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BY EMAIL and RESS

May 12, 2014
Our File: EB20140155

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2014-0155 – Kitchener-Wilmot Hydro Inc. – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Enclosed, please find SEC's written submissions.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Applicant and Intervenors (by email)

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EB-2014-0155

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

AND IN THE MATTER OF an Application by Kitchener-Wilmot Hydro Inc. for an Order or Orders approving just and reasonable rates and other service charges for the distribution of electricity to be effective as of January 1, 2014.

AND IN THE MATTER OF Rule 40 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

WRITTEN SUBMISSIONS OF THE SCHOOL ENERGY COALITION

A. Overview

1. The School Energy Coalition ("SEC") brings this motion to review and vary the Decision and Order in EB-2013-0147 (the "Decision") with regard to one discrete but material issue, the appropriate Working Capital Allowance ("WCA") for Kitchener-Wilmont Hydro Inc. ("KWHI"). In the Decision, the Board fettered its discretion by determining that because KWHI was not required to file a lead-lag study, the Board did not need to ***consider*** any WCA percentage other than the default of 13% set out in the Board's Filing Requirements. This was an error of law. The Board was required to determine the appropriate WCA based on the evidence in the proceeding and parties' arguments.

2. Pursuant to the Ontario Energy Board's *Notice of Motion to Vary and Procedural Order No. 1* in this proceeding, these are SEC's submissions.

B. Facts

3. KWHI filed an application (the "Application") on May 17, 2013 with the Board seeking an order approving changes to its rates charged for electricity distribution pursuant to section 78 of the *Ontario Energy Board Act*. It amended the Application on June 21, 2013.

4. SEC, Energy Probe Research Foundation ("Energy Probe"), and the Vulnerable Energy Consumers Coalition ("VECC") were intervenors in the proceeding (collectively the "intervenors"). After written interrogatories and a technical conference, a Settlement Conference was convened by the Board.

5. A partial settlement agreement was reached between KWHI and the intervenors in the proceeding. Parties had no settlement on two issues:

> Issue 2.2 "Is the working capital allowance for the test year appropriate?"
> Issue 4.1 "Is the overall OM&A forecast for the test year appropriate?"

6. Also, parties were only able to reach partial settlement on Issue 1.1 "[h]as KWHI responded appropriately to all relevant Board directions from previous proceedings?" With respect to that issue, there was a disagreement as to whether the Board had directed KWHI to file a lead-lag study in support of its proposed WCA.

7. An oral hearing took place, during which intervenors and Board Staff cross-examined KWHI on these outstanding issues. Parties filed argument and the Board issued the Decision on March 20, 2014.

8. This Motion does not seek a review of the Board's determinations with respect to Issues 1.1 and 4.1. SEC does seek a review of the Board's determination with respect to Issue 2.2.

Working Capital Allowance

9. In its last rebasing proceeding (EB-2009-0267), KWHI proposed in its reply submissions that it would undertake a lead-lag study in support of its next cost of service application. In its decision in that case, the Board found the proposal timely and appropriate, but since the appropriate WCA percentage was being raised in other proceedings, it recognized that the Board might undertake a generic proceeding. It therefore determined that it expected KWHI to support its WCA in its "next rebasing application based on the outcome of this Board led process or based on the lead/lag study that KWHI stated it would undertake".[1] This was the dispute with respect to Issue 1.1.

10. In the Application, KWHI proposed a WCA percentage of 13%, relying on the Board's letter of April 12, 2012[2] ("Board Letter"). The Board Letter provided the Board's rationale for changes to the 2013 Filing Guidelines for electricity and transmission distribution applications. The Board Letter stated that a distributor had two approaches available to calculating its WCA: filing a lead-lag study, or using a 13% default value. The 13% default WCA percentage was incorporated into section 2.5.1.3 of the *Filing*

[1] *Decision and* Order (EB-2013-0147), dated March 20, 2014 ["*Decision*"] at p.6
[2] Letter of Ontario Energy Board, *Re: Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications – Allowance for Working Capital, dated April 12 2012* (K1.2 p.7-9)

Requirements for Electricity Distributors (the "Filing Requirements").[3] A distributor who had been directed by the Board to carry out a lead-lag study, or had voluntarily carried out a lead-lag study, was not allowed to use the default percentage.

11. Related to the WCA issue was the increase in KWHI's OM&A budget for the test year. KWHI had sought a significant increase in its OM&A budget for the test year. One of the material drivers of that increase was the proposed move to monthly billing of its residential, GS<50 and MicroFIT customers.[4] The cost of moving these customers to monthly billing was roughly $500,000.[5] A major benefit of moving to monthly billing is that it speeds up the cash flow available to a distributor, more closely matching the inflows of revenue with the monthly billing of electricity from the IESO.[6]

Intervenor Arguments

12. Intervenors disputed whether KWHI had responded appropriately to previous Board directions, alleging that the Board Letter did not amount to a "Board led process". Thus, their argument was that KWHI was required to file a lead-lag study to support its WCA. They also argued that regardless of the previous Board decision, the KWHI WCA should be less than 13%, to account for the move of its remaining customers from bi-monthly to monthly billing.[7]

13. Intervenors provided detailed submissions and calculations on the WCA percentage for KWHI, including why the 13% default factor set out in the Board's Letter and Filing Requirements is not appropriate for distributor on or moving to monthly billing.[8]

14. Energy Probe's submissions demonstrated that the default 13% WCA set out in the Board's Letter and Filing Requirements was based on lead-lag studies done by distributors who billed by-monthly. Energy Probe explained in detail why it was not appropriate for a distributor like KWHI who was moving to monthly billing to rely on the WCA percentage of 13%.[9] SEC and VECC made similar submissions.[10]

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[3] Ontario Energy Board, *Filing Requirements For Electricity Distribution Rate Applications, dated July 17 2013*, at 2.5.1.3 p. 15-16

[4] The remainder of its customers were already billed on a monthly basis. (See Interrogatory 2-Energy Probe 16)

[5] *Decision* at p.15

[6] Interrogatory 4-Energy Probe-71

[7] Final Argument of the School Energy Coalition ["SEC Argument"] at paras 2.2.6, (see Appendix A) Energy Probe Research Foundation Argument ["Energy Probe Argument"] at p.4-6 (see Appendix B), Final Argument of the Vulnerable Energy Consumers Coalition ["VECC Argument'] at paras 3-14 (see Appendix C)

[8] SEC Argument at paras 2.2.6 to 2.2.17, Energy Probe Argument at p.4-10, VECC Argument at paras 4-10

[9] Energy Probe Argument at p.8

[10] SEC Argument at paras 2.2.3-2.2.4, VECC Argument at para 5

15. SEC's submissions demonstrated how a change in KWHI's service lag, which would be reduced in half by moving to monthly billing, has a significant quantifiable change in the overall WCA percentage, changing the service lag from 30.42 days to 15.21 days. Since the Applicant was moving 96% of its customers to monthly billing, that would reduce its WCA percentage to 9.00%.[11] Energy Probe also provided very extensive submissions in this regard, and provided their own recommendations for the appropriate amount.[12] In the case of both SEC and Energy Probe, the submissions on the appropriate WCA were based on the evidence in the proceeding, and mathematical results necessarily flowing from that evidence.

The Decision

16. In the Decision, the Board determined that there was a link between Issues 1.1 and 2.2. The Board therefore stated that its "findings on these matters are provided on a hierarchical basis, determining as a first order, whether KWHI ought to have conducted a lead-lag study in response to the Board's earlier decision".[13]

17. The Board then found that KWHI had responded to all relevant Board directions from previous proceedings, accepting KWHI's interpretation of the Board's Letter as being reasonable. In doing so, the Board concluded that KWHI was not required to perform a lead-lag study in support of its application. SEC does not challenge this finding.

18. Continuing to follow its "hierarchical" approach, the Board then determined that it did not need to ***consider*** any WCA percentage other than the default 13%. KWHI, the Board said, was not required to undertake a lead-lag study, and thus properly relied on the 13% default value set out in the Filing Requirements. As a result, the Board found it was not required to look beyond the default value, regardless of the evidence before it:

> Based on the finding above, and in recognition of section 2.5.1.3 of the *Filing Requirements for Electricity Distribution Rate Applications*, which establishes the Board's expectation with respect to the WCA and allows for the default 13% approach in the absence of previous direction by the Board to undertake a lead/lag study; the Board does not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application. [emphasis added]

19. Consistent with this ruling, the Board did not review, make findings, or make a determination on the issues raised by the intervenors regarding the appropriate WCA for KWHI.

[11] SEC Argument at para 2.2.7-2.1.2.17
[12] Energy Probe Argument at p.8-12
[13] *Decision* at p.2

C. Issues and Argument

20. SEC submits that the Board erred in the Decision by finding that in the absence of a previous direction from the Board to undertake a lead-lag study, neither KWHI nor the Board needed to consider any other WCA percentage than the 13% default number set out in the Filing Requirements. The Board was free to determine that KWHI could file its Application using the default value. However, the Board was not free to ignore the evidence before it and simply follow the default value. In doing so, the Board committed an error of law by fettering its discretion, i.e. treating the Filing Requirements as if they were binding on the Board panel.

Threshold Test

21. Pursuant to Rule 43.01 of the Board's Rules of Practice and Procedure, the Board conducts a threshold inquiry, i.e. "whether the matter should be reviewed before conducting any review on the merits".

22. The "threshold test" was articulated by the Board in Motion to Review Natural Gas Electricity Interface Review ("NGEIR") Decision.[14] The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised that a review based on those issues could result in the Board varying, cancelling or suspending that decision. There must be an "identifiable error", and the "review is not an opportunity for a party to reargue the case".[15]

23. SEC submits that this motion satisfies the "threshold test" set out in Rule 43.01. The grounds listed in Rule 42.01(a) are not exhaustive, and an error of law is a proper ground for review.[16] This motion does not seek to re-argue the appropriate WCA percentage. It only seeks to review and vary the Decision as to require the Board to *consider* the evidence in the proceeding, as well as the arguments of intervenors (and the corresponding reply arguments of KWHI), and make specific findings on the WCA issue 2.2.

24. The Board found, relying on what was said in the Filing Requirements, that it did not need to consider whether any other amount was appropriate. In doing so it erred in law by fettering its discretion. SEC submits the Board was required to consider the appropriateness of other amounts based on the

[14] *Decision with Reasons*, Motion to Review Natural Gas Electricity Interface Review Decision (EB-2006-0322/338/340, dated May 22 2007
[15] *Ibid at p.18*
[16] *Ibid at p.14*

evidence before it. It is an identifiable error, which resulted in the Board failing to address a material issue, the appropriate WCA for KWHI. The review could result in varying the Decision by concluding that based on the evidence and argument, the appropriate WCA percentage is different from the 13% default value.

Board Fettered Its Discretion

25. While the Board has broad discretion to determine "just and reasonable" rates and the specific components which make up those rates, pursuant to the section 78(3) of the *Ontario Energy Board Act, 1998*, it still must exercise that discretion on a case-by-case basis depending on the specific circumstances of the case before it. Discretion is fettered when a decision-maker decides a matter on the basis of a pre-existing guideline or policy, rather than on the merits of the individual case.[17]

26. The Board can establish guidelines, policies and other non-binding instruments. Further, the Board can utilize those instruments to inform their decision-making. However, those instruments cannot be treated as binding.

27. The Board's Filing Requirements are not mandatory. They were not made pursuant to any legislative authority such as the Board's Code making authority.[18] As the 2012 version of the Filing Requirements made clear:

> It is not a statutory regulation or a rule or code issued under the Board's authority. <u>It does not pre-empt the Board's discretion to make any order or directive as it determines necessary</u> concerning any of the matters raised by the applications filed.[emphasised added][19]

28. The purpose of the Filing Requirements is to determine what material must be filed with the Board in support of an application. The Filing Requirements are not a basis on which the Board can or should determine just and reasonable rates.

29. Non-binding instruments can only be the starting point on a particular matter. Unless it has statutory authority, a decision-maker must not exercise its discretion solely on the basis of rules or

[17] *Jackson v. Ontario (Minister of Natural Resources),* 2009 ONCA 846 at para 51 (See Appendix D). *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198 at para 68 (See Appendix E)
[18] *Ontario Energy Board, 1998,* s.70.1-70.3
[19] Ontario Energy Board, *Filing Requirements For Electricity Distribution Rate Applications*, dated June 28, 2012 at p.1 (see Appendix F)

policies without regard to the particular circumstances of the case.[20] As the Federal Court of Appeal stated in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*:

> Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered: example, *Maple Lodge Farms* at 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard law", through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.[21] [emphasis added]

30. The Board cannot confine the exercise of its discretion by refusing to consider other factors and submissions that are legally and factually relevant. It was incorrect for the Board to approach the issue on "a hierarchical basis" in which it decided that since KWHI was not required to file a lead-lag study, the Board did not need to consider if any number other than the Board's 13% default WCA percentage was appropriate.[22] While that approach may have been consistent with the Board's Filing Requirements with respect to WCA, it was not proper when intervenors challenged the default number based on the evidence. The Board could have concluded on the evidence that the default number was supported by that evidence. What it could not do, is refuse to even consider whether the default number was appropriate. By not finding it "necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application", the Board unlawfully fettered its discretion, relying on a non-binding document as if it were binding.

31. While the Board may consider the Filing Requirements in determining the appropriate test year WCA, it was required to consider the specific facts presented and arguments made in the proceedings. Intervenors made a number of arguments, supported by the record and evidence in the proceeding, about how the Board's default 13% WCA percentage set out in the Filing Guidelines was not appropriate for a utility such as KWHI that bills its customers on a monthly basis.

32. While it may have been acceptable for KWHI to rely on the Filing Requirements for the purpose of the WCA applied for in the Application, which is its purpose, once intervenors including SEC raised specific issues about the reasonableness of the default 13% based on the evidence in the proceeding, the

[20] *Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal*, 2008 NSCA 1 at para 11 (See Appendix G)
[21] *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198 at para 66
[22] *Decision* at p.2

Board was required to consider that evidence and those arguments (and the reply arguments of KWHI) in determining the appropriate amount.

33. It is was certainly open to the original Board panel to make finds that were contrary to those argued by SEC and other intervenors, but the Board was required to grapple with the issue and make findings on it. It did not do that. The Board in the Decision did not consider any of the intervenor submissions on the appropriate WCA percentage, and did not consider any of the evidence on the issue. In doing so, the Board fettered its decision and therefore erred in law.

D. Remedy

34. This Motion does not depend on this Board panel concluding that a different WCA percentage is appropriate. SEC is seeking a determination that the WCA for KWHI must be determined on the evidence in the proceeding. SEC believes that the appropriate WCA percentage is 9.00%, as it recommended in its Final Argument.[23] However, on this Motion, SEC is only asking that the Board set aside the Board's findings that it does not need to consider any WCA percentage beside the 13% set out in the Filing Requirement. The Board can then make new findings based on a review and consideration of the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, technical conference and hearing transcripts, and final arguments of all parties. In the alternative, the Board should remit the matter back to the original panel to make that determination.

E. Costs

35. SEC submits that it eligible for an award of costs on this motion in accordance with the *Practice Direction on Cost Awards*, and requests that the Board order payment of its reasonably incurred costs in connection with its participation in this proceeding. It is submitted that the SEC has participated responsibly in this proceeding and in bringing this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Original signed by

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Mark Rubenstein
Counsel to the School Energy Coalition

[23] SEC Argument at para 2.2.17

Appendices

A Final Argument of the School Energy Coalition (excerpt)

B Energy Probe Research Foundation Argument (excerpt)

C Final Argument of the Vulnerable Energy Consumers Coalition (excerpt)

D *Jackson v. Ontario (Minister of Natural Resources),* 2009 ONCA 846 at para 51

E *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198

F Ontario Energy Board, *Filing Requirements For Electricity Distribution Rate Applications*, dated June 28, 2012 (excerpt)

G *Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal*, 2008 NSCA 1

A

> *"The Board expects that KW Hydro will support its cash working capital allowance in its next rebasing application based on the outcomes of this Board-led process or based on the lead/lag study that KW Hydro stated that it would individually undertake."*

2.2.3 The Board did not carry out a generic proceeding or consultation. However, on April 12, 2012 it amended the Filing Requirements [K1.2, p. 7-9] to allow LDCs that had not been ordered to carry out a lead/lag study to use 13% in place of the previous 15% default. As the Applicant had agreed to carry out such a study, and had been directed to do so, this default value did not apply to them.

2.2.4 Further, the Board based its new 13% rate on "the results of WCA studies filed with the Board in the past few years". Those studies were in almost every case based on LDCs with bi-monthly billing. As the Board went on to say in its letter, "**The Board has determined that it is not appropriate for a default value for WCA to be set at a higher level than those resulting from lead/lag studies**" [emphasis added].

2.2.5 Having agreed, and been directed by the Board, to provide empirical evidence in this proceeding as to its working capital requirements, the Applicant is, in our submission, no longer eligible to rely on the Board's default value. That being the case, the Applicant has not met its onus to support its application for a working capital component in its rates.

2.2.6 ***The Impact of Monthly Billing***. Kitchener Wilmot Hydro has decided to go to monthly billing for its general service customers, at an annual cost of $401,500 for additional postage and other costs.

2.2.7 The utility admits that there will be financial savings associated with monthly billing [Tr.1:117]:

> *"MR. SHEPHERD: Would you agree the least likely number for the benefits is zero?*
> *MS. NANNINGA: Yes, I would agree with that. I agree that there are benefits. We just don't necessarily know what they are yet."*

2.2.8 While in cross-examination a number of possible cost savings were discussed, one of the largest and most obvious is a reduction in the "service lag" for working capital purposes. This concept is defined by Navigant Consulting in their report for Horizon Utilities as follows [K1.2, p. 38]:

> *"A Service Lag measures the time from the Company's provision of electricity to a customer to the time the customer's service period ends and the meter is read."*

2.2.9 Navigant notes in the same report that a formula called the "mid-point method" is used to calculate the service lag [K1.2, p. 36, 38]. Essentially, you divide the number of days in the year by the number of billing periods in the year, and divide the result by 2. For all studies that we have seen (including the several in evidence) the results are 30.42 days for customers billed bi-monthly, and 15.21 days for customers billed monthly. This is shown, for example, on the Hydro Ottawa analysis at page 49 of K1.2. The overall service lag for a given LDC will be based on the ratio of customers billed monthly, and customers billed bi-monthly[1].

2.2.10 Energy Probe has correctly set out the formula for the working capital allowance percentage on page 28 of K1.2. The net lag days are calculated and divided by 365. That gives the percentage that should be applied to annual cash spending to determine the amount of working capital required.

2.2.11 The reason this is all important is that the impact of changing the service lag is a simple mathematical calculation. It does not require a lead-lag study. It does not require any difficult assumptions.

2.2.12 A shift from bi-monthly to monthly billing will reduce the service lag from 30.42 days to 15.21 days for those customers affected. If that is 90% of the utility's revenue, then the impact on net lag is 90% * (30.42-15.21) = 13.689 days. When that is divided by 365, you get the impact on the working capital percentage, which is, in this example, a reduction of 3.75%. The remaining elements of the working capital calculation are irrelevant, because all that needs to be determined is the impact of the change itself.

2.2.13 In this case, it would appear from the material filed by the Applicant that they are proposing to move 96% [Tr.1:44-45] of their customers (Residential and GS<50) from bi-monthly to monthly billing. Based on the mid-point methodology described above, the effect of this change is a reduction in the Applicant's working capital required of 4.00%, or a reduction from 13.00% (the Board default) to 9.00%.

2.2.14 The resulting working capital allowance would be $18,759,072, a reduction of $8,337,366. The impact on revenue requirement should be a reduction of $801,200 (WACC of 9.61%, including gross-up for PILs impact).

2.2.15 We note that the Applicant could have – and perhaps should have – carried out a

[1] SEC and other intervenors have consistently taken the position that service lag should be weighted by dollars rather than by customer numbers, but Board decisions have not accepted this position. The Board has used customer number weighting, and so SEC has used that method here. If the weighting were by dollars, the percentage is 83.23% of revenues moved, and the working capital would be $19,863,773 based on the 13% starting point being correct. However, this would represent a change to how the Board calculates the working capital allowance, and would therefore require that the 13% bi-monthly figure also be reviewed to reflect the same change. It would likely have to be reduced by about 0.55% to reflect the dollar weighted basis for service lag. Since the end result is 15.21 service lag days for all Kitchener customers in either case, mathematically the resulting WCA percentage for Kitchener should be the same whether dollar weighting or customer number weighting is used.

lead/lag study specific to Kitchener Wilmot Hydro. That study might have shown a different WCA on the bi-monthly assumption, i.e. something other than the default value of 13%. However, they did not do that, and determined that they would rely on the default value. That being the case, it is the proper starting point for the calculation, producing the 9.00% result.

2.2.16 We also note that, in proposing only a reduction in WCA for this Applicant, SEC is ignoring the many other financial benefits of monthly billing that are likely to arise. Some of those benefits are described in the Util-Assist report for Oakville Hydro, at page 21 of K1.2. While the Applicant says that they do not agree with all of those potential benefits [J1.2], they also admit that they have not done any analysis of the various cost savings they will realize as a result of monthly billing [Tr.1:115, and numerous other places in the transcript].

2.2.17 SEC therefore submits that the Board should reduce the working capital allowance for this Applicant to 9.00%, and reduce the revenue requirement and rates accordingly. In addition, SEC submits that the Board should direct the Applicant to undertake a lead lag study no later than eighteen months after implementing monthly billing, and file that study with the Board in its next following rate application, whether COS or IRM.

2.3 ***Alternative Solution***

2.3.1 SEC's recommendation above stems from the Applicant's decision to include the costs of moving to monthly billing in its revenue requirement for the rebasing year 2014. As a matter of basic principle, if you propose a change, and you want the ratepayers to pay for it, then you must credit the ratepayers with the benefits that arise from the incremental cost. In this case, those benefits are at the very least a reduction in the working capital allowance.

2.3.2 This also could be approached from the IRM paradigm. The Applicant could have said that they were considering a move to monthly billing as one of the cost saving initiatives during IRM. In that case, the Applicant's shareholder would take the cost risk, but would also enjoy the net benefits during IRM. This is, in fact, the essence of the IRM concept. Utilities invest shareholder money in productivity, and for a period of four or five years, depending on the IRM term, the benefits of that productivity show up in improved ROE for the shareholder.

2.3.3 SEC notes that the key here is symmetry. What is funded by the ratepayers should benefit the ratepayers during IRM. What is funded by the shareholder can benefit the shareholder during IRM.

2.3.4 In the current situation, SEC believes that, if the Applicant in its Reply Argument withdrew its $401,500 annual OM&A cost for this change – reducing the OM&A budget accordingly – it would be reasonable for the Board to leave the working capital

at 13% and in effect treat the move to monthly billing as an IRM productivity initiative.

2.3.5 However, in the event that the Applicant endorses and takes up this alternative, SEC believes two things should still happen. First, the Applicant should complete its lead/lag study, as it was directed to do so. Second, the Applicant should report at its next rebasing on all impacts of moving to monthly billing, so that they can be properly reflected in rates on rebasing.

B

Energy Probe respectfully submits that the Board's April 12, 2012 letter was simply an update to the filing requirements for transmission and distribution applications. The letter is clearly labeled as "Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications - Allowance for Working Capital". Energy Probe submits that this update to the filing requirements is not equivalent to a Board initiated or Board led process. The Board decision in EB-2009-0267 specifically refers to a generic proceeding/consultation. In the response to 2-Energy Probe-15 KWHI could not provide a Board file number related to this generic proceeding/consultation. This is because no such proceeding or consultation took place.

Further, the Board stated that it expected KWHI to participate in any such generic/consultative process. KWHI confirmed that it did not participate in such a process (Tr. Vol. 1, page 35).

Energy Probe submits that KWHI should have followed the Board's directive and filed a lead-lag study given that there was no generic proceeding/consultative in which the Board expected KWHI to participate.

Energy Probe further submits that KWHI should have consulted with Board Staff and intervenors with respect to the obligation to do the lead-lag study in advance of making the unilateral decision to not do one based solely on its interpretation of the directive.

Issue 2.2 - Is the WCA for the test year appropriate?

There are two outstanding issues with respect to the whether or not the WCA for the test year is appropriate. The first is the level of OM&A included in the calculation of the WCA. The level of the OM&A is dealt with under Issue 4.1 below.

The second issue is the appropriate percentage to be applied to the sum of the cost of power and OM&A expenses. KWHI has used a factor of 13%, based on the Board's April 12, 2012 letter discussed under the previous section.

Energy Probe submits that this percentage is significantly too high for KWHI.

a) The Move to Monthly Billing

Regardless of whether or not KWHI should have filed a lead-lag study as a result of the EB-2009-0267 Decision, Energy Probe submits that KWHI should have submitted a lead-lag study for the test year because of the decision to move to monthly billing.

KWHI currently bills its residential, GS < 50 kW and MicroFIT customers on a bi-monthly basis. The remainder of the customers are billed on a monthly basis. KWHI proposes to move all customers to monthly billing for the 2014 test year (2-Energy Probe-16). The reason for doing this is to assist customers with cash flow concerns due to rising electricity bills (Exhibit 2, Tab 2, Schedule 2, page 4).

Energy Probe generally supports the move to monthly billing, but only if it is done properly. Energy Probe submits that KWHI has not done a proper analysis as part of this application.

KWHI has only done an analysis of the increase in costs related to office supplies and postage (4-Staff-20d). The cost increase associated with this change is $401,500, as included in the 2012 test year forecast (Undertaking JT1.15). However, as acknowledged in Undertaking J1.2, these costs will actually be higher because of the recent announcement by Canada Post of increased postage rates. This would add another $98,000 to the costs, bringing the total cost to close to $500,000 (Tr. Vol. 1, page 36).

As part of the response to Undertaking J1.2, KWHI indicates that there may be an additional cost of $94,000 per year if an additional collector is needed. As a result the total potential costs are close to $600,000 per year.

However, KWHI has not done a business case for the change to monthly billing (Tr. Vol. 1, page 50). KWHI, while agreeing that the move to monthly billing would more closely match the inflows of revenue with the monthly billing of electricity costs from the IESO (4-Energy Probe-71) states that it cannot quantify the impact of the improved cash flow because it did not do a lead-lag study.

Energy Probe submits that this change is precisely why a lead-lag study should have been undertaken. The improvement in cash flow is one of the biggest benefits to the distributor of monthly billing as compared to bi-monthly billing. This ties the flow of revenues much more closely to the monthly payment of the cost of power to the IESO, as acknowledged by KWHI. As shown in the Review Requirement Workform attached as Appendix D to the Settlement Agreement, the cost of power expense makes up more than 91% of the costs to which the WCA is applied.

The Util-Assist report on moving to monthly billing (Exhibit K1.2, pages 17 to 23), while not a business case, is described by the authors of the report as *'a "listing" of the benefits which other Ontario LDCs have reported in recent years'* (Section 1.2). However, as shown in the response to Undertaking J1.2, KWHI disagrees with most of the benefits reported by other LDCs in Ontario, such as reduced collections, bad debt write-offs, number of payment arrangements made, reduction in customer calls and so on. It would appear that KWHI, for some unknown reason, is different from other distributors in Ontario.

However, as confirmed by the KWHI witnesses, KWHI did not talk to any other distributors that had moved from bi-monthly to monthly billing (Tr. Vol. 1, page 52). Thus, KWHI has failed to explain why it is different from other distributors and it has failed to learn from others with respect to the move to monthly billing.

Energy Probe submits that the onus is on the utility to present a case for the change it is proposing. KWHI has not met this onus due to the lack of a business case that would establish both costs and benefits of moving to monthly billing; KWHI believes that the move to monthly billing will result in cost increases where other distributors have found cost decreases; KWHI failed to complete a lead-lag study to quantify the beneficial impacts of improved cash flow. In short, KWHI only quantified cost increases to customers, not cost decreases.

b) Remedies for the Lack of Lead-Lag Study

Energy Probe submits that the Board should not accept the move to monthly billing as proposed by KWHI without some modifications.

In particular, Energy Probe submits that there are two options that the Board should consider related to this matter.

i) Deny Approval for the Move to Monthly Billing

The Board could simply deny approval for the $401,500 included in the 2014 test year OM&A forecast associated with the costs of moving to monthly billing. Further, the Board could direct KWHI to complete a full business case, including a lead-lag study, to be filed before or as part of its next rebasing application, if it proposes to move to monthly billing in that rebasing application.

ii) Adjust WCA to Reflect the Impact on the Service Lag

Energy Probe notes that KWHI does not believe that the WCA should be updated to reflect the proposal to move a number of its rate classes to monthly billing. Energy Probe respectfully submits that the Board should adjust the WCA if it approves the costs associated with monthly billing. To do otherwise would burden customers with additional costs while ignoring the obvious benefits to KWHI in terms of cash flow. These benefits need to be passed on as cost reductions to ratepayers. Anything else could not and would not result in just and reasonable rates.

A Board Decision changing the WCA to reflect the move to monthly billing would be consistent with the decision in EB-2009-0096 (Decision with Reasons dated April 9, 2010, pages 27-29) for Hydro One Networks Inc. wherein the Board concluded that it would make an adjustment to the working capital allowance to recognize the impact of the shift from bi-monthly to monthly billing. As indicated in that Decision, Hydro One was moving about 140,000 customers to monthly billing, representing about 11% of their customers, whereas the impact on KWHI is much more significant, with 96% of the customers being switched to monthly billing (Tr. Vol. 1, pages 44-45).

In the submission that follows below in part (c), Energy Probe provides a simple methodology to reduce the 13% WCA used by KWHI to reflect the movement to monthly billing. Energy Probe submits that the Board should approve a WCA of 9.365% for the 2014 test year. Details of how this figure are provided in part (c) below.

iii) Preferred Option

Energy Probe submits that the preferred option is to adjust the WCA to reflect the impact on the service lag component of the WCA percentage. As noted earlier, Energy Probe supports the movement to monthly billing, assuming benefits, and not just costs, for customers are properly accounted for.

While denying the costs associated with moving to monthly billing is the simplest solution, it is not in the best of interest of customers. They would have to wait until 2019 to receive monthly invoices. Energy Probe submits that this is not reasonable.

c) Calculation of an Appropriate WCA for KWHI

i) Use of the Default 13% Information

Energy Probe submits that it is reasonable to assume that the Board's update to the filing requirements in the April 12, 2012 letter was based on the electricity distribution lead-lag studies that the Board had seen and approved at that time. The following table summarizes the electricity distribution lead-lag studies that the Board had seen and approved when the filing requirement change from 15% to 13% was made.

Table 1

FILE NO.	DISTRIBUTOR	WC %
EB-2011-0054	HYDRO OTTAWA	14.20%
EB-2010-0131	HORIZON UTILITIES	13.50%
EB-2007-0680 (1)	TORONTO HYDRO	12.90%
EB-2009-0096 (2)	HYDRO ONE DIST.	11.50%
AVERAGE		13.03%

The calculation of the WCA percentage is the result of the difference in days between a revenue lag and an expense lead, divided by the number of days in the year. Mathematically, the lead-lag formula is a simple difference of two figures:

(REVENUE LAG/365) - (EXPENSE LEAD/365) = (NET LAG DAYS/365)

The revenue lag is further divided into specific components, being the service lag, billing lag, collection lag and payment processing lag. These are standard revenue related lags and are defined in lead-lag studies. For example, the lead-lag study for Navigant Utilities from Exhibit 2, Tab 4, Schedule 1, Appendix 2-3 in EB-2010-0131 (and included at pages 29 through 49 of Exhibit K1.2 in this proceeding), and are not repeated here.

The following table summarizes the components of the revenue lag from the lead-lag studies of the four distributors that were available to the Board before it changed the WCA to 13%.

Table 2

					PAYMENT	TOTAL
		SERVICE	BILLING	COLLECTION	PROCESSING	REVENUE
FILE NO.	DISTRIBUTOR	LAG	LAG	LAG	LAG	LAG
EB-2011-0054	HYDRO OTTAWA	30.24	18.11	25.47	1.15	74.97
EB-2010-0131	HORIZON UTILITIES	30.27	17.35	24.00	1.21	72.83
EB-2007-0680	TORONTO HYDRO	27.10	16.17	27.06	1.43	71.76
EB-2009-0096	HYDRO ONE DIST.	21.00	19.12	32.07	0.00	72.19
AVERAGE		27.15	17.69	27.15	0.95	72.94

The information used to populate Table 2 is found in the various lead-lag studies filed in the individual applications. The figures are taken from the relevant parts of these studies, which were included in pages 29 through 59 of Exhibit K1.2.

The move to monthly billing primarily impacts the service lag. This lag measures the time from the distributor's provision of electricity to a customer to the time the customer's service period ends and the meter is read.

Based on the mid-point methodology used in lead-lag studies, a monthly service period has a service lag of 15.21 days, while a bi-monthly service period has a lag of 30.42 days. These two lags are simply the calculation of the number of days in the year (365) and the number of service periods in the year (12 for monthly, 6 for bi-monthly), divided by 2.

The service lag is then simply a weighted average of the 15.21 and 30.42 figures, with the weights being the number of customers that are billed monthly and bi-monthly, respectively.

As can be seen by the service lags in the above table, none of the distributors in the group which was used by the Board to set the WCA at 13% bills all of its customers on a monthly basis.

As KWHI agreed, when they go to monthly billing, their service lag will decline to 15.21 days (Tr. Vol. 1, page 70).

The Board's current WCA default value of 13% does not take into consideration the mix of monthly and bi-monthly invoiced customers. The 13% default is equivalent to a net lag days of 47.45 days (13% of 365 days in the year). Combined with the average revenue lag of 72.94 days as calculated in Table 2, the average expense lead days is simply the difference between these figures, or 25.49 days (Tr. Vol. 1, page 68).

With respect to the billing, collection and payment processing lag, Energy Probe submits that KWHI is not likely to be significantly different from the average of the four distributors shown in Table 2. KWHI agreed with this (Tr. Vol. 1, pages 63-64). Similarly, KWHI agreed that overall, there was no reason to expect that the expense leads for KWHI would be any different from that of the four distributors (Tr. Vol. 1, pages 64-65). This is especially true when considering that the cost of power expense represents about 91% of the controllable costs and cost of power to which the WCA is applied and the fact that payment deadlines associated with the cost of power are standard across the electricity industry in Ontario (Tr. Vol. 1, pages 65-65).

KWHI further agreed that there would be no impact of moving to monthly billing on the expense leads, the billing lag or the payment processing lag (Tr. Vol. 1, pages 65-66). KWHI indicated that they were not sure about the impact on the collection lag, but only insofar as the impact of a change in the threshold that KWHI would set as the amount that they would actively pursue for collections (Tr. Vol. 1, page 67). KWHI further indicated it had not fully examined any change in this threshold from that currently used.

Energy Probe submits that the evidence is clear that moving to monthly billing does not impact the revenue lag days or expense lead days with the obvious exception of shortening the service lag to 15.21 days. In the absence of changing the company's policy with respect to the threshold for active collections, the collection lag is likely to decrease as well, but Energy Probe is not making any recommendation that reflects such a change.

KWHI may not necessarily agree that each of the components of the revenue lag (excluding the service lag) and the expense leads are directly applicable to it. However, in the absence of a lead-lag study and given that KWHI believes the 13% should apply to it, and given that the 13% is based on these exact same averages, Energy Probe submits that using these figures for KWHI is appropriate.

The average 72.94 revenue lag shown in Table 2 includes an average service lag of 27.15 days. Replacing this service lag with the agreed upon 15.21 day lag for KWHI reduces the total revenue lag to 61.00 days. With an average expense lead of 25.49 days, the net lag days is calculated as 35.51 (61.00 - 25.49). This represents a WCA of 9.73%.

ii) Specific Adjustment for KWHI Service Lag

A simpler alternative to the approach discussed at length above is to just reflect the change in the service lag that is specific to KWHI as an adjustment to the 13% WCA.

KWHI has forecast that it will have 90,407 customers that are current billed on a bi-monthly basis that will move to monthly billing in 2014. The remaining 3,428 forecast customers are already on monthly billing. Based on these weights, KWHI agreed that their current weighted service lag is 29.86 days (Tr. Vol. 1, pages 69-70).

When all customers are moved to monthly billing, the service lag falls to 15.21 days, a decline of 14.65 days. Given that there are no other changes in any of the other components of the revenue lag or in the expense leads associated with the move to monthly billing (discussed in the previous section), this results in a reduction of 14.65 days in the net lag days. This 14.65 day reduction, when divided by 365 days in the year, results in a reduction of 4.0% in the WCA from 13% to 9%.

iii) Recommendation

Energy Probe submits that the Board should reduce the WCA for KWHI associated with the move to monthly billing from 13% as applied for to 9.365%, being the average of two results calculated above. Energy Probe submit that this is an appropriate WCA percentage for KWHI, in the absence of a company specific lead-lag study. It relies on both the averages for the lags and leads from the four distributors shown in Table 1 which the Board relied on to set the default value of 13% along with the change in the service lag from the average for those distributors used in the first method and on the KWHI specific change in the service lag used in the second method. Both methods highlight the fact that the service lag is the only lag or lead component of the analysis that is impacted by the move to monthly billing.

As a check on whether or not the 9.365% is a reasonable level for a WCA for a distributor that bills monthly, Energy Probe notes that in the response to Board Staff at Exhibit K2, Issue 2.2, Interrogatory #2 in EB-2011-0054, Hydro Ottawa indicated that when they move to monthly billing, their WCA would fall to 9.6%.

iv) London Hydro WCA

Energy Probe notes that the Board has one additional lead-lag study that has been filed and approved since it issued its letter in April, 2012. That study was for London Hydro in EB-2012-0146. This study was the first the Board had seen and approved for an electricity distributor that billed all of its customers on a monthly basis. KWHI stated that they did not believe the London Hydro study would be comparable to the situation that KWHI found itself in because London Hydro bills for water.

Energy Probe agrees with KWHI that London Hydro's results should not be factored into the analysis done above because of the water billing performed by London Hydro. While this water billing would not impact the service lag, payment processing lag or any of the expense leads, Energy Probe submits that the billing lag may be higher because of the additional time to create the bills. Similarly, the collection lag may also be higher because of the higher bills being collected. In short, the revenue lag for London Hydro is probably higher than what it would be if it only billed for electricity due to the inclusion of water billing.

d) Ratepayer Impact of the WCA Change

A reduction of 100 basis points in the WCA has the impact reducing costs to ratepayers by $161,429 per year. The calculation of this figure, shown on page 71, Section 2 of Exhibit K1.2 is based on controllable expenses & cost of power from the Settlement

Agreement and the pre-tax return of 7.74% on rate base. Ms. Nanninga accepted these calculations (Tr. Vol. 1, page 72).

The proposed reduction in the allowed WCA from 13.0% to 9.365% to reflect the move to monthly billing for all customer classes for KWHI results in a reduction in costs to ratepayers of $586,794. This figure is calculated by multiplying the difference in the WCA of 3.635% times the figure of $161,429 noted in the previous paragraph.

The actual impact of the reduction in the WCA from 13% to the proposed 9.365% would, of course, also be impacted by any reduction in the OM&A forecast which is dealt with below in Issue 4.1.

Issue 4.1 - Is the overall OM&A forecast for the test year appropriate?

a) The Requested Increase

KWHI is requesting approval of an OM&A forecast of $18,480,760 for the 2014 test year. This is an increase of 6% from the bridge year forecast of $17,431,075, which in turn is an increase of 11.3% over the last year of actual expenditures for 2012. These figures are summarized in the table below.

Table 3

	New CGAAP	New CGAAP	New CGAAP
	2012	2013	2014
Final as Filed (1)	16,390,832	17,431,075	18,480,760
Adj. for Smart Meter Decision (2)	-731,974	0	0
Final as Filed after Smart Meter Adj.	15,658,858	17,431,075	18,480,760
% Change		11.3%	6.0%
(1) Undertaking JT1.15			
(2) 2-Energy Probe-30			

As can been in the above table, each of the years shown is under New CGAAP accounting. Figures for 2012 have been adjusted to remove the smart meter related expenditures incurred prior to 2012 but recorded in OM&A in 2012 as a result of the smart meter decision.

Energy Probe submits that these increases for the 2013 bridge year and the 2014 test year are not appropriate, and not supported by the evidence in the proceeding.

b) Line by Line Forecast Comparisons

In the EB-2009-0267 Decision and Order dated April 7, 2010 for KWHI for electricity rates effective May, 2010, the Board stated (page 13):

C

Working Capital

3. KWH maintains that its proposed Working Capital Allowance of 13% is appropriate given the Board's approach established in its letter of April 12, 2012 (page 3, VECC compendium) Ex K1.3). While KWH previously agreed to do a lead/lag study associated with its working capital requirement, it has not done so and is proposing switching to monthly billing of customers at cost estimated by KWH to be $401,000 (JT1.5).

4. It must be recognized that the Board's default approach, in the absence of company specific information, set out in the Board letter on page 3 of the VECC compendium(Ex K1.3) was established after receipt of a number of studies from bimonthly billing utilities concerning their needs (VECC compendium, p.1).

5. In VECC's view, the Board's recommended use of the 13% WCA default value had more to do with what was a practical response to the evidence at hand rather than articulating a regulatory formula to be plugged in regardless of circumstances, such as the ROE formula, for example.

6. In lead lag studies conducted by London Hydro in EB 2012-0380, and by Hydro One in EB 2013-0416, (Ex K1.4 herein) a substantially reduced percentage of OM&A and Cost of Power for working capital were found to be required for these utilities that implemented monthly billing. For London Hydro, that figure was 11.4%, and for Hydro One, that figure was 7.4% for 2015, 7.5% for 2016 and 7.6% for 2017.

7. As Mr. Aiken of Energy Probe's explored with WH's witness panel at the hearing, the 13% figure set as a default came from data utilities billing on a bi-monthly basis. The move from bi-monthly to once a month billing had the observed effect in utilities of reducing the amount required for the working capital allowance.

8. Specifically, the service lag (the amount of time from the provision of electricity to a customer and the customer service period ends and the meter is read), was reduced in the case of monthly billing London Hydro from the bi-monthly 30.27 days figure to 15.21 days. (Tr. Vol. 1 p. 60). London Hydro's working capital percentage, was, as a result the lowest in the group set out on page 28 of the Energy Probe compendium (Ex. K1.2).

9. Later in the cross-examination by Mr. Aitken, the impact of a similar reduction to service lags by implementation of monthly billing was discussed with the witness panel. In essence, equating the 13% default percentage with the bi-monthly service lag of 29.86 days the anticipated reduction to 15.21 days effects a reduction of some 4 percentage points to the working capital percentage of KWH (Tr. p. 70).

10. Because, KWH has not done a lead lag study or a business case analysis (Tr. Vol. 1, p.56), nor an empirical comparison of KWH with monthly billing utilities, there can be no precision concerning the effect of KWH's move to monthly billing. However, it is clear that KWH will spend , on its own estimate, some $400,000 switching to monthly billing

11. As is noted in the Reply filed by KWH in EB 2009-0267, set out in part in the compendium of Energy Probe (Ex K 1.2) filed in the within proceeding, KWH undertook to file a lead-lag study that would have provided a basis for the Board determination in this case, and simply, unilaterally, chose to rely on the Board letter referenced earlier. In the circumstances, its determination to rely on the Board letter of 2012 should not be entertained given the substantial evidence that the 13% figure is not correct after a transition to monthly billing.

12. The Board letter contemplated potential new information arising from a lead –lag study. In this case, KWH has used the Board letter to freeze the inquiry and attempt to glean all the benefits of an operational transition without passing on to ratepayers any of the positive results.

13. In VECC's view, the working capital percentage should be no higher than London Hydro's 11, 4%. It is higher than the reasonable estimate of a 4% deduction derived from calculations from anticipated service lag reductions from existing numbers but based on a comprehensive lead-lag study.

D

Case Name:

Jackson v. Ontario (Minister of Natural Resources)

Between
Larry Jackson, L.R. Jackson Fisheries Ltd. and William Cronheimer, Applicants (Appellants), and
Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources, Respondent (Respondent)

[2009] O.J. No. 5166

2009 ONCA 846

264 O.A.C. 275

47 C.E.L.R. (3d) 8

2009 CarswellOnt 7465

2 Admin. L.R. (5th) 248

Docket: C49636

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, J.M. Simmons and S.E. Lang JJ.A.

Heard: May 6, 2009.
Judgment: December 1, 2009.

(66 paras.)

Constitutional law -- Division of powers -- Federal jurisdiction -- Federal powers (Constitution Act, 1867, s. 91) -- Fisheries -- Appeal by commercial fishermen from dismissal of judicial review application dismissed -- Ontario Minister of Natural Resources had been validly delegated power to regulate commercial fishing licenses for Lake Erie, and properly exercised discretion in limiting quotas for 2007 and 2008 based on recommendations by joint Canada-US committee -- Constitution Act, 1867, s. 91(12).

Natural resources law -- Fishing -- Quotas and catch limits -- Commercial quotas -- Fishing grounds -- International waters -- Appeal by commercial fishermen from dismissal of judicial review application dismissed -- Ontario Minister of Natural Resources had been validly delegated power to regulate commercial fishing licenses for Lake Erie, and

properly exercised discretion in limiting quotas for 2007 and 2008 based on recommendations by joint Canada-US committee -- Fisheries Act, ss. 7, 43.

Appeal by Ontario-based commercial fishermen from the dismissal of their judicial review application concerning the quotas set for them for 2007 and 2008. The Ontario Minister of Natural Resources had imposed quotas for fishing yellow perch and walleye in Lake Erie after consulting with the Lake Erie Committee, consisting of herself and her counterparts in neighbouring US states. In 2007 and 2008, the consultations resulted in a lowering of quotas for the Ontario fishermen. In their application, the fishermen challenged the regulatory regime by way of which the quotas were imposed, and sought to set aside their quotas for 2007 and 2008.

HELD: Appeal dismissed. The federal government had properly delegated its authority to the provincial Ministry to attach quotas to commercial fishing licenses. There was no need for the federal government to establish a comprehensive scheme for regulating commercial fishing licenses prior to delegating this authority. The Minister did not fetter her discretion by accepting the recommendations of the Committee in setting the total allowable catch for the commercial fishermen. Ontario had adopted a policy to adhere to the decisions of the Committee, and this policy best served the purpose of managing the shared resource of Lake Erie. Ontario was a full participant in the process of decision-making by the Committee, although it was not bound to accept the Committee's recommendations. There was no evidence the Minister exercised her discretion unreasonably in accepting the Committee's recommendations for 2007 and 2008, and implementing them by reducing the quotas for the commercial fishermen.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867 (U.K.) 30 & 31 Victoria, c. 3, s. 91(12)

Convention on Great Lakes Fisheries, Article II

Fisheries Act, R.S.C. 1985, c. F-14, s. 7(1), s. 43, s. 43(1)

Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41, s. 60

Milk Act, R.S.O. 1990, c. M.12

Ontario Fishery Regulations, 1978, SOR/63-157

Ontario Fishery Regulations, 1989, SOR/89-93

Ontario Fishery Regulations, 2007, SOR/2007-237, s. 1(1), s. 3(1)(a), s. 4(1)

War Measures Act, s. 3

Appeal From:

On appeal from the judgment of the Divisional Court (E.R. Browne, J.R. Henderson and D.J. Gordon JJ.) dated May 26, 2008, with reasons reported at (2008), 239 O.A.C. 29, [2008] O.J. No. 2719.

Counsel:

John H. McNair and Mavis J. Butkus, for the appellants.

William Manuel, Edmund Huang and Elaine Atkinson, for the respondent.

Timothy S.B. Danson, for the intervener, Ontario Federation of Anglers and Hunters.

The judgment of the Court was delivered by

J.I. LASKIN J.A.:--

A. OVERVIEW

1 Ontario and four American states - Michigan, New York, Ohio and Pennsylvania - border Lake Erie. Every year, government representatives from these five jurisdictions meet as a committee - the Lake Erie Committee - to discuss the management of the fish stocks in the Lake. The Committee recommends an annual total allowable catch for the two economically most important fish, walleye and yellow perch, and then allocates each jurisdiction's share of that catch based on a fixed formula. Ontario's Minister of Natural Resources typically accepts the Committee's recommendations.

2 The Minister is authorized to issue commercial fishing licences, and to attach as conditions to those licences catch quotas for each species of fish. These individual quotas for walleye and yellow perch are based on Ontario's share of the total allowable catch.

3 The appellants carry on commercial fishing operations in Lake Erie. They have earned their livelihood from fishing for many years. In 2007 and 2008, the Minister reduced their individual catch quotas for walleye and yellow perch. The Minister did so because she had accepted the Lake Erie Committee's recommendations for a reduction in Ontario's share of the total allowable catch for each fish.

4 The appellants then brought a judicial review application to challenge the regulatory regime by which the provincial Minister imposes catch quotas in commercial fishing licences for Lake Erie. They sought a declaration that the federal *Ontario Fishery Regulations* for 1989 and 2007 are *ultra vires* to the extent that they authorize the provincial Minister to impose these quotas in their licences. And they sought to set aside their walleye and yellow perch quotas for 2007 and 2008. The Divisional Court dismissed their application.

5 On their appeal, the appellants argue the same three points that were rejected by the Divisional Court:

1) Neither the federal *Fisheries Act*, R.S.C. 1985, c. F-14, nor the regulations to this Act passed by the Governor in Council validly delegate to Ontario's Minister of Natural Resources the authority to attach catch quotas to commercial fishing licences;
2) The Minister improperly fettered her discretion by accepting the Lake Erie Committee's annual recommendations on the total allowable catch for walleye and yellow perch; and
3) The Minister's exercise of her discretion to allocate individual catch quotas was unreasonable because of her reliance on the Lake Erie Committee's recommendations.

What underlies all three arguments is the appellants' contention that instead of invariably accepting the Lake Erie Committee's recommendations, the Minister should fix overall catch quotas independently.

6 To put these arguments in context, I will review briefly the regulatory framework for managing the Lake Erie fishery.

B. REGULATORY FRAMEWORK

7 The management of Ontario's fisheries is an example of both cooperative federalism and international cooperation.

1. The Applicable Federal Legislation

8 Section 91(12) of the *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c.3, gives Parliament exclusive legislative authority in relation to inland fisheries. Parliament has exercised that authority by passing the *Fisheries Act*. Under s. 7(1) of that Act, the federal Minister of Fisheries and Oceans may "issue or authorize to be issued leases and licences for fisheries or fishing". Section 43, which is germane to this appeal, authorizes the Governor in Council to make regulations on a wide variety of subjects. These include regulations:

- For the proper management and control of the sea-coast and inland fisheries;
- Respecting the conservation and protection of fish;
- Respecting the issue, suspension and cancellation of licences and leases;
- Respecting the terms and conditions under which a licence may be issued;
- Prescribing the powers and duties of persons engaged or employed in the administration and enforcement of the Act; and
- Authorizing those engaged in the administration and enforcement of the Act to vary a fishing quota or limit the size or weight of fish that is fixed by regulation.

2. The Federal *Ontario Fishery Regulations*

9 The Governor in Council has exercised its authority under s. 43 of the *Fisheries Act* by passing, at various times, *Ontario Fishery Regulations* (OFR). Three sets of regulations were discussed in this appeal: OFR 1978, OFR 1989 and OFR 2007.[1]

10 OFR 1978 contained detailed rules regulating commercial fishing. These rules included, for example:

- Prohibitions against the use of listed fishing gear;
- Restrictions on the placement of nets;
- General and special conditions of gill net licences in specific water;
- Conditions of carp and sturgeon gill net licences and trawl net licences;
- Size of mesh for gill nets;
- Regulation of quantities of underweight or undersized fish;
- Prohibitions against fishing gear in identified waters between certain dates;
- Maximum quantities and mesh sizes of gill nets;
- Aggregate quotas for yellow pickerel, sturgeon, lake trout and whitefish for each fishing licence;
- Seasonal and global quotas for commercial fishing by body of water and fish species, including lake trout, lake herring, chubb, whitefish and yellow perch; and
- Minimum size limits for commercial catches for ciscoes, herring, lake trout, sturgeon, whitefish, yellow pickerel and perch depending on the body of water from which the fish were harvested.

11 In 1989, the OFR was substantially rewritten and streamlined. Much of the detail that had been in OFR 1978 was removed and attached to individual commercial fishing licences. The regulatory impact analysis statement that accompanied OFR 1989 described the thinking behind this policy change:

> For commercial fishing, cumbersome, indirect controls over fishing gear are removed and replaced by direct controls (closed seasons together with an explicit allocation of fish to each licensed commercial fisherman). This will allow commercial fishermen to fish in more economically efficient ways and reduce their capital costs for equipment over the long term and will encourage the industry to maximize the value of landings through innovative marketing and quality control.

See *Canada Gazette Part II*, Vol. 123 No. 4, pp. 1430-1433 at 1432.

12 In 2007, the OFR was again rewritten and even further streamlined. However, the policy change reflected in OFR 1989 was carried forward into OFR 2007. An important part of the appellants' argument on improper delegation rests on

a comparison between what they describe as a comprehensive federally-enacted regulatory scheme governing commercial fishing in Ontario in OFR 1978, and what they allege is the absence of a comprehensive scheme in OFR 1989 and OFR 2007.

13 OFR 1989 and OFR 2007 do, however, contain provisions concerning the licensing of commercial fishing. For example, s. 3(1)(a) of OFR 2007 stipulates that "no person shall, except as authorized under a licence, fish". The provincial aspect of the legislative scheme comes into play through the definition of licence. Section 1(1) of OFR 2007 defines a licence to mean, among other things, "a licence or permit issued under the *Fish and Wildlife Conservation Act, 1997*", S.O. 1997, c. 41.

14 Consistent with the policy change first reflected in OFR 1989, s. 4(1) of OFR 2007 authorizes the provincial Minister to impose a broad array of terms and conditions in a commercial fishing licence, including a quota on the quantity of a species of fish that may be caught.

3. Ontario's *Fish and Wildlife Conservation Act, 1997*

15 The legislative underpinning for Ontario's management of its fisheries is the provincial *Fish and Wildlife Conservation Act, 1997*. Section 60 authorizes the Minister of Natural Resources to issue licences for the purpose of this Act and the *Ontario Fishery Regulations*.

4. The Lake Erie Committee

16 The last link in the cooperative arrangements for managing Ontario's fishery on Lake Erie is the Lake Erie Committee. In 1954, Canada and the United States entered into the Convention on Great Lakes Fisheries. Article II of the Convention established the Great Lakes Fisheries Commission. The Commission in turn established the Lake Erie Committee.

17 The Lake Erie Committee operates under a joint strategic plan, which was agreed to by the Great Lakes Fisheries Commission, Ontario, the eight Great Lakes states and the two federal governments. This joint strategic plan mandates a coordinated approach to the management and allocation of fish stocks on the Great Lakes. Specifically, the plan states that "protection of fish stock from overexploitation by any or all user groups is a paramount responsibility of all fishery agencies. Fishery agencies need to make joint allocation decisions on stocks of common concerns." The Lake Erie Committee is charged with carrying out this mandate on Lake Erie.

18 The Committee has five members, one for each of the jurisdictions bordering the Lake. The Ontario Minister's delegate on the Committee and its Chair at the time was Michael Morencie, a senior public servant in the Ministry of Natural Resources and Manager of the Ministry's Lake Erie Management Unit. On the judicial review application, Mr. Morencie testified extensively about the deliberations of the Lake Erie Committee and its processes for making recommendations on the annual allowable harvest for walleye and yellow perch.

19 The Committee receives proposals from two sub-bodies - the Walleye Task Group and the Yellow Perch Task Group - on a recommended allowable harvest for each species. Ontario experts are members of both groups. The Committee relies on the Task Groups' proposals in formulating its own recommendations for the total allowable catch for walleye and yellow perch.

20 Mr. Morencie acknowledged that conflicts arise between Ontario's interests and the interests of the American states. Commercial fishing on Lake Erie is largely confined to Ontario's part of the Lake. The American side is dominated by sport fishing; walleye, in particular, is the mainstay of a large sport fishing community. Consequently, the American representatives on the Committee tend to be unsympathetic to commercial fishing and press for more conservative total catch quotas than does Ontario. As there is no weighted voting on the Committee, Ontario frequently finds itself in a minority position.

21 Still, Mr. Morencie said that the Lake Erie Committee operates by consensus. It aims for considerations jointly agreed to by all five Committee members.

5. Ministerial Discretion

22 The quotas for walleye and yellow perch allocated to the appellants and other commercial fishing operations in Lake Erie depend on three discretionary decisions by the Minister of Natural Resources or her delegate. The Minister's first discretionary decision concerns the total allowable catch for each species. Usually - although, as I will discuss, not always - the Minister exercises her discretion to accept the Lake Erie Committee's recommendations. Ontario is then allocated a share of the total allowable catch for walleye and yellow perch based on a formula, which has been accepted by all jurisdictions. Ontario receives 43 per cent of the total allowable catch for walleye and 49 per cent of the total allowable catch for yellow perch. These percentages are based on a proportionate share of the functional habitat for walleye, and on the surface area of waters within Ontario's jurisdiction for yellow perch. The total allowable catch for each species of fish changes every year, but Ontario's percentage of the overall allowable catch does not.

23 The Minister's second decision is her exercise of discretion to apportion Ontario's share of the total allowable catch among its user groups: commercial fishing, recreational or sport fishing, aboriginal fishing and government research. In practice, the Minister allocates about 98 per cent of Ontario's share to commercial fishing.

24 The Minister's final decision is the allocation of quota amounts for each species of fish to individual commercial fishing licences. The reduction in the appellants' individual quotas in 2007 and 2008 prompted their challenge to the regulatory regime.

C. ANALYSIS

1. Has the Governor in Council validly delegated authority to Ontario's Minister of Natural Resources to attach quotas to commercial fishing licences?

25 Under OFR 1978, OFR 1989 and OFR 2007, the Governor in Council delegated to Ontario's Minister of Natural Resources authority to attach quotas to individual commercial fishing licences. The appellants' principal ground of appeal is that this delegation under OFR 1989 and OFR 2007 is invalid.

26 Under our constitutional system, Parliament cannot delegate its legislative powers to a provincial legislature. Parliament can, however, delegate its legislative powers to another body: see *R. v. Furtney*, [1991] 3 S.C.R. 89, at 104. Here, Parliament has not delegated its legislative power in relation to inland fisheries to the provincial legislature. Instead, it has delegated its legislative power over fisheries to another body, the Governor in Council, which, in turn, has sub-delegated this power to the Ontario Minister of Natural Resources. Thus, the delegation at issue here is not constitutionally impermissible. The narrow question raised by the appeal is whether the delegation is invalid because it was not carried out properly.

27 In support of their argument on the invalidity of the delegation, the appellants make three submissions. First, they say that the delegation is invalid because the *Fisheries Act* does not specifically authorize the Governor in Council to delegate powers - including the power to attach species quotas to commercial fishing licences - to the provincial Minister. Second, they say that the delegation is invalid because neither OFR 1989 nor OFR 2007 establishes a "comprehensive federally-enacted regulatory scheme". Third, they say that the delegation is invalid because what has been delegated is legislative power, not administrative power.

28 The appellants acknowledge that in 1985, in *Peralta et al. and the Queen in Right of Ontario et al. v. V. Warner et al.* (1985), 49 O.R. (2d) 705 (C.A.), aff'd [1988] 2 S.C.R. 1045, this court rejected a similar challenge to the Governor in Council's delegation of authority to the provincial Minister to attach quotas to commercial fishing licences. That

delegation was under OFR 1978 and this court upheld its validity. The appellants submit that the delegation in question in *Peralta* differs from the delegation in question on this appeal. In OFR 1978, the appellants say, the federal government established detailed regulatory provisions for commercial fishing, and the provincial Minister allocated quotas within and consistent with those provisions. Thus, the sub-delegation from the Governor in Council to the provincial Minister was valid. By contrast, the appellants say, the absence of detailed regulatory provisions in OFR 1989 and OFR 2007 makes the sub-delegation to the provincial Minister invalid.

29 I do not agree with the appellants' submissions. The policy change reflected in the streamlining of OFR 1989 and OFR 2007 - or in the appellants' words, the removal of "a comprehensive federally-enacted regulatory scheme - does not turn a valid sub-delegation into an invalid one. In my view, the Governor in Council has validly sub-delegated to the provincial Minister of Natural Resources authority to attach quotas to commercial fishing licences. I will now specifically address the appellants' three submissions.

(i) No specific authority in the *Fisheries Act*

30 The *Fisheries Act* does not specifically authorize the Governor in Council to delegate its powers to the provincial Minister. The appellants contend that the Act's failure to do so renders the delegation invalid. This contention is at odds with *Reference Re: Regulations in Relation to Chemicals*, [1943] S.C.R. 1.

31 In the *Chemicals Reference*, the Supreme Court of Canada had to decide whether a broad delegation of powers to the Governor in Council under s. 3 of the *War Measures Act* authorized the Governor in Council to delegate its powers to subordinate agencies, though the statute did not contain any specific wording that it could do so. Despite the absence of specific wording, the court held that the Governor in Council had authority to delegate to subordinate agencies. Chief Justice Duff put the principle this way at 12:

> I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the delegation to them of such powers as those in question. Ex facie such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.

And in concurring reasons, Rinfret J. stated at 19:

> That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war.

32 Any suggestion that this principle, which originated in war time legislation, was confined to circumstances of emergency was dispelled in *Reference Re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] 2 S.C.R. 1198. There, the Supreme Court affirmed that the rationale underlying the *Chemicals Reference* was not limited to emergency legislation.

33 Therefore, the absence of specific authority in the *Fisheries Act* is not fatal to the Governor in Council's delegation of authority to the provincial Minister. As is invariably the case, the issue becomes one of Parliamentary intent. I agree with Ontario that several considerations show Parliament intended the Governor in Council, in making gegulations under s. 43 of the *Fisheries Act*, to be authorized to delegate its powers and duties.

34 Under s. 43, the Governor in Council is authorized to make regulations "respecting" a wide range of subjects, including for example, "respecting the terms and conditions under which a licence and lease may be issued". "Respecting" is a broad term and, in my view, reflects Parliament's intention that the Governor in Council have authority to delegate its powers to other bodies.

35 Moreover, s. 43(l) of the *Fisheries Act* authorizes the Governor in Council to prescribe the powers and duties of persons employed in the administration and enforcement of the statute. At least implicitly, this provision shows that the Governor in Council can make regulations delegating its powers and duties. At the same time, s. 43(l) does not limit the persons who may be prescribed powers and duties. The choice of delegate is that of the Governor in Council. And the Governor in Council has chosen the provincial Minister. Section 4(1) of OFR 2007 authorizes the provincial Minister to specify a broad array of terms and conditions in commercial fishing licences, including species quotas on the fish that can be caught.

36 In addition to these considerations, administrative necessity underscores Parliament's intent. In *Peralta*, Mackinnon A.C.J.O. commented on the importance of administrative necessity at p. 717:

> When courts have considered whether delegation of ministerial powers was intended, considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative powers given to him. Further, in such cases the suitability of the delegate has been a material factor in determining whether such delegation is intended and lawful. [Citation omitted.]

37 And, as Mackinnon A.C.J.O. pointed out at p. 717: "it is the provincial ministers, familiar with the multiplicity of situations and problems in their own province, to whom these powers are delegated."

(ii) Absence of a comprehensive federally-enacted regulatory scheme

38 The appellants also contend that the delegation of authority to the Ontario Minister to attach quotas to commercial fishing licences and the exercise of that authority are invalid because of the absence in OFR 1989 and ORF 2007 of any detailed provisions or even guidelines governing commercial fishing in Ontario. The appellants maintain that in the absence of any standards in the federal legislation, the provincial Minister is not applying a federal scheme when she attaches quotas as conditions to the appellants' licences. In advancing this contention, the appellants rely on the majority judgment of the Supreme Court of Canada in *Brant Dairy Co. v. Ontario (Milk Commission)*, [1973] S.C.R. 131, where the majority of the Supreme Court held that a regulation purportedly made in the exercise of a delegated power was invalid. I do not accept the appellants' argument.

39 Since the *Chemicals Reference*, the law has been clear that in delegating authority the delegating body - Parliament, or as in this case, the Governor in Council - need not establish a comprehensive regulatory regime or even fix standards or guidelines. In the *Agricultural Product Marketing Act Reference* at 1225-1226, the majority judgment affirms that there is no constitutional requirement to do so:

> Involved in the appellants' submissions, as reflected in their factum and in oral argument, was the contention that there is a constitutional requirement in the delegation of authority that standards be fixed by Parliament or where, as here, there is delegation in depth, that is by orders which the Governor-in-Council is authorized to make, the orders of the Governor-in-Council should establish standards and not, by wholesale redelegation, leave their determination to the provincial boards nor, as s. 2(1) provides, adopt the various provincial standards for federal purposes. I do not think this Court would be warranted in imposing such a constitutional limitation on the

> delegation of authority. The matter of delegation in depth is covered by the judgment of this Court in Reference re Regulations (Chemicals) under the War Measures Act [[1943] S.C.R. 1.], and I would not limit its rationale to emergency legislation. There is sufficient control on a administrative law basis through the principle enunciated and applied by this Court in the Brant Dairy Case ... and I find no ground for raising it to a constitutional imperative.

40 Thus the absence of detailed provisions governing the commercial fishery in OFR 1989 and ORF 2007 does not render the Governor in Council's delegation to the provincial Minister invalid.

41 The *Brant Dairy* case referred to in the passage from the *Agricultural Product Marketing Act Reference* quoted above shows how the exercise of delegated authority can be invalid. But the principle that emerges from *Brant Dairy* does not assist the appellants. In *Brant Dairy*, Ontario's *Milk Act, 1965* authorized the Milk Commission to regulate the marketing of milk in the province, including fixing quotas. The Act also authorized the Milk Commission to delegate its regulation making power to the Milk Marketing Board. The Commission did so by making a regulation sub-delegating its powers to the Board. That sub-delegation was held to be valid: "the Commission could lawfully invest the Board with the discretion originally committed to the Commission in the carrying out of the powers conferred by the Act."

42 The problem with the sub-delegation arose when the Milk Marketing Board failed to properly exercise the power delegated to it. The Commission had delegated to the Board the power to make regulations providing for, among other things, "the fixing and allotting to persons of quota for the marketing of a regulated product on such basis as the Commission deems proper". Instead of carrying out the power delegated to it, however, the Board simply passed a regulation providing that "[t]he marketing board may fix and allot to persons quotas for the marketing of milk on such basis as the marketing board deems proper". The court held that this regulation was *ultra vires* because:

> What the Board has done has been to exercise the power in the very terms in which it was given. It has not established a quota system and allotted quotas, but has simply repeated the formula the statute, specifying no standards and leaving everything in its discretion.

43 In other words, instead of making a regulation setting out quotas, the Board made a regulation authorizing itself to allot quotas in its discretion. That, the Court said, was illegal:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades the exercise of the power and, indeed, turns the legislative power into an administrative once. It amount to a re-delegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this court in *Attorney General of Canada v. Brent*, [1956] S.C.R. 318. [at 146-7]

44 The *Brant Dairy* principle does not apply here. Under s. 43 of the *Fisheries Act*, the Governor in Council was authorized to make Regulations on a variety of matters including regulations respecting the terms and conditions under which a licence may be issued and regulations prescribing the powers and duties of persons engaged in the administration of the Act.

45 The Governor in Council validly exercised that authority by passing OFR 1989 and OFR 2007. However, and this is the key difference between the present case and *Brant Dairy*, the Governor in Council did not delegate to the provincial Minister the power to make regulations fixing species quotas on fish that may be caught; he simply delegated to the provincial Minister, in s. 4(1)(a) of OFR 2007, the authority to specify a quota as a condition of a commercial fishing licence. The Ontario Minister has exercised that discretionary authority given to her by attaching quotas to the appellants' and other commercial fishing licences. In short, in *Brant Dairy* the Milk Board acted illegally because it improperly carried out the delegated power given to it; by contrast, here the provincial Minister has acted legally because she has properly carried out the power delegated to her.

(iii) Delegation of legislative, not administrative power

46 Finally, the appellants contend that the delegation to the provincial Minister is invalid because what has been delegated is legislative power, not administrative power. The contention appears to be that the Governor in Council can validly delegate only administrative powers.

47 Respectfully, this contention is misconceived. For the purpose of determining whether a delegation is valid, the distinction between legislative and administrative power is irrelevant. The delegation of any kind of power, legislative or administrative, to Parliament or a provincial legislature, is not permitted. The delegation of any kind of power, even a legislative power, to an official or to a body other than Parliament or a legislature, is quite permissible: see e.g. *Chemicals Reference*; *R. v. Furtney* at para. 33; and Hogg, *Constitutional Law of Canada*, 5th ed. supplemented (Scarborough: Thomson Carswell, 2007) at 14-22.

48 Admittedly, para. 63 of the judgment of this court in *Peralta* suggests that legislative power cannot be delegated. That suggestion is inconsistent with principles of delegation and with the Supreme Court of Canada's jurisprudence. Thus, it is unnecessary to characterize the delegation of the provincial Minister. However characterized, the Governor in Council's delegation of its powers to Ontario's Minister of Natural Resources is valid.

49 I would not give effect to the appellants' principal ground of appeal.

2. Did the Minister fetter her discretion?

50 Fettering of discretion is a common basis for challenging administrative decision-making. It is one of the appellants' grounds of review on this appeal. They contend that by accepting the Lake Erie Committee's recommendations on the total allowable catch for walleye and yellow perch, and Ontario's share of the catch, the Minister has fettered her discretion. I do not accept this contention.

51 Decision makers fetter their discretion when they fail to genuinely exercise discretionary power in an individual case, and instead automatically apply an existing policy or guideline: see David J. Mullan, *Administrative Law* (Toronto: Irwin Law 2001) at 115-116. The appellants argue that, year after year, in allocating quotas to commercial fishing licences, the Minister has automatically accepted the recommendations of an outside body, the Lake Erie Committee, instead of independently determining Ontario's share of the total allowable catch for each species of fish. In my view, the appellants' argument fails for three reasons.

52 First, Ontario has accepted, as a matter of policy, joint decision-making on the management of fish stocks in Lake Erie. It is surely not the court's role to second guess this policy. It is not for the court to say, as the appellants urge us to do, that the Minister should adopt a "go it alone" policy.

53 Moreover, Ontario's policy makes good sense. Fish do not respect the 49th parallel; our ecosystem does not pay attention to international boundaries. Cooperative decision making among the five jurisdictions with a stake in the Lake Erie fishery is undoubtedly the best way to manage and conserve a fragile yet shared resource.

54 Second, the appellants' argument does not take into account of the process by which the Lake Erie Committee arrives at its recommendations. Ontario's own experts and delegates participate in that process. The delegate from Ontario's Ministry of Natural Resources, along with the four other delegates, must agree on the recommendations. It is, therefore, hardly surprising that the Minister finds the Committee's recommendations persuasive, even compelling, and usually accepts them.

55 Third, although the Lake Erie Committee's recommendations are persuasive, the Minister does not automatically rubber stamp them. The record before us refers to two examples where the Minister did not accept the Committee's

recommendations: the 2004 arbitration and the 2005 yellow perch error correction.

56 The 2004 arbitration arose because members of the Lake Erie Committee believed that the harvest of walleye should be reduced. However, the members were at an impasse on how to achieve this reduction. The American members insisted Ontario make a 40 per cent cut to its commercial fish harvest; Ontario proposed a 20 to 22 per cent cut. Because of the impasse, the Committee appointed two experienced arbitrators to consider the issue. Out of their consideration, the parties reached a negotiated settlement: Ontario accepted a 30 per cent cut in its commercial walleye harvest. This example shows that Ontario did not simply accept the American position on the allowable catch for commercial walleye fishing.

57 In 2005, the Lake Erie Committee's recommendation on yellow perch erroneously understated Ontario's allocation. Ontario did not accept the Committee's recommendation; it complained. And its complaint led to an error correcting adjustment to the allocation. This example also shows that the Minister has not automatically surrendered her discretion to the Committee's recommendations.

58 For these reasons, I do not accept the appellants' argument on fettering of discretion.

3. Has the Minister exercised her discretion unreasonably?

59 The appellants' related argument is that the Minister has exercised her discretion unreasonably because, in allocating quotas to commercial fishing licences, she has relied on the Lake Erie Committee's recommendations on the total allowable catch. In support of this argument, the appellants submit that the Lake Erie Committee relies on data of dubious reliability, and that a coordinated strategy for managing the Lake Erie fishery does not require Ontario to surrender its decision making to a joint international body. The Divisional Court rejected these submissions, concluding that "it is not unreasonable for the Minister to heavily rely on the recommendations of the [Lake Erie Committee] when the Minister determines the fish quota for the applicants." I agree with the Divisional Court's conclusion.

60 The Divisional Court specifically addressed the appellants' attack on the reliability of the data used by the Committee:

> The Minister also acknowledges that the data used by the task groups may be uncertain or indefinite, but the evidence shows that the data used is the best data available. Moreover, the [Lake Erie Committee] and the task groups are aware of the fact that the data is uncertain, and have an ongoing discussion as to how to improve the reliability of the data.

I agree with the Divisional Court's assessment.

61 Moreover, the Minister's reliance on the Lake Erie Committee's recommendations is entirely reasonable. These recommendations are the product of the collective wisdom, expertise and science of experts from the five jurisdictions that share the Lake Erie fishery. Ontario's own experts actively participate in the Committee's deliberations. And the consensual decision-making that produces the catch quotas for walleye and yellow perch. Viewed in this context, the Minister's adoption of the Committee's recommendations can only be considered reasonable.

62 At the same time, Ontario is not legally required to accept the Lake Erie Committee's recommendations. Although its recommendations ordinarily are compelling, the Minister occasionally has departed from them, reinforcing the reasonableness of her approach.

63 I would not give effect to this ground of appeal.

D. CONCLUSION

64 I would reject the three grounds of appeal raised by the appellants. In my view, the Governor in Council has validly delegated authority to Ontario's Minister of Natural Resources to attach walleye and yellow perch quotas to the appellants' commercial fishing licences.

65 Moreover, in ordinarily adopting the Lake Erie Committee's recommendations on the total allowable catch for walleye and yellow perch, the Minister has neither fettered her discretion nor exercised her discretion unreasonably.

66 I would dismiss the appeal, with costs payable by the appellants and fixed at $20,000, inclusive of disbursements and G.S.T. No costs shall be awarded to or against the intervener.

J.I. LASKIN J.A.
J.M. SIMMONS J.A.:-- I agree.
S.E. LANG J.A.:-- I agree.

cp/e/qlaim/qljxr/qlced/qlhcs/qlana/qlced

1 OFR 1978 is at SOR/63-157.

OFR 1989 is at SOR/89-93.

OFR 2007 is at SOR/2007-237.

E

Case Name:

Thamotharem v. Canada (Minister of Citizenship and Immigration)

Between
The Minister of Citizenship and Immigration, Appellant,
and
Daniel Thamotharem, Respondent, and
The Canadian Council for Refugees and the Immigration Refugee Board, Interveners

[2007] F.C.J. No. 734

[2007] A.C.F. no 734

2007 FCA 198

2007 CAF 198

366 N.R. 301

60 Admin. L.R. (4th) 247

64 Imm. L.R. (3d) 226

158 A.C.W.S. (3d) 972

2007 CarswellNat 1391

[2008] 1 F.C.R. 385

Docket A-38-06

Federal Court of Appeal
Toronto, Ontario

Décary, Sharlow and Evans JJ.A.

Heard: April 16, 2007.
Judgment: May 25, 2007.

(120 paras.)

Administrative law -- The hearing -- Procedure -- Appeal by Minister from decision allowing refugee claimant's application for judicial review of dismissal of claim allowed -- Court of first instance found guideline setting standard procedure for hearings, instructing members to allow Refugee Protection Officers to question claimants first, was unlawful fetter on discretion of member -- Guideline was not unlawful fetter, as it provided for exercise of discretion in exceptional cases where fairness dictated claimants should be questioned by their counsel first -- Loss by claimant of possible tactical advantage in having own counsel question claimant first did not rise to level of procedural unfairness -- Immigration and Refugee Protection Act, s. 159(1)(h).

Administrative law -- Natural justice -- Duty of fairness -- Procedural unfairness -- Appeal by Minister from decision allowing refugee claimant's application for judicial review of dismissal of claim allowed -- Court of first instance found guideline setting standard procedure for hearings, instructing members to allow Refugee Protection Officers to question claimants first, was unlawful fetter on discretion of member -- Guideline was not unlawful fetter, as it provided for exercise of discretion in exceptional cases where fairness dictated claimants should be questioned by their counsel first -- Loss by claimant of possible tactical advantage in having own counsel question claimant first did not rise to level of procedural unfairness.

Immigration law -- Constitutional issues and legislation -- Other legislation -- Miscellaneous legislation -- Appeal by Minister from decision allowing refugee claimant's application for judicial review of dismissal of claim allowed -- Court of first instance found guideline setting standard procedure for hearings, instructing members to allow Refugee Protection Officers to question claimants first, was unlawful fetter on discretion of member -- Guideline was not unlawful fetter, as it provided for exercise of discretion in exceptional cases where fairness dictated claimants should be questioned by their counsel first -- Loss by claimant of possible tactical advantage in having own counsel question claimant first did not rise to level of procedural unfairness.

Immigration law -- Refugee protection -- Practice and judicial review -- Natural justice -- Duty of fairness -- Miscellaneous issues -- Appeal by Minister from decision allowing refugee claimant's application for judicial review of dismissal of claim allowed -- Court of first instance found guideline setting standard procedure for hearings, instructing members to allow Refugee Protection Officers to question claimants first, was unlawful fetter on discretion of member -- Guideline was not unlawful fetter, as it provided for exercise of discretion in exceptional cases where fairness dictated claimants should be questioned by their counsel first -- Loss by claimant of possible tactical advantage in having own counsel question claimant first did not rise to level of procedural unfairness.

Appeal by the Minister of Citizenship and Immigration from a Federal Court decision, granting Thamotharem's application for judicial review of a decision dismissing his claim for refugee protection. Thamotharem was a Tamil and citizen of Sri Lanka, who entered Canada in September 2002 on a student visa and made a refugee claim in 2004. He clamed he feared he would be persecuted by the Liberation Tigers of Tamil Eelam if returned to Sri Lanka. Before his hearing, Thamotharem submitted in writing that a guideline providing that a Refugee Protection Officer was to start the questioning of Thamotharem as the claimant, deprived him of his right to a fair hearing. The guideline provided for the exercise of discretion in exceptional cases where fairness dictated that a claimant should be questioned by his own counsel first. Thamotharem did not argue that he would be denied a fair hearing if the guideline were applied to him. Thamotharem suffered from post-traumatic stress disorder. He was questioned by the Officer first at his hearing, as the Refugee Protection Division member presiding applied the guideline and found claimants did not always have the right to be questioned by their counsel first. Thamotharem's refugee claim was dismissed, as the member found he was not a person in need of protection. The decision was based on documentary evidence of improved country conditions in Sri Lanka and on the absence of reliable evidence that Thamotharem would be persecuted if returned there as a perceived member of a political group, or would be targeted for extortion. Thamotharem applied for judicial review of this decision. The Federal Court judge found the guideline was an unlawful fettering of the discretion of Refugee Protection Division members to determine the order of questioning at a hearing, and allowed Thamotharem's application. The

judge rejected an argument by Thamotharem that the guideline was invalid because it denied claimants a fair hearing. The judge certified questions with respect to the validity of the guideline.

HELD: Appeal allowed. The guideline was not on its face invalid for procedural unfairness. It was also not an unlawful fetter on the discretion of members, as it expressly directed them to consider the facts of each case to determine whether circumstances warranted deviating from the standard practice of having the officer question the claimant first. Although the guideline could have been issued as a rule instead, subject to legislative approval, it was not invalid because it was issued as a guideline. It was validly issued within the Board's broad statutory power to issue guidelines to assist members in carrying out their duties. It was reasonable for the Board to set the guideline, to ensure claimants could expect essentially the same procedure to be followed at hearings throughout Canada. The fact the guideline deprived claimants of a possible tactical advantage in having their counsel question them first did not rise to the level of unfairness. The guideline did not have the force of law, such that it imposed a legal duty on members to comply.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 27(2), s. 27(3), s. 49(2)

Department of the Environment Act, R.S.C. 1985, c. E-10, s. 6

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 159, s. 159(1)(h), s. 161(1)(a), s. 161(2), s. 162

Immigration and Refugee Protection Guidelines, Guideline 7

Inquiries Act, R.S.C. 1985, c. I-11

Refugee Protection Division Rules, SOR/2002-228, Rule 7, Rule 16(e), Rule 25, Rule 38, Rule 69

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 25.1(1)

Appeal From:

Appeal from a decision of Hon. Mr. Justice Blanchard, dated January 6, 2006, in Federal Court file IMM-7836-04, [2006] F.C.J. No. 8.

Counsel:

Jamie Todd and John Provart, for the Appellant.

Jack Davis, for the Respondent.

Christopher D. Bredt and Morgana Kellythorne, for the Intervener, the Immigration and Refugee Board.

Catherine Bruce and Angus Grant, for the Intervener, the Canadian Council for Refugees.

[Editor's note: An amendment was released by the Court on July 24, 2007. The changes were not indicated. This document contains the amended text.]

Reasons for judgment by: Evans J.A. Concurred in by: Décary J.A. Concurring reasons by: Sharlow J.A.

EVANS J.A.:--

A. INTRODUCTION

1 The Chairperson of the Immigration and Refugee Board ("the Board") has broad statutory powers to issue both guidelines and rules. Rules have to be approved by the Governor in Council and laid before Parliament, but guidelines do not.

2 This appeal concerns the validity of Guideline 7 (*Preparation and Conduct of a Hearing in the Refugee Protection Division*), issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines ... to assist members in carrying out their duties": *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), paragraph 159(1)(*h*). The key paragraphs of Guideline 7 provide as follows: "In a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant" (para. 19), although the member of the Refugee Protection Division ("RPD") hearing the claim "may vary the order of questioning in exceptional circumstances" (para. 23).

3 The validity of Guideline 7 is challenged on two principal grounds. First, it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel. Second, even if Guideline 7 does not prescribe a hearing that is in breach of the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under IRPA, paragraph 161(1)(*a*), not as a guideline under IRPA, paragraph 159(1)(*h*). Guideline 7 is not valid as a guideline because paragraphs 19 and 23 unlawfully fetter the discretion of members of the RPD to determine the appropriate order of questioning when hearing refugee protection claims.

4 This is an appeal by the Minister of Citizenship and Immigration from a decision by Justice Blanchard of the Federal Court granting an application for judicial review by Daniel Thamotharem to set aside a decision by the RPD dismissing his claim for refugee protection: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168.

5 Justice Blanchard held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing, in the absence of a provision in either IRPA or the *Refugee Protection Division Rules*, SOR/2002-228, dealing with this aspect of refugee protection hearings. He remitted Mr Thamotharem's refugee claim to be determined by a different member of the RPD on the basis that Guideline 7 is an invalid fetter on the exercise of decision-makers' discretion.

6 However, Justice Blanchard rejected Mr Thamotharem's argument that Guideline 7 is invalid because it deprives refugee claimants of the right to a fair hearing, and distorts the "judicial" role of the member hearing the claim. Mr Thamotharem has cross-appealed this finding.

7 The Judge certified the following questions for appeal pursuant to paragraph 74(*d*) of IRPA.

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard?
2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion?
3. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

8 Immediately after hearing the Minister's appeal in *Thamotharem*, we heard appeals by unsuccessful refugee claimants challenging the validity of Guideline 7 and, in some of the cases, impugning on other grounds the dismissal of their claim. In the Federal Court, 19 applications for judicial review concerning Guideline 7 were consolidated. Justice Mosley's decision on the Guideline 7 issue is reported as *Benitez v. Canada (Minister of Citizenship and Immigration*), 2006 FC 461, [2007] 1 F.C.R. 107. The appeals from these decisions were also consolidated, *Benitez* being designated the lead case.

9 In *Benitez*, Justice Mosley agreed with the conclusions of Justice Blanchard on all issues, except one: he held that Guideline 7 was not an unlawful fetter on the discretion of Board members because its text permitted them to allow the claimant's counsel to question first, as, in fact, some had.

10 For substantially the reasons that they gave, I agree with both Justices that Guideline 7 is not, on its face, invalid on the ground of procedural unfairness, although, as the Minister and the Board conceded, fairness may require that, in certain circumstances, particular claimants should be questioned first by their own counsel. I also agree that Guideline 7 is not incompatible with the impartiality required of a member when conducting a hearing which is inquisitorial in form.

11 However, in my opinion, Guideline 7 is not an unlawful fetter on the exercise of members' discretion on the conduct of refugee protection hearings. The Guideline expressly directs members to consider the facts of the particular case before them to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning. The evidence does not establish that members disregard this aspect of Guideline 7 and slavishly adhere to the standard order of questioning, regardless of the facts of the case before them. Accordingly, I agree with Justice Mosley on this issue, and must respectfully disagree with Justice Blanchard.

12 Nor does it follow from the fact that Guideline 7 could have been issued as a statutory rule of procedure that it is invalid because it was not approved by the Governor in Council. In my opinion, the Chairperson's rule-making power does not invalidate Guideline 7 by impliedly excluding from the broad statutory power to issue guidelines "to assist members in carrying out their duties" changes to the procedure of any of the Board's Divisions.

13 Accordingly, I would allow the Minister's appeal, and dismiss Mr Thamotharem's cross-appeal and his application for judicial review. Although separate reasons are given in *Benitez* ([2007] F.C.J. No. 735, 2007 FCA 199) dealing with issues not raised in Mr Thamotharem's appeal, a copy of the reasons in the present appeal will also be inserted in Court File No. A-164-06 (*Benitez*) and the files of the appeals consolidated with it.

B. FACTUAL BACKGROUND

(i) Mr Thamotharem's refugee claim

14 Mr Thamotharem is Tamil and a citizen of Sri Lanka. He entered Canada in September 2002 on a student visa. In January 2004, he made a claim for refugee protection in Canada, since he feared that, if forced to return to Sri Lanka, he would be persecuted by the Liberation Tigers of Tamil Eelam.

15 In written submissions to the RPD before his hearing, Mr Thamotharem objected to the application of Guideline 7, on the ground that it deprives refugee claimants of their right to a fair hearing. He did not argue that, on the facts of his case, he would be denied a fair hearing if he were questioned first by the Refugee Protection Officer ("RPO") and/or the member conducting the hearing. There was no evidence that Mr Thamotharem suffered from post-trauma stress disorder, or was otherwise particularly vulnerable.

16 At the hearing of the claim before the RPD, the RPO questioned Mr Thamotharem first. The RPD held that the duty of fairness does not require that refugee claimants always have the right to be questioned first by their counsel and that the application of Guideline 7 does not breach Mr Thamotharem's right to procedural fairness.

17 In a decision dated August 20, 2004, the RPD dismissed Mr Thamotharem's refugee claim and found him not to be a person in need of protection. It based its decision on documentary evidence of improved country conditions for Tamils in Sri Lanka, and on the absence of reliable evidence that Mr Thamotharem would be persecuted as a perceived member of a political group or would, for the first time, become the target of extortion.

18 In his application for judicial review, Mr Thamotharem challenged this decision on the ground that Guideline 7 was invalid, and that the RPD had made a reviewable error in its determination of the merits of his claim. As already noted, Mr Thamotharem's application for judicial review was granted, the RPD's decision set aside and the matter

remitted to another member for re-determination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing. In responding in this Court to the Minister's appeal, Mr. Thamotharem did not argue that, even if Guideline 7 is valid, Justice Blanchard was correct to remit the matter to the RPD because it committed a reviewable error in determining the merits of the claim.

(ii) Guideline 7

19 Before the Chairperson issued Guideline 7, the order of questioning was within the discretion of individual members; neither IRPA, nor the *Refugee Protection Division Rules*, addressed it. Refugee protection claims are normally determined by a single member of the RPD. The evidence indicated that, before the issue of Guideline 7, practice on the order of questioning was not uniform across Canada. Members sitting in Toronto and, possibly, in Vancouver and Calgary, permitted claimants to be "examined in chief" by their counsel before being questioned by the RPO and/or the member. In Montreal and Ottawa, on the other hand, the practice seems to have been that the member or the RPO questioned the claimant first, although a request by counsel for a claimant to question first seems generally to have been granted.

20 It is not surprising that the Board did not regard it as satisfactory that the order of questioning was left to be decided by individual members on an *ad hoc* basis, with variations among regions, and among members within a region. Claimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted.

21 There was also a view that refugee protection hearings would be more expeditious if claimants were generally questioned first by the RPO or the member, thus dispensing with the often lengthy and unfocussed examination-in-chief of claimants by their counsel. The backlog of refugee determinations has been a major problem for the Board. For example, from 1997-98 to 2001-02 the number of claims referred for determination each year increased steadily from more than 23,000 to over 45,000, while, in the same period, the backlog of claims referred but not decided grew from more than 27,000 to nearly 49,000: Canada, Immigration and Refugee Board, *Performance Report, for the period ending March 31, 2004*.

22 Studies were undertaken to find ways of tackling this problem. For example, in a relatively early report, *Rebuilding Trust*: *Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, 1993), refugee law scholar, Professor James C. Hathaway, made many recommendations designed to make the Board's determination of refugee claims more effective, expeditious, and efficient. The following passage from the Report (at 74) is particularly relevant to the present appeal.

> The present practice of an introductory "examination in chief" by counsel should be dispensed with, the sworn testimony in the Application for Refugee Status being presumed to be true unless explicitly put in issue. Panel members should initially set out clearly the substantive matters into which they wish to inquire, and explain any concerns they may have about the sufficiency of documentary evidence presented. Members should assume primary responsibility to formulate the necessary questions, although they should feel free to invite counsel to adduce testimony in regard to matters of concern to them. Once the panel has concluded its questioning, it should allow the Minister's representative, if present, an opportunity to question or call evidence, ensuring that the tenor of the Ministerial intervention is not allowed to detract from the non-adversarial nature of the hearing. Following a brief recess, the panel should outline clearly on the record which matters it views as still in issue, generally using the Conference Report as its guide. Any matters not stated by the panel to be topics of continuing concern should be deemed to be no longer in issue. Counsel would then be invited to elicit testimony, call witnesses, and make submissions as adjudged appropriate, keeping in mind that all additional evidence must be directed to a matter which remains in issue. [footnotes omitted]

23 Starting in 1999, the Board worked to develop what became Guideline 7, which was finally issued in October 31, 2003, as part of an action plan to reduce the backlog on the refugee side by increasing the efficiency of its decision-making process. In addition to the order of questioning provisions in dispute in this case, Guideline 7 also deals with the early identification of issues and disclosure of documents, procedures when a claimant is late or fails to appear, informal pre-hearing conferences, and the administration of oaths and affirmations.

24 In addition to the consultations with the Deputy Chairperson and the Director General of the Immigration Division mandated by paragraph 159(1)(*h*) before the Chairperson issues a guideline, the Board held consultations on the proposed Guideline with members of the Bar and other "stakeholders". Some, however, including the Canadian Council for Refugees, an intervener in this appeal, regarded the consultations as less than meaningful, while others characterized Guideline 7 as an overly "top-down" initiative by senior management of the Board. On the basis of the material before us, I am unable to comment on either of these observations.

25 From December 1, 2003, the implementation of Guideline 7 was gradually phased in, becoming fully operational across the country by June 1, 2004. Like other guidelines issued by the Chairperson, Guideline 7 was published.

C. LEGISLATIVE FRAMEWORK

(i) IRPA

26 IRPA confers on the Chairperson of the Board broad powers over the management of each Division of the Board, including a power to issue guidelines.

27 IRPA also empowers the Chairperson of the Board to make rules for each of the three Divisions of Board. The rules, however, must be approved by the Governor in Council, and laid before Parliament.

28 IRPA emphasises the importance of informality, promptness and fairness in the Board's proceedings.

29 In keeping with the inquisitorial nature of the RPD's process, IRPA confers broad discretion on members in their conduct of a hearing.

30 Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11, empowers commissioners of inquiry as follows:

31 The following provisions of IRPA respecting the decision-making process of the RPD are also relevant.

(ii) Guideline 7

32 Paragraphs 19 and 23 of Guideline 7, issued by the Chairperson under IRPA, paragraph 159(1)(*h*), are of immediate relevance in this appeal, while paragraphs 20-22 provide context.

D. ISSUES AND ANALYSIS

Issue 1: Standard of review

33 The questions of law raised in this appeal about the validity of Guideline 7 are reviewable on a standard of correctness: they concern procedural fairness, statutory interpretation, and the unlawful fettering of discretion. The exercise of discretion by the Chairperson to choose a guideline rather than a formal rule as the legal instrument for amending the procedure of any of the Board's Divisions by is reviewable for patent unreasonableness.

Issue 2: Does Guideline 7 prescribe a hearing procedure that is in breach of claimants' right to procedural fairness?

34 Justice Blanchard dealt thoroughly with this issue at paras. 36-92 of his reasons. He concluded that the

jurisprudence did not require that, as a matter of fairness, claimants always be given the opportunity to be questioned first by their counsel (at paras. 38-53). He then considered (at paras. 68-90) the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28 ("*Baker*"), for determining where to locate refugee protection hearings on the procedural spectrum from the informal to the judicial. Largely on the basis of the adjudicative nature of the RPD's functions, the finality of its decision, and the importance of the individual rights at stake, he concluded (at para. 75) that "a higher level of procedural protection is warranted".

35 However, recognizing also that the content of the duty of fairness varies with context, Justice Blanchard noted that Parliament had chosen an inquisitorial procedural model for the determination of refugee claims by the RPD, in the sense that there is no party opposing the claim, except in the rare cases when the Minister intervenes to oppose a claim on exclusion grounds. Consequently, in the overwhelming majority of cases, the task of probing the legitimacy of claims inevitably falls to the RPO, who questions the claimant on behalf of the member, and/or to the member of the RPD conducting the hearing, especially when no RPO is present. This is an important reason for concluding that not all the elements of the adversarial procedural model followed in the courts are necessarily required for a fair hearing of a refugee claim: see paras. 72-75.

36 Justice Blanchard also acknowledged that claimants may derive tactical advantages from being taken through their story by their own lawyer before being subjected to questioning by the RPO, who will typically focus on inconsistencies, gaps, and improbabilities in the narrative found in the claimant's personal information form ("PIF") and any supporting documentation, as well as any legal weaknesses in the claim. The tactical advantage of questioning first may be particularly significant in refugee hearings because of the vulnerability and anxiety of many claimants, as a result of: their inability to communicate except through an interpreter; their cultural backgrounds; the importance for them of the RPD's ultimate decision; and the psychological effects of the harrowing events experienced in their country of origin.

37 Nonetheless, Justice Blanchard concluded that these considerations do not necessarily rise to the level of unfairness. Indeed, in addition to shortening the hearing, questioning by the RPO may also serve to improve the quality of the hearing by focusing it and enabling a claimant's counsel to make sure that aspects of the claim troubling the member are fully dealt with when the claimant comes to tell his or her story. Consequently, in order to be afforded their right to procedural fairness, claimants need not normally be given the opportunity to be questioned by their counsel before being questioned by the RPO and/or RPD member.

38 Justice Blanchard noted, for example, that RPD members receive training to sensitize them to the accommodations needed when questioning vulnerable claimants, that claimants may supplement or modify the information in their PIF and adduce evidence before the hearing, and that expert evidence indicated that vulnerable claimants' ability to answer questions fully, correctly and clearly is likely to depend more on the tone and style of questioning than on the order in which it occurs.

39 Moreover, the duty of fairness forbids members from questioning in an overly aggressive and badgering manner, or in a way that otherwise gives rise to a reasonable apprehension of bias. Fairness also requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it. To this end, fairness may also require that, in certain circumstances, a claimant be afforded the right to be questioned first by her or his counsel. In addition, Guideline 7 recognizes that there will be exceptional cases in which, even though not necessarily required by the duty of fairness, it will be appropriate for the RPD to depart from the standard order of questioning.

40 I agree with Justice Blanchard's conclusion on this issue and have little useful to add to his reasons. Before us, counsel did not identify any error of principle in the Applications Judge's analysis nor produce any binding judicial authority for the proposition that it is a breach of the duty of fairness to deny claimants the right to be questioned first by their own counsel. Criticisms were directed more to the weight that Justice Blanchard gave to some of the evidence and the factors to be considered. I can summarize as follows the principal points made in this Court by counsel.

41 First, the importance of the individual rights potentially at stake in refugee protection proceedings indicates a court-like hearing, in which the party with the burden of proof goes first: see, for example, *Can-Am Realty Ltd. v. Canada* (1993), 69 F.T.R. 63 at 63-64. I agree at a general level that the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament, as well as the RPD's high volume case load, considerations which reduce the power of the claim to aspects of the adversarial model used in courts, including the order of questioning.

42 Second, the procedure set out in Guideline 7 is derived from the erroneous notion that the RPD is a board of inquiry, not an adjudicator. Unlike those appearing at inquiries, refugee claimants have the burden of proving a claim, which the RPD adjudicates.

43 I do not agree. The Board correctly recognizes that the RPD's procedural model is more inquisitorial in nature, unlike that of the Immigration Appeal Division (*Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 82). I cannot conclude on the basis of the evidence as a whole that the Board adopted the standard order of questioning in the mistaken view that the RPD is a board of inquiry, even though it decides claimants' legal rights in the cases which they bring to it for adjudication and claimants bear the burden of proof. This conclusion is not undermined by a training document ("Questioning 101"), prepared by the Board's Professional Development Branch in 2004 for members and RPOs, which contains a somewhat misleading reference to the compatibility of the standard order of questioning with "a board of inquiry model".

44 A relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, especially before inexperienced tribunal members or those who lack the confidence that legal training can give. Nonetheless, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process, where the order of questioning is not as obvious as it generally is in an adversarial hearing.

45 Third, placing RPD members in the position of asking the claimant questions first, when no RPD is present, distorts their judicial role by thrusting them into the fray, thereby creating a reasonable apprehension of bias by making them appear to be acting as both judge and prosecutor. Guideline 7 is particularly burdensome for members now that panels normally comprise a single member, and there is often no RPO present to assume the primary responsibility for questioning the claimant on behalf of the Board.

46 I disagree. Adjudicators can and should normally play a relatively passive role in an adversarial process, because the parties are largely responsible for adducing the evidence and arguments on which the adjudicator must decide the dispute. In contrast, members of the RPD, sometimes assisted by an RPO, do not have this luxury. In the absence in most cases of a party to oppose the claim, members are responsible for making the inquiries necessary, including questioning the claimant, to determine the validity of the claim: see IRPA, paragraph 170(*a*); *Sivisamboo v. Canada (Minister of Citizenship and Immigration*), [1995] 1 F.C. 741 (T.D.) at 757-78; *Shahib v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1509, 2005 FC 1250 at para. 21. The fact that the member or the RPO may ask probing questions does not make the proceeding adversarial in the procedural sense.

47 To the extent that statements in *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.), suggest that a member of the RPD hearing a refugee claim is restricted to asking the kind of questions that a judge in a civil or criminal proceeding may ask, they are, in my respectful opinion, incorrect, especially when no RPO is present.

48 The fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of a person who was informed of the facts and had thought the matter through in a practical manner. Inquisitorial processes of adjudication are not unfair simply because they are relatively unfamiliar to common lawyers.

49 Fourth, Guideline 7 interferes with claimants' right to the assistance of counsel because it prevents them from being taken through their story by their counsel before being subject to the typically more sceptical questioning by the RPO. I do not agree. Guideline 7 does not curtail counsel's participation in the hearing; counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision-maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or, for that matter, any other aspect of the procedure to be followed at the hearing.

50 Finally, no statistical evidence was adduced to support the allegation that Guideline 7 jeopardizes the ability of the RPD accurately to determine claims for refugee protection. There is simply no evidence to establish what impact, if any, the introduction of Guideline 7 has had on acceptance rates.

51 In summary, the procedure prescribed by Guideline 7 is not, on its face, in breach of the Board's duty of fairness. However, in some circumstances, fairness may require a departure from the standard order of questioning. In those circumstances, a member's refusal of a request that the claimant be questioned first by her counsel may render the determination of the claim invalid for breach of the duty of fairness.

52 Consequently, if the Chairperson had implemented the reform to the standard order of questioning at refugee determination hearings in a formal rule of procedure issued in accordance with paragraph 161(1)(*a*), it would have been beyond challenge on the grounds advanced in this appeal respecting the duty of fairness, including bias. The somewhat technical question remaining is whether the Chairperson's choice of legislative instrument (that is, a guideline rather than a formal rule of procedure) to implement the procedural change was in law open to him.

Issue 3: Is Guideline 7 unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings?

53 As already noted, Justice Blanchard and, in *Benitez*, Justice Mosley, reached different conclusions on whether Guideline 7 unlawfully fettered the discretion of members of the RPD in deciding the order of questioning at a refugee determination hearing. The records in the two applications were not identical. In particular, there was more evidence before Justice Mosley, comprising some forty decisions and excerpts from transcripts of RPD hearings, that RPD members are willing to recognize exceptional cases in which it is appropriate to depart from the standard order of questioning.

54 In the circumstances of these appeals, it is appropriate to consider all the evidence before both judges. From a practical point of view, it would be anomalous if this Court were to reach different conclusions about the validity of Guideline 7 in two cases set down to be heard one after the other. However, I do not attach much, if any, significance to the differences in the records. Justice Blanchard properly based his conclusion, for the most part, on what he saw as the mandatory language of Guideline 7.

(i) Rules, discretion and fettering

55 Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis.

56 Though the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an

administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83 ("*Ainsley*").

57 Both academic commentators and the courts have emphasized the importance of these tools for good public administration, and have explored their legal significance. See, for example, Hudson N. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule-Making" in Special Lectures of the Law Society of Upper Canada 1992, *Administrative Law: Principles, Practice and Pluralism*; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 374-79; P.P. Craig, *Administrative Law*, 5th edn. (London: Thomson, 2003) at 398-405, 536-40; *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141 at 171; *Vidal v. Canada (Minister of Employment and Immigration*) (1991), 49 Admin. L.R. 118 (F.C.T.D.) at 131; *Ainsley* at 82-83.

58 Legal rules and discretion do not inhabit different universes, but are arrayed along a continuum. In our system of law and government, the exercise of even the broadest grant of statutory discretion which may adversely affect individuals is never absolute and beyond legal control: *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140. (*per* Rand J.). Conversely, few, if any, legal rules admit of no element of discretion in their interpretation and application: *Baker* at para. 54.

59 Although not legally binding on a decision-maker in the sense that it may be be an error of law to misinterpret or misapply them, guidelines may validly influence a decision-maker's conduct. Indeed, in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at 6):

> The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. [Emphasis added]

The line between law and guideline was further blurred by *Baker* at para. 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

60 The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

61 It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282 at 327 ("*Consolidated-Bathurst*"):

> It is obvious that coherence in administrative decision-making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted]

62 Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms* at 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

63 In addition, the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision. *Ainsley* is the best known example. That case concerned a challenge to the validity of a non-statutory policy statement issued by the Ontario Securities Commission setting out business practices which would satisfy the public interest in the marketing of penny stocks by certain securities dealers. The policy also stated that the Commission would not necessarily impose a sanction for non-compliance on a dealer under its "public interest" jurisdiction, but would consider the particular circumstances of each case.

64 Writing for the Court in *Ainsley*, Doherty J.A. adopted the criteria formulated by the trial judge for determining if the policy statement was "a mere guideline" or was "mandatory", namely, its language, the practical effect of non-compliance, and the expectations of the agency and its staff regarding its implementation. On the basis of these criteria, Doherty J.A. concluded that the policy statement was invalid. He emphasized, in particular, its minute detail, which "reads like a statute or regulation" (at 85), and the threat of sanctions for non-compliance. He found this threat to be implicit in the Commission's pronouncement that the business practices it described complied with the public interest, and was evident in the attitude of enforcement staff ,who treated the policy as if it were a statute or regulation, breach of which was liable to trigger enforcement proceedings.

(ii) Guideline 7 and the fettering of discretion

(a) *Is Guideline 7 delegated legislation?*

65 An initial question is whether guidelines issued under IRPA, paragraph 159(1)(*h*) constitute delegated legislation, having the full force of law ("hard law"). If they do, Guideline 7 can no more be characterized as an unlawful fetter on members' exercise of discretion with respect to the order of questioning than could a rule of procedure to the same effect issued under IRPA, paragraph 161(1))(*a*): *Bell Canada v. Canadian Telephone Association Employees*, 2003 SCC 36, [2003] 1 S.C.R. 884 at para 35 ("*Bell Canada*").

66 In my view, despite the express statutory authority of the Chairperson to issue guidelines, they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

67 However, the meaning of "guideline" in a statute may depend on context. For example, in *Society of the Friends of Oldman River v. Canada (Minister of the Environment),* [1992] 1 S.C.R. 3 at 33-37, La Forest J. upheld the validity of mandatory environmental assessment guidelines issued under section 6 of the *Department of the Environment Act,* R.S.C. 1985, c. E-10, which, he held, constituted delegated legislation and, as such, were legally binding.

68 In my view, *Oldman River* is distinguishable from the case before us. Section 6 of the *Department of the Environment Act* provided that guidelines were to be issued by an "order" ("*arrêté*") of the Minister and approved by the Cabinet. In contrast, only rules issued by the Chairperson require Cabinet approval, guidelines ("*directives*") do not. It would make little sense for IRPA to have conferred powers on the Chairperson to issue two types of legislative instrument, guidelines and rules, specified that rules must have Cabinet approval, and yet given both the same legal effect.

69 Guidelines issued by the Human Rights Commission pursuant to subsection 27(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, have also been treated as capable of having the full force of law, even though they are made by an independent administrative agency and are not subject to Cabinet approval: *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.) at paras. 136-41; *Bell Canada* at paras. 35-38.

70 In *Bell Canada*, LeBel J. held (at para. 37), "on a functional and purposive approach to the nature" of the Commission's guidelines, that they were "akin to regulations", a conclusion supported by the use of the word "*ordonnance*" in the French text of subsection 27(2) of the *Canadian Human Rights Act*. In addition, subsection 27(3)

expressly provides that guidelines issued under subsection 27(2) are binding on the Commission and on the person or panel assigned to inquire into a complaint of discrimination referred by the Commission under subsection 49(2) of the Act.

71 In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the word "*directives*" in the French text of paragraph 159(1)(*h*) suggests a less legally authoritative instrument than "*ordonnance*".

72 I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(*h*) cannot have the same legally binding effect on members as statutory rules may.

(b) Is Guideline 7 an unlawful fetter on members' discretion?

73 Since guidelines issued by the Chairperson of the Board do not have the full force of law, the next question is whether, in its language and effect, Guideline 7 unduly fetters RPD members' discretion to determine for themselves, case-by-case, the order of questioning at refugee protection hearings. In my opinion, language is likely to be a more important factor than effect in determining whether Guideline 7 constitutes an unlawful fetter. It is inherently difficult to predict how decision-makers will apply a guideline, especially in an agency, like the Board, with a large membership sitting in panels.

74 Consequently, since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order, in the absence of clear evidence to the contrary, such as that members have routinely refused to consider whether the facts of particular cases require an exception to be made.

75 I turn first to language. The Board's *Policy on the Use of Chairperson's Guidelines*, issued in 2003, states that guidelines are not legally binding on members: section 6. The introduction to Guideline 7 states: "The guidelines apply to most cases heard by the RPD. However, in compelling or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly"

76 The text of the provisions of Guideline 7 of most immediate relevance to this appeal. Paragraph 19 states that it "will be" standard practice for the RPO to question the claimant first; this is less obligatory than "must" or some similarly mandatory language. The discretionary element of Guideline 7 is emphasized in paragraph 19, which provides that, while "the standard practice will be for the RPO to start questioning the claimant" (emphasis added), a member may vary the order "in exceptional circumstances".

77 Claimants who believe that exceptional circumstances exist in their case must apply to the RPD, before the start of the hearing, for a change in the order of questioning. The examples, and they are only examples, of exceptional circumstances given in paragraph 23 suggest that only the most unusual cases will warrant a variation. However, the parameters of "exceptional circumstances" will no doubt be made more precise, and likely expanded incrementally, on a case-by-case basis.

78 I agree with Justice Blanchard's conclusion (at para. 119) that the language of Guideline 7 is more than "a recommended but optional process". However, as *Maple Lodge Farms* makes clear, the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision-maker may deviate from normal practice in the light of particular facts: see *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195.

79 To turn to the effect of Guideline 7, there was evidence that, when requested by counsel, members of the RPD had exercised their discretion and varied the standard order of questioning in cases which they regarded as exceptional. No such request was made on behalf of Mr Thamotharem. In any event, members must permit a claimant to be questioned first by her or his counsel when the duty of fairness so requires.

80 In at least one case, however, a member wrongly regarded himself as having no discretion to vary the standard order of questioning prescribed in Guideline 7. On July 3, 2005, this decision was set aside on consent on an application for judicial review, on the ground that the member had fettered the exercise of his discretion, and the matter remitted for re-determination by a different member of the RPD: *Baskaran v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-7189-04). Nonetheless, the fact that some members may erroneously believe that Guideline 7 removes their discretion to depart from the standard practice in exceptional circumstances does not warrant invalidating the Guideline. In such cases, the appropriate remedy for an unsuccessful claimant is to seek judicial review to have the RPD's decision set aside.

81 There was also evidence from Professor Donald Galloway, an immigration and refugee law scholar, a consultant to the Board and a former Board member, that RPD members would feel constrained from departing from the standard order of questioning. However, he did not base his opinion on the actual conduct of members with respect to Guideline 7.

82 In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.

83 I recognize that members of the RPD must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board. However, the jurisprudence also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions, a particular challenge for large tribunals which, like the Board, sit in panels.

84 Most notably, the Supreme Court of Canada in *Consolidated-Bathurst* upheld the Ontario Labour Relations Board's practice of inviting members of panels who had heard but not yet decided cases to bring them to "full Board meetings", where the legal or policy issues that they raised could be discussed in the absence of the parties. This practice was held not to impinge improperly on members' adjudicative independence, or to breach the principle of procedural fairness that those who hear must also decide. Writing for the majority of the Court, Gonthier J. said (at 340):

> The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. ...
>
> The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice. ...

85 However, the arrangements made for discussions within an agency with members who have heard a case must not be so coercive as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined: *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952.

86 Evidence that the Immigration and Refugee Board "monitors" members' deviations from the standard order of questioning does not, in my opinion, create the kind of coercive environment which would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. On a voluntary basis, members complete, infrequently and inconsistently, a hearing information sheet asking them, among other things, to explain when and why

they had not followed "standard practice" on the order of questioning. There was no evidence that any member had been threatened with a sanction for non-compliance. Given the Board's legitimate interest in promoting consistency, I do not find it at all sinister that the Board does not attempt to monitor the frequency of members' compliance with the "standard practice".

87 Nor is it an infringement of members' independence that they are expected to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning. Such an expectation serves the interests of coherence and consistency in the Board's decision-making in at least two ways. First, it helps to ensure that members do not arbitrarily ignore Guideline 7. Second, it is a way of developing criteria for determining if circumstances are "exceptional" for the purpose of paragraph 23 and of providing guidance to other members, and to the Bar, on the exercise of discretion to depart from the standrd order of questioning in future cases.

88 In my opinion, therefore, the evidence in the present case does not establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline; the evidence of members' deviation from "standard practice"; and the need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly be single members.

89 Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

(iii) Is Guideline 7 invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*)?

90 On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Members' "duties" include the conduct of hearings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit": IRPA, section 162. In my view, structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159.

91 In any event, the Chairperson did not need an express grant of statutory authority to issue guidelines to members. Paragraph 159(1)(*h*) puts the question beyond dispute, establishes a duty to consult before a guideline is issued, and, perhaps, enhances their legitimacy.

92 An express statutory power to issue guidelines was first conferred on the Chairperson of the Board in 1993, as a result of an amendment to the former *Immigration Act* by *Bill C-86*. Appearing before the Committee of the House examining the Bill, Mr Gordon Fairweather, the then Chairperson of the Board welcomed this addition to the Board's powers:

> I'm also pleased that the minister has responded to the need for new tools for managing the board itself. In the board's desire to ensure consistency of decision-making, we welcome the legislative provision allowing for guidelines.... The provision will reinforce my authority, after appropriate consultations, and the courts have been very specific about saying, no guidelines until you have consulted widely with the caring agencies, the immigration bar, and other non-governmental organizations. But the courts have given the green light for such provision provided we go through those consultations.

> This provision will reinforce my authority, or the chair's authority -- that is a little less pompous -- after appropriate consultations to direct members toward preferred positions and therefore foster consistency in decisions. [Emphasis added]
>
> (Canada, House of Commons, Legislative Committee on Bill C-86, Minutes of Proceedings and Evidence, 34th Parl., 3d sess., Issue 5 (July 30, 1992) at 80)

93 In my view, the present appeal raises an important question about the relationship between the Chairperson's powers to issue guidelines and rules. In particular, are these grants of legal authority cumulative so that, for the most part, the scope of each is to be determined independently of the other? Or, is the Chairperson's power to issue guidelines implicitly limited by the power to make rules of procedure? If it is, then a change to the procedure of any Division of the Board may only be effected through a rule of procedure issued under paragraph 161(1)(*a*) which has been approved by Cabinet and subjected to Parliamentary scrutiny in accordance with subsection 161(2).

94 The argument in the present case is that Guideline 7 is a rule of procedure and, since it reforms the existing procedure of the RPD, should have been issued under paragraph 161(1)(*a*), received Cabinet approval and been laid before Parliament. The power of the Chairperson to issue guidelines may not be used to avoid the political accountability mechanisms applicable to statutory rules issued under subsection 161(1).

95 For this purpose, the fact that Guideline 7 permits RPD members to exercise their discretion in "exceptional circumstances" to deviate from "standard practice" in the order of questioning does not prevent it from being a rule of procedure: rules of procedure commonly confer discretion to be exercised in the light of particular facts.

96 An analogous line of reasoning is found in the Ontario Court of Appeal's decision in *Ainsley*, where it was said that the Ontario Securities Commission's policy statement prescribing business practices of penny stock dealers which would satisfy the statutory public interest standard was invalid, because it was in substance and effect "a mandatory provision having the effect of law" (at 84). In my opinion, however, *Ainsley* should be applied to the present case with some caution.

97 First, when *Ainsley* was decided, the Commission had no express statutory power to issue guidelines and no statutorily recognized role in the regulation-making process. In contrast, the Chairperson of the Board has a broad statutory power to issue guidelines and, subject to Cabinet approval, to make rules respecting a broad range of topics, including procedure.

98 Admittedly, the Board's rules of procedure (as well, of course, as IRPA itself and regulations made under it by the Governor in Council) have a higher legal status than guidelines, in the sense that, if a guideline and a rule conflict, the rule prevails.

99 Second, the policy statement considered in *Ainsley* was directed at businesses regulated by the Commission and was designed to modify their practices by linking compliance with the policy to the Commission's prosecutorial power to institute enforcement proceedings, which could result in the loss of a licence by businesses not operating in "the public interest". Guideline 7, on the other hand, is directed at the practice of RPD members in the conduct of their proceedings. It does not impose *de facto* duties on members of the public or deprive them of an existing right. Guideline 7 lacks the kind of coercive threat, against either claimants or members, in the event of non-compliance, which was identified as important to the decision in *Ainsley*.

100 The Commission's promulgation of detailed industry standards, other than through enforcement proceedings against individuals, when it lacked any legislative power, raised rule of law concerns. In my opinion, the same cannot plausibly be said of the Chairperson's decision to introduce a standard order of questioning through the statutory power to issue guidelines, rather than his power to issue rules.

101 Third, while the Board can only issue formal statutory rules of procedure with Cabinet approval, tribunals often do not require Cabinet approval of their rules. In Ontario, for example, the procedural rules of tribunals to which the province's general code of administrative procedure applies are not subject to Cabinet approval: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, subsection 25.1(1). Hence, it cannot be said to be a principle of our system of law and government that administrative tribunals' rules of procedure require political approval.

102 Fourth, while Guideline 7 changed the way in which the Board conducts most of its hearings, it represents, in my view, more of a filling in of detail in the procedural model established by IRPA and the *Refugee Protection Division Rules*, than "fundamental procedural change" or "sweeping procedural reform", to use the characterization in the memorandum of the intervener, the Canadian Council for Refugees.

103 For example, rule 16(*e*) includes the questioning of witnesses in the RPO's duties, but is silent on the precise point in the hearing when the questioning is to occur. Similarly, while rule 25 deals with the intervention of the Minister, it does not specify when the Minister will lead evidence and make submissions. Rule 38 permits a party to call witnesses, but does not say when they will testify.

104 Fifth, the differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated. Rules of procedure commonly permit those to whom they are directed to depart from them in the interests of justice and efficiency. Thus, rule 69 of the *Refugee Protection Division Rules* permits a member to change a requirement of a rule or excuse a person from it, and to extend or shorten a time period. Failure to comply with a requirement of the Rules does not make a proceeding invalid: rule 70.

105 Finally, as I have already indicated, the Chairperson's power to issue guidelines extends, on its face, to matters of procedure. Its exercise is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) which is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid.

106 On the basis of the foregoing analysis, I conclude that, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. That the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(*a*) will not normally invalidate it, provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, which, for reasons already given, I have concluded that it does not.

107 In my opinion, the Chairperson may choose through which legislative instrument to introduce a change to the procedures of any of the three Divisions of the Board. Parliament should not be taken to have implicitly imposed a rigidity on the administrative scheme by preventing the Chairperson from issuing a guideline to introduce procedural change or clarification.

108 I do not say that the Chairperson's discretion to choose between a guideline or a rule is beyond judicial review. However, it was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the more flexible legislative instrument, the guideline, rather than through a formal rule of procedure.

109 First, Guideline 7 is not a comprehensive code of procedure nor, when considered in the context of the refugee determination process as a whole, is it inconsistent with the existing procedural model for RPD hearings. Second, the procedural innovation of standard order questioning may well require modification in the light of cumulated experience. Fine-tuning and adjustments of this kind are more readily accomplished through a guideline than a formal rule. Parliament should not be taken to have intended the Chairperson to obtain Cabinet approval for such changes.

E. CONCLUSIONS

110 For these reasons, I would allow the Minister's appeal, dismiss Mr Thamotharem's cross-appeal, set aside the order of the Federal Court, and dismiss the application for judicial review. I would answer the first two certified questions as follows:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard? No
2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion? No.

111 Since I would dismiss the application for judicial review, the third question does not arise and need not be answered.

EVANS J.A.
DÉCARY J.A.:-- I agree.

112 SHARLOW J.A. (Concurring):-- I agree with my colleague Justice Evans that this appeal should be allowed, but I reach that conclusion by a different route.

113 As Justice Evans explains, IRPA gives the Chairperson two separate powers. One is the power in paragraph 159(1)(h) to issue guidelines in writing to assist Members in carrying out their duties. The other is the power in paragraph 161(1)(a) to make rules respecting the activities, practice and procedure of the Board, subject to the approval of the Governor in Council. Both powers are to be exercised in consultation with the Deputy Chairpersons and the Director General of the Immigration Division. In my view, these two powers are different in substantive and functional terms, and are not interchangeable at the will of the Chairperson.

114 The subject of Guideline 7 is the order of proceeding in refugee hearings. That is a matter respecting the activities, practice and procedure of the Board, analogous to the subject matter of the procedural rules of courts. In my view, the imposition of a standard practice for refugee determination hearings should have been the subject of a rule of procedure, not a guideline.

115 I make no comment on the wisdom of the Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the Member to start questioning the refugee claimant. That is a determination that the Chairperson was entitled to make. However, to put that determination into practice while respecting the limits of the statutory authority of the Chairperson, the Chairperson should have drafted a rule to that effect, in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, and sought the approval of the Governor in Council.

116 Justice Evans notes that some commentators have suggested that the implementation of a rule under paragraph 161(1)(a) is more onerous in administrative and bureaucratic terms than the implementation of a guideline under paragraph 159(1)(h). That appears to me to be an unduly negative characterization of the legislated requirement for the approval of the Governor in Council, Parliament's chosen mechanism of oversight for the Chairperson's rule making power under paragraph 161(1)(a). It is also belied by the facts of this case, which indicates that the development of Guideline 7 took approximately four years. I doubt that a rule with the same content would necessarily have taken longer than that.

117 The more important question in this case is whether the Chairperson's erroneous decision to implement a guideline rather than a rule to establish a standard practice for refugee hearings provides a sufficient basis in itself for setting aside a negative refugee determination made by a Member who requires a refugee claimant to submit to questions from the RPO or the Member before presenting his or her own case.

118 I agree with Justice Evans that the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and that Guideline 7, properly understood, does not unlawfully fetter the discretion of Members. In my view, despite Guideline 7, each Member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the Member is assigned.

119 It may be the case that a particular Member may conclude incorrectly that Guideline 7 deprives the Member of the discretion to permit a refugee claimant to present his or her case before submitting to questioning from the RPO or

the Member. If so, it is arguable that a negative refugee determination by that Member is subject to being set aside if (1) the Member refused the request of a refugee claimant to proceed first and required the refugee claimant to submit to questioning by the RPO or the Member before presenting his or her case, and (2) it is established that, but for Guideline 7, the Member would have permitted the refugee claimant to present his or her case first. In the case of Mr. Thamotharem, those conditions have not been met.

120 For these reasons, I would dispose of this appeal as proposed by Justice Evans, and I would answer the certified questions as he proposes.

SHARLOW J.A.

F

Chapter 1 - Overview

This document provides information about the filing requirements for electricity transmission and distribution applications. It is designed to provide direction to applicants, and it is expected that applicants will comply with the filing requirements unless such compliance is not practical or in the public's interest. It is not a statutory regulation or a rule or code issued under the Board's authority. It does not preempt the Board's discretion to make any order or directive as it determines necessary concerning any of the matters raised by the applications filed.

The filing requirements are generally intended to apply to both transmitters and distributors. Unless specifically identified, the use of the words "utility", "utilities", "applicant" or "applicants" in this document refers to both transmitters and distributors. However, some sections, such as cost allocation in Chapter 2, are only applicable to distributors. These sections will use the word "distributor" when referring to the filer.

The purpose of this document is to provide information about several filing requirements dealing with electricity transmission and distribution applications. These include:

Chapter 2 - Filing requirements for electricity transmission and distribution companies' cost of service rate applications pursuant to section 78 of the *Ontario Energy Board Act, 1998* (the "Act"), based on a forward test year;

Chapter 3 - Filing requirements for the 3rd generation incentive regulation mechanism for electricity distributors pursuant to section 78 of the Act;

Chapter 4 - Filing requirements for leave to construct electricity transmission projects under section 92 of the Act;

Chapter 5 - Vacant;

Chapter 6 – Vacant; and

Chapter 7 - Filing requirements for applications for service area amendments under section 74(1) of the Act.

G

Case Name:

Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal)

Between
Stanley Guy, Appellant, and
Nova Scotia Workers' Compensation Appeals Tribunal and The Workers' Compensation Board of Nova Scotia, Respondents

[2008] N.S.J. No. 1

2008 NSCA 1

163 A.C.W.S. (3d) 1081

68 Admin. L.R. (4th) 314

2008 CarswellNS 1

261 N.S.R. (2d) 89

Docket: CA 268704

Registry: Halifax

Nova Scotia Court of Appeal
Halifax, Nova Scotia

E.A. Roscoe, N.J. Bateman and T.A. Cromwell JJ.A.

Heard: November 13, 2007.
Judgment: January 3, 2008.

(30 paras.)

Workplace health, safety and compensation law -- Workers' compensation -- Legislation -- Application and interpretation -- Vocational rehabilitation -- Appeal in which appellant, Guy, claimed that the cap imposed by the Workers' Compensation Board on living expenses for injured workers who maintained a second residence during vocational rehabilitation was not consistent with the Workers' Compensation Act -- Appeal dismissed -- The Board had broad discretion under the Act to make policies related to the expenditure of monies for vocational rehabilitation.

Appeal by Guy from a decision of the Workers' Compensation Appeals Tribunal that found that the Workers' Compensation Board's cap of $750 per month under a policy which governed living allowances to be paid to injured workers who maintained a second residence during vocational rehabilitation was valid. Guy contended that the policy was not consistent with the Workers' Compensation Act, and therefore invalid.

HELD: Appeal dismissed. The Board was authorized by the Act to make binding policies. That power, read in conjunction with the broad discretion given to the Board to make expenditures for vocational rehabilitation, led to the conclusion that the Legislature intended that the Board could make policies to structure and limit its discretion to make those expenditures.

Statutes, Regulations and Rules Cited:

Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 112, s. 183

Court Summary:

Workers' Compensation -- Vocational rehabilitation -- Whether Board policy is consistent with the Workers' Compensation Act, S.N.S. 1994-95, c. 10.

The Board offered the worker a vocational rehabilitation program and, in accordance with a Board Policy, provided a living allowance for a second residence capped at $750 per month. The worker claimed that the cap was not consistent with the **Workers' Compensation Act** and therefor was invalid. WCAT ruled against him on this point and the worker was granted leave to appeal.

Issue: Was the Board's policy capping the living allowance inconsistent with the **Workers' Compensation Act** and therefor invalid?

Result: Appeal dismissed. The Board was authorized by the **Act** to make binding policies. That power, read in conjunction with the broad discretion given to the Board to make expenditures for vocational rehabilitation, led to the conclusion that the Legislature intended that the Board could make policies to structure and limit its discretion to make those expenditures.

[Note: This summary does not form part of the Court's judgment. Quotations must be from the judgment, not this summary.]

Counsel:

Appellant in person.

Alexander MacIntosh, for the respondent Nova Scotia Workers' Compensation Appeals Tribunal.

Paula Arab and Madeleine Hearns, for the respondent The Workers' Compensation Board of Nova Scotia.

Edward Gores, Q.C., for the respondent Attorney General of Nova Scotia not participating.

Held: Appeal dismissed per reasons for judgment of T.A. Cromwell J.A.; E.A. Roscoe and N.J. Bateman JJ.A. concurring.

T.A. CROMWELL J.A.:--

I. INTRODUCTION:

1 The Workers' Compensation Board (WCB) has a policy governing living allowances to be paid to injured workers who maintain a second residence during vocational rehabilitation; the WCB has also capped the room and board expense under the policy at $750 per month. The appellant contends that the cap is inconsistent with the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10, as am. (**WCA**) and therefore invalid.

2 In my view, the **WCA** permits the Board to impose this cap. I would dismiss the appeal.

II. OVERVIEW OF FACTS AND ISSUES:

3 I will not go into the many different aspects of the worker's various claims and the WCB's responses to them. What is material to this appeal is that the WCB accepted the worker for vocational rehabilitation in the form of an educational program in Halifax. The worker moved here to pursue his course of study. The WCB undertook to provide him with a living allowance of $750 per month, the maximum amount provided for under the WCB's Policy 4.2.4 (now Policy 4.2.4R).

4 The worker found that this amount was not sufficient. There is no issue that his position in this regard was anything other than a reasonable one in the circumstances. He requested an increase, but WCB refused because he was receiving the maximum amount permitted under the Policy.

5 On the worker's appeal to the Workers' Compensation Appeals Tribunal (WCAT), one of the issues was whether this cap on the amount of the allowance imposed by the Policy was consistent with the **WCA**. WCAT found that it was. It reasoned that the WCB had a broad discretion with respect to such benefits under the **WCA** and that it had acted consistently with the **WCA** in exercising its discretion by means of the Policy.

6 The Court granted the worker leave to appeal WCAT's decision on the issue of whether what is now Policy 4.2.4R, section 3, headed "Living Allowance," is inconsistent with s. 112 of the **WCA**. Some other points were raised during the hearing of the appeal and I will address them as well.

III. ANALYSIS:

A. <u>Standard of Appellate Review</u>:

7 The consistency of the policy with **WCA** is a question of law. It does not, in my view, engage to any great extent WCAT's expertise acquired through its highly specialized functions in the workers' compensation system. Both the nature of the question and how it relates to WCAT's expertise suggest less rather than more deference to WCAT's decision. When one takes into account the other factors which must be considered under the pragmatic and functional approach to determining the standard of review, none of them favours giving WCAT deference on a question of this nature: see, for example, **Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal) ("Puddicombe")**, 2005 NSCA 62, [2005] N.S.J. No. 137 (Q.L.) at paras. 15-20.

8 Taking all of the factors into account, I agree with the respondent that the applicable standard of review here is correctness, the standard most favourable to the worker in the circumstances of this case. This means simply that the Court is entitled to substitute its own view of the law for WCAT's on this issue if persuaded that WCAT was wrong.

B. <u>Is the Policy Inconsistent with the WCA</u>?

1. Legal principles:

9 The question of whether the Policy is inconsistent with **WCA** engages two legal principles.

10 The first is that subordinate legislation must be authorized by a statute and not conflict with it. This is simply one aspect of the fundamental principle of legality: delegated power must be exercised within the limits granted by the legislature. If those limits are exceeded, the exercise of power is said to be *ultra vires* - beyond the authority of - the delegate: see, e.g., David J. Mullan, **Administrative Law**, (Toronto: Irwin Law, 2001) at 141.

11 The second principle is related to the first. Unless it has clear legislative authority, a decision-maker generally must exercise its statutory discretion having regard to the particular circumstances of the case before it; it must not exercise its discretion solely on the basis of general rules or policies without regard to those particular circumstances. This is often referred to as the principle that a decision-maker may not "fetter" its discretion: see, e.g. Donald J.M. Brown and John M. Evans, **Judicial Review of Administrative Action in Canada**, (Toronto: Canvasback Publishing, 1998 updated to July, 2007), vol. 3, s. 12.4410 ff. As Brown and Evans point out, "[s]ome statutes confer express authority on agencies to formulate rules or guidelines that are legally binding. However, as with all grants of statutory authority, whether such powers confer authority to create rules that have the force of law, or merely guide the judgment of decision-makers in much the same way as those made without explicit statutory authority, will depend upon their construction.": para. 12.4422.

12 The main question in this case is whether the **WCA** gives the WCB the authority to exercise its statutory discretion with respect to vocational rehabilitation benefits by means of policies which have the force of law. To answer that question, we must interpret the scope of the policy-making power conferred on the WCB as well as its powers to award living allowances.

2. Interpreting the legislation:

13 As with the interpretation of any statute, the words of the **WCA** must "... be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the [Legislature]": **Rizzo and Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27; Elmer A. Driedger, **The Construction of Statutes**, (Toronto: Butterworths, 1974) at 67.

14 The WCB is entitled by s. 183 of **WCA** to adopt policies "consistent with" Part I of **WCA** and the regulations. These policies are expressly by statute binding on the WCB and on WCAT, although in the case of WCAT, only to the extent that they are consistent with **WCA** and the regulations: s. 183(5) and 183(5A). These policies are not, therefore, informal administrative guidelines. Because the WCB's policies are specifically authorized and made binding by statute, they have more in common with subordinate legislation than with administrative policies and guidelines which are not specifically authorized or binding. In short, within the workers' compensation system, these policies, by express statutory provision, have the force of law. The legislature could not more clearly have evidenced its intent that the WCB has the authority to make policies which are binding to the extent that they are not inconsistent with the **WCA** or the regulations under it.

15 Section 112 of **WCA** provides that the Board "may make any expenditures and take any measure that, in the Board's opinion, will (a) aid injured workers in returning to work; and (b) reduce the effects of workers' injuries." Two things are striking about this provision.

16 The first is that it confers an extremely broad discretion on the Board to make expenditures provided that the Board thinks they will help injured workers return to work or reduce the effects of their injuries. Secondly, this discretion is concerned with the expenditure of funds generally; the discretion is not conferred in the context of a provision which creates a specific benefit for which individual workers may be eligible.

17 In this respect, s. 112 is distinct from other provisions of the **WCA** which confer entitlement to certain sorts of benefits and set out in detail how they are to be determined. Examples of this sort of provision may be found in the sections of **WCA** dealing with permanent impairment benefits (ss. 34-36) and earnings replacement benefits (ss. 37-48). In both cases, the statute confers entitlement to the benefit ("the Board shall pay to the worker a permanent-impairment

benefit": s. 34(1); "an earnings-replacement benefit is payable to the worker": s. 37(1)) and sets out in some detail how the amount of the benefit is to be calculated. Unlike these provisions, s. 112 does not establish a particular benefit to which a worker is or may be entitled or how its amount is to be determined. Rather, the section confers a discretion on the WCB to make expenditures for the broadly-stated objectives set out in the section. Thus, the discretion conferred on WCB by s. 112 is not to award particular benefits in a specific case, but rather a discretion to spend money for broadly stated purposes.

18 This understanding of s. 183 and s. 112 of **WCA** is consistent not only with the grammatical and ordinary sense of the words of theses sections, but also with the overall scheme and purpose of the **WCA**. The WCB is given broad powers to manage the Accident Fund out of which benefits are to be paid and to give shape, by regulation and by policy, to many of the benefits contemplated by the **WCA**: see, for example, s. 114 ff, s. 10(8), s. 184; **Boyle v. Workers' Compensation Board (Nova Scotia)**, 2004 NSCA 88, 225 N.S.R. (2d) 69 at paras. 47-51 and para. 68. Within the scheme of the **WCA**, policies are intended to provide the WCB with a means to bring clarity, predictability, consistency and a measure of financial control over the process of awarding benefits.

3. The policy:

19 The Policy itself provides that when the worker is involved in a vocational rehabilitation program or service, the WCB may reimburse the worker for travel expenses "in accordance with the provisions" of the Policy: section 1. Section 3 of the Policy, the part in issue here, provides that when, in the Board's discretion, it is appropriate for a worker to relocate and maintain a second residence for the duration of his/her vocational rehabilitation program, a vocational rehabilitation counsellor may authorize a living allowance in the form of reimbursement for room and board expenses to a maximum of $750/month, which is considered to include the costs of rent, basic utilities, meals and travel expenses: section 3.

20 There is no issue here about whether the Policy is being applied in accordance with its terms. What is in question is whether section 3 of the Policy itself is consistent with the **WCA**.

4. Applying the principles:

21 The question, then, is whether the Policy is inconsistent with **WCA**. The appellant's position, in effect, is that **WCA** requires that the broad discretion in s. 112 be exercised on a case-by-case basis, unfettered by binding policies such as section 3 of Policy 4.2.4 which imposes a cap on reimbursement for living expenses. I cannot accept this position, taking into account the following three points.

22 First, as noted, the **WCA** expressly gives the WCB authority to make policies which are binding and therefore have the force of law. This authority to make binding policies in itself shows that the legislature intended the WCB to have the ability to fetter its own decision-making discretion in some respects by making policies to be applied in all cases. I agree with the submission by the WCB that it has a broad mandate to adopt policies that contain limiting provisions provided that they are not inconsistent with the **WCA**.

23 Second, the discretion conferred on the WCB by s. 112 with respect to spending funds on vocational rehabilitation is extremely wide. It permits the WCB to spend money for broadly stated purposes but does not create any particular sort of benefit or confer any entitlement on workers to receive, or even to apply for, particular benefits. As noted earlier, this is not a discretion addressing a benefit to be paid to a particular worker, but rather it addresses certain types of expenditures for certain broad purposes.

24 Third, I do not see any inconsistency between s. 112, on the one hand, and on the other, policy 4.2.4R, section 3, which of course must be consistent with the **WCA** and regulations. Section 112 gives the WCB the power to decide how much money, if any, it will spend and, within the broadly stated purposes set out in the section, on what to spend it. As counsel for the WCB properly noted, Policy 4.2.4R, section 3, defines and sets parameters around that discretion. This, in my view, is not inconsistent with the type of discretionary expenditure authority conferred on the WCB by s.

112. Rather, when one looks at the scheme of the **WCA** as a whole, this appears to be a situation in which the legislature has chosen to leave the definition of these benefits largely to the WCB by exercising its regulation and/or policy-making powers.

25 I conclude, therefore, that section 3 of Policy 4.2.4R is authorized by s. 183 of the **WCA** and is not inconsistent with s. 112.

26 I will mention briefly some other points that were raised during the hearing of the appeal.

27 The worker submitted that the Policy limiting living allowances to $750 per month was an unreasonable and arbitrary exercise of the discretion conferred by s. 112. I cannot agree. The WCB, in my view, is entitled to decide how much, if any, money from the Accident Fund will be devoted to living allowances. While the cap it has set will be insufficient in some cases, it is not in my opinion so inadequate across the board as to be arbitrary or unreasonable in relation to a second residence.

28 The worker also submits that the amounts payable under this Policy should be revised and updated as the WCB has done with respect to other types of reimbursements. While I can certainly understand the worker's position on this point, the question of when various benefits should be reviewed and adjusted upwards is a matter for the WCB, not the Court, to decide.

29 The worker further submitted that an individual could be placed in an impossible situation because of an inadequate living allowance. The WCB under s. 113 has the power to suspend, reduce or terminate compensation if a worker fails to co-operate in the development or implementation of a rehabilitation program. The situation could arise in which a worker was given inadequate means to pursue a rehabilitation program and yet have benefits cut off for failing to do so. This point was not considered by WCAT and I am not persuaded on the record we have that this scenario is what has occurred in this case. I would simply note that, if a worker were able to demonstrate that he or she had been forced by the WCB to pursue a particular vocational rehabilitation program and yet the worker could not reasonably be expected to do so on the available resources, different legal considerations than the ones I have discussed and applied here might well be relevant.

IV. DISPOSITION:

30 I would dismiss the appeal.

T.A. CROMWELL J.A.
Concurred in:
E.A. ROSCOE J.A.
N.J. BATEMAN J.A.

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