim under the warranty. They do not assert a cause of action under s. 36 of the *Competition Act* and they have no cause of action for unjust enrichment because they are unable to assert either a direct enrichment of Canon or the absence of a juristic reason for the enrichment. The claim in waiver of tort fails for lack of a predicate

wrongdoing.

C. Section 5(1)(b): Identifiable Class

238 In an action involving an allegedly defective product, the class will generally consist of those who purchased the product: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 20. As Lax J. noted in *Griffin v. Dell Canada Inc.*, above, at para. 70, the class definition in a product liability case will not usually be a matter of controversy, because the relationship between the class and the common issues will be clear from the facts.

239 The plaintiffs propose the following class definition:

> All persons in Canada who, either: (i) purchased one (1) or more of the Cameras, for their own use and/or received the Camera(s) as a gift from someone who purchased the Camera(s), during the Class Period [July 30, 2005 to the date of certification], or, (ii) purchased one (1) or more of the Cameras, for their own use and/or received the Camera(s) as a gift from someone who purchased the Camera(s) and had their Cameras manifest the Error during the Class Period.

240 I asked plaintiffs' counsel whether the group of Class members within part (ii) of the above definition was not a subset of the class members included within part (i). He explained that the intention was to include people who acquired their cameras before the Class Period in group (ii) if their cameras manifested the E18 Error during the Class Period. I suggested that this could create difficulties of identification, since an assessment would have to be made, in the case of each group (ii) class member, whether his or her camera "manifested" the E18 Error during the Class Period. After reflecting on this issue, plaintiffs' counsel acknowledged that the definition should be amended to delete group (ii).

241 The class definition is important because it identifies persons who have a potential claim for relief against the defendants. It defines the parameters of the lawsuit by identifying those persons who are bound by the result and it describes who is entitled to notice of certification: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (Ont. Gen. Div.), per Winkler J. at para. 10.

242 In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 (S.C.C.), McLachlin C.J. discussed the "identifiable class" requirement, at paras. 38 and 40, as follows:

> ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria...
>
> ...[W]ith regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

243 The class definition must also be connected to the common issues raised by the cause of action. As McLachlin C.J. said in *Western Canadian Shopping Centres Inc. v. Dutton* at para. 39, "an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim."

244 The plaintiffs submit that the revised definition meets the requirements of a proper class definition because it uses objective criteria, has a rational relationship to the common issues and does not depend on the outcome of the litigation. They submit that the definition is not unduly broad.

245 The "Cameras" are defined as any one of the twenty Canon models set out earlier, all of which fall within the "PowerShot" family, but they do not include all PowerShot models. Thus, the qualification for membership in the Class is ownership of one of twenty camera models. The problem with the class definition in this case is that there is no evidence to show any commonality between the complaints of the individual plaintiffs Lipner and Schatz, who owned two of the PowerShot models at issue, and the owners of the other eighteen camera models. There is no evidence as to why these twenty models, out of all the other PowerShot models (which were said to be 136) were chosen for inclusion in the class definition and the others were excluded. Why are the other seven PowerShot models inspected by Mr. Atkins not included in the class? Why are the other 116 models not included in the class? What is the feature of these twenty models that the Cameras have that gives commonality to their claims and that the other models do not have?

246 The evidence of Mr. Joffe does not help us with this issue, because his internet searches did not discriminate between different models of the Canon camera. Nor does the evidence of Mr. Atkins help for the reasons identified above — in fact, it was his opinion that "all Canon PowerShot optical units likely share a reasonably common design and functionality." If that is the case, why are all PowerShot models not included within the Class definition?

247 Balanced against this, the evidence of Canon is that only a very small number of the Cameras at issue have needed repairs as a result of the E18 Error message being displayed and the evidence of Mr. Hieber is to the effect that the cameras of the two representative plaintiffs displayed the message because of conditions that were *intended* to trigger the error message.

248 I have concluded that the plaintiffs are unable to articulate a coherent and evidence-based explanation for the class definition and I would not approve it.

D. Section 5(1)(c): Common Issues

1. General Principles regarding Common Issues

249 Section 5(1)(c) of the *C.P.A.* requires that "the claims or defences of the class members raise common issues." These are defined in s. 1 as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

250 It has been said that the common issue requirement is a critical inquiry, which lies at the heart of a class proceeding: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (B.C. C.A.) at para. 62.

251 The principles applicable to the common issues analysis have been set out in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (Ont. S.C.J.) at para. 140 and in *McCracken v. Canadian National Railway* [2010 CarswellOnt 5919 (Ont. S.C.J.)], above, at paras. 312-320. The common issues require-

ment is a "low bar": see *Cloud v. Canada (Attorney General)* [2004 CarswellOnt 5026 (Ont. C.A.)], above, at para. 52.

252 The plaintiff must, however, adduce evidence to show that there is "some basis in fact" for the existence of common issues: *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234, [2005] O.J. No. 3961 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, 71 C.P.C. (6th) 97 (Ont. S.C.J.), at para. 21; *Hollick* at paras. 16-26; *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120, [2009] O.J. No. 1910 (Ont. S.C.J.) at paras. 56-74; *Cloud v. Canada (Attorney General)*, above, at paras. 49 to 52; *Grant v. Canada (Attorney General)* (2009), 81 C.P.C. (6th) 68, [2009] O.J. No. 5232 (Ont. S.C.J.) at para. 21; *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.) at paras. 13-14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 4129 (Ont. Div. Ct.); *Ring v. Canada (Attorney General)*, 2010 NLCA 20, [2010] N.J. No. 107 (N.L. C.A.) at paras. 12-14.

253 The requirement of "some basis in fact" has been expressed in different ways. In *Grant v. Canada (Attorney General)*, Cullity J. stated at para. 21:

> At least for the purposes of the inquiry into commonality, it appears that the evidence must show merely that there is some basis in reality for the assertion that the Class members have claims raising issues in common with the claims of the plaintiff.

254 In *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, 71 C.P.C. (6th) 97 (Ont. S.C.J.), Lax J stated at para. 52:

> The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in fact to show that issues are common: *Hollick* at para. 25. An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

255 In his recent decision in *McCracken v. Canadian National Railway*, Justice Perell made a thorough examination of the "some basis in fact" test and the evidentiary burden for certification, noting the overwhelming authority for the propositions that (a) the plaintiff's evidentiary burden on a certification motion is low; and (b) the plaintiff is only required to adduce evidence to show some "basis in fact" to meet the requirements of ss. 5(1)(b) to (e) of the test for certification as a class action. He also noted, at para. 285:

> It is also established that a certification motion is not the time to resolve conflicts in the evidence: *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at para. 50 or to resolve the conflicting opinions of experts: 2038724 *Ontario Ltd v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.) at paras 101-102, aff'd. [2010] O.J. No. 2683 (C.A.).

256 Perell J. went on to describe the basis in fact test as a "necessary but not sufficient condition for certification." He noted at para. 301:

> That the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters. In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law,

and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.

257 In the context of the common issues analysis in this case, there must be some basis in fact for the plaintiffs' claims and some basis in fact to enable the court to determine whether the common issue requirement has been satisfied: *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Ont. Gen. Div.) ; *Grant v. Canada (Attorney General)* at para. 21. I must determine whether there is a "basis in reality" for the assertion that Class members have claims raising issues in common with the plaintiffs.

258 Recognizing this obligation, plaintiffs' counsel submitted that he would establish a basis in fact for the existence of a design defect in the Cameras and a basis in fact that this issue can be determined on a common basis.

2. Common Issues Proposed by the Plaintiffs

259 The plaintiffs propose the following common issues:

(a) Did the Canon cameras ("Cameras"), listed in the Claim (Schedule A of the Notice of Motion), contain a defect in design that renders the Cameras prone to manifesting the E18 Error? If so, were Defendants aware of this defect? If not, should Canon have been aware of such a defect?

(b) Does the warranty in respect of the Cameras constitute a contract as between the Defendants and the Class Members?

(i) Do the Defendants have duty of good faith and fair dealing in the performance of their Warranty Contract?

(ii) Does the doctrine of fundamental breach apply?

(iii) Are the Defendants barred from relying on the Warranty Contract's exculpatory clauses as the Class Members could not review same prior to the purchase of the Cameras in sealed boxes?

(iv) If yes to i, ii, or iii, should the court strike the following terms of the Warranty Contract: A) one year time limitation, B) the exculpatory clause (as referred to in the Claim), and C) the waiver of the implied warranties?

(c) Were the Defendants' representations, listed in paragraph 54 of the Claim (Schedule A of the Notice of Motion), false, misleading, deceiving or did they tend to deceive?

(d) If yes to question c, did the Defendants make materially false and misleading representations to the public in violation of Section 52 of the Competition Act, in respect of the Cameras?

(e) Are the sales of the Defendants' Cameras to Class Members "consumer transactions" and/or "consumer agreements" as defined by Section 1 of the Consumer Protection Act?

(f) If yes to question c or question e, did the Defendants engage in unfair practices or acts in the solicitation, offer, marketing and sale of the Cameras contrary to Part III of the Consumer Protection Act, 2002?

(g) Is the Defendants' warranty a (i) "consumer transaction" or (ii) a "consumer agreement", as defined by Section 1 of the Consumer Protection Act?

(h) Does Section 9(2) of the Consumer Protection Act apply?

(i) If yes to question h (i) Did the Defendants breach the implied warranty of merchantability by supplying the Cameras? (ii)) Did the Defendants breach the implied warranty of fitness for a particular purpose by supplying the Cameras?

(j) If the Defendants breached Parts I, II, and/or III of the Consumer Protection Act, are the Class Members entitled to (i) damages, (ii) rescission, (iii) disgorgement of profits, under Sections 18, 94, 98 and/or 100 of the Consumer Protection Act?

(k) Should the court exercise its discretion to waive the notice provisions of Sections 18(3) and 92 of the Consumer Protection Act as permitted by Sections 18(15) and 101 of the Consumer Protection Act?

(l) Were the Defendants unjustly enriched from the sale of the Cameras?

(m) Are the Class Members entitled to elect Waiver of Tort to compel the Defendants to disgorge their revenues or net income in connection with the sale of the Cameras?

(n) Is this an appropriate case to admit statistics under Section 23 of the Class Proceedings Act to determine the amount of the Defendants' liability?

(o) Pursuant to Section 24 of the Class Proceedings Act, should the court determine part or all of the Defendants' liability to the Class Members?

(p) Should the Defendants pay punitive damages to the Class Members?

260 Counsel for Canon submits that the first issue is the core common issue. The plaintiff's counsel acknowledged that this issue is "Do the Cameras break by virtue of a design defect" and that most of the remaining common issues are legal questions. For reference, I repeat the first common issue:

> Did the Canon cameras ("Cameras"), listed in the Claim... contain a defect in design that renders the Cameras prone to manifesting the E18 Error? If so, were Defendants aware of this defect? If not, should Canon have been aware of such a defect?

261 I agree that the fundamental question regarding the common issues is whether the plaintiffs have established a basis in fact for the existence of a design defect, common to all the Cameras, that causes the E18 Error message to appear and renders the Cameras inoperable. If there is a basis in fact for the first common issue, then some of the other issues will be appropriate for certification. If there is no basis in fact for this issue, then the resolution of the remaining issues would be of purely academic interest and would not move the action forward.

262 The obstacle to certification of the proceeding is the absence of admissible evidence to show that the plaintiffs' claims give rise common issues of fact. As I have noted, there is no evidence to show that the E18 Er-

ror message displayed by the plaintiffs' cameras is caused by a defect. Nor is there evidence to show that the answer to this question can be extrapolated from the plaintiffs' cameras to the Cameras of the class in such a way as to advance the resolution of every class member's claim.

263 To begin with, there is no admissible evidence that the display of the E18 Error message in the plaintiffs' cameras is anything other than an indication that the cameras were doing exactly what they were programmed to do — shut down and warn the user that the lens cannot extend in safety. This may be frustrating to the user, who will not necessarily know why the camera has stopped working and is refusing to start up again, but according to the evidence of Mr. Hieber, it is a built-in safety feature, designed to prevent further damage. This is not a case, like *Griffin v. Dell Canada Inc.* or *Bondy v. Toshiba of Canada Ltd.*, where the product unexpectedly shut down for no reason. In this case, the product was *designed* to shut down in certain conditions and there is no admissible evidence that the plaintiffs' cameras shut down for any reason attributable to defective design. The evidence of Mr. Hieber, who was the only qualified expert to actually inspect the plaintiffs' cameras, is that they probably experienced the E-18 Error message due to conditions unique to each camera that triggered the message because the barrel of the lens was being prevented from extending in the normal manner and within the pre-programmed time.

264 Moreover, there is no evidence that liability for the defect, if there is one, in the twenty Canon PowerShot models referred to in the statement of claim, can be determined on a common basis. The evidence of Mr. Hieber is that while there is a similarity in the basic design of the PowerShot cameras and the cameras have some common features, there are differences in their design and construction. There is no evidence to show that the similarities are such that the causes of the E18 Error can be determined on a common basis.

265 Mr. Atkins, based on an inspection of the 11 "exemplar" cameras (7 of which were in the PowerShot product line but not amongst the Cameras included in the class proceeding), purported to say that "Based on the variety of cameras that we inspected, it is our opinion that all Canon PowerShot optical units likely share a reasonably common design and functionality." This comes from a witness who had no prior experience in camera inspection, no experience in camera design and who had not even examined the optical units of the plaintiffs' cameras.[FN3] On cross-examination, Mr. Atkins admitted that this conclusion was an assumption on his part and that the only way he could know it would be by examining every single model. He also acknowledged that while the display of the E18 Error could be "consistent" with a design deficiency, it could also be consistent with other causes, such as impact damage or debris within the camera.

266 In re-examination of Mr. Atkins, plaintiffs' counsel asked him, on the assumption that he examined eleven cameras out of a PowerShot line of 136 cameras, whether he had on a statistical basis, a particular level of confidence in his conclusion that the eleven cameras were representative of the PowerShot line and that the optical units of the cameras were "reasonably identical in design..." The witness replied that he had a "very high level of confidence" in his conclusion.

267 There are two problems with this conclusion. The first is that, not being an expert in the field and never having seen the optical units in the plaintiffs' cameras, the witness was in no position to judge whether the design of one optical unit was the same as any other units, let alone whether they were similar to the design of the optical units in the plaintiffs' cameras. Second, statistics and probabilities have nothing to do with the determination of whether the design of one camera is the same as the design of another. The witness properly admitted on cross-examination that the only way to be sure was to examine the cameras themselves.

268 I might note in passing that it is clear that there are many cameras in the PowerShot line that are not included in this proceeding. The number of such cameras has not been clearly identified, although Mr. Atkins himself examined seven cameras that are not at issue in this proceeding and reference was made in the cross-examinations and in the factum of the plaintiffs to 136 models. No explanation has been given as to how the twenty cameras at issue were identified, out of all the PowerShot cameras produced by Canon, for the purpose of inclusion in this proceeding. If Mr. Atkins' conclusions are valid, no explanation has been given as to how the twenty cameras at issue in this proceeding have been selected.

269 I note as well that this is not a case, such as *Griffin v. Dell Canada Inc.*, in which the court has received evidence to establish that many other consumers (in that case over 400) have experienced the very problem of which the representative plaintiffs complain. The evidence of Mr. Joffe, which I find is inadmissible in any case, does not differentiate between "correct" E18 Error messages and "false" E18 Error messages — that is, between messages correctly identifying an obstruction of the movement of the lens and messages falsely shutting down the camera for other reasons, one of which is allegedly inadequate design. Nor does Mr. Joffe's report differentiate between the Cameras that are included in the class and all the other cameras in the PowerShot line that are outside the class. The data is entirely useless for the purpose of establishing a common issue relating to design.

270 In closing on this point, I should note that the plaintiffs submitted in their factum that they were unable, at this stage of the litigation, to make "a definitive determination of the existence of the Defect," because they "were prohibited from requesting the schematics and related technical drawings and specifications of the Defendants' Cameras" by an order of the court dated October 6, 2010. What the plaintiffs neglected to mention is that the order in question was made *on consent*, and dealt with a number of issues including the addition of three new plaintiffs and the removal of Mr. Berkovits, the delivery of a fresh as amended statement of claim, the inspection of the plaintiffs' cameras and other issues. The issue of whether the plaintiffs were entitled to the production of the defendants' technical drawings and other information was never argued, presumably because the plaintiffs concluded that they were content to proceed without them.

271 As I find the plaintiffs' first common issue is incapable of certification, the resolution of the remaining issues, which hinge on it, would do nothing to advance the claims of the class. Moreover, I have found that the plaintiffs have not pleaded any of the causes of action on which these common issues are based. I therefore do not propose to comment on them.

E. Section 5(1)(d): Preferable Procedure

272 Section 5(1)(d) of the *C.P.A.* requires that a class proceeding must be "the preferable procedure for the resolution of the common issues." In view of my findings that the fundamental common issue is inappropriate for certification, it is obvious that this action does not meet that aspect of the test.

F. Section 5(1)(e): Representative Plaintiffs

273 Section 5(1)(e) of the *C.P.A.* requires that there be a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

274 Representation has been problematic in this case. The original representative plaintiff, Mr. Berkovitz, withdrew in October, 2010. It was his evidence that he no longer had the camera as his children had been playing with it and apparently damaged it. As a result, it was impossible longer had to determine the cause of the E18 Error message. Mr. Williams has, as I have noted, also removed himself as a representative plaintiff. The evidence does not establish that his camera is affected by an E18 Error message.

275 That leaves Mr. Lipner and Ms. Schatz. For the purpose of this discussion, I will assume that there is a debate about whether their cameras displayed the E18 Error due to customer abuse or misuse, as Mr. Hieber opined, or for some other reason.

276 The defendants make a vigorous attack on the adequacy of these plaintiffs. They contend that:

(a) the representative plaintiff must demonstrate that he or she has a general understanding of the class action procedure and the nature of the lawsuit, in order that he can properly instruct counsel;

(b) the evidence must demonstrate that the plaintiff will be able to discharge these responsibilities and capably and vigorously prosecute the action to advance the interests of the class: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.) at para. 41; *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée*, [2008] O.J. No. 4153 (Ont. Div. Ct.) at para. 62;

(c) the representative plaintiff is not a mere placeholder, but rather must serve as a genuine client actively engaged in instructing counsel and directing the action on behalf of other persons with a direct interest in the common issues: *Chartrand v. General Motors Corp.*, 2008 BCSC 1781 (B.C. S.C.) at para. 99; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (Ont. S.C.J.) at para. 219.

277 Canon says that neither Lipner nor Schatz displayed the degree of familiarity or interest with the litigation that would be displayed by a real litigant who was engaged in his or her own proceedings. Lipner displayed a lack of appreciation of the statement of claim and of the models at issue in the proceeding. Questions to both Lipner and Schatz concerning their understanding of the role and responsibility of a representative plaintiff were refused.

278 I make no finding that Mr. Lipner and Ms. Schatz were recruited. They clearly had sufficient concern about an issue affecting their cameras that they were prepared to undertake the role of representative plaintiff. If the issue of representation was the only matter standing in the way of certification, I would be prepared to make a more thorough examination of this issue and of the proposed representatives and the litigation plan. In the circumstances, it is unnecessary to do so.

V. Conclusion

279 As is so often the case in Canadian class actions, this action appears to have followed on the heels of a class action in the United States: *Canon Cameras, Re*, 237 F.R.D. 357 (U.S. Dist. Ct. S.D. N.Y. 2006), 2006 U.S. Dist. LEXIS 62176. There were a number of cameras within the scope of the action and a number of complaints were made, including but by no means limited to complaints relating to the "E-18 Defect subclass," which referred to three of the cameras included in this action. While the test for certification of a class proceed-

ing under Rule 23 of the *Federal Rules of Civil Procedure* differs from the requirements of the *Class Proceedings Act*,[FN4] it is interesting to note that the United States District Court denied the motion for certification, finding that questions of law or fact common to the members of the class did not predominate over questions affecting only individual members. The Court also found that a class action was not superior to other available methods for the fair and efficient adjudication of the controversy.

280 The court described the history of the action as "a lawsuit in search of a basis." It observed that the plaintiffs had "not shown that more than a tiny fraction of the cameras in issue malfunctioned *for any reason*." It found that proof that the camera had malfunctioned would be a prerequisite to any of the plaintiffs' claims but that the class consisted overwhelmingly of owners of cameras that had not malfunctioned at all. Further, the court said that it was undisputed that where cameras did malfunction, many were due to causes such as consumer misuse, which would not result in liability under any theory, and the determination of a malfunction would require highly individualized fact-finding. The court continued:

> To be sure, this problem, in the abstract, may be present in many product design cases in which a class is nonetheless certified. But here, where the portion of the proposed class that even suffered malfunctions appears to be tiny, plaintiffs' proposal to certify the class of all camera owners, then determine which few suffered malfunctions, and then determine which few of those few even arguably can attribute the malfunctions to the design defect here alleged, would render the class action device nothing more than a façade for conducting a small number of highly individualized cases.

281 As I noted earlier, when this action was originally commenced, in 2007, the statement of claim pleaded that the E18 Error was caused by a defect in the "algorithm" used by the Cameras' internal processor. While this theory has since been scrapped, the plaintiffs have failed to replace it with any alternative theory that is grounded in the evidence. There is no evidence at all that the plaintiffs' cameras have a "defect." Nor is there any evidence to establish a factual basis for the proposition that all Cameras in the proposed class share the same defect or that the defendants' liability for that defect can be established on a common basis.

282 In the course of submissions, I asked plaintiffs' counsel why no effort had been made to present foundational evidence on these issues through an expert in camera design and construction. Mr. Juroviesky replied, very candidly, that he had looked for a digital camera expert but had been unable to find anyone, other than Mr. Atkins, whose shortcomings I have described. The fact that the plaintiffs are unable to meet the low "basis in fact" test in relation to subsections (b), (c) and (d) of section 5(1) of the *C.P.A.* through qualified expert evidence confirms my view that this is an appropriate case to exercise the Court's "gatekeeper" role by refusing certification.

283 For these reasons, the motion for certification is dismissed. Costs, if not resolved, may be addressed by written submissions.

Motion dismissed.

FN1 The Canon models are: A60; A70; A75; A80; A85; A95; 510; S30; S40; S100; S110; SD200; SD300; S400; SD450; S410; SD500; S2 IS; S500.

FN2 In the Canon SX100 model, this is the equivalent to the "E18 Error" message.

FN3 Mr. Atkins attended to observe the inspection of the plaintiffs' cameras by Mr. Hieber, but he did not inspect them himself, and Mr. Hieber did not disassemble the cameras to observe the optical units.

FN4 Under Rule 23(a), the threshold prerequisites to certification of a class action are numerosity, commonality, typicality and adequacy of representation. If these requirements are met, the plaintiff s are required to establish that they meet one of the three alternative conditions in Rule 23(b) which, in this case, was the condition that that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy

END OF DOCUMENT

TAB 16

2012 CarswellOnt 8439, 2012 ONSC 3692, 219 A.C.W.S. (3d) 33, 294 O.A.C. 251

Williams v. Canon Canada Inc.

James Williams, Kathleen Schatz and Rafael Lipner, Appellants and Canon Canada Inc. and Canon Inc., Respondents

Ontario Superior Court of Justice (Divisional Court)

Aston J., Herman J., Pomerance J.

Heard: June 21, 2012
Judgment: June 21, 2012
Docket: Toronto 548/11

Proceedings: affirming *Williams v. Canon Canada Inc.* (2011), 2011 ONSC 6571, 2011 CarswellOnt 12407 (Ont. S.C.J.); additional reasons at *Williams v. Canon Canada Inc.* (2012), 2012 ONSC 1856, 2012 CarswellOnt 3711 (Ont. S.C.J.)

Counsel: Henry Juroviesky, Mario Middonti, for Appellants

Paul J. Martin, Sarah J. Armstrong, for Respondents

Subject: Evidence; Civil Practice and Procedure; Corporate and Commercial

Evidence --- Opinion — Experts — Qualification of expert — Miscellaneous

Digital camera at times displayed error message, which plaintiff camera owner claimed was defect — Web analyst did searches through popular website to ascertain scope of problems, and engineer provided evidence as product failure expert — Plaintiff brought action for breach of contract, breach of Consumer Protection Act, breach of Competition Act and unjust enrichment — Plaintiff brought unsuccessful motion for certification of class proceedings — Motions judge did not admit evidence of web analyst or of engineer — Motions judge held that engineer did not have experience to be product failure expert — Plaintiffs appealed — Appeal dismissed — Motions judge did not err in striking evidence of engineer — Motions judge was correct in his articulation of legal test for admission of expert evidence — It was open to motions judge to conclude that neither engineer's academic credentials nor his experience gave him specialized knowledge about camera design or defects — Motions judge did not misapprehend nature or purport of opinion.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Digital camera at times displayed error message, which plaintiff camera owner claimed was defect — Plaintiff abandoned original theory that error was caused by failure in algorithm of camera's computer, and did not offer new theory — Plaintiff brought action for breach of contract, breach of Consumer Protection Act, breach of Competition Act and unjust enrichment — Plaintiff brought unsuccessful motion for certification of class proceedings — Motions judge held that there were insufficient common issues to warrant class proceedings — Motions judge held that it was not shown that error message was defect or that any defect applied to all class members' cameras in same manner — Plaintiffs appealed — Appeal dismissed — Motions judge did not err in his treatment of common issues or in striking evidence of engineer, proffered by plaintiff as product failure expert — Once engineer's evidence was struck, there was no remaining evidence capable of satisfying threshold under s. 5(1)(c) of Class Proceedings Act, 1992 — Repair statistics for camera, standing alone, were not capable of establishing common design defect — Even if engineer's evidence had not been struck, nature of evidence was too speculative to ground basis in fact for common issue.

Cases considered by *Pomerance J.*:

Fanshawe College of Applied Arts & Technology v. LG Phillips LCD Co. (2009), 2009 CarswellOnt 7272, 84 C.P.C. (6th) 125 (Ont. S.C.J.) — distinguished

Griffin v. Dell Canada Inc. (2009), 72 C.P.C. (6th) 158, 2009 CarswellOnt 560 (Ont. S.C.J.) — distinguished

Hollick v. Metropolitan Toronto (Municipality) (2001), *(*sub nom. *Hollick v. Toronto (City))* 56 O.R. (3d) 214 (headnote only), *(*sub nom. *Hollick v. Toronto (City))* 205 D.L.R. (4th) 19, *(*sub nom. *Hollick v. Toronto (City))* [2001] 3 S.C.R. 158, *(*sub nom. *Hollick v. Toronto (City))* 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — referred to

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — considered

Tavernese v. Economical Mutual Insurance (2009), 2009 CarswellOnt 3204 (Ont. S.C.J.) — distinguished

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(c) — considered

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 31(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57 — considered

APPEAL by plaintiff camera owners from judgment reported at *Williams v. Canon Canada Inc.* (2011), 2011 ONSC 6571, 2011 CarswellOnt 12407 (Ont. S.C.J.), dismissing their motion to certify class action.

***Pomerance J.*, (Orally):**

1 This is an appeal of the decision of Strathy J. declining to certify a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The action was proposed on behalf of a class of owners of cameras manufactured by the defendant, Canon Inc. and distributed in Canada by Canon Canada Inc. (Canon). It alleged that the cameras have a common design defect which causes them to display an error message (the "E18 message") and become inoperative.

2 Strathy J., in a lengthy and comprehensive ruling, found that the plaintiffs had failed to satisfy the requisite criteria for certification under s. 5(1) of the *Class Proceedings Act, 1992*, which provides as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

3 The appellants have raised issues in relation to each of the statutory requirements set out in s. 5 of the Act. We have determined that the issues arising under s. 5(1)(c) — the common issues requirement — are dispositive

of the appeal.

The Ruling on the Common Issues Requirement

4 On the agreement of counsel, the essence of the common issue was framed by the following question:

> Did the Canon cameras (cameras) listed in paragraph 1(c) of the amended, amended, amended fresh as amended statement of claim contain a defect in design that renders the cameras prone to manifesting the E18 error?

5 The motions judge ruled that there was no basis in fact for the allegation of a common design defect in either cameras of the plaintiffs or the cameras identified more generally in the class. The plaintiffs put forward two experts to give evidence on this point. The evidence of both witnesses was struck because the evidence did not satisfy the *Mohan* criteria for receipt of expert evidence (*R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.)). The appellants do not appeal the decision striking the evidence of Mr. Joffe, only that of Mr. Atkins. The motions court judge struck the evidence of Christopher Atkins on the basis that he was not a properly qualified expert.

6 On appeal, it is alleged that the motions judge erred in striking the evidence of Mr. Atkins and, further, in finding no basis in fact for the common issue. Applying the standard of review of correctness, we find that the experienced motions judge did not err in his treatment of these issues. Mr. Atkins did not have the qualifications necessary to voice an opinion about camera design in general, or optical lenses in particular. Once Mr. Atkins' evidence was struck, there was no remaining evidence capable of satisfying the threshold under s. 5(1)(c) of the Act. Even if Mr. Atkins' evidence had not been struck, the nature of the evidence was such that it would not have provided a basis in fact for the common issue. For these reasons, the appeal cannot succeed.

The Qualifications of Christopher Atkins

7 Mr. Atkins was proffered by the plaintiffs as a "consumer product failure expert". His qualifications were described by the motions judge in paragraphs 106-08 of his reasons:

> [106] Turning to Mr. Atkins' qualifications:
>
> • he was 32 years old at the time he gave his opinion;
>
> • he obtained a Bachelor of Applied Science degree in Mechanical Engineering in 2001 and obtained his P.Eng. designation in 2007;
>
> • he had no particular experience or expertise in cameras and had never designed or repaired a camera;
>
> • he is not a member of any relevant professional association other than the Association of Professional Engineers;
>
> • he has not published, taught or taken courses on the subject of camera design, construction or repair;
>
> • he has no relevant practical experience or training in the field of cameras in general or digital cameras in particular;
>
> • he has never testified as an expert witness on any subject, let alone camera design, construction or repair.

> [107] Prior to joining Walters Forensic Engineering ("Walters") in 2007, Mr. Atkins was employed by Canadian Tire from 2001 to 2007 in the quality engineering area and was involved in developing specifications for and inspecting, testing and conducting design modifications of consumer products, such as bicycles, lawn mowers, weed trimmers and hand tools. His work with Walters, though it involved some consumer products, seems to have been focused on accident reconstruction, automotive systems and human factors.
>
> [108] Mr. Atkins admitted that he did not have expertise in camera design to enable him to give an opinion about what specific design features would have to be incorporated in the Cameras to prevent the occurrence of the E18 Error message.

8 The plaintiffs acknowledge that the motions judge accurately described Mr. Atkins' education, experience and background.

9 In finding that Mr. Atkins was not qualified to state the proffered opinion, the motions judge stated at paras. 109-11 of his reasons:

> [109] The plaintiffs seek to qualify Mr. Atkins as a "consumer product failure expert." His main qualification, prior to becoming a consultant, seems to be his work at Canadian Tire. To conclude that Mr. Atkins is a "product failure expert" and is therefore qualified to express opinions on the failure of a digital camera because he has experience in inspecting, testing and developing specifications for lawnmowers, bicycles and weed whackers is a leap of faith that is not supported by any evidence. I cannot conclude that his work experience with power tools, lawnmowers and the like qualifies him to give an opinion about the alleged failure of what he himself describes as an "intricate and highly complicated" optical unit of a camera, which has its own internal computer mechanism, or about the design features that should have been installed in the camera to prevent a failure, the cause of which he does not even identify. Never having examined a camera other than the Canon cameras he bought over the internet and having had no training or experience in camera inspection, repair and design, he can have no way of knowing what is, or is not, appropriate design.
>
> [110] Like Mr. Joffe, Mr. Atkins' expertise is entirely self-conferred. There is no independent evidence that he is qualified to give an opinion on digital camera design or failure. He has no experience whatsoever with camera products and has done nothing to acquire any expertise.
>
> [111] In my view, Mr. Atkins is not qualified to give the opinion that he purports to give. His opinion is, therefore, inadmissible.

10 The plaintiffs allege various errors. First, they allege that the motions judge erred in applying an unduly stringent standard of scrutiny to the evidence of Mr. Atkins. The plaintiffs submit that, while the case of *Mohan* governs receipt of expert opinion, the rigours of the test should be relaxed when applied at a certification stage rather than a trial or other hearing on the merits. The plaintiffs rely on *Fanshawe College of Applied Arts & Technology v. LG Phillips LCD Co.* [2009 CarswellOnt 7272 (Ont. S.C.J.)], 2009 CanLII 65376 and *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.) as supporting this proposition. However, those cases are distinguishable in that the courts were concerned with the weight to be attached to expert opinion, rather than its admissibility. This was made clear by Lax J. in *Griffin*, at para. 76:

> The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*,

> 2005 BCCA 540, 260 D.L.R. (4th) 488 (B.C. C.A.). However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, *if they are otherwise admissible*: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (Ont. S.C.J.) at para. 19.
>
> [Emphasis added.]

11 In this case, the issue is not weight, but admissibility. Before a witness can offer an expert opinion, he or she must be "shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." (see *Mohan*, at p. 25). This is a vital pre-condition to admissibility. Even at the certification stage, there is no principled reason to relax the requirement that only a qualified expert can give opinion evidence. Absent a properly qualified witness, there is no expert opinion and therefore no basis for receiving the evidence.

12 We find that the motions judge was correct in his articulation of the legal test, as exemplified in paras. 65-67 of his reasons.

> [65] While the evidentiary burden on a certification motion is the low, "basis in fact" test, that burden must be discharged by admissible evidence. The evidence tendered on a certification motion must meet the usual criteria for admissibility: *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (CanLII), [2011] O.J. No. 17, 2011 ONSC 63 at para. 13; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (CanLII), (2005), 260 D.L.R. (4th) 488, 2005 BCCA 540 at para. 31, leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 545.
>
> [66] This applies to all forms of evidence, including expert evidence: *Schick v. Boehringer Ingelheim (Canada) Ltd.* at para. 14. In *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319, 158 A.C.W.S. (3d) 193 (S.C.J.), Cullity J. observed at para. 19:
>
> > I accept, also, [counsel's] submission that the fact that only a minimum evidential foundation need be provided for each of the statutory requirements for certification - other than that in section 5(1)(a) - does not mean that the standards for admissibility can properly be ignored, or are to be relaxed for this purpose. However, insistence that the general rules of admissibility are applicable to expert evidence filed on motions for certification does not entail that the nature and amount of investigation and testing required to provide a basis for preliminary opinions for the purpose of such motions will necessarily be as extensive as would be required for an opinion to be given at trial.
>
> [67] This means that expert evidence tendered on a certification motion must meet the test for admissibility but, once found admissible, the quality of evidence required to establish a "basis in fact" is not the same as would be required for proof "on a balance of probabilities" at a trial on the merits.

13 The plaintiffs also allege that the motions judge erred in failing to appreciate that Mr. Atkins' opinion concerned the optical lens of the camera, rather than the camera as a whole. We find that the motions judge did not misapprehend the nature or purport of the opinion. The plaintiffs' position is that the optical lens should be viewed as something of a "stand-alone" unit that operates independently of the camera. It is said that, even if Mr. Atkins had no expertise in cameras as a whole, he was equipped to offer an opinion about the optical lens of a camera. However this argument is based on the dubious assumption that the operation of the optical lens can

be understood without reference to the camera in which it functions, an assumption that is not supported by the record in this case. According to Henrique Teixeira, a defence expert who was not cross-examined by the plaintiffs, the E18 message is displayed when the optical lens unit interacts with a computer within the camera. If the computer detects that the lens barrel has not extended or retracted within a specified period of time, it shuts down and displays the E18 message in order to prevent damage to the optical unit. Given this evidence, which stood uncontradicted, it is doubtful that the optical lens can be viewed independently of the camera.

14 In any event, Mr. Atkins himself acknowledged that he did not have expertise in the design of cameras or their lens mechanisms. During cross-examination, he was asked about his opinion that the camera was defective because the lens mechanism did not possess preventative measures to guard against the entry of minimal amounts of dust or debris. There followed this exchange:

> Q. You don't list what any of these preventative measures could be, right?
>
> A. No.
>
> Q. In fact, you don't have the requisite expertise to be able to opine on that, correct?
>
> A. On camera design, no.

15 Finally, contrary to the assertions of the plaintiffs, Mr. Atkins did not restrict himself to the optical lens unit when stating his opinion. He overstepped this boundary when he asserted in his report that the optical lens "is below standard in its durability and functionality being overly sensitive, prone to failure, and not fit for normal use of a digital camera". There was nothing in Mr. Atkins' education, experience or background that qualified him to opine on acceptable standards of durability or operability of cameras. Mr. Atkins' experience with consumer products involved items such as lawn mowers, bicycles and weed trimmers. It is self-evident that these items are fundamentally different than cameras, and must have different capacities to withstand sand, dust and debris. Expertise is contextual. As held by the motions judge, there was no reason to believe that the witness' experience with power tools and lawnmowers would generalize to more sensitive devices such as digital cameras.

16 The plaintiffs argued that there was no need for Mr. Atkins to have prior experience with cameras, relying on the decision in *Tavernese v. Economical Mutual Insurance* [2009 CarswellOnt 3204 (Ont. S.C.J.)], 2009 CanLII 28405. In *Tavernese*, two mechanical engineers were allowed to give expert opinion about the mechanism of a door to a safe that had been broken into. Neither expert had specialized knowledge about safes *per se*. In allowing the evidence, Lauwers J. held at para. 24 that:

> Mechanical engineering is about the properties of various materials and the application of forces and loads to them. It studies the failure of various types of materials and structures under stress. A mechanical engineer qualified by a professional designation and forensic experience is capable of giving evidence on the issues in this case after study of the safe, as was undertaken by both experts. Both experts testified that the safe in question was a simple mechanical structure and special technical expertise was not required for them to determine the way in which the door was removed from the safe.

17 By way of contrast, in this case, the optical lens of the camera was described by Mr. Atkins himself as being "intricate and highly complicated". Unlike the safe in *Tavernese*, it was not a simple mechanical structure.

18 The plaintiffs also relied upon *Griffin*. In that case, an engineer gave evidence about computer defects outlined in the statement of claim. The expert had no prior experience with computers and was not a computer or electrical engineer. He did, however, have other relevant experience — "many years of engineering experience that involves design, manufacturing and maintenance of electronic components for process machinery and electronic devices and failure analysis of major systems and printed circuits, including component, wiring and solder failures." (see *Griffin*, at para. 81). Lax J. found that the experience of the witness was relevant and transferable to the issue of the computer defects alleged in that case.

19 *Tavernese* and *Griffin* turned on their particular facts, just as this case does. Those cases do not, in their reasoning or result, cast doubt upon the correctness of the ruling in this case. On the evidence before him, it was open to the motions judge to conclude that neither Mr. Atkins' academic credentials nor his experience gave him specialized knowledge about camera design or defects. We see no error in the ruling of the motions judge striking this evidence.

No Other Basis in Fact for the Common Issue

20 In oral argument, the plaintiffs submitted that, even without the evidence of Mr. Atkins, there was some basis in fact for the common issue. The plaintiffs referred to repair statistics cited by Mr. Teixiera, the defence expert. Mr. Teixiera asserted that between January 2000 and April 2009, the total number of cameras of the models referred to by the plaintiffs sold were 977,085. Of those, 88,615 (9.07%) were repaired. 5,829 (.60%) of the cameras were repaired because they displayed the E18 error message code. Only 5,380 (.55% of total sold) needed repair for some reason other than customer misuse or abuse.

21 The plaintiffs asserted that these repair statistics, standing alone, are capable of establishing a common design defect. We do not agree. Cameras may be repaired for any number of reasons, just as there are many reasons for the E18 message to be displayed. One cannot infer a design defect from the fact of repair. This is all the more so given the defence evidence that the E18 message is an intended feature of the device designed to protect the camera lens in situations that could cause damage. We note as an aside, that in this case the repair statistics may well support the contrary conclusion given that the vast number of camera repairs were for reasons other than the E18 message. In oral argument, the plaintiffs counsel advised that the plaintiffs do not rely upon the E18 message displayed on the cameras of the representative plaintiffs. There is accordingly, no other evidence capable of providing a basis in fact for the common issue.

Would the Test Have Been Met by the Evidence of Mr. Atkins?

22 In his reasons, the motions judge noted that, even if he had considered Mr. Atkins' evidence, he would still have found no basis in fact for the alleged common design error. We agree with this conclusion. At its highest, Mr. Atkins' evidence was that there *might* be a design defect in the cameras, just as there might be any number of other reasons for the E18 message. Mr. Atkins' evidence was that the E18 message "was consistent with" a design deficiency in the optical unit of the camera, but that it was also "consistent with" any number of other explanations. This evidence was far too speculative to ground a basis in fact for the common issue.

23 The test under s. 5(1)(c), while low, must be sufficiently robust to screen out abusive or unmeritorious fishing expeditions. The gatekeeping function of the court would be effectively neutered if a plaintiff could satisfy its evidentiary burden based merely on a speculative assertion. Counsel for the plaintiffs submitted that the burden imposed by under s. 5(1)(c) is merely to present a basis for asking a question. That, in our view, cannot be enough. It is true that common issues are often expressed as questions. However, in order to justify certifica-

tion, the plaintiffs must raise a legitimate possibility that the question or questions could be answered in their favour. This does not involve an examination of the merits of the claim (see *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at paras. 16, 25). It simply requires that there be some factual basis — in the form of admissible evidence — to support the allegation. In the present case, that translated into a requirement that the plaintiffs adduce some evidence that there is at least some probability of a design defect in the cameras. In oral submissions, counsel for the plaintiffs conceded that its burden at the certification stage is to show that there is at least a triable issue.

24 Similarly, the plaintiffs have failed to establish the requisite degree of commonality for certification under s. 5(1)(c). Mr. Atkins asserted that, having examined the optical lens units of some cameras, he believed that all of the models in the class had the same or similar design. However, in cross examination, this assertion was exposed as an untested assumption. As explained by the motions judge in paras. 265-67:

> [265] Mr. Atkins, based on an inspection of the 11 "exemplar" cameras (7 of which were in the PowerShot product line but not amongst the Cameras included in the class proceeding), purported to say that "Based on the variety of cameras that we inspected, it is our opinion that all Canon PowerShot optical units likely share a reasonably common design and functionality." This comes from a witness who had no prior experience in camera inspection, no experience in camera design and who had not even examined the optical units of the plaintiffs' cameras. On cross-examination, Mr. Atkins admitted that this conclusion was an assumption on his part and the only way he could know it would be by examining every single model. He also acknowledged that while the display of the E18 Error could be "consistent" with a design deficiency, it could also be consistent with other causes, such as impact damage or debris within the camera.
>
> [266] In re-examination of Mr. Atkins, plaintiffs' counsel asked him, on the assumption that he examined eleven cameras out of a PowerShot line of 136 cameras, whether he had on a statistical basis, a particular level of confidence in his conclusion that the eleven cameras were representative of the PowerShot line and that the optical units of the cameras were "reasonably identical in design ..." The witness replied that he had a "very high level of confidence" in his conclusion.
>
> [267] There are two problems with this conclusion. The first is that, not being an expert in the field and never having seen the optical units in the plaintiffs' cameras, the witness was in no position to judge whether the design of one optical unit was the same as any other units, let alone whether they were similar to the design of the optical units in the plaintiffs' cameras. Second, statistics and probabilities have nothing to do with the determination of whether the design of one camera is the same as the design of another. The witness properly admitted on cross-examination that the only way to be sure was to examine the cameras themselves. [Footnotes omitted.]

25 For all of these reasons, we find that the motions judge did not err in ruling that the plaintiffs failed to satisfy s. 5(1)(c) of the Act. This conclusion is determinative of the appeal and it is unnecessary for us to consider s. 5(1)(a), (b), (d), or (e).

26 The appeal is therefore dismissed.

***Aston J.*:**

Costs

27 For oral reasons delivered by Pomerance J. and recorded, the appeal is dismissed. I will go on to provide brief reasons on behalf of the panel with respect to costs later today.

28 I have endorsed the Appeal Book and Compendium on behalf of the panel: "For oral reasons delivered by Pomerance J. (recorded), this appeal is dismissed with costs fixed at $40,000.00 all inclusive."

Costs Reasons

29 This case does not raise issues that would invite the application of s. 31(1) of the *Class Proceedings Act, 1992*. When considering the factors under Rule 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the reasonable expectations of the unsuccessful appellants as a factor, proposed plaintiffs in class action proceedings must understand they are engaged in high stakes litigation which will be aggressively defended at the certification stage. We note that the claim for partial indemnity costs is mainly at rates that are less than half of full indemnity.

Appeal dismissed.

END OF DOCUMENT

TAB 17

DATE: 19990913
DOCKET: C21487
C21488

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., CHARRON and MOLDAVER JJ.A.

B E T W E E N :	)	
	)	James C. Fleming,
HER MAJESTY THE QUEEN	)	for the appellant A. K.
	)	
Respondent	)	Timothy E. Breen,
	)	for the appellant N. K.
- and -	)	
	)	Susan L. Reid, Ian R. Smith and
A. K. and	)	Gillian Roberts,
N. K.	)	for the respondent
	)	
	)	
Appellants	)	Heard: April 6, 7, 8 and 9, 1999
	)	

On appeal from their convictions by Mr. Justice H. David Logan, sitting with a jury, on February 24, 1995

CHARRON J.A., McMURTRY C.J.O. concurring:

I. Overview

[1] Following their trial by judge and jury, the appellants were convicted of a number of sexual offences against children in their family and were each sentenced to a term of five years' imprisonment. They appeal against their convictions and seek leave to appeal their sentences.

[2] The conviction appeal raises two main issues. The first issue concerns the right of an accused charged with sexual offences to challenge prospective jurors for cause on the ground that the juror, by reason of the nature of the offence, is not indifferent between the Queen and the accused. The second issue relates to the admissibility of expert evidence called by the Crown to explain the complainants' delayed disclosure and other features of the complainants' behaviour. The conviction appeal also raises other issues regarding the propriety of Crown counsel's cross-examination of defence witnesses, the correctness of the charge to the jury on reasonable doubt and character evidence and the sufficiency of the competency hearing with respect to one of the complainants. Leave to appeal the sentence is sought on the ground that the sentence imposed is excessive having regard to the personal circumstances of each accused.

[3] On the first issue, it is my view that the trial judge was correct in refusing to permit the proposed challenge for cause. This ground of appeal essentially turns on the question whether this court's decision in R. v. Betker (1997), 115 C.C.C. (3d) 421 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused February 26, 1998, has been effectively overruled by the Supreme Court of Canada in the subsequent decision of R. v. Williams (1998), 124 C.C.C. (3d) 481 (S.C.C.). In my view, it has not. Although Betker must now be read in the light of the

principles in Williams, it remains authoritative and essentially disposes of this ground of appeal.

[4] On the second issue, I am of the view that it was open to the trial judge to allow the Crown to call expert opinion evidence on some restricted subject-matters. However, the prejudicial effect of the expert evidence called by the Crown at trial far exceeded its probative value and should not have been admitted. The expert evidence took on such importance at the trial that it cannot be said that no substantial wrong has been occasioned by this error. Consequently, on this ground alone, there must be a new trial.

[5] In view of my conclusion that there must be a new trial I will only address the other issues raised on the conviction appeal to the extent that they may impact on the conduct of the new trial and I will not deal with the sentence appeal.

II. The Right to Challenge for Cause

A. The application at trial

[6] At the commencement of their trial on January 23, 1995, the appellants brought an application to challenge for cause all prospective jurors because of the nature of the offences. The appellants A. K. and N. K. are brothers. They were tried jointly with two other accused on a 29 count indictment involving four complainants. The other two accused are A.K.’s sons. The complainants are granddaughters of A.K. and grandnieces of N.K. The charges relate to sexual abuse alleged to have occurred between 1978 and 1992 when the complainants were between the ages of 4 and 12. Following a month long trial, A.K. was convicted of 7 sexual offences against the four complainants. N.K. was convicted of 7 sexual offences against two of the complainants. The other two accused were acquitted on all counts.

[7] The appellants alleged before the trial judge that there was a realistic potential for partiality because of the nature of the charges themselves. They argued that allegations of sexual abuse, particularly as against children, give rise to such strong feelings, opinions and beliefs in the general population that there is a real risk that some prospective jurors might decide the case based on their personal views rather than solely on the evidence and in accordance with the judge’s instructions on the law. They argued that the right to challenge for cause should be recognized in all cases of sexual offences.

[8] The appellants further argued before the trial judge that the jury selection process that resulted in a mistrial on May 18, 1994 demonstrated a realistic potential for partiality entitling them on that basis alone to the statutory right of challenge for cause. The appellants relied on the following history of the proceedings in support of this latter argument.

[9] The appellants first appeared for trial before Logan J. and a jury on May 10, 1994. No application to challenge for cause was made at the time and the jury selection commenced. Following arraignment and plea before the jury panel, and prior to calling prospective jurors forward, the trial judge vetted the panel for bias. He briefly described the nature of the allegations, and advised the members of the panel that, if selected on the jury, they would be required to arrive at a decision based solely on the evidence. He then asked if anyone felt that they were

incapable of setting aside any biases. Eleven members of the panel came forward and advised the trial judge that they could not be impartial. The jury selection then proceeded and a jury was empanelled. The proceedings of May 10, 1994 are not in issue on this appeal.1

[10] On May 11, 1994 the Crown called its first witness. Upon entering the courtroom, the witness advised the Crown that one of the jurors was known to her. Following a voir dire, the juror was discharged. Given the anticipated length of the trial, all counsel agreed that a mistrial should be declared and that a new jury should be selected from the same panel the following Monday. The trial judge was reluctant to accede to this request as he anticipated that it could be difficult to select a jury from the number of members left in the panel. In his view, the trial should either proceed with 11 jurors or be put over for jury selection before another panel. However, in light of comments made by this court in R. v. Textor (1993), 75 O.A.C. 396, leave to appeal to the Supreme Court of Canada refused May 26, 1994 that the right of an accused to a jury of 12 should not be lightly interfered with, the trial judge finally declared a mistrial. Based on counsel's insistence for an early date, the trial judge adjourned the proceedings to the following Monday, on May 16, 1994 for jury selection before the same panel.

[11] At the commencement of the day on May 16, 1994, defence counsel, now anticipating some difficulties in selecting a jury from the same panel, made an application to challenge for cause in an attempt to address some of those concerns. Eleven questions were suggested, including questions on bias. Following discussions with counsel, the trial judge allowed the application and approved six of the proposed questions. Because the appellants are contending that an apprehension of bias was raised by the answers given to those questions by some members of the jury panel, it is important to consider the actual questions that were asked. I therefore reproduce them here.

> As the judge will tell you, in deciding whether or not the prosecution has proven the charges against the accused, a juror must judge the evidence of the witnesses without bias, prejudice, or partiality.
>
> Have you ever suffered sexual abuse or sexual assault, or known closely any individual who has claimed to have suffered sexual assault, sexual abuse, or sexual misconduct, such that you would be unable to be impartial as between the prosecution and the defence in this case?
>
> In spite of the judge's direction, would your ability to judge witnesses without bias, prejudice, or partiality be affected by the fact that the charges involve allegations of sexual misconduct, sexual assault, or sexual abuse of children?

> In spite of the judge's direction, would your ability to judge witnesses without bias, prejudice, or partiality be affected by the fact that the charges involve allegations of sexual misconduct, sexual assault, or sexual abuse by a male, or males, against a female, or females?
>
> Did you discuss, or have you heard the reason why a previous juror was discharged?
>
> Do you think a previous challenge of you will cause you to be biased, prejudiced, or partial towards either the defence or the prosecution?
>
> Has anything that has happened in the process thus far affected your ability to be unbiased, impartial, or indifferent between the defence or the prosecution?

[12] The jury selection process for the second trial commenced on May 16, 1994. Over the course of three days, 48 peremptory challenges were made; 47 members of the panel were found to be partial due to their answers to the questions asked during the challenge for cause process; and nine jurors were selected. On May 18, 1994, the third day of the selection process, the panel was exhausted. The trial judge refused to exercise his discretion under s.642 to summons other jurors from the community because, in his view, an additional 100 persons would have to be brought in and this would cause too much hardship on members of the community. A second mistrial was therefore declared.

[13] The transcript reveals that many members of the panel were confused by the questions asked on the challenge. They often asked that the question be repeated or indicated that they did not understand it. The answers given to the questions were at times confusing. The prospective jurors who gave a simple "yes" to any one or more of the questions were successfully challenged. Others who were successfully challenged gave answers such as the following:

> Well, I have an 11 year old daughter, and I think I would be biased.
>
> I think I would be affected emotionally. I wouldn't be able to make a fair decision.
>
> It is difficult for me to—how should I say it, I am having difficulty with this kind of charges, basically, because from my culture that I have, this doesn't happen that often, so I am having difficulty dealing with the facts as far as what might be presented in this case.
>
> Yes, I would be. I have a daughter

myself, and I have certain feelings.

Yes, in all honesty we have been speaking amongst ourselves whether this would be true or not, the accusations, the charges have – I just became a father just over three months ago, and if something like this were to be true, it would come down very hard on me emotionally. Hearing the charges being read bothered me emotionally. I don't – I did not want to believe that something like this could happen, so – and if it was brought to light that indeed it was true, it takes a lot out of a person. So as a father, I'd rather believe that it never happened, could not happen. Am I making any sense?

I really can't answer. I don't know. I don't know how I would be affected by the information given to me. I do seem to have a pre-judgment in my mind. I have seen these gentlemen in the hallway since last week, and I can't help but feel what I feel. I think I would have a difficult time trying to separate the facts with my emotions.

As a mother and a grandmother, I wouldn't like to swear on that, one way or the other.

Pertaining to the sexual assault, I would – I would be biased, yeah, I – I am not close with one, but I – it was a friend who was, so I am.

I don't know because I have three children of my own, and I don't know if I could.

I would find it difficult to not be biased.

Well, my wife was abused when she was younger… I guess [I would be unable to be impartial.]

I may have some trouble with that maybe because my wife is a school teacher.

I believe myself to be a fair man, but in light of my two daughters, one being ten and one being eleven, I must admit that I have some concern. It's also my understanding that the evidence is going to be potentially graphic or – as it is probably necessary to do, and I must admit I find that a little

upsetting. I'm sorry, that may not be a clear answer.

I was sexually assaulted one time, so I have a hard time to deal with this.

I have a very strong feeling about that. .. I'd have great difficulty with it.

That's hard to answer. I don't – I really don't know. I don't know what to say. I feel very strongly, and I'm quite upset about these charges, so…

I have five children of my own so it might. I might find it hard to be objective.

I think I going to be bias because I got two daughters, fourteen years old and eight years old.

I can't say for sure.

I really can't answer that, like unless I get into – you know, I think I probably would be, yeah.

[14] At the end of the process, the trial judge commented on the challenge process as follows:

In retrospect, and it is nice to look at things in retrospect, in my view the first three questions were too long. It was obvious that some had difficulty grasping the whole question, and that is something that would have to be looked at in the future by myself.

[15] The next appearance for trial was on January 23, 1995, again before Logan J. As stated earlier, defence counsel relied on the previous aborted selection of the jury as an additional basis to challenge for cause. It was argued that, in the eyes of the accused, there was an apprehension of bias by reason of the fact that, over the course of the three-day aborted selection process, they had repeatedly observed members of a jury panel declare that they could not be impartial. The appellants sought leave to ask the following question:

As His Honour will tell you, in deciding whether or not the Crown has proven the charges against an accused person, a juror must judge the evidence of all witnesses without bias, prejudice or partiality; that is the juror must decide the case with an open and fair mind. In this case, the complainants are related to the accused persons and allege that over a number

of
years, while they were young girls, they were sexually abused by
the accused men, who are relatives of theirs. Knowing these allegations, do you believe that you can set aside any preconceived biases, prejudices or partiality that you may hold
and decide this case with a fair and impartial mind?

[16] In addition to the aborted selection process, the appellants relied on the following material:

a) an unsigned and unsworn affidavit purportedly written by professor Neil Vidmar in 1993;

b) six articles on the subject of challenge for cause written by counsel; 2

c) the transcript from one previous trial in which such a challenge had been permitted; and

d) reference in argument to other cases where a similar challenge was permitted.

[17] During the course of the argument on the application at trial, defence counsel acknowledged that they could not rely on Professor Vidmar's affidavit given the fact that it was not authenticated.

[18] The trial judge refused to permit the challenge for cause. In his view, the material, including the unsigned affidavit by Professor Neil Vidmar, did not demonstrate the existence of generalized beliefs or prejudices that shape the daily behaviour of individuals. He held that the issue was unlike that in R. v. Parks (1993), 84 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused April 28, 1994, where the application was based on widespread racism. He concluded as follows:

> Racism is a complex set of ideas which amount to
> an ideology. Historically, it is an organized set of beliefs that
> promotes the superiority of one racial group over another. The
> same principles, as far as I can make out from the information
> filed, do not apply to [this case]… The application is denied.

At the commencement of the trial, the trial judge again vetted the panel for bias on the basis of the nature of the allegations as he had done earlier on May 10, 1994.

B. The issues on appeal

[19] This ground of appeal raises essentially the same question that was before this court in R. v. Betker. It was argued in Betker that an accused who is charged with sexual offences is entitled, as of right, to challenge prospective jurors for cause

because of the nature of the charges. The evidentiary basis relied upon in Betker was very similar to that filed in this case. Moldaver J.A., in writing for the court, held that the evidence did not show a realistic potential for partiality and that, consequently, the trial judge had not erred in refusing to permit the proposed challenge.

[20] The appellants submit that the rationale in Betker was effectively overruled by the Supreme Court of Canada in the subsequent decision of R. v. Williams. As a result, three arguments are advanced.3

[21] First, it is argued that, based on the precedential value of Williams alone and regardless of the material filed in support of the application for challenge for cause, this court should take judicial notice of the existence of generic prejudice, arising from stereotypical attitudes about the nature of the crime itself and from bias against persons charged with sex abuse. It is argued that the existence of this generic prejudice entitles an accused person to challenge prospective jurors for cause in all cases involving sexual offences.

[22] Second, it is argued in the alternative that Williams has effectively overruled this court's finding in Betker. Consequently, it is submitted that this court should revisit its finding in Betker and conclude that the material filed at trial in this case showed a realistic potential for partiality giving rise to a right to challenge for cause in all cases involving sexual offences.

[23] Third, and in the further alternative, it is argued that, even if Betker remains authoritative, the present case can be distinguished on the basis of the reasonable apprehension of bias arising from the aborted jury selection described above.

C. Analysis

[24] The right to challenge prospective jurors is a statutory right set out in the Criminal Code. The appellants rely on s.638(1)(b):

> s.638(1) A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> (b) a juror is not indifferent between the Queen and the accused;

[25] The right to challenge jurors on the ground of lack of indifference was recently the subject of review by the Supreme Court of Canada in R. v. Williams. Williams, an aboriginal person, was charged with robbery. At his trial, he applied to question potential jurors for racial bias under s.638(1)(b) of the Criminal Code. In support of his application, he filed materials that alleged widespread racism against aboriginal people in Canadian society. The application was denied and Williams was convicted. His appeal to the British Columbia Court of Appeal was dismissed. On further appeal to the Supreme Court of Canada, the appeal was allowed and a new trial was ordered on the ground that the proposed challenge for cause should have been permitted.

[26] The appellants contend that Williams has expanded the right

to challenge for cause. In my view, the Supreme Court in Williams simply reiterated established principles and clarified the law on the applicable test that must be met by an applicant before the right to challenge for cause can be exercised.

[27] The Court recognized that “lack of indifference” may be translated as “partiality” and the term was defined as follows (at p.488):

> “Lack of indifference” or “partiality”, in turn, refers to the possibility that a juror’s knowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused. A juror who is partial or "not indifferent" is a juror who is inclined to a certain party or a certain conclusion. The synonyms for “partial” in Burton’s Legal Thesaurus (2nd ed. 1992), at p.370, illustrate the attitudes that may serve to disqualify a juror:
>
> bigoted… discriminatory, favorably disposed, inclined, influenced… interested, jaundiced, narrow-minded, one-sided, partisan, predisposed, prejudiced, prepossessed, prone, restricted… subjective, swayed, unbalanced, unequal, uneven, unfair, unjust, unjustified, unreasonable.

[28] The Court reiterated the principles established in R. v. Sheratt (1991), 63 C.C.C. (3d) 193 (S.C.C.). The Court emphasized that the right to challenge for cause is not only a statutory right conferred upon the prosecutor and the accused. It is also an important means of safeguarding the accused’s right to a fair trial by an impartial tribunal guaranteed under s.11(d) of the Canadian Charter of Rights and Freedoms. Because of this Charter guarantee, the Court stated that (at p.499):

> [t]his means that the accused must be permitted to challenge potential jurors where there is a realistic potential or possibility that some among the jury pool may harbour prejudices that deprive them of their impartiality.

However, the Court confirmed that the right to challenge for cause, although neither exceptional nor extraordinary, is not automatic. An accused may challenge for cause only upon establishing that there is a realistic potential for juror partiality. The Court distinguished this approach from the approach taken in the United States (at p.489)

> The practical problem is how to ascertain when a potential juror may be partial or “not indifferent” between the Crown and the accused. There are two approaches to this problem. The first approach is that prevailing in the United States.

On this approach, every jury panel is suspect. Every candidate for jury duty may be challenged and questioned as to preconceptions and prejudices on any sort of trial. As a result, lengthy trials of jurors before the trial of the accused are routine.

> Canada has taken a different approach. In this country, candidates for jury duty are presumed to be indifferent or impartial. Before the Crown or the accused can challenge and question them, they must raise concerns which displace that presumption. Usually this is done by the party seeking the challenge calling evidence substantiating the basis of the concern. Alternatively, where the basis of the concern is "notorious" in the sense of being widely known and accepted, the law of evidence may permit a judge to take judicial notice of it.

The Court stated further at paragraph 52, p.501:

> In my view, the rule enunciated by this Court in Sheratt, supra, suffices to maintain the right to a fair and impartial trial, without adopting the United States model of a variant on it. Sheratt starts from the presumption that members of the jury pool are capable of serving as impartial jurors. This means that there can be no automatic right to challenge for cause. In order to establish such a right, the accused must show that there is a realistic potential that some members of the jury pool may be biased in a way that may impact negatively on the accused.

[29] The Court also reviewed the two ways in which facts can be established in the trial process. The first is by evidence and the second is by judicial notice. The Court gave some guidance on the application of the doctrine of judicial notice in the context of challenges for cause. As the appellants in this case seek to invoke this doctrine, it may be useful to reproduce the comments made in Williams (at p.502):

> Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be [sic] the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and

Bryant, The Law of Evidence in Canada, at p.976. The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule. As Sopinka, Lederman and Bryant note, at p.977, “[t]he character of a certain place or of the community of persons living in a certain locality has been judicially noticed”. Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. “The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted": see Sopinka, Lederman and Bryant, supra, at p.977. It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule. For these reasons, it is unlikely that long inquiries into the existence of widespread racial prejudice in the community will become a regular feature of the criminal trial process. While these comments are not necessarily limited to challenges for cause, the question whether they are applicable to other phases of the criminal trial is not to be decided in the present case.

[30] As indicated earlier, it is the appellants’ first argument that this court, on the basis of Williams, should take judicial notice of the fact that with respect to certain offences there exists a widespread bias in the community giving rise to concerns about prospective jurors’ impartiality. It is argued that allegations of sexual abuse, particularly as against children, give rise to such strong feelings, opinions and beliefs in the general population that there is a real risk that some prospective jurors might decide the case based on their personal views rather than solely on the evidence and in accordance with the judge’s instructions on the law. Reliance is placed on the following excerpt from Williams in support of the contention that an accused is now entitled, as of right, to challenge prospective jurors for cause in all cases of sexual assault because of the nature of the charges (at p. 488):

> Generic prejudice, the class of prejudice at issue on this appeal, arises from stereotypical attitudes about the defendant, victims, witnesses or the nature of the crime

itself.

> Bias against a racial or ethnic group or against persons charged with sex abuse are examples of generic prejudice. [Emphasis added.]

[31] I do not accept the appellants' argument that the Supreme Court in Williams has recognized a right to challenge for cause in all cases of sex abuse. Although the above-noted two sentences do make reference to bias against persons charged with sex abuse, they must not be read out of context. Williams could only have the precedential value contended by the appellants if the Court had actually taken judicial notice of the matter. It did not.

[32] Williams was a case of racial prejudice. The issue of offence-based challenges for cause was not before the Court in Williams. Crown counsel confirm in their factum that there was no evidence, testing or analysis of any expert theories on the subject of offence-based challenges at any level of the Williams proceedings. The issue was not even raised in oral argument before the Supreme Court. The above-noted reference is taken from one article which itself contains no analysis of the issue. The excerpt is found in the following paragraph at the beginning of the Court's analysis on the issue (at p. 488):

> The predisposed state of mind caught by the term "partial" may arise from a variety of sources. Four classes of potential juror prejudice have been identified – interest, specific, generic and conformity: see Neil Vidmar, "Pretrial prejudice in Canada: a comparative perspective on the criminal jury" (1996), 79 Jud. 249 at p. 252. Interest prejudice arises when jurors may have a direct stake in the trial due to their relationship to the defendant, the victim, witnesses or outcome. Specific prejudice involves attitudes and beliefs about the particular case that may render the juror incapable of deciding guilt or innocence with an impartial mind. These attitudes and beliefs may arise from personal knowledge of the case, publicity through mass media, or public discussion and rumour in the community. Generic prejudice, the class of prejudice at issue on this appeal, arises from stereotypical attitudes about the defendant, victims, witnesses or the nature of the crime itself. Bias against a racial or ethnic group or against persons charged with sex abuse are examples of generic prejudice. Finally, conformity prejudice arises when the case is of significant interest to the community causing a juror to perceive that there is strong community feeling about a case coupled with an expectation as to the outcome. [Emphasis added.]

[33] I agree with the Crown's characterization of the remarks made by the Court on the subject of offence based challenges - at best, they are "passing remarks" for the purpose of illustrating the main issue of racial bias. It is correct to say that the Supreme Court does not foreclose the nature of the crime itself as a potential source of partiality. This is not at all surprising since the issue was not raised and there was no record before the Supreme Court that would enable it to make a finding either way on the issue.4 Hence I cannot accept the argument that the Supreme Court intended by those remarks to dispense with the need to show a realistic potential of the existence of partiality in all cases of sexual offences. This contention is simply unsupportable when one considers the record before the Court and the judgment in its entirety.5

[34] In their second argument, the appellants submit that Williams has overruled Betker, holding that the test enunciated in that case was too high and that, consequently, this court, in considering the evidence in this case, should arrive at a different conclusion than it did in Betker. The appellants rely on the following statement in Williams (at p.492):

> It follows that I respectfully disagree with the suggestion in R. v. B. (A.) (1997), 33 O.R. (3d) 321 at p.343, 115 C.C.C. (3d) 421 sub. nom. R. v. Betker (C.A.) that a motion to challenge for cause must be dismissed if there is "no concrete evidence" that any of the prospective jurors "could not set aside their biases". Where widespread racial bias is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases. It is therefore reasonable to permit challenges for cause.

[35] In effect, the Supreme Court in Williams recognized that the impugned words in Betker may serve to confuse the two phases of the challenge for cause process. Crown counsel in Williams adopted a position consistent with the above-noted words in Betker and the Supreme Court rejected the Crown's position. Later in the judgment, the Supreme Court clarified the distinction that should be drawn between the two phases of the process (at pp. 495-6):

> Section 638(2) [sic] requires two inquiries and entails two different decisions with two different tests. The first stage is the inquiry before the judge to determine whether challenges for cause should be permitted. The test at this stage is whether there is a realistic potential or possibility for partiality. The question is whether there is reason to suppose that the jury

pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from the judge. The operative verbs at the first stage are “may” and “might”. Since this is a preliminary inquiry which may affect the accused’s Charter rights (see below), a reasonably generous approach is appropriate.

> If the judge permits challenges for cause, a second inquiry occurs on the challenge itself. The defence may question potential jurors as to whether they harbour prejudices against people of the accused’s race, and if so, whether they are able to set those prejudices aside and act as impartial jurors. The question at this stage is whether the candidate in question will be able to act impartially. To demand, at the preliminary stage of determining whether a challenge for cause should be permitted, proof that the jurors in the jury pool will not be able to set aside any prejudices they may harbour and act impartially, is to ask the question more appropriate for the second stage.
>
> The Crown conflates the two stages of the process. Instead of asking whether there is a potential or possibility of partiality at the stage of determining the right to challenge for cause, it demands proof that widespread racism will result in a partial jury. The assumption is that absent such evidence, no challenge for cause should be permitted. This is not the appropriate question at the preliminary stage of determining the right to challenge for cause. The question at this stage is not whether anyone in the jury pool will in fact be unable to set aside his or her racial prejudices but whether there is a realistic possibility that this could happen.

[36] Williams makes it clear that there is no need at the first stage of the inquiry to present “concrete evidence” that jurors could not set aside their biases. Whether or not a particular juror will be able to set aside his or her biases is a question to be determined at the second stage of the process. However, as the above excerpt clearly shows, this does not in any way mean that there is no need at the first stage of the process to show that a) there exists a particular prejudice amongst members of the community and b) that the prejudice in question might result in some jurors being incapable of setting aside their biases on directions from the judge. As recognized in both Parks and Williams, prejudice that may result in partiality has both an attitudinal and a behavioural component. And, as stated in

Williams, where widespread racial bias is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases, given the fact that "[r]acial prejudice and its effects are as invasive and elusive as they are corrosive" (at p. 492).

[37] In the case at bar, the question is not one of racial prejudice. It is not sufficient simply to show that members of the community may have strong feelings, opinions and beliefs about a certain subject-matter. It must be shown first that those Sfeelings, opinions and beliefs" are demonstrative of an attitude that is inconsistent with impartiality and second that there is a possibility that some jurors might not be able to set aside the biases that result from this attitude. This court in Betker was not satisfied that either component of partiality had been shown and, in my view, Williams does not impact upon the operative reasoning in Betker.

[38] In Betker, the appellant was convicted of indecent assault, gross indecency and incest. The complainant was his daughter. At the outset of the jury selection process, defence counsel applied under s.638(1)(b) of the Criminal Code to challenge each prospective juror for cause on the basis that there was a realistic possibility that one or more of the prospective jurors would not be impartial between the Crown and the accused, because of the nature of the charges of sexual assault between father and daughter.

[39] In support of the application, the appellant in Betker relied on (a) excerpts from several studies and surveys conducted in Canada showing that a large percentage of the population, both male and female, have been the victims of sexual assault and (b) excerpts from several trial decisions in Ontario where challenges for cause were permitted in cases of sexual assault together with articles reviewing and analyzing the results of this process. The court also considered topical articles by Professors Neil Vidmar and David Paciocco.

[40] The evidentiary basis relied upon in this case is similar in kind but appears to be much less extensive than that before the court in Betker, particularly when no consideration is given to the unsigned affidavit allegedly written by Professor Vidmar. Even considering this affidavit, the trial judge concluded that the appellants had not met the threshold test. I agree with the trial judge's conclusion. Just as this court held in Betker, I am of the view that the evidentiary basis relied upon in this case does not demonstrate the existence of a realistic potential for partiality based on the nature of the offences.

[41] The argument made in this case is similar to that made by counsel for the appellant in Betker. Counsel rely on the evidence before the court in support of the contention that accused persons charged with sexual assault are subject to a form of juror partiality analogous to the racism discussed in Parks. This court rejected this contention in Betker and held that the appellant's argument was "fundamentally flawed in that it fails to recognize the principled distinction between a want of indifference towards the accused and a want of indifference towards the nature of the crime." The court held that the racial prejudice at issue in Parks was conceptually different from strongly held views about a particular crime (at p. 441):

> Racial prejudice is a form of bias directed against a particular class of accused by virtue of an identifiable immutable characteristic. There is a direct and logical connection between the prejudice asserted and the particular accused. In contrast, the prejudice asserted by the appellant involves negative views about a type of crime and not a type of person. In my opinion, there is no direct and logical connection that translates views about a particular crime into prejudice against a specific accused such that jurors would disregard their oath and render a verdict based on something other than the evidence and the legal instruction provided by the trial judge.
>
> To be more precise, I am of the view that strong attitudes about a particular crime, even when accompanied by intense feelings of hostility and resentment towards those who commit the crime, will rarely, if ever, translate into partiality in respect of the accused.

The court noted further that one must not confuse pre-trial partiality arising from the nature of the crime with strong feelings of resentment and hostility fostered by the evidence tendered to prove the crime. The latter cannot form the basis of a permissible challenge for cause: see R. v. Hubbert, [1977] 2 S.C.R. 267.

[42] The court in Betker further stated that even if the appellant was correct in his assertion that in cases of sexual assault, it is the nature of the crime itself that gives rise to potential partiality and not the evidence led in support of it, it remained unconvinced that the threshold test for pre-trial partiality had been met. The court was of the view that victimization statistics provided “little, if any, support for the application” (at p.442):

> There is nothing in the material filed to indicate when or how the statistics were compiled or what questions, using what definitions, were asked. Apart from that, the statistics do not indicate a resultant bias against all persons accused of all sexual offences, let alone the nature and extent of that bias. Moreover, they do not purport to address how experiencing sexual assault might affect juror behaviour at the deliberation stage. In the end, the statistics do no more than establish the prevalence of sexual assault in contemporary Canadian society; this, by itself, does not support the inference that there is a

realistic risk of juror partiality.

[43] In my view, the same conclusion must be reached in this case. As indicated earlier, the appellants submit that allegations of sexual abuse give rise to such strong feelings, opinions and beliefs in the general population that there is a real risk that some prospective jurors might decide the case based on their personal views rather than solely on the evidence and the law. In other words, the appellants argue that certain attitudes are present in the general population that may cause jurors to behave contrary to their oath. The material before the court does not demonstrate the presence of such attitudes that may affect behaviour as contended. The "attitudes" are not even described, let alone their possible effect on behaviour.

[44] Further, it is my view that the presence of such "strong feelings, opinions and beliefs" is not a fact capable of being judicially noticed. It can hardly be said to be a fact that is "so notorious as not to be the subject of dispute among reasonable persons" or one that is "capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy" (Williams, as quoted above). The work of Professor Neil Vidmar is generally cited in support of the notion of "generic prejudice" in relation to the nature of sexual offences. Professor Vidmar's views are not indisputable. They are very much the subject of debate amongst social scientists. Consider for example Freedman, Jonathan L. and Doob, Anthony N., Vidmar's Generic Prejudice Article: Misleading Notions, Anecdotal Statistics, Unwarranted Conclusions. Further, as noted in Betker, Professor Vidmar himself conceded in his cross-examination in R. v. Hillis, [1996] O.J. No. 2739 (Gen. Div.) that the notion of "generic bias" does not have scientific validity (Betker at p.444):

> … in cross-examination, Professor Vidmar admitted that "generic bias" was not a scientific label or a recognized term of art within his professional community. He also agreed that the American studies to which his affidavit referred did not generally consider the effect of this type of bias on deliberation behaviour. The only study that did examine such behaviour found that pre-deliberation attitudes did not correlate significantly with post-deliberation verdicts.

[45] The appellants are quite correct in stating that there is no need for "scientific" certainty in these matters. However, it is not even clear what feelings, opinions and beliefs are being targeted for judicial notice. Is it the belief that no children would lie about being sexually abused and that their testimony is therefore reliable? Or, rather, is it the belief that children are highly susceptible to the influence of adults and that their testimony should not be relied upon? Are the appellants concerned about the opinion some may hold that too many charges are laid without foundation out of concern for "political correctness"? Or is the concern rather about opinions that sexual abuse is pervasive and that a person who is charged is probably guilty?

Are the appellants referring to the feeling that some may have that allegations of sexual abuse are easily made and difficult to defend, or rather the feeling that the criminal trial process is stacked unfairly in favour of accused persons?

[46] Even accepting for the purpose of argument that many jurors may have strong feelings, opinions and beliefs about sexual offences, I am not at all clear on how one could infer from that fact that there is a risk that those jurors may discharge the jury function in a way that is improper or unfair to the accused. I would think it rather more likely that, given their variance, the effect of these pre-conceived notions would be diffused during the course of the jurors' deliberations.

[47] The appellants would perhaps respond to this argument by saying that it does not matter to which conclusion the pre-conceived notion would lead. It still amounts to partiality in the sense that the candidate for jury duty may be inclined to a particular result and this should be canvassed during the second stage of the challenge process.

[48] In my view, if this court were to accept the appellants' argument, it would be tantamount to a wholesale adoption of the approach in the United States. Every juror would be viewed as suspect. Every candidate for jury duty could be challenged and questioned as to preconceptions and prejudices in an effort to uncover potential partiality. There would be no rational basis to limit the adoption of this procedure to trials for sexual offences. Indeed, why would there not be strong feelings, opinions and beliefs about murders of children, child pornography, drug trafficking, abuse of the elderly, convenience store robberies or break and entries in private homes?

[49] More importantly, the contention that all feelings, opinions and beliefs that may have a bearing on decision-making amount to prejudice or partiality is, in my view, ill-conceived. Professors Freedman and Doob make the point quite well in their article that this wide approach to partiality or prejudice renders the concept meaningless:6

> We believe that psychologists and others have quite deliberately and correctly reserved the term "prejudice" for negative attitudes and beliefs about groups of people. Our society considers these beliefs wrong and we condemn them… Calling all conceivable sources of bias "prejudice" dilutes the significance of real prejudice, and merely confuses the issue. In short, the concept of generic prejudice is not useful – it makes little sense and is likely to produce confusion. It should not be accepted.

[50] Williams clearly reiterates that the Canadian approach is to presume that prospective jurors are impartial. That presumption does not mean that we, as Canadians, expect jurors to come to the task without any knowledge and without any life experience. It is inevitable in any case that each juror will bring his or her own feelings, opinions and beliefs to the deliberations. This fact

alone does not translate into partiality. Candidates for jury duty are not, under our system, routinely subjected to questioning on those feelings, opinions and beliefs in an attempt to uncover some possible source of partiality. Such an approach would constitute an unwarranted invasion of their privacy interests. General concerns of the kind raised by the appellants in this case are addressed on a case by case basis in the evidence, the argument, and the instructions from the trial judge. We trust that jurors will approach their duties with impartiality as a result of these trial safeguards. We also trust that the deliberation process itself and the requirement for unanimity will result in the weaknesses of one juror being offset by the strengths of another.

[51] The appellants rely mostly on the answers given by the challenged jurors in this case and on excerpts from several trial decisions in Ontario where challenges for cause were permitted in cases of sexual assault, together with articles reviewing and analyzing the results of this process, in support of their contention that there is a realistic potential for bias. This argument cannot succeed. In my view, it is impossible to draw any meaningful inference from the answers provided by the jurors when confronted with general questions such as those found in the aborted jury selection process in this case and in other cases relied upon.

[52] The answers provided by the candidates for jury duty who were successfully challenged for cause in this case generally reveal nothing more than they may find it difficult to hear a case of this kind. Many state that this is because they have children of their own or they may know someone who has been victimized. These answers provide no evidence of partiality whatsoever. And, unless real hardship is shown that would interfere with the juror’s ability to hear the case, discomfort at hearing unpleasant evidence can hardly provide sufficient ground for dismissal from jury duty. A review of the jurisprudence reveals that, even in the United States where jurors are routinely questioned on their feelings, opinions and beliefs, the mere fact that a potential juror may have strong feelings or views about an offence or has been the victim or is closely related to a victim of a similar crime is not sufficient reason to dismiss him or her.7

[53] Some of the challenged jurors expressed concern that they may not be able to be impartial given their strong emotions about sexual abuse of children. Even in those instances it is my view that, without more, it is impossible to draw any meaningful inference from those answers. The prospective candidates were not provided with any meaningful instruction on the nature of jury duty and on the meaning of impartiality. So little information was obtained from the prospective jurors that no reasonable decision could be made on the issue of partiality. No distinction was drawn between partiality and general feelings, opinions, and beliefs that influence all decision-making. The mere fact that a prospective juror may hold an opinion or have a belief that may in some way influence him or her in making a decision provides no ground for rejection. This was made clear in Parks (at 364):

> Partiality cannot be equated with bias… Questions which

seek
to do no more than establish that a potential juror has beliefs,
opinions or biases which may operate for or against a particular
party cannot establish partiality. A diversity of views and outlooks is part of the genius of the jury system and makes jury
verdicts a reflection of the shared values of the community.

[54] I am not at all suggesting by the above comments that a detailed probing of jurors' beliefs, opinions or biases should be embarked upon at the second stage of the challenge process so as to provide evidence of partiality. That is indeed the whole point of the requirement for evidence of a realistic potential for partiality, with both its attitudinal and behavioural components, at the first stage of the inquiry. In this way, fishing expeditions can be avoided. For example, in cases where widespread racial prejudice is demonstrated at the first stage of the inquiry, we can take it as a given when embarking upon the second stage that many people in the jury panel may have prejudices of a kind that renders them partial to the extent that they might not be able to set them aside. Hence few questions are required to weed out the undesirable candidates. But in this case, as stated earlier, the evidence before the court does not even identify the attitudes that may lead to partiality, let alone their possible effect on behaviour.

[55] It follows that I see no merit to the appellants' final argument on this issue that the earlier aborted jury selection process in this case gave rise to such an apprehension of bias in the eyes of the appellants that the trial judge should have allowed a challenge for cause in the interest of the appearance of fairness. The appearance of fairness must be assessed, not from the subjective point of view of the accused person, but from the perspective of an informed person who views the matter realistically and practically and thinks the matter through. In my view, an informed person could not reasonably conclude that what transpired during the aborted selection process had any effect on the fairness of the trial.

D. Conclusion on right to challenge for cause

[56] The question whether the evidence has met the threshold test is one for determination by the trial judge. Where the test is met, the trial judge cannot, in his discretion, deny the challenging party's right to a fair trial by an impartial tribunal. In this case, the appellants have not shown a realistic potential for partiality. Consequently, the trial judge was correct in refusing to permit the proposed challenge.

III. The Expert Evidence

A. The evidence called at trial

1. Position of the parties at trial

[57] At trial, Crown counsel sought to call Mr. Alan Grant Fair, a social worker with extensive experience in the field of child

sexual abuse, to give opinion evidence on the behaviour of sexually abused children. The purpose of calling this evidence was two-fold.

[58] First, the evidence was intended to show that the complainants in this case exhibited certain behavioural symptoms during their childhood that were consistent with their allegations of sexual abuse. Crown counsel also proposed to call evidence from the parents of the complainants on various aspects of the complainants' behaviour during the time that they were growing up to establish a factual foundation for the proposed expert opinion. The behaviour in question included matters such as bed wetting, fighting with peers and depression.

[59] Second, the expert opinion evidence was intended to dispel certain "myths" about children's behaviour. The Crown sought to introduce evidence to explain that certain behaviour exhibited by the complainants was not unusual for victims of sexual abuse and was not inconsistent with the truth of their allegations. This behaviour included delayed disclosure of the abuse, inconsistent versions of the events, denial that abuse occurred, the inability to recall peripheral matters and the lack of detection by persons close to the complainants. It was argued that this evidence was necessary to counter defence counsel's attack on the complainants' credibility.

[60] The defence vigorously challenged the validity of the theory that sexual abuse could be inferred from "behavioural indicators" observed in an alleged victim. The defence also disputed that the alleged "myths" still existed in today's society given the numerous changes in the law and the increased public awareness of issues related to child sexual abuse in the last fifteen years. The defence further argued that because the behaviour in question was equally consistent with no abuse having occurred, the proposed evidence in relation to the "myths" could be of no assistance to the jury in assessing the complainants' credibility.

2. Evidence on the voir dire

[61] A voir dire was held to address the issues raised by counsel. Mr. Fair was called as a witness on the voir dire. His testimony was essentially based on a theory advanced by Dr. Roland Summit in 1983 in an article entitled "The Child Sexual Abuse Accommodation Syndrome." The theory explains the various stages that a typical victim of sexual abuse experiences and describes various behavioural indicators of sexual abuse. Mr. Fair testified that his clinical observations were consistent with Dr. Summit's theory.

[62] In cross-examination, Mr. Fair readily conceded that the theory underlying the Child Sexual Abuse Accommodation Syndrome is of no diagnostic value. He was aware that Dr. Summit himself, in later articles, clarified that his theory was never intended to be used as a diagnostic tool and that its use for that purpose by behavioural experts testifying in many courtrooms had been misleading. Hence it is quite clear from Mr. Fair's testimony that there is no scientific basis to draw an inference that a child has been sexually abused from the fact that the child exhibits certain behavioural symptoms. While certain behavioural symptoms may be consistent with sexual abuse having occurred,

there can be many other explanations for these symptoms that have nothing to do with sexual abuse. Further, the existing research shows that some sexually abused children exhibit no apparent behavioural symptoms.

[63] Mr. Fair also agreed that behaviour such as delayed disclosure, inconsistent versions, denial and the like, although not unusual for victims of sexual abuse, were not in any way indicators of truth. Mr. Fair also conceded that there was an increased public awareness of issues related to child sexual abuse and that the "myths" identified by Dr. Summit in 1983 may not be present to the same extent in today's society. For example, members of today's society may be aware from intense media coverage of such issues in recent years that many children who are victims of sexual abuse do not disclose the abuse until they are adults. Mr. Fair was of the view however that the Child Sexual Abuse Accommodation Syndrome could still play a valid role in rebutting suggestions that children's complaints were not credible because the complainants displayed certain behaviour.

3. The trial judge's ruling

[64] The trial judge was satisfied that Mr. Fair was qualified to give expert opinion evidence in the field of child sexual abuse. He granted leave to the Crown to call expert opinion evidence to assist the jury in understanding the following aspects of the complainants' behaviour: delay in disclosing the abuse, inconsistent disclosures, faulty memory about alleged occurrences of sexual abuse and peripheral events, repeated involvement with the alleged abusers and lack of detection by persons close to the complainants.

[65] However, the trial judge held that no evidence could be called to show that the complainants in this case exhibited certain behavioural symptoms during their childhood that were consistent with their allegations of sexual abuse. He stated as follows:

> At the same time I deny the Crown permission to ask the expert questions about any opinions he might have, or opinions that any other expert might have from his or their clinical or scientific experience about the behavioural indicators, signs or symptoms, health, or otherwise, stated to be consistent with the child sexual abuse, or which allow conclusions to be drawn from the evidence concerning the symptomatology of the complainants in this case. I find that in this area, the prejudicial effect from such questions outweighs any probative value.

[66] It followed from this ruling that the proposed evidence from the parents about the complainants' problem behaviour when they were growing up was also inadmissible.

[67] Crown counsel on appeal does not contend that the trial judge erred in excluding any evidence about behavioural

indicators consistent with sexual abuse. Indeed, given the record before the court, the correctness of the trial judge's ruling on the inadmissibility of that part of the proposed evidence cannot be disputed.

4. The argument on appeal

[68] The appellants' argument is essentially two-fold. First, they reiterate the position taken by counsel at trial and argue that the trial judge erred in allowing any of the proposed expert evidence to be called. It is submitted that the evidence called to rebut certain "myths" was of no probative value and should not have been admitted. Second, they argue that, even if the trial judge was correct in admitting part of the expert opinion evidence, the evidence adduced at trial exceeded the permissible bounds set by the trial judge in his ruling. In fact, it is submitted that, if not in form certainly in its effect, the adduced evidence was no different from that which the trial judge had expressly ruled to be inadmissible at the conclusion of the voir dire. In light of the fact that the trial judge had ruled this kind of evidence inadmissible because its prejudicial effect outweighed any probative value, it is argued that there must be a new trial.

[69] It is my view that, based on the evidence adduced at trial, it was open to the trial judge to allow, in his discretion, expert opinion evidence on some restricted subject-matters. However, I agree with counsel for the appellants that the expert evidence called at trial far exceeded the scope of admissibility and that its prejudicial effect necessitates a new trial.

B. The opinion rule

[70] Before embarking upon a consideration of the criteria for admissibility of expert opinion evidence, it is important to recognize the nature of and reason for the "opinion rule".

[71] The opinion rule is a general rule of exclusion. Witnesses testify as to facts. As a general rule, they are not allowed to give any opinion about those facts. Opinion evidence is generally inadmissible. Opinion evidence is generally excluded because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form his or her opinions on the issues in the case. Hence, as will be discussed below, it is only when the trier of fact is unable to form his or her own conclusions without help that an exception to the opinion rule may be made and expert opinion evidence admitted. It is the expert's precise function to provide the trier of fact with a ready-made inference from the facts which the judge and jury, due to the nature of the facts, are unable to formulate themselves: R. v. Abbey (1982), 68 C.C.C. (2d) 394 at 409.

[72] The line between fact and opinion must therefore be kept clearly in mind. A witness, who is an expert in a particular field, may be called simply to give evidence on the facts he or she has observed without offering an opinion based on those facts. To that extent, and if otherwise admissible, this evidence is not subject to the opinion rule. This would be the case, for example, where a treating physician is called to describe the injuries he or she observed on a patient without

offering any opinion on the matter. It is only when a witness purports to give an opinion on certain facts that the opinion rule comes into play. If, in our example, the treating physician goes on to say that it is usual or unusual, as the case may be, to observe this kind of injury in a patient who alleges that sexual intercourse has taken place, the witness is offering opinion evidence and the evidence will be subject to the general rule of exclusion. It will only be admissible if certain established criteria are met.

[73] Because of this general rule of exclusion, it follows that, absent a favourable ruling, a party is not allowed to adduce opinion evidence at trial. In some cases it may be possible to rule on the admissibility of the proposed evidence on the basis of counsel's submissions alone.8 However it may at times prove necessary to hold a voir dire in order to properly consider all relevant factors. Where the trial is before a jury and the question of admissibility cannot be clearly determined in a summary fashion, it may indeed be prudent to scrutinize the evidence during the course of a voir dire before admitting it. While in some cases the ruling can be made early in the proceedings, in other cases, it may be only later in the trial that the value of the proposed evidence can be properly assessed. For example, in this case, it was only after the main Crown witnesses had testified and the defence strategy became apparent that the determination of the admissibility of the expert evidence could properly be made.

[74] The law governing the admissibility of expert opinion evidence is well established. It depends on the application of the criteria set out in R. v. Mohan (1994), 89 C.C.C. (3d) 402 (S.C.C.):

> (1) relevance;
>
> (2) necessity in assisting the trier of fact;
>
> (3) the absence of any exclusionary rule; and
>
> (4) a properly qualified expert.

[75] In a nutshell, the opinion rule can be stated as follows: Opinion evidence is generally inadmissible unless it meets all four criteria set out above. A consideration of the first two criteria, relevance and necessity requires a balancing of the probative value of the proposed evidence against its potential prejudicial effect. The Supreme Court in Mohan identifies a number of factors that should be considered in this balancing process. The proposed evidence will only be admissible if its probative value exceeds its prejudicial effect. The third criterion involves a consideration of other applicable rules of evidence. Even if the proposed evidence is sufficiently probative to warrant admission, it may be subject to some other exclusionary rule and further inquiry may be required. Finally, the last criterion requires that expert opinion evidence be adduced solely through a properly qualified expert.

[76] The balancing process which lies at the core of the determination of the admissibility of this kind of evidence is not unique to expert opinion evidence. It essentially underlies

all our rules of evidence. It is, however, necessarily case-specific. The probative value of the proposed evidence and its potential prejudicial effect can only be assessed in the context of a particular trial. It is therefore important to keep in mind that the admissibility of expert opinion evidence is not a question of precedent. Both general and case-specific appellate pronouncements respecting the admissibility of expert opinion evidence in similar cases must always be considered in context. For example, expert opinion evidence on the phenomenon of delayed disclosure by victims of sexual abuse is by no means admissible in all cases simply because it has been admitted in some cases that have withstood appellate review. I agree with the approach taken by Hill J. in R. v. C. (G.) (1997), 8 C.R. (5th) 21 at 35 (Ont. Gen. Div.) on the proper use of precedents in the determination of this issue:

> To the extent that the record in the voir dire before me provides opinion evidence upon matters identical, or nearly identical, to expert evidence generically recognized by appellate authorities to be the proper subject of expert opinion this recommends itself as a factor worthy of consideration in the legal determination of admissibility.
>
> Nevertheless, I must bear in mind that the state of scientific knowledge is fluid. Differing challenges may be mounted case-to-case and the evidentiary record of each prosecution constitutes a case-specific context for the relevant inquiries and balancing of factors which the court is obliged to undertake.

1. Relevance

[77] Relevance is a matter to be decided by the trial judge as a question of law. It involves the determination of the logical relationship between the proposed evidence and a fact in issue in the trial. The logical relevance of the evidence is determined by asking the following questions:

(a) Does the proposed expert opinion evidence relate to a fact in issue in the trial?

(b) Is it so related to a fact in issue that it tends to prove it?

[78] If the answer to both these questions is yes, the logical relevance of the evidence has been established. This is the basic threshold requirement for the admissibility of any evidence. But, as we know from many rules of evidence, passing the threshold test is not always enough for proposed evidence to gain admission at trial. Depending on the nature of the evidence or its potential effect, policy considerations often require further screening of the evidence before it can be admitted. In the case of expert opinion evidence, the courts have recognized the danger that it may distort the fact-finding process. The Supreme Court

in Mohan stated as follows (at p. 411):

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

[79] Therefore, although the evidence may be logically relevant to some issue in the case, further inquiry is necessary to determine "whether its value is worth what it costs."9 In other words, the following question must be asked:

(c) Although relevant, is the evidence sufficiently probative to warrant its admission?

[80] In other words, the evidence, although relevant, will not be admitted unless its probative value outweighs its prejudicial effect. Both the probative value of the evidence and its potential prejudicial effect will depend on a number of factors. The particular inquiries that should be made will depend on the particular facts of the case. The following questions may be useful to consider. The list is by no means exhaustive.

(i) To what extent is the opinion founded on proven facts?

[81] Although the expert is entitled to take into consideration all possible information in forming his or her opinion, the weight to be given to the opinion will depend on the extent to which the facts upon which the opinion is based are proven: see R. v. Abbey.

(ii) To what extent does the proposed expert opinion evidence support the inference sought to be made from it?

[82] In some cases, the expert opinion can be so strong as to be determinative of an issue. One can think, for example, of uncontradicted testimony from a medical expert as to cause of death. In other cases, the opinion evidence may support the inference sought to be made but only in a limited way or it may be equally supportive of other inferences and its probative value will therefore be diminished.

(iii) To what extent is the matter that the proposed evidence tends to prove at issue in the proceedings?

[83] It has already been determined earlier that the evidence must relate to an issue in the case before it can pass the threshold test of relevance. The question here is how important is this issue in the case? If it is only of marginal relevance, it may not be worthwhile to receive the expert opinion evidence and risk confusing the jury, unnecessarily prolonging the trial, or causing some other form of prejudice.

(iv) To what extent is the evidence reliable?

[84] This factor concerns the validity of the theory which forms the basis of the opinion advanced by the expert. The evidence must meet a certain threshold of reliability in order to have

sufficient probative value to meet the criterion of relevance. The reliability of the evidence must also be considered with respect to the second criterion of necessity. After all, it could hardly be said that the admission of unreliable evidence is necessary for a proper adjudication to be made by the trier of fact.

[85] The question is particularly important in the case of novel theories. As indicated in Mohan, any "novel scientific theory or technique" must be "subjected to special scrutiny to determine whether it meets a basic threshold of reliability" before it is admitted. In some cases, it may be obvious that a novel theory or technique is sought to be advanced. This was the case for example when polygraph evidence was sought to be admitted10 or when DNA evidence was first introduced.11 In other cases, the theory or the technique sought to be advanced may form part of a recognized field of expertise such as psychiatry or psychology and, for that reason, it may be more difficult to readily recognize that the theory or technique is novel within its field. It must nonetheless be scrutinized. Mohan itself provides an example where a psychiatrist's evidence of psychosexual profiles was held to be insufficiently reliable or helpful to be admitted in evidence. The court stated as follows (at p. 423):

> The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves.

[86] The same principle applies in the field of the behavioural sciences. Although psychology or sociology are certainly recognized fields of expertise, some theories advanced in courtrooms in recent years within those fields are entirely novel. Further, as indicated earlier, the state of scientific knowledge is fluid. The fact that a particular theory may have been accepted in the past does not necessarily end the inquiry. This case provides an example where the evidence showed that the Child Sexual Abuse Accommodation Syndrome, a theory that has been accepted in certain courts in the past, was not reliable as a diagnostic tool. Hence the basis for Mr. Fair's theory that certain of the complainants' behavioural symptoms were consistent with sexual abuse did not withstand scrutiny. The proposed evidence in this respect was insufficiently reliable to warrant

admission.

[87] This court's decision in R. v. McIntosh (1997), 117 C.C.C. (3d) 385 (Ont. C.A.) provides some guidance on the requirement of scrutinizing the subject-matter of the proposed expert testimony to determine whether it meets a threshold of reliability. I also find the following comments by Hill J. in R. v. J. E. T., [1994] O.J. No. 3067 (Gen. Div.) to be helpful (at para. 75):

> Needless to say there is a continuum of reliability in matters of science from near certainty in physical sciences to the far end of the spectrum inhabited by junk science and opinion akin to sorcery or magic. Whether the technique can be demonstrably tested, the existence of peer review for the theory or technique, the existence of publication, the testing or validation employing control and error measurement, and some recognition or acceptance in the relevant scientific field all contribute to an assessment of the reliability of the opinion and hence its capacity to outweigh the prejudicial impact of imposing on the jury highly suspect opinion evidence masquerading as science: Daubert v. Merrell Dow Pharmaceuticals Inc. at 2795-2797 per Blackmun, J.; Gold, Alan, Expert Evidence –Admissibility (1994), 37 C.L.Q. 16 at 21-30.

[88] A number of other factors can also be relevant in assessing the extent to which the proposed evidence poses a danger of overwhelming the jury and distorting the fact-finding process. For example, it may be useful to make the following inquiries:

(v) What is the level of complexity of the proposed expert evidence? Is it easily understood or is it likely to confuse the average juror?

(vi) To what extent is it controversial? Will it require lengthy cross-examination by the other party or the calling of other experts in response?

[89] Of course, the fact that the evidence may be complex or that experts may provide conflicting opinions does not necessarily render the evidence inadmissible. These are simply factors to be considered in assessing whether the value of the evidence makes it worth receiving.

2. Necessity

[90] The proposed expert opinion evidence must not only be relevant and worth receiving as discussed above, it must be necessary to assist the trier of fact. If the trier of fact can form his or her own conclusions on the facts without help, the opinion of an expert, even though it may be relevant, is unnecessary and inadmissible.

[91] As indicated in Mohan, the evidence must be more than just

helpful to meet this criterion. On the other hand, necessity cannot be judged by too high a standard. The test is formulated in different ways in Mohan (at p.413):

> The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.
>
> The opinion must be necessary in the sense that it provides information which is likely to be outside the experience and knowledge of a judge or jury.
>
> The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

[92] Therefore, the following alternative questions should be asked:

(a) Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue? or
(b) Will it provide information which is likely to be outside the experience of the trier of fact? or
(c) Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?

[93] Where the subject-matter of the opinion evidence is technical in nature, it is usually easy to meet the criterion of necessity. No one would dispute that the trier of fact is likely to need expert assistance in understanding the engineering principles involved in the construction of a bridge. However, in cases such as this one, where the proposed opinion evidence is about human behaviour, it is much more difficult to decide whether the opinion will provide information which is likely to be outside the experience of the trier of fact, or whether the trier of fact is unlikely to form a correct judgment about the matter in issue. It is up to the trial judge in each case to make a judgment call on this issue in the context of the particular case and his or her judgment is entitled to deference. O'Connor J.A., writing for this court in R. v. F. (D.S.) (1999), 132 C.C.C. (3d) 97, stated as follows (at pp. 115-16):

> There is no exact way to draw the line between what is within the normal experience of a judge or a jury and what is not. The normal experiences of different triers of fact may differ. Over time the subject matters that come within the normal experiences of judges and juries may change. The normal experiences of those in one community may differ from those in other communities. In

the end, the court in each case will be required to exercise its best judgment in deciding whether a particular subject matter is or is not within the normal experience of the trier of fact.

> It seems to me that in cases being tried with a jury, the trial judge is in a better position than this court to determine whether expert evidence is necessary to assist the jury in evaluating evidence or drawing inferences from it. The trial judge has the advantage of hearing the evidence in issue, observing the jury and being able to appreciate the dynamics of the particular trial. In addition, the trial judge may also be in a better position to determine what may come within the normal experience of the average juror in the community in which the case is being tried. For those reasons, in my view, this court should show some deference to decisions of trial judges in this area.

[94] In the same way, it is up to the trial judge in each case to determine whether the trier of fact is unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence. Care should be taken however not to replace old stereotypes with new ones. What is the “correct” judgment about a matter in issue can rarely be presumed and will depend upon the particular facts of each case. The ultimate determination must be left to the trier of fact.

[95] In cases of sexual abuse such as this one, the proposed expert evidence often touches upon matters of credibility. This presents an even more difficult task for the trial judge in the application of the criterion of necessity. In determining whether expert opinion is necessary to assist the trier of fact in arriving at his or her own conclusions, it becomes particularly important to keep in mind that the credibility of witnesses is a question that is reserved to the trier of fact. The Supreme Court, in R. v. Marquard (1993), 85 C.C.C. (3d) 193 at 228, held it to be “a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion.”

[96] The difficulty lies in the fact that a distinction is drawn between evidence about credibility, which is inadmissible, and evidence about a feature of a witness’s behaviour or testimony that may be admissible even though it will likely have some bearing on the trier of fact’s ultimate determination of the question of credibility. For example, evidence tendered to show that it is not unusual for sexual offence complainants to delay reporting incidents of abuse may be admissible, if it meets the admissibility requirements for expert opinion evidence in the particular case, even though it may have some bearing on the ultimate determination of the complainant’s credibility. However, any evidence tendered to show either directly or indirectly that the complainant is more or less likely to be telling the truth

because she delayed reporting the abuse is not the proper subject-matter of expert testimony and is inadmissible. It is strictly up to the trier of fact to determine what effect any delay in reporting may have on the credibility of the complainant without any expert assistance on this ultimate issue of credibility.

[97] Finally, it is clear from Mohan that "the need for the evidence is assessed in light of its potential to distort the fact-finding process." There is a concern that the trier of fact may give the expert testimony more weight than its true usefulness deserves. Therefore, even if the evidence is necessary to assist the trier of fact in the sense discussed above, a further inquiry must be made before it can meet this criterion:

(d) Is the need for the evidence sufficient toovercome its potential prejudicial effect?

[98] The factors that should be considered in this balancing process will, of course, vary from case to case. Much of the same inquiries discussed above may be useful to make with respect to this criterion. In particular, the question of reliability is equally relevant to this criterion. In addition, the following questions may be asked. Again, the list is by no means exhaustive.

(i) To what extent is other evidence available to assist the trier of fact in determining the issue in question?

[99] In some cases, for example, the complainant herself or himself may well have provided sufficient explanation for the behaviour that is sought to be explained through expert testimony. The need for expert testimony in such a case would be diminished and, given its potential distorting effect, it may not be worthwhile receiving. Consider for example, the decision of Hill J. in R. v. C. (G.) (1997), 8 C.R. (5th) 21 (Ont. Gen. Div.) at 41 where the fact that other evidence in the case explained the delay in disclosing the incident of abuse served to tip the balance against the admission of the expert opinion evidence on the issue of delayed disclosure:

> In light of the court's earlier ruling to admit evidence of the course of reporting or disclosure by the complainant, I am concerned that the repetition of that evidence before the jury within the foundational context for Dr. Berry's opinion would impermissibly tip the balance toward the triers utilizing the disclosure evidence itself as evidence that the assault occurred.
>
> The effect on the trial process, were the expert evidence to be admitted respecting the delayed disclosure by S.S. to her mother, would be disproportionate to the value of the doctor's opinion to the truth-seeking objective of the trial.

(ii) What is the level of complexity of the proposed expert evidence? Is it easily understood or is it likely toconfuse the average juror?

[100] The proposed evidence may be simple, easy to understand and hence may present little risk of confusion. On the other hand, it may introduce difficulties that outweigh its usefulness. Professor Paciocco, in an article entitled "The Evidence of Children: Testing the Rules Against What We Know", (Spring 1996) 21 Queen's L.J. 345 at 387 observes that:

> [I]t is ironic that it is undoubtedly easier to evaluate the evidence of children than it is to evaluate the evidence of the experts who testify in order to help us evaluate the evidence of children.

[101] In my view, there is much merit to this observation. Of course, in some cases, this result may be inevitable and, in the balancing process, the expert opinion evidence may still be worth receiving. It is important, however, to assess the usefulness of the proposed evidence in the context of the whole case.

3. The absence of any exclusionary rule

[102] Expert opinion evidence that would otherwise be admissible may still be excluded on the basis of another rule of evidence. For example, the evidence may offend the similar fact evidence rule and be inadmissible on that basis.

4. A properly qualified expert

[103] As stated in Mohan, "the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." This criterion is usually not difficult to apply. However, it must not be overlooked. Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject-matter that the average trier of fact does not already have. If the witness's "special" or "peculiar" knowledge on a subject-matter is minimal, he or she should not be qualified as an expert with respect to that subject.

[104] As stated earlier, it is only when expert opinion evidence meets the four criteria that it can be admitted. And, as the following discussion will demonstrate, if the evidence is to be admitted, it is crucial that it be confined within the scope of proper admissibility. In other words, the evidence, as presented to and left with the trier of fact, must remain relevant, necessary, otherwise admissible and founded upon expertise.

C. Application to this case

[105] As indicated earlier, the trial judge granted leave to the Crown to call expert opinion evidence about the following features of the complainants' behaviour: delay in disclosing the abuse, inconsistent disclosures, faulty memory about alleged occurrences of sexual abuse and peripheral events, repeated involvement with the alleged abusers and lack of detection by persons close to the complainants. The purpose of the expert testimony was to explain to the jurors that this kind of conduct was not unusual for victims of sexual abuse and, consequently, to

alert them that complaints of sexual abuse should not be discounted simply on the basis of this behaviour.

1. Relevance

[106] As in many cases of this nature, the issues at trial turned on the credibility of the complainants. Counsel for the appellants concede that the above-noted features of the complainants' behaviour formed the basis of the defence's attack on their credibility and, consequently, became relevant issues in the trial. It is also conceded that the expert opinion evidence stating that certain behaviour is not uncommon in victims of sexual abuse related to those issues. Therefore, the logical relevance of this expert evidence is not disputed.

[107] It is argued, however, that the expert opinion evidence is of no probative value because the expert fairly conceded that the behaviour in question, although not uncommon in victims of sexual abuse, would similarly not be uncommon in cases where the complaint was fabricated. It is therefore argued that the expert evidence about those features of behaviour does not tend to prove anything and is worthless.

[108] This argument is based on the fallacy that this evidence was presented to prove that sexual abuse in fact occurred. If that were the case, the appellants would be quite correct in their assertion that the evidence would be of little, if any, probative value. Indeed that was the case with the proposed evidence with respect to certain behavioural symptoms being consistent with sexual abuse. That evidence was rightly excluded by the trial judge because it was not sufficiently reliable and its potential prejudicial effect far exceeded any probative value it could have.

[109] Rather, the expert opinion evidence that certain behaviour, such as delayed disclosure of the abuse, is not unusual in victims of sexual abuse is presented simply to prove that fact and nothing more. The same applies with respect to the other features of behaviour. The evidence is not and cannot be presented to show that the complainant is more likely to have been abused because she has not disclosed the abuse in a timely fashion or because she has exhibited some of the other forms of behaviour. Such proposition would be untenable. It would turn features such as delayed disclosure, faulty memory, inconsistent versions and the like into hallmarks of truth.

[110] The relevance of the evidence here is that it can provide the trier of fact with a more complete picture. For example, logic alone could lead the trier of fact to infer from the absence of timely complaint that no abuse has taken place. After all, if nothing untoward is happening to the child, it only makes sense that she makes no complaint. And, that may indeed be the case. However, what the expert opinion evidence can show is that there are other possibilities. Mr. Fair's evidence discloses that, for several reasons, it is not uncommon for a child victim of sexual abuse to disclose the abuse sometimes only years after it has occurred. This evidence can assist by simply alerting the jury to the fact that more than one inference can be drawn from the failure to disclose the abuse at the time it occurred. Therein lies its probative value.

[111] Much the same analysis applies to one other feature of

the complainants' behaviour identified in this case, the repeated involvement with the alleged abusers. The defence took the position in cross-examination of some of the complainants that their allegations of abuse were not credible because they kept returning to their abusers although they could have avoided the situation. Expert opinion evidence showing that, for various reasons, it is not uncommon for a child victim of sexual abuse to become repeatedly involved with an abuser can assist in rebutting this inference and is therefore relevant.

[112] To a certain extent, the same analysis can also apply to the lack of detection by persons close to the complainants since it is somehow linked to the failure to disclose the abuse. For the purposes of this appeal, I am also prepared to accept that the logical relevance of the expert opinion evidence on inconsistent disclosures and faulty memory has also been established.

[113] The question remains, once the evidence is found to be relevant, whether the probative value of the expert opinion evidence outweighs its prejudicial effect.

[114] First, the probative value of the evidence must be considered in the context of the whole case. As discussed earlier, the probative value of the expert evidence in this case related solely to the fact that certain features of the complainants' behaviour were not uncommonly seen in victims of sexual abuse. The features in question were prominent in the evidence. They raised issues of crucial importance in the case. The opinion evidence that it was not uncommon for child victims of sexual abuse not to disclose the abuse in a timely manner and to remain involved with their abusers and the evidence relating to the lack of detection of the abuse by persons close to the complainants was reliable and cogent. In fact, the evidence in this regard was not really disputed at trial. However, the cogency, or even the reliability, of the evidence with respect to inconsistent disclosures and faulty memories in victims of sexual abuse is not so apparent in the record, and the evidence relating to these matters is not sufficiently probative to warrant admission.

[115] Second, the prejudicial effect of the evidence in the context of the whole case must be considered. The prejudicial effect of this evidence was potentially devastating to the appellants. The outcome of the case was entirely dependent on findings of credibility. The above-noted features of the complainants' behaviour were pivotal to the defence. In the circumstances, there was a real danger that the expert opinion evidence would serve to hide the weaknesses of the Crown's case behind a cloak of scientific reliability and that the trier of fact would be left with the impression than none of the features of the complainants' behaviour could detract from their credibility or, worse still, that these apparent weaknesses were in fact hallmarks of their truthfulness.

[116] In my view, it was open to the trial judge, on the basis of the record before him, to find that the expert evidence on delayed disclosure, repeated involvement with the alleged abusers and lack of detection was sufficiently probative to outweigh its prejudicial effect but only if the potential dangers of the evidence were guarded against by restricting the scope of

the expert's testimony and by giving appropriate instructions to the jury. Given the potential danger of this evidence, it was crucial that the expert's evidence be restricted to giving the simple opinion that, based on his knowledge and experience, these features were not uncommonly observed in victims of child abuse and that no suggestion be made that complainants, either generally or in this case, are any more or less credible because they have exhibited one or more of these features.

2. Necessity

[117] With respect to the criterion of necessity, it was also open to the trial judge on this record to find that the expert evidence would provide information that is likely to be outside the experience and knowledge of the jury or that the jury would be unlikely to form a correct judgment on the relevant issues without assistance. As noted earlier, the decision of the trial judge on this issue is entitled to deference in this court. Of course, the record may well be different on this point (and with respect to other issues) at the new trial and it will be up to the trial judge to make the decision.

[118] The question that is of equal difficulty is whether the need for the evidence was sufficient to overcome its prejudicial effect. Of particular relevance to this question is the fact that the complainants provided explanations for their behaviour. They were described by the trial judge during the course of the discussion with counsel on the voir dire as "intelligent young females that are, obviously, above average in intelligence." All but one were adults. Given the potential prejudicial effect of the expert opinion evidence, there was a serious question whether the need for the evidence was sufficient to overcome it. Although the reasons of the trial judge do not provide assistance on this point, it is apparent from the transcript that the matter was specifically raised by counsel and I see no reason to believe that the trial judge would not have given the question serious consideration.

[119] On the whole of the evidence, I am satisfied that it was open to the trial judge to conclude that the criterion of necessity had been met, but again, only on the understanding that the expert's evidence would be strictly confined within the scope of proper admissibility and that appropriate instructions would be given to the jury to guard against the danger that the evidence be misused. As I will explain later, it is in failing to ensure that the evidence remained within the scope of proper admissibility and in failing to instruct the jury correctly on the available inferences that reversible error was made.

3. The absence of any exclusionary rule

[120] No issue is raised on this appeal with respect to the third criterion. The evidence, if otherwise admissible as opinion evidence, was not subject to any other exclusionary rule.

4. A properly qualified expert

[121] Finally, it is conceded that Mr. Fair was a qualified expert to give evidence on the named features of the complainants' behaviour, except as it related to memory. I have already expressed the view that Mr. Fair's testimony on this

point was not sufficiently probative to warrant its admission. I am also in agreement with the appellants that Mr. Fair was not a properly qualified expert on matters related to memory.

[122] Mr. Fair appears to be otherwise highly qualified in his field, but, on this point, the evidence is clear that Mr. Fair is a social worker whose knowledge and experience about matters related to memory were limited to his study of relevant articles written by a psychiatrist and to certain observations made in his clinical practice as a social worker that were consonant with that psychiatrist's view. It is not apparent at all from the record that Mr. Fair was in a position to critically evaluate the psychiatric opinions contained in the articles.

5. The inadmissible scope of the evidence called at trial

[123] As I have indicated earlier, it is my view that, although admissible on certain restricted subject-matters, the expert opinion evidence presented to the jury in this case far exceeded the scope of admissibility and indeed, if not in form certainly in its effect, directly contravened the trial judge's ruling.

[124] Notwithstanding the trial judge's ruling on the inadmissibility of "any opinions about behavioural indicators, signs or symptoms, health, or otherwise, stated to be consistent with the child sexual abuse", the expert opinion evidence led by the Crown at trial was entirely couched in terms of the Child Sexual Abuse Accommodation Syndrome. In the end result, although Mr. Fair was never asked directly by Crown counsel whether any particular behaviour was "consistent with sexual abuse", I must agree with counsel for the appellants that the effect of his testimony was essentially the same as it would have been had he been permitted to testify on the full scope of the matters canvassed during the voir dire. One need only look at the cross-examination of the expert witness at trial to be satisfied that the same attack that had been made during the course of the voir dire with respect to the validity of the theory behind the Child Sexual Abuse Accommodation Syndrome had to be repeated to counter the evidence that was advanced during the examination in chief. Given the clear ruling of the trial judge that this evidence was not sufficiently probative to be admitted, the jury should never have been exposed to any of the highly controversial evidence on this subject-matter. I will attempt to describe some of the ways in which the evidence went beyond expressing a simple opinion about the occurrence of the features of behaviour that were in issue.

[125] First, the expression "Child Sexual Abuse Accommodation Syndrome" in and of itself is suggestive that an inference of sexual abuse can be drawn from certain behaviours. Dr. Summit himself recognized in later articles the extent to which many persons were misled by the use of the term "syndrome" and how his theory had been inappropriately used as a diagnostic tool both in the field of behavioural sciences and in the courtroom. I don't find it necessary for the purpose of this appeal to analyze these later developments in any detail. The evidence was all before the court on the voir dire and amply supported the ruling that this kind of evidence was inadmissible. It is perhaps sufficient for our purposes to consider one dictionary definition of "syndrome"

to show how the term can be misleading.

[126] "Syndrome", in Webster's Ninth New Collegiate Dictionary, is defined as "a group of signs and symptoms that occur together and characterize a particular abnormality; a set of concurrent things (as emotions or actions) that usually form an identifiable pattern". Hence, the repeated use of the word syndrome, in my view was highly prejudicial and in contravention of the trial judge's ruling. I am not unmindful that Crown counsel at trial elicited from Mr. Fair a qualification to the ordinary meaning of the word "syndrome" at one point during the examination-in-chief:

> Q. …. is this Child Sexual Abuse Accommodation Syndrome, is it meant to be used as a tool to identify or diagnose children who have been sexually abused?
>
> A. Well, it is not meant to be something that would diagnose child sexual abuse. By that I mean, you can't use this when there is a complaint to determine beyond a reasonable doubt, was this child abused, or not. What it is, is intended to do is to help understand when children have been abused, you know, how that might come about, and to understand that some of the myths that have gotten [in the way] of that are, in fact, myths.

[127] And later:

> Q. Did [Dr. Summit later] comment at all on the choice of language, in terms of labelling the Child Sexual Abuse Accommodation Syndrome?
>
> A. Yes, he did.
>
> Q. Can you tell me what he had to say about the choice of language?
>
> A. He said that there had been some controversies in the American courts because he had called it a "Syndrome", and he felt that he would have been further ahead if he called it a "Pattern", simply a pattern that he was seeing in children who had been sexually abused.

[128] With all due respect to Mr. Fair, these answers, particularly when considered in the context of the whole of his testimony in chief, fall quite short of explaining to the jury the true limitations of the theory, as acknowledged by him during the course of the voir dire and as clarified by the author of the theory himself, Dr. Summit. The evidence before the court on the voir dire made it clear that it has been recognized in the field

that there is no basis to draw any inference that sexual abuse has occurred from any of the behaviour referred to in Mr. Fair's evidence. On the other hand, Mr. Fair's answers leave the impression that while the Child Sexual Abuse Accommodation Syndrome cannot be used to prove abuse beyond a reasonable doubt, it can still be used to determine when abuse has occurred. It is only through lengthy cross-examination that that notion was dispelled. Given the trial judge's ruling, the jury should never have been subjected to any of this difficult and confusing evidence on the debate over the Child Sexual Abuse Accommodation Syndrome.

[129] Hence, the evidence was not only difficult and confusing, it left the impression that some link had been scientifically established between the observation of certain behaviour in a complainant and the incidence of sexual abuse. This is further evidenced in the description of Dr. Summit's theory on the five stages that a child victim of sexual abuse experiences. During the course of that description, repeated references were made to the fact that it was a "myth" to discredit a child's complaint about sexual abuse because of delayed disclosure, inconsistent versions, confusion, recantations and the like. Repeatedly, the jury was told that in Dr. Summit's view, to conclude that sexual abuse did not occur on the basis of these features of behaviour was a "myth".

[130] In my view, there is a real danger that this testimony may have left the jury with the impression, not only that they should not discredit the complainants' testimony on the basis of any of these features (a notion which in itself is legally incorrect), but that there was a scientific basis to conclude that the presence of these very features that formed the basis of the defence theory somehow made their testimony more credible.

[131] The prejudice occasioned by this evidence was compounded by Crown counsel's repeated use of hypothetical questions that paralleled the specific allegations and the behaviour of the individual complainants in this case. First, Crown counsel would describe the allegations. The following is one example taken from the transcript:

> Q. Okay. Now, what I would like to do next, Mr. Fair, is give you a series of hypothetical factual situations and ask you a number of questions about each one.
>
> A. Yes.
>
> Q. I would like you to assume that we have a child between the ages of about five and ten, a female child, is repeatedly subjected to various sexual acts, ranging from fondling outside of her clothing, to fondling underneath her clothing, to having a penis inserted into her mouth, to intercourse.
>
> A. Yes.

Q. I would like you to assume that these acts are committed upon her, or she is enticed into participating in these acts, by various older members of her family, male members of her family, including her grandfather, a great uncle, and two uncles.

A. Yes.

Q. Finally, I would like you to assume that there is no one else in the room, so there are no other independent witnesses, if I can call them that, to any of the activities?

A. Yes.

[132] Then hypothetical questions were asked with respect to certain features of the behaviour of the "hypothetical" complainant such as the following:

Q. What can you tell us, if anything, about the likelihood that this child would speak with someone at the time these acts are taking place?

Q. Can you offer any explanation, either based on your clinical experience, or on the research, or on Dr. Summit's theory, that might explain why this child would continue to be alone in the company of a person who is abusing them?

Q. Would you expect this hypothetical child to be able to describe each individual incident with each of her abusers with any degree of detail?

Q. Would you expect this hypothetical child to be able to tell you with any degree of accuracy, or to remember with any degree of accuracy, what she had been doing, either prior to or after the abuse? I mean, let's assume that the abuse occurred at lunchtime….

Might you expect that child to tell you what they had been doing that morning where acts of abuse took place over a long period of time?

[133] Then Crown counsel repeated similar questions with respect to "another hypothetical child", "a third hypothetical child" and "finally one more hypothetical child" each time relating the specific allegations of abuse and referring to particular features of behaviour of the particular "hypothetical" child. Some references to behaviour was highly specific such as

the following:

> Q. Okay, and dealing with that same hypothetical child, let's add to that hypothetical that at about the age of nine someone asks her, "Has anyone touched you?" and she responds, "No."… Have you any explanation for why she might deny that touching?

[134] The hypothetical questions closely described the evidence of each complainant. In answer to each question, the expert confirmed that the behaviour would not be unusual and explained why.

[135] In my view, this whole series of hypothetical questions and answers far exceeded any legitimate purpose for expert testimony in this case. The answers given by the expert would likely be understood by the jury not just as evidence which would help them understand these features of behaviour generally but as a further invitation to accept each complainant's evidence regardless of their conduct and notwithstanding the weaknesses of the testimony. It served to effectively mask the weaknesses of each complainant's testimony and to cloak it with a semblance of scientific reliability. Presented in this manner, the evidence was no longer admissible because its prejudicial effect far exceeded its probative value. It was obviously calculated to bolster the credibility of each complainant and as such was not the proper subject of expert testimony.

[136] I have already indicated earlier that, in my view, Mr. Fair was not properly qualified as an expert on memory. Hence his evidence on "script memory" and "spot memory" and other aspects of the functioning of the mind was also inadmissible.

[137] It is important in every case to ensure that the expert opinion evidence, in both form and substance, remain relevant, necessary and within the recognized expertise of the witness. In this case, the expert opinion evidence could be admitted for the limited purpose of explaining that certain features of behaviour have been commonly observed in child victims of sexual abuse. This evidence could have been given in a simple succinct manner. I note for example this court's reference in R. v. F.(D.S.) to the expert opinion evidence called in that case regarding certain behavioural characteristics of women who report living in abusive relationships:

> Ms. Sinclair's evidence before the jury was extremely brief; after the description of her qualifications, the examination-in-chief covered less than four pages of transcript and the cross-examination one page. In answer to the specific questions permitted by the ruling of the trial judge, Ms. Sinclair expressed the opinions that it was quite typical for persons who are battered or abused in a relationship to remain in the relationship for a period of time; that it was quite unusual for

persons who are being abused in intimate relationships to report it to outsiders before they are ready to leave the relationship;

and that it was not unusual for those persons to minimize or fabricate what has happened to them if they are reporting an injury to a health care person or someone else.

[138] I have not reviewed the above-noted transcript of evidence and hence I am not saying that it should be used as a model. I have noted it, however, for the purpose of illustrating that this kind of evidence does not have to be lengthy or complex to fulfill its purpose. It can and should be confined so as to minimize any danger of distorting the fact-finding process.

D. Conclusion on the admissibility of the expert opinion evidence

[139] In the final analysis, the expert opinion evidence presented to the jury was almost entirely improper and inadmissible. It also effectively breached the trial judge's ruling. No one has suggested that this breach was done other than unwittingly by Crown counsel at trial or by the expert witness. It is perhaps noteworthy that the trial judge did not intervene nor did defence counsel object during the course of the expert's testimony. It undoubtedly would have been difficult for anyone present at the trial to assess the full impact of the evidence as it was presented. There is necessarily an element of hindsight in appellate review. In this case, a review of the evidence leads me to conclude that the admission of the expert opinion evidence as presented constitutes a reversible error that necessitates a new trial.

E. Instruction to the jury

[140] It is also important to give a careful instruction to the jury on the limited use that can be made of the expert opinion evidence. In R. v. F.(D.S.), this court noted that the trial judge had given the following clear instruction to the jury:

> The purpose of such evidence is to assist you in determining whether an inference adverse to the credibility of the complainant should be drawn based on the evidence of the manner and timing and consistency of her disclosure. It may or may not assist you in that respect. Your duty is to consider the evidence of Ms. Sinclair and weigh it in the balance. You must not be overwhelmed or unduly swayed by the credentials of a particular witness just because he or she is permitted to give expert evidence. While her evidence concerning observed behaviours in persons who report abuse in intimate relationships may or may not assist you in assessing the credibility of the complainant in the manner I have described, I emphasize you must not use her evidence and it is not relevant for any other

> purpose. You may not, for example, use her evidence to increase or bolster the credibility of the complainant. Aside from considering her evidence in relation to the credibility of the complainant in the manner which I have described, you may not use her evidence for the purpose of assessing the likelihood that the events described by [the complainant] occurred.

[141] It is important to note that this instruction correctly leaves it open to the jury to decide whether or not to draw an adverse inference on the credibility of the complainant on the basis of the described features of her conduct.

[142] The appellants in this case submit that the following instruction from the trial judge amounted to a direction that, as a matter of law, no adverse inference could be drawn from the absence of a contemporaneous complaint:

> Expert evidence may be given by a qualified expert who has special skill to better understand matters outside of our normal experience. I found that Grant Fair had a special skill, from a clinical point of view, and could give opinion evidence in the child abuse situation about delayed disclosure, memory about what occurred, and events adjacent to occurrences, repeated occurrences, and lack of detection by persons close to the complainant, such as a parent.
>
> …
>
> His evidence may be used by you to better understand the workings of the mind in matters I mentioned, and it is given to you for the purpose to prevent inaccurate opinions being formed, what were described as "myths", on what adults might expect children to do in certain situations when those opinions are not based upon actual fact.

[143] The trial judge gave other instructions to the jury on the subject of expert evidence to which no objection is taken. In my view, it may have been preferable, in the context of this charge, not to give the first above-noted excerpt. The reference to the trial judge's finding that Mr. Fair had a special skill was unnecessary and created a risk that the jury understand that Mr. Fair's evidence has received the stamp of judicial approval. This impression may have been left with the jury particularly in light of the second excerpted instruction. The later instruction, in my view, constituted misdirection in so far as it may have suggested to the jury that opinions other than those offered by the expert would be "inaccurate" or constitute "myths". Rather, the jury instructions should have clearly left it open to the jury to decide whether or not an adverse inference was to be drawn on the credibility of the complainants on the

basis of the features of conduct that formed the subject-matter of expert testimony.

IV. Additional Grounds of Appeal

[144] In light of the fact that I would order a new trial, I do not find it necessary to deal with the additional grounds of appeal other than summarily with a view as to what may be of relevance in the new trial.

A. Cross-examination of defence witnesses

[145] The appellants submit that the cross-examination of defence witnesses as to the derogatory nicknames used within the appellants' family to refer to the police officer in charge of the investigation and to the prosecutor was improper. I agree. This cross-examination was irrelevant to any of the issues in the trial and should not have been allowed.

[146] The appellants further submit that the prejudice from such questioning was exacerbated by Crown counsel's address to the jury wherein she submitted that the use of such derogatory terms signaled "a distinct lack of respect for the administration of justice." It was further compounded by the trial judge's instruction to the jury that such disrespect could be used in assessing the weight to be attached to the evidence of good character. I also agree with this submission. The cross-examination, although improper, may not have been of much consequence were it not for this direction on the use that could be made of this wholly irrelevant evidence.

B. Charge on character evidence

[147] In the course of his charge, the trial judge stated as follows:

> You can use the evidence of good character given on behalf of all the accused, to infer that they are not the type of person who would commit the offences mentioned in the indictment. The evidence of good character is relevant to their credibility as a witness. If the evidence is evenly balanced, the character evidence may weigh the balance in favour of the accused.

[148] It is conceded that this instruction improperly stated the onus with respect to character evidence. Again, it is not necessary for the disposition of this appeal to assess the impact of this error in the context of the charge as a whole.

C. Charge on reasonable doubt

[149] The appellants' argument on the inadequacy of the charge to the jury as it relates to reasonable doubt is based on alleged structural flaws in the presentation of the evidence and to repeated directions to the jury that they would have to decide if the "incident took place". It is submitted that the instructions as structured would encourage the jury to simply choose the more persuasive of the competing versions.

[150] The argument in essence relates to the trial judge's personal tailoring of the charge to the particular evidence called at trial. In light of the lesser number of accused and

counts and the success of this appeal on the expert opinion evidence, the evidence may be substantially different at the new trial. Hence, it would serve little purpose to deal with this ground of appeal.

D. Competency hearing for child witness

[151] The appellants submit that the trial judge erred in permitting the eleven year old complainant S.K. to give evidence under oath. It is submitted that the trial judge made no effort to determine if the witness understood the nature of the oath. It is conceded however that the witness was able to communicate the evidence and that she could have been permitted to testify on promising to tell the truth.

[152] In his assessment of the child's capacity to testify, the trial judge ensured that she understood the difference between telling the truth and telling a lie. When the trial judge inquired whether the child would tell the truth if asked to do so she said "Yes". When asked why she would tell the truth, she answered "Because you are promising others to tell the truth." The witness also said she knew what an oath meant and stated that it's when "a guy comes up and he puts a bible, and he says, 'Put your right hand on – promising God, and everyone in this court when you tell the truth'." She added that she knew what the bible was, having learned about it in school.

[153] Although it may have been preferable if further inquiry had been made on the witness's understanding of the solemnity of the occasion and the importance of telling the truth, I see no reason to interfere with the trial judge's exercise of discretion in permitting the witness to testify under oath. As stated in R. v. Marquard, at p. 220, "a large measure of deference is to be accorded to the trial judge's assessment of a child's capacity to testify." Unless his discretion "is manifestly abused", it should not be interfered with.

V. Disposition

[154] For the reasons set out above, I would allow the appeal, set aside the convictions and order a new trial.

(signed) "Louise Charron J.A."

(signed) "I agree R. McMurtry C.J.O."

RELEASED: September 13, 1999

MOLDAVER J.A. (concurring in the result):

[155] I have had the advantage of reading the reasons of my colleague Charron J.A. and I agree with her analysis and conclusions on all but the challenge for cause issue. On that issue, my colleague and I differ in our assessment of R. v. Williams (1998), 124 C.C.C. (3d) 481 (S.C.C.) and its impact on this court's decision in R. v. Betker (1997), 115 C.C.C. (3d) 421 (leave to appeal to the S.C.C. refused February 26, 1998). With respect, I do not share her view that following Williams, Betker remains authoritative on the subject of challenges for cause based on the nature of the crime. By that, I do not mean to suggest that as a result of Williams, applications to challenge for cause based on the nature of the crime are now destined to succeed in all cases. To the contrary, in most instances they will not and to that extent, Betker remains authoritative.

[156] But where, as here, the class of prejudice at issue is generic, arising at least in part from stereotypical attitudes and beliefs about the crime of sexual abuse and the parties involved, the legal principles that led this court in Betker to deny the legitimacy of all crime-based challenges must be adjusted to conform with the principles set forth in Williams. When the correct legal principles are applied to the evidence, I am satisfied that there is reason to suppose that the jury pool may contain people who are unable to apply the presumption of innocence to persons charged with sexual abuse or who are unable to fairly weigh the evidence of the accused and/or complainant. In other words, the evidence meets the threshold test for partiality enunciated in Williams. It follows, in my opinion, that the appellants should have been permitted to challenge prospective jurors for cause and the trial judge erred in concluding otherwise.

ANALYSIS

Betker re-evaluated

[157] Writing for the court in Betker, I found that the evidence led in support of the application to challenge for cause based on the nature of the crimes (indecent assault, gross indecency and incest) did not meet the threshold test for partiality. In coming to that conclusion, I tested the evidence against legal principles that have since been discredited in Williams. The impugned principles from Betker are summarized below:

- ection 638(1)(b) of the Criminal Code speaks to a lack of
- indifference between the Crown and the accused, not the Crown and
- the type of offence charged. The distinction is fundamental to a
- proper understanding of the permissible limits within which
- challenges for cause based on alleged partiality may be brought
- (p. 437);
- Unlike racial prejudice, where there is a direct and logical
- connection between the prejudice asserted and the particular
- accused, no such connection exists that would translate negative
- views about a particular crime into partiality against a
- particular accused (p. 441);
- To meet the threshold test for partiality, the evidence must
- disclose a realistic possibility that one or more prospective
- jurors would be biased against the accused due to the nature of
- the crime and that such bias would influence a juror in the
- performance of his or her judicial duties (pp. 433, 436 and 442);
- and
- A motion to challenge for cause must be dismissed if there
- is no “concrete” evidence that any of the prospective jurors
- could not set aside his or her biases and render a fair and

- impartial verdict based solely upon the evidence and legal
- instruction from the judge (p. 444).
-

[158] In light of Williams, the legal principles that ought to have been applied to the evidence are these:

- Section 638(1)(b) of the Code is to be construed in a broad
- and purposive fashion. It is designed to prevent persons who are
- not indifferent between the Crown and the accused from serving on
- the jury. Section 638(1)(b) is triggered where there is a
- realistic possibility of partiality, regardless of the origin of
- the apprehension of partiality (pp. 490, 499 and 500);
- A juror who is partial is a juror who is inclined to a
- certain party or a certain conclusion. The predisposed state of
- mind caught by the term “partial” may arise from a variety of
- sources, including generic prejudice.
- Generic prejudice arises from stereotypical attitudes about
- the defendant, victims, witnesses or the nature of the crime
- itself. Bias against a racial or ethnic group or against
- persons charged with sexual abuse are examples of generic
- prejudice (p. 488);
- Section 638(1)(b) of the Code requires two inquiries and
- entails two different decisions with two different tests. The
- test at the first stage is whether there is a realistic potential
- or possibility for partiality. The question is whether there is
- reason to suppose that the jury pool may contain people who are
- prejudiced and whose prejudice might not be capable of being set
- aside on directions from the judge. The question at the second
- stage is whether the candidate in question will be able to act
- impartially (pp. 495-496); and
- It is wrong to suggest that an application to challenge for
- cause must be dismissed if there is no “concrete” evidence that
- any of the prospective jurors could not set aside his or her
- biases. To ask an accused to present evidence that some jurors
- will be unable to set their prejudices aside is to ask the
- impossible. In many cases, it can be inferred from the nature of
- the prejudice (widespread racial prejudice being one example)
- that some jurors at least may be influenced by those prejudices
- in their deliberations (pp. 492 and 497).

[159] A comparison of the two decisions leads me to conclude that the Betker approach to crime-based challenges is flawed in two significant respects.

[160] First, Betker fails to give s. 638(1)(b) the fair, large and liberal interpretation it deserves. Properly construed, the provision is triggered whenever there is a realistic possibility of partiality, regardless of its origin. Moreover, given that s. 638(1)(b) is aimed at ensuring a fair trial, it is to be approached in the spirit suggested by McLachlin J. at p. 492:

> Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not. It is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary. [footnotes omitted.]

[161] Second, Betker conflates the two stages of the challenge for cause process. Instead of asking whether the evidence discloses the existence of a potential for partiality, Betker demands proof of partiality at the first stage of the inquiry. In other words, Betker sets the evidentiary threshold for partiality too high.

Evidence led in support of the application

[162] Charron J.A. has fairly summarized the evidence relied upon by the appellants to show widespread prejudice against persons charged with sexual abuse and there is no need to repeat it. I would, however, make two brief observations.

[163] First, as my colleague points out, although the trial judge dismissed the challenge for cause application, he vetted the jury panel for bias based on the nature of the allegations. This resulted in no less than 23 prospective jurors being excused by the trial judge on account of bias.

[164] Second, Charron J.A. notes that the evidentiary base in this case is far less extensive than that in Betker, particularly if the unsworn affidavit of Professor Vidmar is ignored. Be that as it may, I do not take this to mean that my colleague would have come to a different conclusion had the record in this case been identical to that in Betker. Rather, as I read her reasons, it is my colleague's opinion that taken at its highest, the evidence falls short of satisfying the threshold test for partiality delineated in Williams. That accounts for her conclusion at paragraph 3 that – "[A]lthough Betker must now be read in light of the principles in Williams, it remains authoritative… ."

[165] Even if I have misconstrued my colleague's approach to the evidence, I see no impediment to amplifying the record by taking judicial notice of the additional material filed in Betker. The evidence in question is a matter of public record and one of the purposes of this appeal is to determine whether Betker remains authoritative in light of Williams.

[166] Considering the evidence in its entirety, and, where

appropriate, taking judicial notice of facts that are so notorious as not to be the subject of dispute among reasonable persons, the following findings of fact can safely be made:

- Studies and surveys conducted in Canada over the past two
- decades reveal that a large percentage of the population, both
- male and female, have been the victims of sexual abuse. From
- this, it is reasonable to infer that any given jury panel may
- contain victims of sexual abuse, perpetrators and people closely
- associated with them.
- The harmful effects of sexual abuse can prove devastating
- not only to those who have been victimized, but those closely
- related to them. Tragically, many victims remain traumatized and
- psychologically scarred for life. By the same token, for those
- few individuals who have been wrongfully accused of sexual abuse,
- the effects can also be devastating.
- Sexual assault tends to be committed along gender lines. As
- a rule, it is women and children who are victimized by men.
- Women and children have been subjected to systemic
- discrimination reflected in both individual and institutional
- conduct, including the criminal justice system. As a result of
- widespread media coverage and the earnest and effective efforts
- of lobby groups in the past decade, significant and long overdue
- changes have come about in the criminal justice system. For
- some, the changes have not gone far enough; for others, too far.
- Where challenges for cause have been permitted in cases
- involving allegations of sexual abuse, literally hundreds of
- prospective jurors have been found to be partial by the triers of
- fact. In those cases where trial judges have refused to permit
- the challenge, choosing instead to vet the panel at large for
- bias, the numbers are equally substantial.
- Unlike many crimes, there are a wide variety of
- stereotypical attitudes and beliefs surrounding the crime of
- sexual abuse.

[167] There is no need to elaborate on these findings apart from the last two.

[168] With respect to the results obtained in prior cases where challenges for cause have been permitted, at paragraphs 51 and 52 of her reasons, my colleague makes the point that it is impossible to draw any meaningful inference from the answers provided by prospective jurors when confronted with general questions such as those found in the aborted jury selection process in this case. In this regard, she observes:

> [T]he answers provided by the candidates for jury duty who were successfully challenged for cause in this case reveal nothing more than they may find it difficult to hear a case of this kind. Many state that this is because they have children of their own or they may know someone who has been victimized. The answers provide no evidence of partiality whatsoever.

[169] With respect, I am unable to agree with my colleague that the answers given in previous cases by prospective candidates found to be partial "provide no evidence of partiality whatsoever." In Betker, I too rejected this body of evidence as unhelpful because it failed to provide "concrete" evidence that any of the prospective jurors could not set aside his or her biases and render a fair and impartial verdict based solely upon the evidence and legal instructions from the judge. As Williams points out, however, that was too high a test. Considered afresh, if nothing else, the responses disclose the existence of widespread bias against persons charged with sexual abuse and strongly-held attitudes and beliefs capable of impacting on the presumption of innocence and the ability to judge the evidence fairly.

[170] Once widespread bias is shown to exist, according to Williams, "it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases" (p. 492). Whether the inference is reasonable will depend upon a number of factors, including the nature and extent of the bias at issue and the detrimental effects it may have on an accused's right to a fair trial.

[171] Turning next to the existence of stereotypical attitudes surrounding the crime of sexual abuse, at para. 45 of her reasons, my colleague points out that there are a variety of pre-conceived notions surrounding the crime of sexual abuse, some potentially harmful to an accused, others beneficial. On the harmful side of the ledger, she includes the following beliefs:

- Children do not lie about being sexually abused;
- Sexual abuse is pervasive in our society and persons accused
- of the crime are probably guilty;
- The criminal trial process is unfairly stacked in favour of
- accused persons.

[172] Having identified the divergent beliefs and attitudes, my colleague observes that it is not at all clear how one could infer that jurors harbouring such beliefs "may discharge the jury function in a way that is improper or unfair to an accused." Rather, she maintains, it is "more likely that given their variance, the effect of these pre-conceived notions would be diffused during the course of the jurors' deliberations."

[173] If my colleague is correct, then surely the same argument would apply to race-based challenges where one would also expect to find divergent views amongst prospective jurors. And yet, that argument has not prevailed. The reason, I suggest, is because the issue is not whether prospective jurors may hold pre-conceived notions about the accused or in this case, the

nature of the crime itself, but whether the notions are so firmly rooted that they may prove resistant to the usual trial safeguards.

The strain of bias at issue and its potential detrimental effects

[174] In my opinion, the crime of sexual abuse is capable of giving rise in some people to a strain of bias that is particularly virulent and potentially resistant to judicial cleansing. In this respect, I am guided by the thoughts expressed by Professor Paciocco in an unpublished paper titled, "Challenge for Cause in Jury Selection after R. v. Parks: Practicalities and Limitations" February 11, 1995.

[175] In his paper, Professor Paciocco identifies two groups of people – victims and dogmatists – who, in his view, are capable of harbouring intense and deep-seated biases against persons charged with sexual abuse that may be immune to the usual trial safeguards and detrimental to an accused.12

[176] With respect to victims, he writes:

> Undeniably, those who have been victimized by sexual offences … carry an incredible trauma. Surely no evidence is needed to establish that. The loss of self-worth, the feeling of helplessness and the need for validation are common themes in law reform initiatives and sentencing submissions before the courts. One cannot help but believe that these deep scars would, for some, prevent them from adjudicating sexual offence violations impartially.13 [Emphasis added, footnotes omitted.]

[177] As for dogmatists, he observes:

> It is difficult to argue that society is not somehow better because of the work of many of these people [support groups and lobbyists]. Moreover, it would be unreasonable to urge that no-one who characterizes themselves as "feminist" could discharge their function as jurors effectively and fairly; indeed, speaking generally the perspectives that some feminists bring to bear no doubt represent part of the cross-section of society that needs to be heard in jury rooms. Yet, for others, commitment gives way to zealotry and dogma. Just as there are sexist myths that have reduced the integrity of womanhood, there are sexist myths that would undermine the presumption of innocence.
>
> Few of us would not have seen placards held in front of courtrooms asserting that "woman don't lie, men do." Few of us would

> not have heard the often used rhetoric that it is the victim who is placed on trial, or that sexual experience evidence relating to a complainant is never relevant to what happened, or that the system of justice is designed to protect men from rape allegations, or that children never lie about sexual abuse.…
>
> The possession by a juror of biases relating to the prosecution of sexual offences is exactly the kind of bias that requires a challenge for cause. Parks advises that the nature and extent of the bias must be considered. We are speaking here of beliefs more emotional and profound than views on pornography. We are speaking of what become for some, attitudes that are ingrained in the subconscious and which become a basis for self-identification. Some will even consider themselves to have a personal stake in the prosecution based on gender empowerment. Nothing can be more resistant to "judicial cleansing" than the conviction that the judicial system is biased against women and children, and is unable with its rules to protect victims or women and children generally. How much fidelity to judicial discretion can be expected on the part of those who see the prosecution of sexual offenders as a battlefront in a gender based war?14 [Emphasis added, footnotes omitted.]

[178] It is important, I believe, to recognize that in advocating a right to challenge for cause in cases of sexual abuse, Professor Paciocco does not suggest that mere disapprobation of a particular crime is sufficient to trigger s. 638(1)(b) of the Criminal Code. Nor, for that matter, does he take the position that all victims of sexual abuse or all individuals who support change in the criminal justice system must necessarily be ousted from jury duty. To the contrary, he accepts that many such individuals will be perfectly capable of discharging their jury function in a fair and proper manner. As explained, his concerns lie with those individuals who, by virtue of the nature and extent of their biases, may be incapable of setting their biases aside and rendering a true verdict based solely on the evidence and legal instruction from the judge. This accords entirely with the views expressed by McLachlin J. at p. 492 of Williams, where, albeit in the context of racial prejudice, she states:

> Where widespread racial bias is shown, it may well be reasonable
> for the trial judge to infer that some people will have difficulty identifying and eliminating their biases. It is therefore reasonable to permit challenges for cause. This is

> not to suggest that a prospective juror who on a challenge for cause admits to harbouring a relevant racial prejudice must necessarily be rejected. It is for the triers on the challenge for cause to determine: (1) whether a particular juror is racially prejudiced in a way that could affect his or her partiality; and (2) if so, whether the juror is capable of setting aside that prejudice. [Emphasis added.]

[179] My colleague points out at paragraph 52 of her reasons that "even in the United States where jurors are routinely questioned on their feelings, opinions and beliefs, the mere fact that a potential juror may have strong feelings or views about an offence or has been the victim or is closely related to a victim of a similar crime is not sufficient reason to dismiss him or her." I do not disagree with the American position. Indeed, it coincides with the views expressed by McLachlin J. above. With respect, however, I do not find the American authorities helpful in resolving the issue at hand.

[180] At issue is whether persons charged with sexual abuse in Canada should be permitted to do what accused persons in the United States are entitled to do as of right. In other words, does the evidence disclose a realistic potential for partiality? Professor Paciocco points to the evidence of widespread prejudice against persons charged with sexual abuse and argues, correctly in my view, that having regard to the nature and extent of the prejudice, there is reason to suppose that some members of the jury pool may be incapable of setting aside their biases on instructions from the judge. In other words, the evidence reaches a level sufficient to displace the presumption of impartiality, thereby entitling persons charged with sexual abuse to test the waters.

[181] Professor Paciocco's thesis is not new. Indeed, in Betker, I considered and rejected it as "speculative" because it was unsupported by empirical data. In other words, absent scientific validation, I was not prepared to acknowledge his concern that some prospective jurors might have difficulty setting their biases aside.

[182] In light of Williams, it is now apparent that I set the evidentiary bar too high. The factual underpinnings of Professor Paciocco's thesis are well documented, if not notorious. No reasonable person would dispute the harmful effects of sexual abuse, nor the fact that in some instances, victims may remain psychologically traumatized and scarred for life. Nor can there be any doubt that the criminal justice system has been, and in the eyes of many, continues to be a source of systemic discrimination against women and children. Likewise, no reasonable person would dispute the fact that the crime of sexual abuse attracts myths and stereotypical attitudes and beliefs.

[183] The real issue, as I perceive it, is whether the factual underpinnings are reasonably capable of supporting the inference that some prospective jurors may harbour the kind of intense and deep seated biases that could prove resistant to judicial cleansing and detrimental to an accused. Admittedly, the issue is a difficult one and not free from doubt. On

balance, however, when the evidence is considered as a whole, I am satisfied that there is a realistic basis for concern about potential partiality in the jury pool where the crime alleged is that of sexual abuse. At very least, the evidence leaves me in a state of doubt. That being so, I feel bound to heed the admonition of McLachlin J., referred to above at para. 6, that "[W]here doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined."

[184] The type of bias at issue can prove detrimental to an accused in a number of ways. For example, it may impact on the presumption of innocence and incline a juror to believe that an accused is likely to have committed the crime alleged. Alternatively, it may incline a juror to reject or put less weight on the evidence of an accused or predispose a juror to a complainant, particularly if he or she is a young child.

[185] Experience has shown that sexual assault trials generally boil down to the issue of credibility. Often times, the word of the complainant stands alone against that of the accused and the line between guilt and innocence can be very difficult to draw. In this context, it is vitally important that accused persons be permitted to examine prejudices that unchecked, could determine where the line is drawn.

The Floodgates Argument

[186] My colleague makes the point that if effect is given to the appellants' argument, this will result in an endless stream of challenges for cause. At para. 48, she observes:

> In my view, if this court were to accept the appellants' argument, it would be tantamount to a wholesale adoption of the approach in the United States. Every juror would be viewed as suspect. Every candidate for jury duty could be challenged and questioned as to preconceptions and prejudices in an effort to uncover potential partiality. There would be no rational basis to limit the adoption of this procedure to trials for sexual offences. Indeed, why would there not be strong feelings, opinions and beliefs about murders of children, child pornography, drug trafficking, abuse of the elderly, convenience store robberies or break and entries into private homes?

[187] I too expressed similar concerns in Betker. At p. 438, I wrote:

> If strongly held views about a particular crime are allowed to become a yardstick against which partiality is measured, then, on a principled approach, I fail to see how the crime of sexual assault can be meaningfully distinguished from other crimes such

as murder, robbery, break and enter or drug trafficking, to mention but a few.

[188] When the principles set forth in Williams are applied to crime-based challenges for cause, I believe that the "floodgate" argument loses much of its force. At the outset of these reasons, I observed that challenges for cause based on the nature of the crime will rarely succeed. In this respect, I remain firmly of the view that standing alone, strong feelings about a particular crime and those who commit it will generally not suffice to meet the threshold test for partiality. But where, as here, the type of prejudice at issue is generic, arising at least in part from stereotypical attitudes and beliefs about the crime of sexual abuse and the parties involved, different considerations apply. In concluding that challenges for cause should be permitted in cases of sexual abuse, I have taken into account a number of features about the crime that tend to distinguish it from most other crimes. These include:

- The prevalence of the crime;
- The long-lasting and devastating effects it produces in many
- victims;
- The fact that sexual abuse is a gender-based crime;
- The fact that the criminal justice system has been a source
- of systemic discrimination against women and children and for
- some, the prosecution of sexual offences is seen as a
- battleground in the war between the sexes;
- The existence of stereotypical attitudes about the crime of
- sexual abuse and the parties involved; and
- The fact that sexual assault trials tend to be emotionally
- charged, particularly in cases of child abuse, where the mere
- allegation can trigger feelings of hostility, resentment and
- disgust in the minds of jurors.

[189] Combined, these factors lead me to believe that unlike other crimes, by its nature, the crime of sexual abuse can give rise to intense and deep-seated biases that may be immune to judicial cleansing and highly prejudicial to an accused.

Proposed Format For Challenge For Cause Process

[190] At paras. 13 and 53 of her reasons, my colleague identifies two deficiencies in the process where challenges for cause have been permitted in cases involving allegations of sexual abuse – first, the questions posed are often confusing; second, prospective jurors have not been provided with meaningful instruction on the nature of jury duty or the meaning of impartiality.

[191] By and large, I share my colleague's concerns. To that end, I have appended to these reasons a document prepared by counsel for the respondent at the request of the court, titled, "Proposed Format For Challenge For Cause Process." In my view, the format correctly outlines the kind of legal instruction trial judges should provide and the type of question prospective jurors should be asked.

[192] Although the format is designed for cases involving sexual abuse of children, it can be easily adjusted as necessary. Importantly, the wording used is not meant to be compulsory. It

is merely a suggested format to guide trial judges and counsel in future cases.

CONCLUSION

[193] In the final analysis, I am satisfied that the risk of partiality in cases of sexual abuse is very real. It follows, in my opinion, that challenges for cause based on the nature of the crime should be permitted upon request.

[194] The appellants should have been permitted to challenge prospective jurors for cause based on the nature of the crime. They were deprived of that right and it cannot be said that they received a fair trial by an impartial jury. For this reason and the reasons given by my colleague on the expert evidence issue, I would allow the appeal and direct a new trial.

(signed) "M. J. Moldaver J.A."

APPENDIX

PROPOSED FORMAT FOR CHALLENGE FOR CAUSE PROCESS

A. Proposed General Instruction to the Panel to be given by the Trial Judge

“We are now going to pick a jury through a process called “challenge for cause”. Defence counsel will be permitted to ask each prospective juror whose name is called a question designed to inquire whether that juror can keep an open mind and follow my instructions. The reason for this process is because it is recognized that in cases of sexual abuse of children people in the community may hold strong views. Let me make it clear that you are not to take from this that it is necessarily inappropriate to have opinions about the sexual abuse of children. One would expect that most people would think such conduct is wrong. Rather, the concern is that notwithstanding those opinions you must be able to keep an open mind and judge this case fairly and objectively, and only on the evidence you hear. You must be able to presume the innocence of [name of the accused] throughout the trial and only set aside that presumption if the Crown has proved [name of the accused] guilt beyond a reasonable doubt.

“Similarly, it is recognized that acting as a juror can be a challenging and sometimes difficult responsibility. You ought not to assume that just because you expect it will be difficult that you would necessarily be a poor juror. This is an important responsibility that we ask of our citizens, because it is essential to our jury system that citizens be willing to sit on juries. I know that each of you will consider the question posed very carefully.”

B. Proposed Instructions to the Two Triers by the Trial Judge

“You have heard my preliminary remarks. Your role is to judge the challenge. You must decide if the prospective juror will be able to keep an open mind and be impartial. You may confer between the two of you and then tell me whether, in your unanimous opinion, you think that the juror will be impartial or partial. As I have already indicated, you ought not to assume that having an opinion or belief about the sexual abuse of

children necessarily excludes a prospective juror. The question is whether, even with such beliefs, that prospective juror can keep an open mind, follow my instructions, and judge the case fairly."

C. Proposed Question by Counsel

"As His/Her Honour will tell you, [name of the accused] is presumed innocent unless the Crown has proven the charges against him/her beyond a reasonable doubt. A juror must judge the evidence of all witnesses without bias, prejudice or partiality, that is the juror must decide this case with an open and fair mind and render a true verdict based only on the evidence given in the trial.

"In this case, the prosecution alleges that [name the accused] committed a number of sexual offences against children.

"Some people in the community, who have thought about the matter, have developed beliefs or attitudes about the sexual abuse of children. Other people may hold no particular beliefs or attitudes on this subject.

"You are not being asked to tell us what views you may hold, if any, or what personal experiences you may have had.

"However, assuming that you hold a belief or attitude about the sexual abuse of children, would any such belief prevent you from giving a fair and impartial verdict in this case based solely on the evidence and the instructions of the trial judge?"

---

1 It would appear that this vetting of the panel for bias was done with the consent of the parties. It should be noted that the trial in this case was heard before this court's decision in Betker where it was held that the trial judge has no authority to prescreen the prospective jurors in this manner. Where the alleged ground of partiality is not obvious, resort must be had to s.638(1)(b) of the Criminal Code and the usual procedure for challenges for cause must be followed.

2 The following articles were submitted to the trial judge on the application: Cooper, "The ABC's of Challenge for Cause" [1994] Crim. L.Q. 62; Chapman et al, "Challenges for Cause Based on Non-Impartiality", Sexual Offences Law Reporter (Sept. 1994); Tanovich, "Rethinking Jury Selection" (1994), 30 C.R. (4th) 310; Paciocco, "Challenges for Cause in Jury Selection" (presented at the Canadian Bar Association Conference on Recent Issues and Developments in Criminal Law, 11 February 1995); Skurka, "Defending a Child Abuse Case", C.L.A. Newsletter (June 1994); Skurka, "Sex Abuse Cases II", C.L.A. Education Programme (November 1994).

3 This appeal was heard together with the appeals in R. v. K.F. and in R. v. D.P. (released concurrently with this judgment) in which the accused's right to challenge for cause in all cases of sexual assault was also raised. The arguments presented to the court by counsel in all three cases have been considered for the purpose of writing this judgment.

4 The issue, however, was before this court in Betker and while the court did not completely foreclose the nature of the crime itself as a potential source of partiality it expressed the view that "strong attitudes about a particular crime, even when accompanied by intense feelings of hostility and resentment towards those who commit the crime, will rarely, if ever,

translate into partiality in respect of the accused." (at p.441)
5 The motion for leave to appeal the decision in Betker to the Supreme Court of Canada was filed in September 1997 and refused on February 26, 1998. The appeal in Williams was argued on February 24, 1998.
6 See article, supra.
7 See for example: State v. Marcus, 34 N.W. 2d 178 (Sup. Ct. Iowa, 1948); Com. v. Myers, 545 A. 2d 309 (Pa. Super. 1988); State v. Walker, 795 S.W. 2d 522 (Mo. App. 1990); Tenon v. State, 545 So. 2d 382 (Dist. Ct. App. 1989); State v. Bebermeyer, 743 S.W. 2d 516 (Mo. App. 1987); State v. Evans, 701 S.W. 2d 569 (Mo. App. 1985); U.S. v. Sumler, 1998 U.S. App. Lexis 13714; State v. House, 456 S.E. 2d 292 (Sup. Ct. N.C. 1995); Nichols v. State, 435 S.E. 2d 502 (Ct. App. Ga. 1993); Wellons v. State, 463 S.E. 2d 868 (Sup. Ct. Ga. 1995); State v. Lewis, 452 So. 2d 720 (La. Ct. App. 4 Cir. 1984); State v. Jones, 584 S.W. 2d 60 (Mo. App. 1993).
8 It ultimately falls upon the trial judge to be the gate-keeper with respect to this type of evidence. Expert opinion evidence that does not meet the criteria for admissibility cannot be admitted regardless of the position of counsel. See for example R. v. McIntosh (1997), 117 C.C.C. (3d) 385 (Ont. C.A.) at 391 where this court expressed "astonishment" at the passivity of Crown counsel with respect to the proposed defence expert evidence on the issue of eyewitness identification. This court was critical of the fact that courts are "overly eager to abdicate their fact-finding responsibilities to 'experts' in the field of the behavioural sciences" without sufficient inquiry into whether the subject-matter itself admits of expert testimony.
9 McCormick on Evidence, 3rd ed. (1984), at 544.
10 See R. v. Beland (1987), 36 C.C.C. (3d) 481 where this evidence was not admitted.
11 See the reference made in R. v. Mohan to the trial judge's ruling in R. v. Bourguignon at p. 412.
12 Professor Vidmar does not draw a distinction between victims and dogmatists and the public at large. In his view, all members of the public are suspect and potentially capable of holding attitudes and beliefs that bear on the presumption of innocence when a defendant is accused of sexual abuse. See Vidmar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997), 21 Law and Human Behaviour 5 at p. 18.
13 I would add that in some cases, the same reasoning may apply to persons closely associated with victims and persons wrongfully accused of sexual abuse.
14 The same arguments can be made in respect of extremists on the other side of the fence.