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May 22, 2014

**Delivered by RESS, Email and Courier**

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

Dear Ms. Walli:

**Re: EB-2014-0155 – Kitchener-Wilmot Hydro Inc.**
**SEC Motion to Review and Vary Decision in EB-2013-0147**

We are counsel to Kitchener-Wilmot Hydro Inc. ("KWHI") with respect to the above-captioned matter. Pursuant to the Board's Procedural Order No.1, please find accompanying this letter KWHI's submission and Brief of Documents and Cases in this regard.

Should you have any questions or require further information, please do not hesitate to contact me.

Yours truly,

**BORDEN LADNER GERVAIS LLP**

*Original Signed by James C. Sidlofsky*

James C. Sidlofsky

cc: M. Helt, OEB Staff
K. Ritchie, OEB Staff
J. Van Ooteghem, KWHI
M. Nanninga, KWHI
Parties of record in EB-2013-0147

TOR01: 5600019: v1

**EB-2014-0155**

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

**AND IN THE MATTER OF** an application by Kitchener Wilmot Hydro Inc. for an order approving or fixing just and reasonable distribution rates effective January 1, 2014.

**AND IN THE MATTER OF** a Motion to Review and Vary by School Energy Coalition pursuant to the Ontario Energy Board's Rules of Practice and Procedure for a review of the Board's Decision and Order in proceeding EB-2013-0147.

# WRITTEN SUBMISSIONS OF KITCHENER-WILMOT HYDRO INC.

## DELIVERED MAY 22, 2014

## I. OVERVIEW

1. Kitchener-Wilmot Hydro Inc. ("KWHI") opposes the School Energy Coalition's ("SEC") motion to review and vary the Decision and Order in EB-2013-0147 (the "Decision") for two reasons:

(a) SEC's motion is not a proper motion to review and vary under the Rule 40 as the SEC has only raised an issue of law. The SEC does not suggest that there are errors in fact, nor does it assert a change of circumstances. In effect, SEC is attempting to re-argue the case on which it was not successful; and

(b) The Ontario Energy Board's (the "Board") Decision is reasonable. The Board did not fetter its discretion by declining to consider whether another working capital allowance ("WCA") other than the 13% used by KWHI is appropriate.

2. KWHI has had the opportunity to review the Board staff submissions dated May 21, 2014 and agrees with the Board staff that the Board did not fetter its discretion in its decision making.

KWHI has also had an opportunity to review the submissions of Energy Probe, and as discussed below, KWHI cannot agree with the Energy Probe submissions.

## II. FACTS

3. KWHI owns and operates the electricity distribution system in the City of Kitchener and the Township of Wilmot and serves approximately 90,500 customers.

4. On June 21, 2013, KWHI filed its Cost of Service Application for distribution rates effective January 1, 2014. Energy Probe, the SEC and the Vulnerable Energy Consumers Coalition ("VECC") requested and were granted Intervenor status.

5. The Settlement Conference in this proceeding concluded on November 8, 2013 with a comprehensive Partial Settlement. The following issues were outstanding:

(a) Issue 2.2: Is the WCA for the Test Year appropriate (the "WCA Issue")?

(b) Issue 4.1: Is the overall OM&A forecast for the Test Year appropriate?

6. Issue 2.2 – the WCA Issue – is the subject of this motion for leave to review or vary the Decision.

7. The evidence in the proceeding consisted of the Application, Intervenor Interrogatories and KWHI's responses to same; questions provided to KWHI prior to the Technical Conference, a Technical Conference held on October 28, 2013 and Undertakings; a Partial Settlement Proposal; and an Oral Hearing held on January 9, 2014 with Undertakings.

8. The Intervenors, including SEC, did not file any evidence.

9. The Board issued a letter on April 12, 2012 giving distributors the option to use the WCA rate of 13% or to complete a lead/lag study. Since KWHI did not do a lead/lag study, nor was it directed to do so, it utilized the 13% rate, in compliance with the OEB Filing Requirements in its Application.

10. Section 2.5.1.4 of the OEB Filing Requirements issued June 28, 2012 (Allowance for Working Capital) – corresponding to section 2.5.1.3 of the July 17, 2013 version of the Filing Requirements – stated, in part:

> In a letter dated April 12, 2012, the Board provided an update to electricity distributors and transmitters on the options established in the June 22, 2011 cost of service filing requirements for the calculation of the allowance for working capital for the 2013 rate year. The applicant may take one of two approaches for the calculation of its allowance for working capital: (1) the 13% allowance approach; or (2) the filing of a lead/lag study. (page 17)
>
> The only exception to the above requirement is if the applicant has been previously directed by the Board to undertake a lead/lag study on which its current working capital allowance is based.

11. Since KWHI was not directed to do a lead/lag study, KWHI had the choice of option (1) or option (2), and chose option (1).

12. SEC submitted that the WCA should be reduced to 9% as a result of the move to monthly billing for KWHI's Residential and GS<50kW customers, or in the alternative, that if monthly billing for KWHI's Residential and GS<50kW customers were excluded from the OM&A expenses, the WCA could remain at 13%.[1]

13. KWHI responded that it had not yet converted its Residential and GS50<kW customers to monthly billing. Moreover, KWHI did not perform a cost benefit analysis for moving its Residential and GS50<kW customers to monthly billing.[2]

14. Furthermore, KWHI submitted that in recent Board decisions[3] for Centre Wellington (EB-2012-0013), Co-operative Hydro Embrun (EB-2013-0122), and Hydro Hawkesbury (EB-2013-0139), the Board accepted the use of 13% for WCA as it is consistent with Board policy and there is no compelling reason to depart from that policy. The Board stated in these decisions

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[1] KWHI's Reply Submissions at paragraph 26; KWHI's Brief of Documents and Cases ("KWHI Brief") **Tab 1**
[2] KWHI's Reply Submissions at paragraphs 27(d), 28 and 32; KWHI Brief **Tab 1**
[3] EB-2013-0122 Co-operative Hydro Embrun, Decision and Procedural Order December 23, 2013, page 4; KWHI Brief **Tab 2**
EB-2012-0113 Centre Wellington, Decision and Order May 23, 2013, page 4; KWHI Brief **Tab 3**
EB-2013-0139 Hydro Hawkesbury, Decision and Order January 30, 2014, page 10; KWHI Brief **Tab 4**

that it was reluctant to adopt the results of a lead/lag study from one utility to another without a thorough analysis of the circumstances for each utility.[4]

15. Finally, KWHI submitted to the Board that recent decisions by the Board (Sioux Lookout EB-2012-0165, Centre Wellington EB-2012-0113, Co-operative Hydro Embrun EB-2013-0122 and Hydro Hawkesbury EB-2013-0139) support the use of the 13% WCA even with monthly billing.[5]

16. The Board issued its Decision and Order on March 20, 2014. In its Decision, the Board accepted KWHI's submission that KWHI was not required to perform and file a lead/lag study in support of its Application given the Board's letter dated April 12, 2012. The Board also decided that in the absence of a lead/lag study, it was not necessary for the Board to consider whether any WCA other than the default 13% used by KWHI is more appropriate in the Application.

## III. ISSUES AND ARGUMENT

### A. Issues

17. The two issues on this motion to review are:

(a) SEC has not met the threshold test under Rule 40.02 for this Board to hear a motion to vary; and

(b) even if SEC has met that test, there is no reason to believe that the Board fettered its discretion in its Decision.

### B. The Threshold Test Under Rule 40.02 has not been met

18. KWHI makes three submissions on this point:

(a) An error of law is not a proper ground for a motion to review or vary;

[4] KWHI Reply Submissions at paragraph 27(e); KWHI Brief **Tab 1**
[5] KWHI Reply Submissions at paragraph 37; KWHI Brief **Tab 1**

(b) An interpretation of Rule 42.01 to include errors of law would be inconsistent with section 33 of the *Ontario Energy Board Act, 1998*[6] (the "Act"); and

(c) SEC is attempting to get a second chance to convince the Board of its arguments.

***1. An error of law is not a proper ground for a motion to review or vary***

19. An error of law is not a proper subject of a motion to review or vary. SEC clearly states in its submissions that in its view the Board committed an error of law.[7] SEC does not suggest that there are errors in fact, nor does it assert a change of circumstances

20. SEC does not rely on any of the enumerated grounds for a motion to vary in Rule 42.01. Rule 42.01 provides that the notice of motion on a motion to review or vary must set out the grounds for the motion that raise a question as to the correctness of the decision, which grounds "may include (i) error in fact; (ii) change in circumstances; (iii) new facts that have arisen; or (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time."

21. The words "may include" in Rule 42.01 do not permit this Board to hear an error of law on a motion to vary. There is no inherent power for a tribunal to reconsider a decision after it has been made. After a final decision has been rendered, a tribunal is *functus officio*. It is only if an issue raised fits within the grounds provided for under Rule 42.01 can the Board hear a motion to vary.

22. The issue of whether an error of law can properly be the subject of a motion to vary was considered by the Divisional Court in *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc.,*[8] ("*Grey Highlands*"). In that case, the Municipality of Grey Highlands appealed the decision of the OEB in which the OEB declined to review a previous decision. The OEB held that a review was not warranted as Grey Highlands had not shown an error of fact and it was essentially restating the legal arguments made in its original submissions.

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[6] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15
[7] SEC's Written Submissions at paragraph 1, 23.
[8] *Grey Highlands v. Plateau Wind Inc*, 2012 ONSC 1001; KWHI Brief **Tab 5**

23. The Divisional Court disagreed with Grey Highlands that the word "may" in Rule 44.01 (today's Rule 42.01) requires the Board to consider errors of law. The Divisional Court held "this is not consistent with the plain meaning of the rule or the nature or review reconsideration process".[9]

24. The Natural Gas Electricity Review Decision ("NGEIR") relied upon by SEC is distinguishable for two reasons:

(a) the NGEIR decision has been overtaken by the Divisional Court's decision in *Grey Highlands*. Moreover, and in any event, previous decisions of a tribunal should not be regarded as binding precedent.

(b) The NGEIR decision dealt with issues of mixed fact and law – and not a pure question of law as the Board has before it in this case.[10]

***2. Right to Appeal - Section 33 of the Act***

25. To have a question of law be determined on a motion to review or vary would be inconsistent with section 33 of the *Ontario Energy Board Act, 1998*[11] (the "Act"). Section 33 of the Act provides that an appeal lies to the Divisional Court from an order of the OEB upon a question of law or jurisdiction. To have a question of law be determined on a motion to review or vary would in effect create two avenues of review or appeal for errors of law. A dissatisfied party could move to correct an error of law under Rule 44 and again appeal that decision to the Divisional Court. KWHI respectfully submits that a second opportunity to argue a case is clearly not what the Board intended in drafting its Rules of Practice and Procedure.

26. Moreover, on an appeal to the Divisional Court, the Board's decision would be granted deference as the Divisional Court would review the Board's decision on a standard of

[9] *Ibid.* at para. 8; KWHI Brief **Tab 5**
[10] *NGEIR* at page 15; KWHI Brief **Tab 6**
[11] *Ontario Energy Board Act* S.O. 1998, c. 15

reasonableness.[12] In contrast, SEC is asking on this motion to review or vary for the Board to apply a standard of correctness.[13]

### *3. A motion to vary should not be used as an opportunity for a party to re-argue a case*

27. The SEC is asking the Board to revisit its Decision and findings based on the existing record.[14] It is not asking the Board to hear new evidence. There are no new facts that would alter the Board's Decision. It is asking the Board to reconsider its Decision based on the evidence that was already before the Board.

28. Similarly, Energy Probe's submissions amount to re-arguing the points of evidence that were already before the Board at the hearing.

29. KWHI respectfully submits that SEC has not met the threshold test, and that the Board's Decision in the KWHI Application should not be reviewed.

## C. Issue 2: The Board's Decision was Reasonable

30. If the Board decides that this matter is properly subject to a motion to review or vary, then the KWHI submits that,

(a) the Board did not improperly fetter its discretion; and

(b) the Board's Decision is reasonable and should stand.

### *1. The Board did not fetter its discretion*

31. Issuing guidelines or filing requirements does not in and of itself fetter the OEB's discretion.[15] To the contrary, the courts have recognized that the use of guidelines enhances the consistency of decision-making so as to ensure that similar cases receive the same treatment. In *Thamotharem*, the Federal Court of Appeal held that

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[12] *Grey Highlands*, *supra* at para. 6; KWHI Brief **Tab 5**
[13] In its Written Submissions, SEC submits that it was "incorrect for the Board to approach the issue on a 'hierarchical basis'" (SEC Submissions at paragraph 30).
[14] SEC's Written Submissions at paragraph 34
[15] *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198; KWHI Brief **Tab 7**

> 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 procedural, evidential or substantive issues, in the performance of their functions.
>
> …
>
> 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.
>
> …
>
> Nonetheless, while agencies may issue guidelines or policy statements to structure their exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law.[16]

32. In this case, the *Filing Requirements for Electricity Distribution Rate Applications* (the "Filing Requirements") specify that "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." (page 1).

33. The SEC submissions on fettering discretion amount to an impermissible parsing of the words in the reasons of the Board and specifically the following paragraph of the reasons:

> Based on the findings 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).

[16] *Ibid.* at para. 60-62

34. On a review of a Board's decision, the reasons must be read as a whole in conjunction with the record before the Board to determine if the outcome is reasonable. [17] It is clear from this record:

(a) the Board had before it SEC's submissions on reducing the WAC to 9% as a result of the move to monthly billing;

(b) the Board was aware that no lead/lag study had been performed by KWHI, and there was therefore no analysis of the circumstances specific to KWHI; and

(c) the Board knew that the KWHI had not yet moved to monthly billing.

35. Moreover, if there is a lacuna in the reasons on this point from the Board, a court may be entitled to look at other similar decisions of the Board and its reasons in those decisions or to provide the decision-maker with the opportunity to give its own reasons for the decision.[18]

36. In recent Board Decisions[19] for Centre Wellington (EB-2012-0013), Co-operative Hydro Embrun (EB-2013-0122), and Hydro Hawkesbury (EB-2013-0139), the Board accepted the use of 13% for WCA as it is consistent with Board policy and there is no compelling reason to depart from that policy. The Board stated in these Decisions that it was reluctant to adopt the results of a lead/lag study from one utility to another without a thorough analysis of the circumstances for each utility.[20]

### *2. The Board's decision is reasonable and should not be varied*

37. While SEC is asking this Board to make new findings based on a review and consideration of the existing record, the existing record supports the reasonableness of the Board's decision. In particular,

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[17] *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 15; KWHI Brief **Tab 8**; See also paragraph 53 of *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; KWHI Brief **Tab 9**

[18] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* at para. 53-55.

[19] EB-2013-0122 Co-operative Hydro Embrun, Decision and Procedural Order December 23, 2013, page 4, KWHI Brief **Tab 2**
EB-2012-0113 Centre Wellington, Decision and Order May 23, 2013, page 4; ; KWHI Brief **Tab 3**
EB-2013-0139 Hydro Hawkesbury, Decision and Order January 30, 2014, page 10; KWHI Brief **Tab 4**

[20] KWHI Reply Submissions at paragraph 27(e); KWHI Brief **Tab 1**

(a) The Intervenor, Energy Probe, focused on one part of the equation (Service Lag) Study for the calculation of its suggested WCA for KWHI which ignored the expense leads that may be unique to KWHI. The expense leads are different for different utilities.[21]

(b) While SEC argued that the Service Lag would be reduced and that therefore the remaining elements of the working capital calculation are irrelevant, KWHI submitted that each LDC that has filed a lead/lag study has had unique expense leads and lags.[22]

38. Lastly, as noted above at paragraph 33, the Board's Decision is consistent with other decisions addressing a similar issue where the Board has stated that it is reluctant to adopt the results of a lead/lag study from one utility to another without a thorough analysis of the circumstances for each utility. No such thorough analysis was presented by the Intervenors to the Board of the lead/lag circumstances specific to KWHI or any other utilities, for that matter.

## IV. REMEDY

39. For all of the foregoing reasons, KWHI requests that the motion to review or vary the Decision be denied.

40. KWHI also notes that SEC and Energy Probe (at the time of filing, no VECC submission had been received) request awards of costs in respect of this motion. KWHI respectfully submits that in making its determination with respect to the requested cost awards of any Intervenor, the Board should consider the appropriateness of a cost award, and of the amount of an award, if any, in light of the Intervenors' reargument of submissions already considered and rejected by the Board in the original proceeding. Should the Board determine that any Intervenor is eligible for a cost award in respect of the motion, KWHI may have further submissions on the amount(s) of such award(s) once any cost claims have been filed.

[21] KWHI Reply Submissions at paragraph 29; KWHI's Brief **Tab 1**
[22] KWHI Reply Submissions at paragraph 30; KWHI's Brief **Tab 1**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF MAY, 2014**

**BORDEN LADNER GERVAIS LLP**
**Per:**

*Original Signed by James C. Sidlofsky*
James C. Sidlofsky
Counsel to Kitchener-Wilmot Hydro Inc.

**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. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for electricity distribution to be effective January 1, 2014.

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

# KITCHENER-WILMOT HYDRO INC.'S BRIEF OF DOCUMENTS AND CASES

May 21, 2014

**BORDEN LADNER GERVAIS LLP**
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Counsel for Kitchener-Wilmot Hydro Inc.

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# TAB 1

KITCHENER WILMOT HYDRO INC.
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**Jerry Van Ooteghem**
President & CEO
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February 6, 2014

**BY RESS & COURIER**

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street, 26th Floor, P.O. Box 2319
TORONTO, ON M4P 1E4

**Re: Board File No. EB-2013-0147**
**Kitchener-Wilmot Hydro Inc. – Reply Submission**

Dear Ms. Walli:

At the conclusion of the Oral Hearing held on January 9, 2014 the Board issued a directive to KWHI to submit its Reply Submission to the Board and all registered Intervenors on or before February 6, 2014. KWHI now respectfully submits its Reply Submission.

A copy of this submission has been electronically filed through the Board's RESS system. The original has been couriered to the Board's offices.

Should you require any further information or clarification of any of the above, kindly contact the writer.

Respectfully submitted,

*Original Signed by*

J. Van Ooteghem, P.Eng.
President & CEO

cc All Intervenors

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**EB-2013-0147**

**IN THE MATTER OF** the *Ontario Energy Board Act,* 1998,being 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. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for electricity distribution to be effective January 1, 2014.

# REPLY SUBMISSION OF KITCHENER-WILMOT HYDRO INC.

## FILED FEBRUARY 6, 2014

## INTRODUCTION

1. Kitchener-Wilmot Hydro Inc. ("KWHI") owns and operates the electricity distribution system in the City of Kitchener and the Township of Wilmot and serves approximately 90,500 customers.

2. On June 21, 2013, KWHI filed its Cost of Service Application for distribution rates effective January 1, 2014. Energy Probe, the School Energy Coalition ("SEC") and the Vulnerable Energy Consumers Coalition ("VECC") requested and were granted Intervenor status.

3. The evidence in this proceeding consists of the Application, Intervenor Interrogatories and KWHI's responses to same; questions provided to KWHI prior to the Technical Conference, a Technical Conference held on October 28, 2013 and Undertakings; a Partial Settlement Proposal; and an Oral Hearing held on January 9, 2014 with Undertakings. As mentioned by Mr. Van Ooteghem in his Evidence in Chief[1], KWHI may have run

[1] TR, Vol. 1, Page 19 lines 18-26

alternative scenarios for the purpose of responding to Interrogatories or Technical Conference questions but KWHI does not necessarily support these alternative approaches.

4. The Settlement Conference in this proceeding concluded on November 8, 2013 with a comprehensive Partial Settlement. The following issues are outstanding:

- Issue 2.2: Is the WCA for the Test Year appropriate?
- Issue 4.1: Is the overall OM&A forecast for the Test Year appropriate?

5. The following issue was shown as incomplete in so far as it relates to KWHI's WCA:

- Issue 1.1: – Has KWHI responded appropriately to all relevant Board directions from previous proceedings?

6. As discussed in the Settlement Proposal[2], the parties have agreed that the effective date of the rates arising out of the proposed agreement and the Board Decision on OM&A and WCA should be January 1, 2014. KWHI will calculate a rate rider for the remainder of the Test Year that will enable KWHI to refund/recover the difference between its incremental Board-approved revenue and its revenue at existing rates, for any months in 2014 in which its new rates are not in effect. KWHI will provide the appropriate calculation in conjunction with its Draft Rate Order following the Board's Decision in this proceeding. The Board's Decision on the Settlement Proposal is outstanding but KWHI understands that the Board will issue its Decision on the Settlement Proposal in conjunction with its Decision on the unsettled issues.

7. KWHI delivered its Argument-in-Chief pertaining to the outstanding issues orally on January 9, 2014 following the conclusion of the Oral Hearing. KWHI received submissions from Board staff, Energy Probe and VECC on January 23, 2014, and from SEC on January 30, 2014.

[2] Settlement Proposal, Page 5

8. Throughout this proceeding, KWHI has attempted to ensure that its evidence and responses to Interrogatories and Undertakings have been clear and that it has assisted the Board and parties in understanding both the Application and KWHI's positions on the outstanding issues.

9. KWHI repeats and relies upon the submissions in its Argument-in-Chief. KWHI offers the following submissions on the outstanding issues in reply to those of Board staff, Energy Probe, SEC and VECC.

## ISSUE 1.1: HAS KWHI RESPONDED APPROPRIATELY TO ALL RELEVANT BOARD DIRECTIONS FROM PREVIOUS PROCEEDINGS?

10. In its Argument-in-Chief, KWHI stated that it did not conduct a lead/lag study nor did the Board direct it to do so in its Decision (EB-2009-0267)[3] on KWHI's 2010 rate application. In its Decision (EB-2009-0267), dated April 7, 2010, the Board wrote:

> *"...and that the Board may initiate a generic proceeding/consultation on determining a new working capital methodology in advance of KW Hydro's next cost of service filing. In such case, the Board expects that KW Hydro will participate in such a process..."*
>
> In the same paragraph, the Board writes:
>
> *"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 would individually undertake*." (Emphasis added).

*Board Staff and Intervenor Submissions*

11. Board staff noted that KWHI was not directed to do a lead/lag study. Board staff submits that KWHI's reliance on the updated default Working Capital Allowance (WCA) factor of 13% is reasonable.

[3] EB-2009-0267, page 27

12. 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.

13. SEC asserts that KWHI was directed to do a lead/lag study.

*KWHI's Reply:*

14. The April 12, 2012 Board letter, in which the Board updates the OEB Filing Requirements for Transmission and Distribution Applications, states:

> *"The Board has reviewed the approaches to the calculation of WCA and will not require distributors to file lead/lag studies for 2013 rates, unless they are required to do so as a result of a previous Board Decision."*

15. Consistent with the observation of Board staff, KWHI submits that it was not required to file a lead/lag study as a result of its previous Board Decision (EB-2009-0267)[4].

16. The Board letter that was issued on April 12, 2012 gave distributors the option to use the WCA rate of 13% or to complete a lead/lag study. Since KWHI did not do a lead/lag study, nor was it directed to do so, it utilized the 13% rate, in compliance with the OEB Filing Requirements.

17. Section 2.5.1.4 of the OEB Filing Requirements issued June 28, 2012 (Allowance for Working Capital) stated:

> *"the applicant may take one of two approaches for the calculation of its allowance for working capital (1) the 13% allowance approach; or (2) the filing of a lead/lag study. The only exception to the above requirement is if the applicant has been previously directed by the Board to undertake a lead/lag study on which its current working capital allowance is based."* (Page 17)

[4] EB-2009-0267, page 27

18. Since KWHI was not directed to do a lead/lag study, KWHI had the choice of option (1) or option (2), and chose option (1).

19. The options set out above are unchanged in the most current version of the OEB Filing Requirements, issued July 17, 2013.

20. KWHI's Application, as originally filed, anticipated a move to monthly billing for its Residential and GS<50kW customers in the latter half of the 2013 Bridge Year. Had KWHI conducted a lead/lag study, KWHI submits that the results may not have been indicative of what would occur under monthly billing since the study would have been based on KWHI's current practice of bi-monthly billing.

21. It is KWHI's understanding that the Board, on its own accord, conducted a Board-led process to determine the revised WCA of 13%. To KWHI's knowledge, the Board did not solicit input from electricity distributors prior to issuing its April 12, 2012 letter. However, KWHI respectfully submits that the Board clearly turned its mind to the question of an appropriate default WCA percentage factor and, in its letter of April 12, 2012 and the subsequent amendment to the OEB Filing Requirements, reduced that value from 15% to 13%. KWHI reasonably understood that letter to mean that it was not required to complete a lead/lag study for its next Cost of Service Application. Since the OEB Filing Requirements were updated to include the WCA of 13%, as per the Board's letter, KWHI submits that its use of the 13% WCA is appropriate.

**ISSUE 2.2: IS THE WCA FOR THE TEST YEAR APPROPRIATE?**

22. In its Application, and as noted above, KWHI requested a WCA of 13% of the eligible controllable expenses including property taxes and cost of power. This request is consistent with the OEB Filing Requirements. The OEB Filing Requirements suggest one of two approaches for the calculation of the allowance for working capital – the 13% allowance approach or filing a lead/lag study. KWHI did not conduct a lead/lag study, as it

was not directed to do so by the Board and relied on the OEB Filing Requirements to set a rate.

*Board Staff and Intervenor Submissions:*

23. Board staff submits that KWHI's reliance on the updated default WCA factor of 13% is reasonable.

24. Energy Probe submits the percentage is too high because of the move to monthly billing for KWHI's Residential and GS<50kW customers.

25. VECC submits that the WCA should be no higher than London Hydro's 11.4%.

26. SEC suggests the WCA should be reduced to 9% as a result of the move to monthly billing for KWHI's Residential and GS<50kW customers or, in the alternative, that if monthly billing for KWHI's Residential and GS<50kW customers were excluded from the OM&A expenses, the WCA could remain at 13%.

*KWHI's Reply:*

27. KWHI offers the following reply submissions in this regard:

    a. KWHI filed its Application in accordance with the OEB Filing Requirements as issued on June 28, 2012 and July 17, 2013.

    b. KWHI used the results of a Board letter dated April 12, 2012 as allowed by its Decision (EB-2009-0267) in 2010.

    c. The Board has not performed another study since the letter was issued; therefore, KWHI relied on the direction of this letter, and the OEB Filing Requirements.

d. KWHI has not yet converted its Residential and GS<50kW customers to monthly billing.

e. Recent Decisions by the Board (Sioux Lookout EB-2012-0165, Centre Wellington EB-2012-0113, Co-operative Hydro Embrun EB-2013-0122 and Hydro Hawkesbury EB-2013-0139) support the use of the 13% WCA even with monthly billing.

28. KWHI did not perform a cost benefit analysis for moving its Residential and GS<50kW customers to monthly billing. KWHI's anticipated move to monthly billing for these customers was due to the following factors:

a) KWHI understood that monthly billing may be mandated by the Minister of Energy[5] in the near future; and

b) Convenience and easier budgeting for its customers due to smaller electricity bills[6], leading to higher customer satisfaction.

29. Energy Probe is focusing on one part of the equation (Service Lag) for the calculation of its suggested WCA for KWHI, which ignores Expense Leads that may be unique to KWHI. KWHI notes that the Expense Leads are different for London Hydro and Horizon Utilities. London Hydro had a PILS Lag[7] and Horizon had a PILS Lead[8]. Horizon had an Interest Lag[9] while London Hydro[10] had an Interest Lead. Without having performed a precise analysis or a thorough lead/lag study, one cannot assume what KWHI's Expense Leads will be.

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[5] TR. Vol. 1,page 49, line 8, page 52, line 26, page 53, line 3, page 114, line 22, page 118, line 6
[6] Exhibit 4, Tab 2, Schedule 2, Page 4
[7] EB-2012-0146 Exhibit 2, Appendix 2-J, page 16
[8] EB-2010-0131 Exhibit 2, Tab 4 Schedule 1, page 14
[9] EB-2010-0131 Exhibit 2, Tab 4 Schedule 1, page 14
[10] EB-2012-0146 Exhibit 2, Appendix 2-J, page 16

30. SEC argues that the Service Lag will be reduced and that the remaining elements of the working capital calculation are irrelevant. KWHI submits that each LDC that has filed a lead/lag study has had unique Expense Leads and Lags as can be shown below in Table 1:[11]

**Table 1 Expense Leads**

| LDC | File Number | Cost of Power | OM&A Expenses | PILS | Interest Expenses | Debt Retirement Charge |
|---|---|---|---|---|---|---|
| London Hydro | EB-2012-0146 | 32.12 | 15.08 | (28.76) | 47.29 | 31.33 |
| Hydro One | EB-2009-0096 | 32.67 | 22.92 | 16.51 | 52.87 | 52.87 |
| Toronto Hydro | EB-2007-0680 | 32.61 | 19.86 | 37.95 | 43.23 | 33.20 |
| Hydro Ottawa | EB-2011-0054 | 33.67 | 11.18 | (3.31) | 45.63 | 32.69 |
| Horizon | EB-2010-0131 | 32.77 | 13.74 | 34.44 | (62.74) | 28.27 |

These Expense Leads are subtracted from the Service Lag to result in net lag days. These net lag days are weighted to the related expense item to determine a WCA.

31. There is a difference of 66 days between the PILS Expense Leads of the above distributors and 115 days in Interest Expense Leads. KWHI therefore submits that the remaining elements are relevant and that each LDC is different.

32. KWHI has not yet converted its Residential and GS<50kW customers to monthly billing. While it had planned to do so, its ability to convert to monthly billing will depend in part on whether the Board's determination of its OM&A request allows it enough funds to cover the expenses associated with the transition. If KWHI does not move its Residential and GS<50kW customers to monthly billing, then any discussion or calculation of Service Lags is no longer valid and the WCA should remain at 13%.

[11] Energy Probe Compendium, pages 48(Horizon),page 50 (Hydro Ottawa), page 53 (Toronto Hydro),page 56 (Hydro One), page 59 (London Hydro)

33. Another view of WCA is the actual WCA as calculated based on information in the OEB Yearbooks. Based on information found in the OEB Yearbooks, KWHI's actual WCA for the years 2010 through 2012[12] would have been as shown below in Table 2:

**Table 2 Working Capital Allowance**

| | 2012 | 2011 | 2010 |
|---|---|---|---|
| Current Assets (1) | 61,937,740 | 64,268,511 | 67,838,721 |
| Current Liabilities (2) | 30,204,233 | 29,548,384 | 28,369,319 |
| Cost of Power (3) | 170,281,848 | 163,084,890 | 156,940,481 |
| Operations (4) | 4,821,308 | 3,258,635 | 2,824,720 |
| Maintenance (5) | 5,226,753 | 4,856,219 | 4,069,611 |
| Administration (6) | 6,779,135 | 5,492,367 | 5,376,627 |
| | | | |
| Actual Working Capital Allowance as at December 31st | 17.0% | 19.7% | 23.3% |

WCA is calculated as [(1) – (2)] / [(3) + (4) + (5) + (6)]

34. The WCA results calculated above in Table 2 are higher than the previously deemed 15% WCA that was built into KWHI's rates in its last Cost of Service[13] and higher than the 13% WCA deemed by the Board letter of April 12, 2012. KWHI notes that these figures do not include the effects of monthly billing.

35. In the Board letter of April 12, 2012, the Board stated:

*"the Board has determined that it is not appropriate for a default value for WCA to be set at a higher level that those resulting from lead/lag studies"*

36. KWHI is not requesting a higher WCA than is deemed by the Board. The deemed Board rate does not distinguish between monthly and bi-monthly billing. Since KWHI did not do a lead/lag study, it is requesting the Board's deemed rate, which was set following a Board-led study.

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[12] OEB Yearbook, 2010, page 19 and 33
OEB Yearbook, 2011, Page 19 and 33
OEB Yearbook, 2012, page 19 and 33

[13] EB-2009-0267, page 26

37. In recent Board Decisions[14] for Centre Wellington (EB-2012-0013), Co-operative Hydro Embrun (EB-2013-0122), and Hydro Hawkesbury (EB-2013-0139), the Board accepted the use of 13% for WCA as it is consistent with Board policy and there is no compelling reason to depart from that policy. The Board states in its Decisions that it is reluctant to adopt the results of a lead/lag study from one utility to another without a thorough analysis of the circumstances for each utility. All of these LDC's bill monthly.

38. KWHI respectfully submits that the information set out above clearly illustrates the importance of not simply applying the results of one utility's lead/lag study to another. In the absence of a lead/lag study for KWHI, KWHI submits that the Board's default percentage factor of 13% should be used in calculating KWHI's WCA.

39. KWHI notes that Board staff suggest[15] that a consultation or working group could be considered to conduct a more extensive and generic study on an appropriate working capital allowance for distributors moving to monthly billing. They state "*it may be appropriate to do this in about a year or so, when more distributors, including KWHI, may have converted to monthly billing and may have better information on the leads and lags of costs and revenues with this change.*" KWHI submits that this would be a more appropriate approach than the arbitrary adjustments suggested by the intervenors.

## ISSUE 4.1: IS THE OVERALL OM&A FORECAST FOR THE TEST YEAR APPROPRIATE?

40. The evidence for KWHI's OM&A claim is presented in Exhibit 4, various Interrogatories, Technical Conference questions, and Undertakings. The Evidence in Chief and Argument-in-Chief also support KWHI's claim.

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[14] EB-2013-0122 Co-operative Hydro Embrun, Decision and Procedural Order December 23, 2013, page 4
EB-2012-0113 Centre Wellington, Decision and Order May 23, 2013, page 4
EB-2013-0139 Hydro Hawkesbury, Decision and Order January 30, 2014, page 10

[15] Board Staff Submission, January 23, 2014, Page 4-5

41. KWHI has requested an overall increase in rates of 0.3%[16] or $130,436 in additional revenue. Included in this request is the OM&A request of $18,480,760.

42. The details of the various adjustments proposed by KWHI in respect of its OM&A request are noted in the Table 3 below:

**Table 3**

| Reference | Item | OM&A |
|---|---|---|
| Original Application, Exhibit 4 | | 18,523,200 |
| 4-Energy Probe-66 | Update Inflation | (11,200) |
| JT1.6 | Additional Inflation | (31,240) |
| | | 18,480,760 |

43. New initiatives that are planned or have been undertaken by KWHI in the past 4 years include monthly billing ($401,500),[17] ash tree removal ($100,000),[14] a new Human Resource Specialist ($123,099),[18] a Communications person ($98,000),[19] and Smart Meters ($352,000)[20].

*Board Staff and Intervenor Submissions*

44. Board staff asserts that proper maintenance of vegetation is the responsibility of the property owner (including municipal, provincial or federal governments in the case of trees on public property). Board staff further states that the ongoing trimming of trees is a necessary distribution activity. Board staff concludes that the expense of $100,000 for removing ash trees should be denied by the Board as the overall responsibility for removal of the ash tree is the responsibility of the owner.

[16] TR. Vol. 1, page 24, line 10
[17] Undertaking Responses, Undertaking JT1.15
[18] Exhibit 4, Appendix 2-J
[19] TR. Vol. 1 page 140, line 25
[20] Exhibit 4, Appendix 2-J

45. Board staff submits that $300,000 of the $401,500 incremental monthly billing should be removed to reflect the offsetting cost efficiencies and improved cash flow from monthly billing.

46. Energy Probe and VECC submit that an envelope approach to OM&A is appropriate. Energy Probe submits a reduction to OM&A of $1,656,138 based on an average of three methods.

47. VECC submits that an envelope approach to OM&A is appropriate. VECC proposes a reduction of OM&A in a range between $1,095,679 if KWHI's Board-Approved actuals are used, to $2,722,652 if KWHI's Actuals for 2010 is the starting point.

48. SEC also submits an envelope approach is suitable, but recognizes that KWHI is a low cost distributor. Therefore, SEC suggests removing $880,760 from the OM&A budget to reduce it to $17,600,000 and reducing the WCA to 9%. SEC also proposes returning to 2008 and to define 2008 as a typical year for KWHI.

49. An alternative position from SEC is to reduce the OM&A budget to $17,200,000 by backing out the incremental cost of monthly billing, and allow the 13% WCA to stand.

50. VECC argues that membership in the Electricity Distributors Association is largely a benefit to the municipal owners, and some costs such as MEARIE Insurance should be subject to greater scrutiny.

*KWHI's Reply:*

- **ASH TREE REMOVAL**

51. Board staff has argued that "proper maintenance of vegetation is the responsibility of the property owner (including municipal, provincial or federal governments in the case of trees on public property)." KWHI, however, has no authority to direct property owners to

remove dead ash trees. KWHI submits that under Ontario law, it is also the responsibility of the distributor to maintain the trees where the trees are found in proximity to a pole line.

52. Ontario Regulation 22/04 made under the *Electricity Act, 1998* sets out the safety standards that must be met by LDCs operating electricity distribution systems in Ontario. In general terms, subsection 4(2) of the Regulation provides that "All distribution systems and the electrical installations and electrical equipment forming part of such systems shall be designed, constructed, installed, protected, used, maintained, repaired, extended, connected and disconnected so as to reduce the probability of exposure to electrical safety hazards."

53. More particularly, Paragraph 4(3)3 establishes the following requirements for vegetation management: *"**Energized conductors** and live parts **shall be barriered such that vegetation**, equipment **or unauthorized persons do not come in contact with them** or draw arcs **under reasonably foreseeable circumstances.**"* (Emphasis added). Within the context of the Regulation, separation sufficient to prevent contact under reasonably foreseeable circumstances is considered to be an adequate barrier. Note that the Regulation requires action by the LDC regardless of who owns the land that the trees are on.

54. KWHI agrees with Board staff that ongoing tree trimming is a necessary distribution activity and KWHI submits that the removal of dead ash trees and the hazards that they pose to the safe and reliable operation of KWHI's overhead lines is a reasonable and appropriate part of this program. The Emerald Ash Borer problem has been identified as a problem in the City of Kitchener and surrounding area. The City of Kitchener plans to spend up to $6.7 million in the next 10 years to remove ash trees[21]. The $100,000 program identified by KWHI is to remove trees near pole lines that will affect the reliability and safety of its distribution system.

55. Ash tree removal is different than other tree trimming activities that are undertaken by KWHI arborists. KWHI's current tree trimming program trims branches near wires. Ash

[21] http://www.kitchener.ca/en/livinginkitchener/EAB.asp

trees pose a significant threat to poles and wires, because the roots of an ash tree give out when the tree dies, allowing the tree to fall on anything in its path. It is dangerous to cut down an already dead ash tree. Ash trees die quickly once infected. If KWHI is not proactive in mitigating this threat, KWHI will see increased pole line repair costs, increased outages and increased risk to the public. Accordingly, KWHI respectfully requests that the amount budgeted for ash tree removal not be removed from Board-approved OM&A.

- **MONTHLY BILLING**

56. KWHI submits that the $300,000 reduction that Board staff suggest removing from OM&A representing in part the benefits of monthly billing and in part because monthly billing has not commenced, is an arbitrary figure. KWHI does not know what the benefits from monthly billing are[22], if any, and any amount of benefits attributed to monthly billing is at best, speculative. As KWHI stated at the Oral Hearing, until such time as monthly billing is implemented, any benefits streaming from the implementation of monthly billing are difficult to quantify[23]. There is no evidentiary support for this $300,000 figure for the benefits of monthly billing. KWHI respectfully requests that Board allow recovery of the full forecasted cost of $401,500 for monthly billing without offsets for anticipated benefits.

57. KWHI also notes that despite the fact that monthly billing of KWHI's Residential and GS<50kW customers has not yet commenced, additional annual costs to move to monthly billing will be $499,500 per year after factoring in the most recent Canada Post announcement of significant increases in postage charges. KWHI asked for $401,500[24] for the incremental costs of monthly billing. As discussed in the Oral Hearing, these costs have changed by an estimated $98,000[25] with the recent Canada Post announcement, but these additional costs have not been incorporated into KWHI's OM&A request. KWHI is

[22] Interrogatory, October 15, 2013, 2-VECC-2, 4-Staff-20b) and 4-Energy Probe-38
[23] TR. Vol. 1 page 117, lines 7-9
[24] Undertaking, November 6, 2013, JT1.15
[25] TR. Vol. 1 page 39, line 8

prepared to absorb the additional $98,000 in postage costs related to monthly billing, but arbitrary reductions to the amount requested in respect of monthly billing will make is far more difficult for KWHI to do so. The Board staff approach would, in effect, allow KWHI only an amount equivalent to the incremental postage rate increase recently announced by Canada Post, and it will make it far more difficult to provide monthly billing to KWHI's customers in the 2014 Test Year and beyond. KWHI respectfully submits that there is no basis for this reduction in the evidence before the Board.

58. While KWHI agrees that the move to monthly billing is a benefit to the customer, arbitrary offsets that would effectively eliminate the expense on monthly billing from KWHI's revenue requirement may cause KWHI to abandon the initiative.

- **OM&A GENERAL**

59. Through the last rebasing cycle, KWHI has operated under the IRM approach. However, in the last four years; however, KWHI has or will introduce the following new programs[26] as shown in Table 4 below:

**Table 4**

| | |
|---|---|
| HR Specialist | 123,099 |
| Monthly Billing | 401,500 |
| Ash trees removal | 100,000 |
| Animal Proofing | 150,000 |
| Communications Person | 98,000 |
| Disaster Recovery | 66,000 |
| Smart Meter | 352,000 |
| | 1,290,599 |

60. KWHI added a new transformer station in 2010 with it becoming fully operational in 2011. As can be seen by Appendix 2-G, the operating costs on one transformer station can be estimated as:

[26] Exhibit 4, Appendix 2-J, Evidence in Chief

**Table 5**

| OEB Account | Description | 2010 | 2014 | Cost of one station 2010 | Cost of one station 2014 |
|---|---|---|---|---|---|
| 5014 | Transformer Station Equipment - Operation Labour | 281,354 | 294,700 | 40,000 | 37,000 |
| 5015 | Transformer Station Equipment - Operation Supplies and Expenses | 553,544 | 647,500 | 79,000 | 81,000 |
| | | 834,898 | 942,200 | 119,000 | 118,000 |

61. During the first year of operations, the new transformer station would incur minimal costs for maintenance. To calculate the estimated maintenance costs of one transformer station, using the information in Appendix 2-G, the estimated cost of maintaining one transformer station is calculated as:

**Table 6**

| OEB Account | Description | 2011 | 2014 | Cost of one station 2011 | Cost of one station 2014 |
|---|---|---|---|---|---|
| 5110 | Maintenance of Buildings and Fixtures - Distribution Stations | 149,303 | 183,000 | 21,000 | 23,000 |
| 5112 | Maintenance of Transformer Station Equipment | 579,330 | 748,100 | 83,000 | 94,000 |
| | | | | 104,000 | 117,000 |

62. In the last rebasing cycle, KWHI has completed the construction of one transformer station and has incurred additional costs related to the operation and maintenance of this station. Although KWHI does not measure the costs of operating and maintaining one transformer station separately, KWHI estimates the annual cost of maintaining an additional transformer station to be approximately $220,000 per year. The operating and maintenance costs for the new transformer station are fully incremental to KWHI's 2010 Board-approved revenue requirement. As discussed below in paragraph 76, KWHI's construction and ownership of the transformer stations adds to the OM&A costs, but results in significant savings to KWHI's customers on retail transmission service rates.

63. KWHI understands that in previous of Cost of Service applications, the Board has applied a formula for OM&A that uses factors for inflation, customer growth and productivity/stretch factor. As Mr. Van Ooteghem noted in his Evidence-in-Chief[27], during the last rebasing cycle, KWHI has faced unprecedented increases to its operating costs that far exceed the formula of inflation plus growth. KWHI lists a few of those

[27] TR. Vol. 1, page 29, lines 17-21

incremental costs below, but note that Table 7[28] is not exhaustive. Many other costs have increased at a rate that exceeds the rate of inflation, but the individual costs are not material. Taken together they become significant costs to the utility.

**Table 7**

| | 2014 Test | 2010 Actual | Increase | % Increase |
|---|---|---|---|---|
| Insurance | 524,100 | 328,614 | 195,486 | 59% |
| OMERS | 986,207 | 558,195 | 428,012 | 77% |
| Rebasing Costs (Amortized over 4 years) | 68,125 | 40,515 | 27,611 | 68% |
| | 1,578,432 | 927,323 | 651,109 | 70% |

64. The costs shown above in Table 7 are third party costs over which KWHI has no control. If these third party costs increased by 2.67%[29] per year, the 2014 cost would be $1,030,399. The 2014 forecasted costs are, however, $1,578,432, representing an excess cost of $548,033 as shown in Table 8 below. These excess costs continue to increase at rates higher than inflation, and during the IRM period, KWHI must find internal efficiencies in order to continue to operate profitably while also providing a reliable and safe power supply to its customers.

**Table 8**

| | 2010 Actual | Assumed 2014 Test at 2.67% / year | 2014 Test | Excess costs |
|---|---|---|---|---|
| Insurance | 328,614 | 365,141 | 524,100 | 158,959 |
| OMERS | 558,195 | 620,240 | 986,207 | 365,967 |
| Regulatory Costs | 40,515 | 45,018 | 68,125 | 23,107 |
| | 927,323 | 1,030,399 | 1,578,432 | 548,033 |

65. Based on the discussions above, KWHI is facing three distinct cost pressures:

[28] Insurance costs from Appendix 2-G, OEB accounts 5635 & 5640
OMERS costs from Exhibit 4, Tab 4, Schedule 1, Page 11 – less 35% burdened to capital
Regulatory costs from Exhibit 4, Appendix 2-M
[29] Energy Probe Argument, Page 14, Table 4

a. Increases beyond the rate of inflation (i.e. OMERS, Insurance, Regulatory)
b. Increases for new programs (i.e. monthly billing, smart meters, HR specialist)
c. Increases due to additional operating pressures (i.e. new transformer station)

66. 2010 was an unusually low year for OM&A costs due to labour resources being diverted from OM&A to capital projects[30]. As stated by KWHI in its Evidence-in-Chief, it is difficult for KWHI to determine a "typical year"[31] in terms of OM&A. KWHI's 2010 Board approved OM&A was different from its actual results due to the diversion of resources to capital projects, retirements, and the collection of bad debts. When KWHI budgets for a Test Year, the expectation is that the Test Year will be typical. Accordingly, KWHI suggests that it would be appropriate to consider the 2010 Board Approved values as representing a typical year.

67. If KWHI assumes that Board Approved amounts from 2010 represent a typical year, and uses the escalator factor as calculated by Energy Probe in its Argument[32] of 2.67% and then factors in additional costs pressures in excess of inflation, additional operating costs and the addition of new programs, the total is as presented in Table 9 below:

**Table 9**

| | | |
|---|---|---|
| 2010 Board Approved | 13,881,502 | From EB-2009-0267 |
| Inflation/Growth/Productivity | 1,542,984 | From Energy Probe Argument Pg 14 Table 4 |
| Transition costs - OLD GAAP to NEW GAAP | 1,692,337 | from 4-Energy Probe 68 |
| Cost Pressures in excess of inflation: | 548,033 | Table 7 |
| New Operating Costs | 220,000 | Additional Transformer Station |
| New Programs | 1,290,599 | Table 5 |
| | 19,175,455 | |

68. KWHI has requested $18,480,760 for the 2014 Test Year, almost $700,000 less than would be suggested by the Table 9 above. Put another way, KWHI is able to add several new programs ($1,290,599); address cost pressures in excess of inflation ($548,033); and operate an additional transformer station ($220,000) with an OM&A request in the

[30] TR. Vol. 1, page 25, line 2
[31] TR. Vol. 1, page 24, line 26
[32] Energy Probe Argument, Table 4, page 14

Application that is lower than that which would result from the use of a formulaic approach. KWHI respectfully submits that this is because it is an efficient operator. The OM&A request contained in this Application provides the funds needed for the continued safe and reliable operation of the KWHI's distribution system and the addition of appropriate new programs with minimal bill impacts.

69. KWHI respectfully submits that using actual dollars from a specific year as a starting point for applying the envelope approach does not recognize the variations in each year. SEC used the year 2008. VECC used 2010. KWHI would argue that a "typical year" is hard to find in a LDC, due to such factors as weather, capital projects and mandated programs, and for the reasons discussed during the Oral Hearing, it is particularly difficult for KWHI to determine a "typical year." Maintenance schedules are cyclical in nature, and can have variations year over year. When forecasting for a Test Year, KWHI plans for a "typical" one.

70. The formulaic envelope approach also does not recognize when an LDC needs to play catch up. As an example, most LDCs of KWHI's size have had Human Resource departments for years. KWHI recently added this important resource to its staff complement. KWHI has also only recently implemented a Disaster Recovery Program, an additional expense of $66,000, the cost of which was found through KWHI's internally generated efficiencies.

71. The envelope approach assumes that each LDC is operating in an environment where it is assumed that all LDCs are operating with the same in terms of programs, operations and efficiencies. This is not true as KWHI owns and operates all of its transformer stations. Further, KWHI did not have a Human Resource department until 2012. KWHI is a low cost distributor as demonstrated by having the third lowest OM&A cost per customer[33]. The envelope approach assumes that all LDCs begin evenly in terms of efficiencies and

[33] 2012 OEB Yearbook, pages 69-81

have similar amounts that can be trimmed from their OM&A without affecting the safety and reliability of their operations.

72. The current formulaic approach considers only the costs incurred by the LDC and gives no weight to additional pressures faced by the utility or the efficiencies already gained. As an example, KWHI has faced increases in some of its OM&A costs in excess of 70%. Further, it has incurred the costs of operating an additional transformer station and smart meters. These costs alone are greater than the stretch factor applied to KWHI's distribution revenue requirement. By applying a stretch factor on a general envelope, there is no recognition of the cost savings already achieved, nor room for additional programs. The envelope approach further does not allow utilities to expand current programs while continuing to maintain the reliability and safety of the current distribution system.

73. For the above reasons, applying a formula to a base year actual and expecting a utility to operate and maintain its system within that envelope, does not give recognition to the individual cost pressures faced by a utility, particularly a low cost, high performing one. The envelope approach does not give the LDC the flexibility to undertake additional programs that would increase benefits to its customers (i.e. monthly billing or additional vegetation management) or mandated programs (i.e. Smart Meters and Ontario One Call).

74. In order to calculate the OM&A cost per customer, KWHI relies on the information contained in the OEB Yearbook. The source of the information in the OEB Yearbook is distributors' RRR filings.

75. KWHI has the third lowest OM&A per customer in 2012 at $189.02[34]. Using the 2014 proposed OM&A of $18,480,760 and the year-end customer count projected for 2014 of 91,353[35], KWHI's OM&A per customer will be $202.29. Comparing this $202.29 per customer for 2014 to the 2012 OEB OM&A per customer yearbook numbers for all LDCs,

[34] 2012 OEB Yearbook, page 77
[35] Exhibit 3 Tab 1, Schedule 4, Page 13, Table 3-22

KWHI would still be the 5th lowest LDC in the province. KWHI's increase in OM&A per customer would be 7% from 2012, or an average of 3.5% per year. It should be noted that KWHI's customer growth for this same period is 1.5%[36]

76. KWHI's OM&A per customer in 2012 includes $18.87 per customer for operating eight transformer stations. As mentioned during the Oral Hearing[37], KWHI is one of the few LDCs that owns and operates transformer stations for its customers. For KWHI the full cost of the high voltage transformation is included in the distribution OM&A amount which is reflected in KWHI's distribution rates. For other LDC's this cost is included in their retail transmission service rates for connection. As a result, in a case where an LDC is similar in size to KWHI their OM&A would not include the cost of service for high voltage transformers but their retail transmission rates for connection would include around $6.8 million more in costs as this represents the annual savings resulting from KWHI owning the high voltage transformers. KWHI notes that it has maintained its low OM&A costs even though the cost of operating its eight transformer stations – a cost that other LDCs do not have – is embedded in its OM&A. These represent significant costs for which KWHI has, in essence, been penalized when being compared to other LDCs in the Province of Ontario – notwithstanding this, though, KWHI has maintained its position as a low cost performer due to its continual drive for finding internal efficiencies. The approval of KWHI's OM&A as requested will not change this status nor KWHI's continual drive to achieve efficiencies.

77. KWHI OM&A per customer in 2012 also reflects the Smart Meter Decision (EB-2012-0288) and the change in accounting estimates. Per customer these amounts were $12.18 and $19.01 respectively. Removing these amounts from the published $189.02 per customer results in an amount of $157.84 per customer. KWHI's OM&A per customer in 2011 was $154.69[38]. The increase is $3.15 or 2.0% for the year.

[36] Settlement Proposal, Table 3-1, page 64
[37] TR. Vol. 1, page 22, lines 8-20
[38] 2011 OEB Yearbook, page 75

78. KWHI is proud of its standing among its peers. KWHI has had this high standing since the OEB began comparing LDC's for the purpose of stretch factor assignment. KWHI submits that it has significant cost pressures that it has, for the most part, successfully been able to bear but that the formulaic envelope approach is not appropriate for this LDC. KWHI has had a high ranking when compared to its peers year over year and this demonstrates that KWHI has only limited capabilities when it comes to driving further efficiencies. Since it is already working efficiently, there are fewer places where costs can be reduced without affecting the safety and reliability of KWHI's system. KWHI will continue to drive efficiencies where it can find them; however, when uncontrollable base costs are increasing faster than the rate of inflation plus growth less a productivity factor, KWHI has only limited capacity to keep its OM&A as low as the above factor would calculate.

- **EDA AND MEARIE**

79. KWHI submits that membership in the EDA provides benefits for LDCs that are not just for the benefit of the shareholder. Members are provided with up to date analyses of legislation and market rules, networking opportunities, and advocacy and representation in the legislative and regulatory environment. This allows distributors to have superior knowledge and to respond timely to regulatory matters, including better Cost of Service Applications, lightening the load for both Intervenors and the Board. As Mr. Van Ooteghem said[39]

*"If we had to do that ourselves individually, we could not afford to do that. We don't have the staff to do it, to participate, and this is a cost-effective way for us to participate and give our views and inputs on some of these proceedings."*

80. With respect to MEARIE, the MEARIE Group is the only Canadian insurance supplier dedicated to the electricity distribution sector. It offers comprehensive product coverage not readily available in the commercial market. Rates are reflective of member experience and not pooled with other industries.

[39] TR Vol. 1, page 108, lines 20-24

81. The driver of the cost increase in the insurance premiums is the adjustment to the Total Insured Value (TIV). As the TIV increases, so too do the premiums. KWHI's TIV increased by $72 million since 2009 or 89%. The premiums have increased by 67%.[40] Note that KWHI was underinsured in 2010, which could have resulted in significant bill impacts to its customers in the case of a severe event.

82. KWHI respectfully submits that there is no basis for the additional scrutiny advocated by VECC in this proceeding. The expenses related to the EDA and MEARIE are substantiated in the evidence, the insurance expenditures allow for the adequate protection of the utility's assets, and EDA membership assists in the efficient operation of the utility (including its economically efficient operation). These expenses are routinely allowed by the Board as part of OM&A and KWHI respectfully submits that if the Board were to determine that further consideration is warranted (KWHI submits that it is not), this proceeding is not the appropriate forum. Matters such as those being raised by VECC may affect the entire distribution sector and it would be entirely inappropriate to consider VECC's assertions in the context of a single Cost of Service proceeding.

- **FORECASTS**

83. Energy Probe submitted that KWHI's costs increased from November 2012 to November 2013 by 1.6% and suggests that 2013 expenses will therefore be 1.6% higher than 2012. KWHI disagrees with this as there are many year-end adjustments. These include, but are not limited to, true-ups of payroll burdens, accruals of year-end expenses, and account reconciliations.

84. KWHI uses a bottom up approach to budgeting; however, the entire budget (both Capital and OM&A) must pass the scrutiny of the CEO[41] and KWHI's Board of Directors. Senior managers are given guidance as to how much of a percentage increase to expect. In 2014,

[40] Undertaking JT1.18, November 6, 2013, page 27
[41] TR. Vol. 1, page 150, lines16-17

this percentage was set at 2%[42]. Each manager budgets for the controllable costs relevant to their department. Some maintenance programs are cyclical in nature, so costs vary year over year. Costs that are beyond the control of the managers, such as payroll burdens are planned for by the Accounting department.

85. Energy Probe submits that in KWHI's Decision and Order (EB-2009-0267) dated April 7, 2010 the Board stated:

> *"The Board finds it useful to look at OM&A levels from a number of perspectives: the specifics of the test year forecast; trends in spending over time, expectations for inflation and economic conditions; and comparisons with other distributors."*

86. Energy Probe concurred with the comments, and then qualified this by saying it was not possible to compare the specific spending forecast for the Test Year to the years prior to 2012 due to accounting changes and the Smart Meter Decision (EB-2012-0288).

87. KWHI submits that this is possible and points to its completed version of the Board's Appendix 2-G, filed in its original Application. That Appendix contains a line by line comparison year over year. As stated by Ms. Nanninga[43], Appendix 2-G is very helpful at the account level detail. Appendix 2-G details specifically where increases have occurred.

88. Since a line by line comparison can be done at an account level, one can see where cost pressures have been faced by KWHI and where the forecasted increases are expected to occur. KWHI has explained these forecasted increases in the evidence in this proceeding.

89. It can be seen that even with accounting changes and the Smart Meter Decision (EB-2012-0288), some business units have minimal increases or decreases to expenses (i.e. OEB Accounts 5016 and 5075), some accounts have larger increases explained by new programs (i.e. OEB Accounts 5315 and 5320 – monthly billing) and some have very large increases (i.e. OEB Accounts 5635 and 5640 – Insurance increases).

[42] TR. Vol. 1, page 20, line 4
[43] TR. Vol. 1, page 2,1 lines 10-11

90. KWHI has been very successful at maintaining its costs within its budget for the year which is adjusted in Q4. KWHI incurs a disproportionate amount of OM&A expenses in the final quarter of the year and notes that the actual year to date numbers incurred by KWHI may not be an indicator of what the final year end actual numbers will be.

## CONCLUSION

91. KWHI submits that the WCA requested is reasonable, follows Board Policy, and therefore should be approved at 13% as submitted.

92. KWHI submits that its requested OM&A, in the amount of $18,480,760, is just and reasonable, and requests that the Board approve this value and direct KWHI to prepare a draft Rate Order that implements the requested OM&A into the rate model.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF FEBRUARY, 2014.

Jerry Van Ooteghem. P. Eng

President and CEO
Kitchener-Wilmot Hydro Inc.

# TAB 2

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

**EB-2013-0122**

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

**AND IN THE MATTER OF** an application by Cooperative Hydro Embrun Inc. for an order approving just and reasonable rates and other charges, to be effective January 1, 2014.

**BEFORE:** Paula Conboy
Presiding Member

Allison Duff
Member

**DECISION AND ORDER**
**December 23, 2013**

Cooperative Hydro Embrun Inc. ("CHEI") filed a complete application with the Ontario Energy Board ("Board") on June 14, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to the rates that CHEI charges for electricity distribution, to be effective January 1, 2014. The Board issued a Notice of Application and Hearing dated June 28, 2013.

CHEI is a licensed electricity distributor serving approximately 2,000 customers in the Town of Embrun. CHEI's initial application included a requested revenue requirement of $838,798. If the company's application were accepted in full by the Board, the impact on the bill of a typical residential customer would be an increase of about $3.03 per month.

The Board conducted a written hearing. The Vulnerable Energy Consumers Coalition ("VECC") applied for and received intervenor status and cost eligibility. No letters of comments were received. The hearing process included the filing of additional evidence and interrogatories. Board staff and VECC filed submissions on November 13 and 15, 2013 respectively. CHEI filed its reply submission on December 3, 2013.

While the Board has considered the entire record in this proceeding, it has made reference only to such evidence as is necessary to provide context to its findings. The following issues are addressed in this Decision and Order:

- Alignment of Rate Year with Fiscal Year and Effective Date for Rates;
- Capital Expenditures;
- Rate Base;
- Working Capital Allowance;
- Green Energy Act Plan;
- Operating Revenues;
- Operating Expenses;
- Cost of Capital;
- Cost Allocation;
- Rate Design; and
- Deferral and Variance Accounts.

**Alignment of Rate Year with Fiscal Year and Effective Date for Rates**

CHEI requested a fiscal rate year alignment to January 1, in order to reduce administrative and accounting cost burdens, improve budget planning and align rates with costs. The Board approves CHEI's request.

VECC had no issue with this proposal other than submitting that CHEI's rates should become effective the later of January 1, 2014 or the earliest date of implementation after the Board's order. VECC submitted that no retroactivity should be granted in the event that CHEI is unable to implement rates by January 1, 2014 due to the length of this proceeding. Board staff made no submission on this matter.

The Board will permit CHEI to recover any foregone revenue should implementation of final rates not be possible by January 1, 2014. The Board finds that the length of this proceeding has not been prolonged by any actions of CHEI.

**Capital Expenditures**

CHEI proposed a budget of $474,595 for capital projects in 2014 (net of $160,000 in capital contributions). Approximately $400,000 of the capital expenditures is related to a new subdivision consisting of four housing developments which will serve 250 customers. CHEI indicated that both the municipality and the subdivision developer confirmed that the subdivision will be in service by the end of 2014.

VECC submitted that while CHEI indicated the subdivision, with the 250 units, would be in service by the end of 2014, CHEI forecast only 200 customers to be energized in 2014. VECC concluded that CHEI's capital budget should be reduced by 50 units, or $60,000.

The Board approves CHEI's 2014 capital expenditures of $474,595. The Board recognizes that small changes to a utility of Embrun's size can have a material impact on capital and operating costs. There is little dispute that the four housing projects will materialize in the near term. The Board finds the cost of a subsequent application to include the 50 units in rate base is not justified given these units may be energized early in 2015.

**Rate Base**

CHEI's forecast for 2014 rate base is $2,885,590 based on CGAAP, representing an increase of 19.4% over 2012 actual. CHEI filed an Asset Management Plan and Stantec Study, which evaluated the acceptability of CHEI's system with current and future load growth.

Board staff submitted that CHEI had extensively documented the condition of its assets and the program to address the required capital expenditures in the next 10 years.

The Board accepts the proposed rate base of $2,885,590 for 2014.

**Working Capital Allowance**

CHEI proposed to use the Board's default 13% working capital allowance as set out in the Filing Requirements for Transmission and Distribution Applications. Board staff supported CHEI's 13% proposal.

VECC disagreed with CHEI's proposed 13% allowance and submitted a 12% allowance was more appropriate. VECC indicated that CHEI had migrated from bi-monthly to

monthly billing in 2011 which should decrease its need for working capital. In support of its proposal, VECC referenced a lead-lag study which resulted in a working capital requirement near 11% for London Hydro, which also bills monthly. VECC argued it was incorrect for distributors to use an arbitrary proxy when tested evidence from actual lead-lag studies was available.

In reply submission, CHEI opposed VECC's proposal. CHEI indicated that it was arbitrary to reduce its working capital allowance in the absence of its own study or consultation process.

The Board has been clear that an applicant may take one of two approaches for the calculation of its allowance for working capital: (1) the 13% allowance approach based on its findings in a generic consultation; or (2) the filing of a lead/lag study. The Board finds no compelling reason to depart from the policy at this time. The Board is reluctant to adopt the results of a lead-lag study from one utility to another without a thorough analysis of the circumstances for each utility.

**Green Energy Act Plan**

CHEI requested approval of its Green Energy Plan (the "Plan"). CHEI did not propose to connect any generators under the FIT program, undertake any new capital investments or OM&A expenditures during the term of the Plan. CHEI sought an exemption from the filing requirement that a distributor must submit its Green Energy Plan to the Ontario Power Authority (the "OPA") for comment prior to filing the plan with the Board. Given the absence of any forecast connections, CHEI did not consider an OPA review to be warranted.

Board staff submitted the Plan appeared reasonable yet noted that submission to OPA was still required. In the absence of an OPA review, Board staff submitted the Board has no way of confirming whether the assumptions in CHEI's Plan are reasonable. Board staff submitted that the Board should not grant CHEI an exemption and should not approve CHEI's Plan.

VECC submitted that despite the non contentious nature of the Plan, CHEI should still be required to submit the Plan to the OPA and share any findings as part of the draft Rate Order process. If CHEI was unable to obtain a timely response from the OPA, it would bear the risk of having the implementation date for its 2014 rates delayed.

In reply submission, CHEI agreed to file its Plan with the OPA and to file the OPA correspondence when it becomes available. CHEI indicated that the OPA requires a minimum of 30 days to review and approve a Green Energy Plan.

The Board directs CHEI to file its Plan with the OPA and to file a copy of the OPA's response with the Board. The Board trusts CHEI to complete these tasks in a timely fashion but will not delay the implementation date for CHEI's 2014 rates.

## Operating Revenues

*Customer Forecast*

CHEI forecast 2,198 customers for 2014 based on a year-end customer count. The following table provides CHEI's actual 2012, forecast 2013 and 2014 year-end customer numbers.

**Table 1: Number of Year-End Customers**

| Customer Rate Class | 2012 Actual | 2013 Bridge Year | 2014 Test Year |
|---|---|---|---|
| Residential | 1,788 | 1,798 | 1,998 |
| GS<50 kW | 157 | 160 | 168 |
| GS>50 kW | 11 | 11 | 11 |
| Street Lighting (connections) | 1 (409) | 1 (415) | 1 (425) |
| Unmetered Scattered Load | 19 | 20 | 20 |
| **Total** | **1,976** | **1,990** | **2,198** |

VECC submitted CHEI's 2014 forecast customer counts were reasonable and should be adopted by the Board. However, VECC highlighted a discrepancy of 50 customers in CHEI's forecast of new residential customers and the associated capital budget for the new residential subdivisions.

**Table 2: 2014 Capital Expenditures for Subdivision**

| | |
|---|---|
| PATENAUDE SUBDIVISION (100 UNITS) | $ 120 000.00 |
| BRISSON PROJECT OLIGO (50 UNITS) | $ 60 000.00 |
| DOMAINE VERSAILLE PHASE (50 UNITS) | $ 60 000.00 |
| MAURICE LEMIEUX NEW YORK CENTRAL PROJECT (50 UNITS) | $ 60 000.00 |

Board staff had no concerns with the 2014 customer forecast, yet noted that CHEI had proposed to use the year-end number of customers for its load forecast, revenue forecast, cost allocation and rate design, rather than the average number of customers. Board staff submitted that CHEI's year-end approach was justified because it was a better reflection of CHEI's customer and volumetric composition entering into the price cap regime, contemplated in the *Renewed Regulatory Framework for Electricity Distributors*.

In reply submission, CHEI reiterated its rationale for the forecast of 200 residential customers and submitted the forecast was intrinsically linked to its 2014 capital investment. "CHEI submits that the forecasted customers along with their related capital expenditures and forecasted load should remain in the application".

The Board agrees with CHEI and VECC that it is important to align customer additions with the associated capital expenditures. The Board will align these numbers to correspond to the accepted capital expenditure budget based on 250 units. This alignment results in a total forecast of 2,248 customers in 2014.

*Load Forecast*
CHEI proposed a load forecast of 31,609,564 kWh, prior to CDM adjustments. CHEI based its forecast on a multi-variant regression model. Distribution consumption was derived from purchase consumption and then allocated to each rate classes based on historic billing trends. In the application, CHEI included a CDM adjustment to its 2014 load forecast of 710,140 kWh.

Board staff did not comment on the derivation of CHEI's load forecast but submitted that CHEI's should update its CDM adjustment to 58,322 kWh to account for the impact of the 2011 and 2012 CDM programs on a net basis, rather than a gross basis of 710,140 KWh. VECC submitted the regression model developed by CHEI was reasonable and appropriate for the purpose of forecasting purchases; however noted a few areas of concern. VECC submitted that CHEI, in developing the initial purchase energy forecast, should use an economic conditions variable at the close of 2012 rather than a 10-year average. VECC proposed a load forecast of 32,636,155 kWh, higher than CHEI's proposal of 31,609,564 kWh and supported Board staff's submission for a CDM adjustment of 58,322 kWh.

In reply submission, CHEI agreed to accept a CDM adjustment of 58,322 kW.

However, CHEI submitted that VECC's proposal to use year-end 2012 variable may be short-sighted given the fact that the federal government is forecasting more job-cuts in Ottawa.

The Board accepts CHEI's regression model and load forecast methodology but directs CHEI to update its load forecast based on a year-end customer forecast of 2,248 and adjusted by 58,322 kWh for CDM activities. CHEI should include the revised forecast in its draft Rate Order. The Board acknowledges VECC's submission regarding the economic condition inputs to the forecast, yet finds no compelling reason to adjust the load forecast any further.

**Operating Expenses**

CHEI requested approval of $556,279 in OM&A expenses for 2014, excluding taxes and amortization expenses, for an increase of 11.88% over the 2010 Board approved amount or 6.04% over the 2012 actual expenses.

Board staff did not take issue with CHEI's proposed operating expenses. Board staff submitted that CHEI has improved its ability to meet regulatory requirements, has reasonable demonstrated its ability to operate reliably by meeting and exceeding the minimum standards for all service quality indicators. VECC performed an "expected growth test" and submitted that CHEI's proposed OM&A costs were within the range expected from inflation, growth and incremental responsibility cost pressures.

The Board is satisfied that CHEI's proposed OM&A expenses are reasonable. The evidence shows that the OM&A budgets are largely based on historical spending levels as well as additional billing activities and increased ongoing expenses related to incremental smart meter costs.

**Cost of Capital**

CHEI acknowledged the Board would update the cost of capital parameters for 2014 and committed to updating its cost of capital in its draft Rate Order. Board staff and VECC had no concerns.

The Board directs CHEI to update its cost of capital as part of its draft Rate Order to reflect the cost of capital parameters issued by the Board on November 25, 2013.

## Cost Allocation

*Revenue-to-Cost Ratios*

CHEI used the latest Board approved Cost Allocation model which resulted in its GS<50, GS>50 and Unmetered Scattered Load revenue-to-cost ratios outside of the Board policy ranges. CHEI proposed to move all revenue-to-cost ratios to 100% thus eliminating cross-subsidization among classes. CHEI submitted a billing weighting factor of 1.0 for all customer rate classes was appropriate as the time, effort and cost for billing and collection did not vary across customer rate classes.

Board staff expressed concerns with the 1.0 billing weighting factor as it would require significant rebalancing of CHEI's distribution rates. However, Board staff deferred to CHEI's knowledge of its own situation and did not disagree with CHEI's proposed weighting factors. Board staff indicated the variation amongst the distribution rate impacts was attenuated by the other components of the customer's bill yet the total bill impacts would not approach the threshold at which rate impact mitigation was required. Board staff submitted that a phased-in approach over the next three years could be used to gradually adjust the revenue-to-cost ratios to 100%.

VECC noted that CHEI acknowledged that meter reading costs had not been separated out and allocated as required by the Cost Allocation model, but had been included in Account 5314, Customer Billing[1]. VECC questioned the appropriateness of CHEI's allocation of its meter reading costs, which are allocated using the unity weighting factors developed for billing and collecting. VECC submitted that the methodology is not sufficiently improved to justify moving the revenue-to-cost ratios closer to 100% than is currently required by the Report of the Board: *Review of Electricity Distribution Cost Allocation Policy*, dated March 31, 2011.

VECC submitted that the ratios of the GS<50 kW, GS>50 kW and Unmetered Scattered Load should be reduced to the upper end of the Board's respective policy range for each class over a period greater than one year. VECC also submitted in order to maintain revenue neutrality, there should be corresponding increases in the revenue-to-cost ratios for the Residential and Street Lighting classes. VECC submitted that the ratio for the Street Lighting class should be moved to the same level as the Residential rate class, and that both ratios for these classes should then be increased in tandem, subject to any rate impact considerations.

[1] Interrogatory response 7.0-VECC-32.

In its reply submission, CHEI noted that its proposal of an unusually aggressive adjustment is due to the fact that rates, for most classes, are decreasing and that the revenue-to-cost ratio adjustments would not be as noticeable to the customer. CHEI had no issue with VECC's submission and the methodology proposed by VECC.

The following table displays CHEI's current and proposed revenue-to-cost ratios, as well as the Status Quo revenue-to-cost ratios per the Cost Allocation model referred to by Board staff and VECC.

**Table 3: Current and Proposed Revenue-to-Cost Ratios**

| Customer Class | 2010 Board Approved | Status Quo as per CA Model (Board staff) | Status Quo as per CA Model (VECC) | Proposed 2014 | Board Policy Ranges |
|---|---|---|---|---|---|
| Residential | 103.0 | 89.4 | 89.8 | 100.0 | 85.0 – 115.0 |
| GS<50 kW | 91.0 | 143.9 | 139.7 | 100.0 | 80.0 – 120.0 |
| GS>50 kW | 121.0 | 159.4 | 156.7 | 100.0 | 80.0 – 120.0 |
| Street Lighting | 120.0 | 83.1 | 83.1 | 100.0 | 70.0 – 120.0 |
| Unmetered Scattered Load | 120.0 | 231.7 | 231.7 | 100.0 | 80.0 – 120.0 |

The Board supports VECC's submissions that the ratios of the GS<50 kW, GS>50 kW and Unmetered Scattered Load should be reduced to the upper end of the Board's respective policy range for each class. The Board's policy is that distributors should endeavor to move their revenue-to-cost ratios closer to one if this is supported by improved cost allocations. The Board has indicated that given the data limitations in the cost allocation models, as a practical matter, there may be little difference between a revenue-to-cost ratio of near one and the theoretical ideal of one.

In order to maintain revenue neutrality, CHEI should calculate a corresponding increases in the revenue-to-cost ratios for the Residential and Street Lighting classes. The ratio for the Street Lighting class should be moved to the same level as the Residential rate class, and that both ratios for these classes should then be increased in tandem, subject to any rate impact considerations. Rate impact mitigation is not required as the total bill impact will not exceed 10% for any rate class.

## Rate Design

*Fixed/Variable Split*

CHEI proposed to move the fixed/variable split for all customer rate classes closer to a 50% fixed and 50% variable split.

**Table 4: Proposed Fixed/Variable Split**

| Class | Fixed | Variable | Rate |
|---|---|---|---|
| Residential | 49.69% | 50.31% | $14.00 |
| GS<50 kW | 50.06% | 49.94% | $21.22 |
| GS>50 kW | 55.89% | 44.11% | $235.00 |
| Unmetered Scattered Load | 52.83% | 47.17% | $9.75 |
| Street Lights | 64.18% | 35.82% | $2.25 |

Board staff submitted that CHEI's proposed 50/50 split was arbitrary. Board staff suggested it would be preferable to decrease the fixed/variable rates together by a similar percentage, rather than rebalance through the variable part of the bill. Board staff was concerned that CHEI's proposal could have a material impact on certain customers.

VECC submitted that CHEI should base its rate design on the current fixed/variable split for each customer class. VECC noted that the resulting fixed charges should all be below the respective ceilings established by the Board policy[2]. In VECC's view, accepting CHEI's proposal and associated rationale would establish a precedent that other utilities may seek to follow.

In reply submission, CHEI submitted its proposed methodology is fair and should be approved by the Board as the results are more acceptable than VECC's proposed splits.

The Board does not find the arguments to change CHEI's rate design to a 50/50 split compelling and directs CHEI to maintain its existing fixed/variable split for each customer class.

*Retail Transmission Service Rates ("RTSR")*

CHEI is a fully embedded distributor whose host is Hydro One. Pursuant to a Rate Order regarding Hydro One Networks Inc.'s application for 2014 distribution rates (EB-

[2] Exhibit 8, Tab 1, Table 2, p. 12.

2013-0141), Hydro One's Sub-Transmission adjusted rates will be effective January 1, 2014. For CHEI's 2014 rates, the Board directs CHEI to revise its RTSRs by incorporating these new Sub-Transmission rates as part of its draft Rate Order. In accordance with standard practice, Variance Accounts 1584 and 1586 will continue to be used to capture timing differences and differences in the rate paid for wholesale transmission service compared to the retail rate CHEI is authorized to charge when billing its customers.

*Low Voltage ("LV") Charges*

CHEI proposed to increase its LV rates to recover $56,000, which would result in rate increases of 23% to 36% for its rates classes.

**Table 5: Proposed Low Voltage Charges**

| Customer Class | % Allocation | $ Charges | Non-loss Adjusted Volumes | Rate |
|---|---|---|---|---|
| Residential | 70.92% | $39,717 | 21,296,520 | $0.0019 per kWh |
| GS<50 kW | 14.43% | $8,079 | 4,950,960 | $0.0016 per kWh |
| GS>50 kW | 13.54% | $7,584 | 12,372 | $0.6130 per kW |
| Unmetered Scattered Load | 0.26% | $146 | 89,554 | $0.0016 per kWh |
| Street Lighting | 0.85% | $474 | 1,001 | $0.4739 per kW |
| **Total** | **100%** | **$56,000** | **26,350,407** | |

Board staff suggested that the LV charge increase should be close to 40% across the all rate classes. VECC submitted that CHEI's proposal was reasonable for rate setting given any differences would be captured in a variance account.

The Board will allow the recovery of $56,000 of LV charges as proposed by CHEI.

*Loss Factor*

CHEI proposed a loss factor of 1.0663 based on a five-year historical average. VECC accepted CHEI's proposal for 2014 as CHEI has committed to study the issue as loss factors varied widely in the five-year period.

Board staff submitted that CHEI should confirm it is using the approved 1.0443 SFLF in its loss factor calculation. In addition, Board staff submitted that CHEI should simply use the SFLF of 1.0443 rather than the five-year average because it would apply throughout the test year and the subsequent IRM period. In reply submission, CHEI

indicated it had confirmed with Hydro One Network Inc., that the SFLF has been 1.0443 since February 2009.

The Board accepts CHEI's proposed loss factor of 1.0663 which includes the five-year average SFLF.

### Deferral and Variance Accounts

CEHI proposed to dispose of Group 1 and Group 2 Deferral and Variance Account balances as of December 31, 2012 with interest forecast to December 31, 2013. CHEI proposed to dispose of the net debit balance of $64,222 over a two-year period.

**Table 6: Group 1 and 2 Deferral and Variance Account Balances**

| Account Name | Account Number | Total Claim |
|---|---|---|
| LV Variance Account | 1550 | $21,141 |
| Smart Meter OM&A Variance Account | 1556 | $165,834 |
| Accounting Changes Under CGAAP | 1576 | $39,272 |
| RSVA – Wholesale Market Service Charge | 1580 | ($23,233) |
| RSVA – Retail Transmission Network Charge | 1584 | ($2,598) |
| RSVA – Retail Transmission Connection Charge | 1586 | $2,056 |
| RSVA – Power | 1588 | ($21,435) |
| RSVA – Global Adjustment | 1598 | ($8,133) |
| Disposition and Recovery/Refund of Regulatory Balances (2010) | 1595 | ($111,894) |
| Other Regulatory Assets – Sub-Account OEB Cost Assessments | 1508 | $593 |
| Other Regulatory Assets – Sub-Account OEB Cost Assessments | 1508 | $673 |
| LRAM Variance Account | 1568 | $1,946 |
| Total Group 1 and Group 2 Account Balances | | $64,222 |

Board staff agreed with CHEI's proposed Group 1 and Group 2 account balances and disposition period, with the exception of the balances in Accounts 1508, 1556, 1576 and 1568. VECC generally supported Board staff's submissions, making specific submissions regarding Accounts 1556 and 1576.

The Board accepts the disposal of Group 1 and 2 balances over a one-year period, subject to its findings regarding 1508, 1556, 1576 and 1568. The Board wants to be clear that these amounts reflect account balances as of December 31, 2012 with interest forecast to December 31, 2013. This means that in future applications there should be no amounts related to costs incurred prior to December 31, 2012 booked to these accounts. Any such amounts would be considered retroactive ratemaking. It is a fundamental tenet of ratemaking that rates must be set to recover future costs and not to recover past costs in relation to a period for which the rates were already set on a final basis. Once the rates (including any associated rate riders from the clearance of deferral and variance account balances) have been determined to be final by the Board, it is implicit that such rates are just and reasonable and it is therefore improper for the Board to alter the rates retroactively.

*Account 1508, Other Regulatory Assets – Sub Accounts OEB Cost Assessments and Pension Contributions*

CHEI requested disposition sub account balances of $604 and $685 in Account 1508 related to minor transactions which occurred in 2010. Board staff submitted that, even though not material, the amounts are out of period and should be denied.

In interrogatory 9-Staff-37, Board staff asked CHEI why the Board should approve these amounts given they are out of period. In response, CHEI stated that it sought and was granted approval by the Board to dispose of $5,251 in its 2010 cost of service application (EB-2009-0132). CHEI indicated the $565 relates to minor transactions which occurred in early 2010 after disposal through 2010 Board Approved rates.

The Board agrees with Board staff and denies CHEI's request to dispose $604 balance in the OEB Cost Assessments sub account or the $685 balance in the Pension Contributions sub account as these costs were incurred in 2010. In CHEI's 2010 Rate Application decision, the Board approved the disposition of deferral and variance account balances as at December 31, 2008, plus projected interest to April 30, 2010 (not December 31, 2010 as suggested by Board staff). The amounts CHEI are referring to in Account 1508 relate to minor transactions which occurred in 2010. However, the Board notes that the Accounting Procedures Handbook states that effective May 1, 2006 cost assessments and cash pension contributions amounts should not be booked to a deferral and variance account. Effective on May 1, 2006 cost assessments and cash pension contributions amounts are assumed to be included in the distribution rates for the 2006/07 rate year.

*Account 1556, Smart Meter OM&A Variance*

Through interrogatory responses, CHEI updated its evidence and proposed disposition of $165,834 in Account 1556. The $165,834 balance consisted of $80,884 in capital expenses, $21,040 in OM&A expenses, $62,035 in depreciation expenses related to smart meters and $1,875 in interest on Meter Data Management Repository ("MDM/R") expenses[3].

Board staff and VECC submitted that the costs related to these accounts were dealt with in CHEI's stand-alone smart meter application (EB-2012-0094 Decision issued July 26, 2012), in which CHEI did not include any smart meter related OM&A costs for disposition and waived its claim for operating costs in that application.

Both Board staff and VECC opposed the recovery of the $165,834 and made reference to the Board's findings in EB-2012-0094 that stated, "Going forward, no capital and operating costs for new smart meters and the operations of smart meter shall be tracked in Accounts 1555 and 1556."[4] VECC added that the disposition of the Account 1556 balance were, in any event, out of period costs.

In reply submission, CHEI clarified the $165,834 actually related to not only operating costs but included capital costs, depreciation expenses and interest. CHEI updated its proposed balance for disposition to $21,040, by excluding $62,035 in depreciation expenses, $1,874 in interest charges as it should have included the amounts in the stand alone smart meter application. In addition CHEI proposed to transfer $80,884 of capital costs to Account 1611 "Computer Software" which would increase rate base by $8,040 and the revenue requirement by $484. CHEI it interpreted its MDM/R-related costs as the responsibility of the Smart Metering Entity and therefore excluded these costs in EB-2012-0094. CHEI expected to address them in its next cost of service application.

The Board accepts that CHEI no longer wishes to recover the $62,035 in depreciation expenses. The Board also accepts CHEI's statement that since the capital and operating costs should have been included in the smart meter application, it would forego the interest charges of $1,874.

The Board will not however approve the disposition of $21,040 in operating costs or the $80,884 in capital related costs. The Board was clear in its Decision (EB-2012-0094)

[3] Reply submission, Cooperative Hydro Embrun, December 3, 2013, p. 30.
[4] EB-2012-0094, Decision and Order, Cooperative Hydro Embrun Inc.'s Smart Meter application, p. 10.

that the amounts were deemed final and no capital or operating costs for new smart meters and the operating of smart meters were to be tracked in Accounts 1555 and 1556. The time to file a motion on the Decision (EB-2012-0094) has long passed. These costs are clearly out of period and to retroactively allow their inclusion in rates would not be fair to ratepayers.

The Board notes that the capital amount of $80,884 came to light only in CHEI's reply argument. The amount has therefore not been subject to any discovery process and has not been tested on the record of this proceeding. The Board therefore has no way of knowing whether this amount is accurate, whether it is appropriately categorized as software, what the useful life and depreciation amounts are and when the asset(s) went into service. The Board therefore does not have the evidentiary basis to allow recovery of the $80,884. The Board reminds CHEI that new evidence cannot be introduced in reply as it does not allow a complete record on which the Board can make its decision.

The Board notes further that CHEI has booked the $80,833 amount into Account 1556. In its EB-2012-0094 decision the Board indicated that no capital or operating costs for new smart meters and the operating of smart meters were to be tracked in Accounts 1555 or 1556 following that proceeding. It would therefore be inappropriate for the Board to now allow the disposition of and recovery of amounts booked to these accounts.

*Account 1576, Accounting Changes under CGAAP*
Through its interrogatory responses CHEI identified a credit balance of $39,272 in Account 1576 but stated that, in accordance with Board policy, it would seek disposition in a future application once the balances were audited.

Both Board staff and VECC referenced the June 25, 2013 Board letter on Accounting Policy Changes 1575 and 1576 as well as the 2014 cost of service filing requirements requiring licensed electricity distributors to dispose the balance of Account 1576 in their 2014 rate applications.

In its reply submission, CHEI pointed out that its application was filed prior to the June 25th letter and under the 2013 of service filing requirement. CHEI also believed that the balances in Account 1576 should be audited before it is disposed.

The Board appreciates the timing of CHEI's application but directs CHEI to dispose of

the credit balance of $39,272 in Account 1576 over a two-year period, in accordance with the most recent requirements.

*Account 1568, Lost Revenue Adjustment Mechanism Variance Account ("LRAMVA")*
CHEI proposed to dispose of $1,946 in Account 1568 which includes 2011 savings persisting in 2012 and projected interest on the account balance up to December 31, 2013. In response to 4-Staff-28, CHEI indicated it would be updating its application to include a request for approval of its 2012 LRAMVA amounts related to its 2012 OPA Province-wide CDM Programs and that it plans to update its LRAMVA in its draft Rate Order.

Board staff supported a disposition of CHEI's 2011 LRAMVA balance of $1,045, which consists of 2011 CDM savings in 2011 but excludes 2011 persisting savings in 2012. Board staff noted, however, that CHEI should have updated its LRAMVA amount to include 2012 lost revenue in its interrogatory responses and that updating its LRAMVA at the time of the draft Rate Order is inappropriate as Board staff and VECC will not have had an opportunity to test the information. VECC submitted that CHEI's proposal is acceptable provided the amounts in question are not material.

The Board will permit CHEI in this circumstance, given the expected materiality of costs, to update the account balance in Account 1568 to incorporate its 2012 Final OPA Results as part of the Draft Rate Order process with disposition over a one-year period. Board staff and VECC will have an opportunity to raise any relevant concerns through their submissions on the Draft Rate Order.

*Stranded Meters*
CHEI proposed to recover a net book value of stranded meters of $42,924.

The Board accepts the proposed recovery of one year of CHEI's proposed Stranded Meter Rate Rider ("SMRR"). The Board directs CHEI to update the calculation of its SMRR in its Draft Rate Order to adjust for the depreciated amount in 2013, as outlined in interrogatory response 8.0-VECC-42 using the methodology shown at Exhibit 7, Tab7, page 28 of CHEI's application.

### Implementation

The Board has made findings in this Decision which change the 2014 revenue requirement and therefore change the distribution rates from those proposed by CHEI. In filing its draft Rate Order, the Board directs CHEI to file detailed supporting material, including all relevant calculations showing the impact of the implementation of this Decision on its proposed revenue requirements, the allocation of the approved revenue requirement to the classes and the determination of final rates and all approved rate riders, including bill impacts. Supporting documentation shall include, but not be limited to, the filing of a completed version of the Revenue Requirement Work Form Excel spreadsheet, which can be found on the Board's website.

CHEI filed its complete application on June 14, 2013 with a proposed effective date of January 1, 2014 for new rates. The Board's final Rate Order will not be issued until after the proposed effective date of January 1, 2014. The Board is therefore declaring CHEI's current approved rates interim as of January 1, 2014 pending the Board's final Rate Order on this application.

## THE BOARD ORDERS THAT

1. CHEI's current approved rates are declared interim as of January 1, 2014 pending the Board's final Rate Order on this application.

2. CHEI shall file with the Board, and shall also forward to VECC, a draft Rate Order attaching a proposed Tariff of Rates and Charges reflecting the Board's findings in this Decision within **21 days** of the date of this Decision and Order.

3. VECC and Board staff shall file any comments on the draft Rate Order with the Board and forward to CHEI within **7 days** of the filing of the draft Rate Order.

4. CHEI shall file with the Board, forward to VECC, responses to any comments on its draft Rate Order within **4 days** of the date of receipt of Board staff and intervenor comments.

## Cost Awards

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall file with the Board and forward to CHEI their respective cost claim no later than **11 days** from the date of the issuance of the final Rate Order.

2. CHEI shall file with the Board, and shall forward to VECC within **18 days** from the date of issuance of the final Rate Order any objections to the claimed costs.

3. VECC shall file with the Board and forward to CHEI any responses to any objections for cost claims within **25 days** from the date of issuance of the final Rate Order.

4. CHEI shall pay the Board's cost incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2013-0122**, be made through the Board's web portal at, https://www.pes.ontarioenergyboard.ca/eservice// and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available parties may email their document to BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

**DATED** at Toronto, December 23, 2013
**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary

# TAB 3

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

**EB-2012-0113**

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

**AND IN THE MATTER OF** an application by Centre Wellington Hydro Ltd. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2013.

**BEFORE:** Cynthia Chaplin
Presiding Member and Vice-Chair

Allison Duff
Member

# DECISION AND ORDER
**May 28, 2013**

Centre Wellington Hydro Ltd. ("CWH") filed a complete application with the Ontario Energy Board on November 16, 2012 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that CWH charges for electricity distribution, effective May 1, 2013. The Board issued a Notice of Application and Hearing on November 22, 2012.

CWH is an electricity distributor serving the Town of Fergus and the Village of Elora in the Township of Centre Wellington and has approximately 6,683 customers. Its application included a requested revenue requirement of $3,463,407. If the company's application were accepted in full by the Board, the impact on the bill of a typical household customer would be an increase of about $9.62 per month.

The Board conducted a written hearing. The Vulnerable Energy Consumers Coalition ("VECC") applied for and received intervenor status and cost eligibility. The hearing

process included interrogatories, supplemental interrogatories, and revised evidence from the company. Board staff and VECC filed submissions on April 1 and April 4, 2013, respectively. CWH filed its reply submission on April 18, 2013.

The following issues are addressed in this Decision and Order:

- Effective Date for Rates
- Capital Expenditures and Rate Base
- Operating Revenues
- Operating Expenses
- Cost of Capital
- Cost Allocation
- Rate Design
- Deferral and Variance Accounts
- Updated RRRP, WMSC and Smart Metering Entity Charges
- Implementation

**Effective Date for Rates**

CWH filed its application on October 17, 2012, but the Board determined the application was incomplete. CWH completed its application on November 16, 2012.

CWH's current rates were declared interim by the Board, pending a determination in this proceeding. CWH proposed that if a final rate order was not issued before May 1, 2013, the Board should allow recovery of any foregone incremental revenue back to an effective date of May 1, 2013. Board staff and VECC took no issue with CWH's proposed effective date of May 1, 2013.

The Board will not accept the proposal to make rates effective on May 1, 2013 or allow for recovery of any foregone revenue. CWH filed its complete application in November 2012, more than two months after the Board's target date of August 31, 2012. The target date is established to allow sufficient time to complete the proceeding and issue a final rate order before May 1, 2013. In addition, the company revised its evidence regarding the accounting method used to determine rates which added a second round of interrogatories and delayed the filing of submissions. These timing issues were within the company's control. The Board therefore concludes that it would not be appropriate to make the rates effective back to May 1. CWH's new rates will be effective July 1, 2013.

## Capital Expenditures and Rate Base

*Capital Expenditures*

CWH proposed to spend $1,876,400 on capital projects in 2013. Board staff and VECC supported this aspect of the application. The Board accepts the forecast 2013 capital expenditures.

*Incremental Capital Expenditures*

CWH indicated that it may apply for recovery of expenditures using the Incremental Capital Module ("ICM") in future years. The expenditures relate to the planned rehabilitation of additional municipal stations in 2014 and 2015. Board staff expressed concern with this proposal, and submitted that rebuild and rehabilitation should be supported through revenues from existing rates and that the ICM "should be relied upon strictly for non-discretionary incremental capital that cannot be funded through existing rates by prioritizing and pacing of the distributor's capital projects." VECC supported Board staff's submission. CWH, in its reply submission, accepted the position taken by Board staff and VECC, but reserved the right to file for an ICM for material capital projects where existing rates would not recover the forecasted cost of the project.

The Board will not comment on the eligibility of various projects for the ICM. The Board has rendered a number of ICM decisions which provide guiding principles, should CWH consider making an ICM application in the future. VECC proposed that CWH be directed to file a comprehensive capital plan in a subsequent application for future capital expenditures. The Board will not direct CWH to file a capital plan as part of this Decision. Just as the Board will not indicate now whether or not particular expenditures qualify for ICM treatment, the Board will not specify now that a comprehensive capital plan be filed to support an ICM application. The Board has developed generic capital plan requirements as part of the Renewed Regulatory Framework for Electricity ("RRFE") implementation process that will be applicable to cost of service applications filed for 2014 rates and beyond.

*Capital Contributions*

CWH forecast capital contributions of $40,900 for 2013. VECC noted that CWH significantly under forecast its capital contributions in 2012 and proposed that the 2013 forecast be increased by $32,000 to reflect historical trends. CWH disagreed with VECC's proposal. In its view, an increase in contributed capital would only be justified if there were additional capital projects that would attract contributed capital. The Board

will not make the capital contributions adjustment proposed by VECC. The variance in 2012 between forecast and actual occurred in one year and does not constitute a trend. The Board is also satisfied that the types of the capital projects that CWH has projected for 2013 are consistent with a lower level of contributions.

*Rate Base*

CWH's forecast for 2013 rate base is $11,706,804, based on CGAAP. Board staff and VECC took no issue with CWH's rate base. In reply submission, CWH sought to make an adjustment to rate base on the basis of its final 2012 audited financial statements. The Board accepts the rate base as filed and will not make an adjustment for information presented for the first time in reply argument. It is generally inappropriate in a cost of service proceeding to rely on evidence presented through submissions. Although the information arose from an audit, the material was not tested in this proceeding.

*Working Capital Allowance*

CWH proposed that its Working Capital Allowance ("WCA") be calculated using 13% of the sum of the cost of power and controllable expenses as it is Board's default rate for electricity distributors. Board staff took no issue with CWH's proposal to use the default 13%, but submitted that the draft rate order CWH should update the WCA to reflect the Board's Decision and incorporate the April 5, 2013 RPP and non-RPP prices. VECC submitted that because CWH bills customers on a monthly basis, the WCA should be determined using 12% instead of 13%. VECC pointed to a recent lead lag study by London Hydro, a utility which bills monthly, which resulted in a level of 11.4%. In addition, VECC referenced a number of settlement agreements in which the parties settled on 12%. CWH opposed VECC's proposal to use 12%.

The Board accepts CWH's proposal to use 13% as it is consistent with Board policy and there is no compelling reason to depart from that policy. VECC has proposed 12% on the basis of a lead-lag study for another utility and on the basis of several settlement agreements. In accepting settlement agreements, the Board has made it clear that there is no precedential value in the individual components of a settlement agreement. The Board recognizes that all settlements contain trade-offs. The Board is also reluctant to adopt the results of a lead-lag study from one utility to another without a thorough analysis of the circumstances for each utility. CWH shall update the WCA to reflect the Board's findings in this Decision and to reflect the April 5, 2013 commodity prices.

## Operating Revenues

*Customer Forecast*
CWH forecast the number of customers and connections by applying the geometric mean of the growth rate based on 2003-2011 actuals. The growth rates were then applied to forecast 2012 bridge and 2013 test year numbers. The customer/connection forecast was done on a class-specific basis, and the class-specific geometric mean growth rate was applied to all classes except sentinel lighting, for which customer connections were held constant. Board staff and VECC submitted that CWH's methodology was reasonable and consistent with Board policy and practice. The Board accepts the forecast of customers and connections as proposed.

*Load Forecast*
CWH used statistical regression to model consumption for the residential and GS<50 kW customer classes and a 3-year historical average to model normalized annual consumption ("NAC") for other customer classes, namely GS > 50 kW, Streetlighting, Unmetered Scattered Load and Sentinel Lighting.

CWH's statistical regression models were based on a number of explanatory variables to incorporate weather, employment and conservation and demand management ("CDM") data. Through the interrogatory process, CWH was asked by VECC to run other regression models and update data inputs to utilize the most current CDM results from 2011. In its reply submission, CWH agreed that it was appropriate to use the updated CDM inputs to determine the load forecast for the residential and GS<50kW classes. The Board accepts the residential and GS<50 kW load forecasts as proposed by VECC and accepted by CWH and Board staff.

CWH used a historical average use per customer to forecast growth rates for the other customer classes. Board staff accepted CWH's forecast while VECC did not. VECC submitted that the 2013 forecast should be based on the 2011 actual average annual consumption for each class. While highlighting the forecasted reduction for the USL class, VECC submitted that the 3-year negative trend in other classes was inconsistent with increasing employment and incorrectly incorporated post-2011 CDM program impacts. CWH responded that it was reasonable to expect the historical decline in demand to continue into 2013 in its service area and that the employment data related to the Kitchener-Waterloo-Barrie area included cities outside of CWH's service area.

The Board accepts CWH's demand forecast for the GS>50 KW, Intermediate, Sentinel, USL and Streetlighting customer classes. Employment data for the region does not provide sufficient basis to increase the load forecast for these classes. Other factors undoubtedly also influence the load level. Although the most recent year's data is an important consideration, there is no compelling reason to ignore results from the prior years. The Board concludes that CWH's approach provides a reasonable basis for forecasting load for these classes.

*The CDM Adjustment to the Load Forecast*

An adjustment for new CDM program impacts is made to the load forecast. A related amount is identified for purposes of operating the lost revenue adjustment mechanism ("LRAMVA"). CWH identified the amount of CDM savings for programs in 2011, 2012 and 2013. The data was reported by the OPA and provided on a normalized, net basis.

The company proposed that the load forecast be adjusted by 1,730,946 kWh to account for new CDM programs. Board staff and VECC did not agree with the proposed load forecast adjustments. The first year impact for CDM programs was disputed. Also, there was disagreement as to whether the adjustment should be made on a "net" or "gross" basis.

Board staff noted that CDM activities do not start on January 1st and do not generate a full 12 months of CDM results in the first year. Board staff submitted that in the absence of specific information regarding program timing, the first year of each CDM program should be adjusted using the "half-year rule". VECC agreed with Board staff. CWH responded that the half-year rule was not appropriate as it appeared to be treating the CDM programs like capital assets in that asset acquisitions are allowed 50% of the depreciation expense in the year of installation. To counter the half-year recommendation, CWH included a table that estimated the 2013 monthly impact of CDM programs persisting from previous years plus the change resulting from the 2013 programs.

The Board concludes that it is appropriate to reduce the first year CDM estimates as provided by the OPA for the 2012 and 2013 programs. Program results build over the year and are not fully realized from day one. Using the half-year approach recognizes the accumulation of impacts over the year and is consistent with other Board decisions. The Board places no weight on the monthly CDM table provided by CWH in its reply

submission. As indicated above, it is generally inappropriate in a cost of service proceeding to submit evidence through submissions.

With respect to the "net" and "gross" issue, Board staff agreed with CWH that the 2012 and 2013 CDM forecasts should be adjusted on a gross basis, in other words to include the CDM impact of "free riders". Board staff noted that recent settlement agreements for other electricity distributors were based on net results, not gross, but submitted that the net CDM numbers understate the real decline in demand: "While the utility is not compensated for free ridership through the LRAMVA, the CDM savings (i.e. reduced consumption) of free riders occur in reality and will reduce consumption." VECC submitted that the CDM adjustment should be based on the assumed net savings from the 2012 and 2013 CDM programs and not the estimated gross saving as advocated by CWH and Board staff. VECC argued that the net to gross difference does not represent additional CDM that will actually occur. VECC maintained that the individual customer class load forecasts already reflect the trends associated with natural conservation activities, activities that would have occurred without the benefit of CDM programs or incentives.

The Board agrees with VECC that the CDM savings associated with free riders and natural conservation is embedded in the historical demand data and incorporated into the demand forecast produced by the statistical regression model. The Board finds merit in VECC's submission that "natural conservation is independent of the level of CDM programming and, therefore, future levels cannot be linked to the level of CDM programming". The Board does not accept that the incremental 2012 and 2013 CDM programs will cause or be correlated with natural conservation savings over and above that already captured in the regression analysis. As a result, the Board will not accept the adjustment to the OPA's CDM program estimates by a net-to-gross factor. The CDM adjustment to the load forecast is 986,133 KWh, reflecting the full year persistence of 2012 CDM programs and the initial year impact of 2013 CDM programs on 2013 load. CWH is directed to reflect this adjustment in the load forecast used for the determination and allocation of the revenue requirement, and in the determination of the rates and rate riders in its draft Rate Order filing.

*The LRAMVA*

A CDM impact adjustment is also identified for purposes of operating the lost revenue adjustment mechanism ("LRAMVA"). CWH identified the amount of CDM savings for

programs in 2011, 2012 and 2013, and the corresponding amount used to derive the balance for the LRAMVA. The company proposed that the LRAMVA be determined using annualized "net" CDM savings of 2,288,799 kWh. Board staff and VECC supported this proposal. The Board accepts CWH's proposal for the amount, and the allocation to customer classes on a kWh and kW basis, to be used for the determination of the LRAMVA for 2013 and 2014.

*Other Revenues*

CWH forecast Other Operating Revenues of $240,938 for 2013. Board staff submitted that CWH had adequately explained and supported its proposal. VECC submitted that CWH's forecast should be increased by $20,000. In particular, VECC submitted that CWH should remove the $9,362 loss on the disposal of distribution assets as the loss will not occur under CGAAP. VECC argued that revenue offsets be increased by $9,500 as actual 2012 revenue offsets were higher than forecast. VECC also submitted that CWH had failed to forecast MicroFIT revenues of $1,400.

CWH agreed with VECC regarding the addition of the MicroFIT revenues and the removal of the $9,362 loss. However, CWH disagreed with VECC's proposal to increase non-utility revenue offsets, as the amounts related to water and sewer billing performed for the municipality that were already included in the revenue offsets. In reply submission, CWH indicated that its MS # 1 – Elora station will require replacement in 2014 and requested that the Board approve an accelerated depreciation expense of $35,055 over the existing depreciation expense of $3,790.

The Board approves CWH's Other Operating Revenue forecast with the addition of the MicroFITt revenues and the removal of the loss on disposal. The Board will not make any further changes for non-utility offsets. In addition, the Board will not allow for an accelerated depreciation expense for the MS #1 – Elora station as requested by CWH in its reply submission. As indicated previously, it is generally inappropriate in a cost of service proceeding to rely on evidence presented through submissions. The Board further notes that the replacement of the Elora MS is scheduled for 2014, outside of the 2013 test year period in this application.

## Operating Expenses

*OM&A*

CWH's forecast of operations, maintenance and administration expenses ("OM&A") is $2,250,013 for 2013. The proposed OM&A is 28.3% higher than its 2009 Board-approved OM&A. CWH's annual OM&A expenses are provided below:

| Year | 2009 Board approved | 2009 Actual | 2010 Actual | 2011 Actual | 2012 Bridge year forecast | 2013 Test Year forecast (revised) |
|---|---|---|---|---|---|---|
| OM&A | $1,753,350 | $1,708,477 | $1,758,814 | $1,976,448 | $2,278,700 | $2,250,013 |

CWH lists the drivers for the increases in OM&A as follows:

- Two new staffing positions (Systems Analyst – IT in 2011 and Financial/Regulatory Analyst in 2012) to deal with increasing work in these areas;
- Annual increases in wages, salaries and other benefits;
- Decreased meter reading costs due to automated meter reading of smart meters;
- Increase in bad debt expenses due to economic factors and changes in deposit refund policy;
- Increased regulatory expenses;
- Increased computer-related costs due to move to TOU billing;
- Increased outside services for legal, audit and consulting service, unrelated to regulatory rate-setting;
- Non-labour inflation increases estimated at Canadian CPI of 2.11% (July 2012 to October 2011);
- Change in useful lives of transportation equipment, which affects OM&A through burden rates; and
- Reduction in contracted work and re-allocation of outside crew between capital and O&M work.

Board staff took no issue with the OM&A forecast and submitted that CWH had supported the proposed increase. VECC opposed the OM&A forecast and proposed a reduction of $193,408 as an envelope reduction to OM&A. VECC derived the $193,408 reduction by constructing an "expected" OM&A level based on annual inflation of 1.9%, plus customer growth of 5.25%, minus imputed productivity savings of 0.72% and minus

efficiency savings of 0.6% for CWH's assigned cohort. The resulting OM&A for 2013 period would be $363,408 lower than proposed. From this "envelope" calculation, VECC proposed an adjustment of $170,000 to recognize the cost of incremental responsibilities for smart meter operations, and labour costs for regulatory and financial positions. VECC made a number of observations regarding other expense items but did not recommend individual reductions to the OM&A expense given its envelope reduction proposal.

In its reply submission, CWH argued that it had addressed the concerns raised by VECC in responses to interrogatories, and opposed any reduction to its OM&A forecast.

The Board considers the increase in OM&A from 2009 to 2013 to be unreasonable. The average annual increase is 8%. And although its customer base has grown, CWH's OM&A cost per customer has also increased by 6.2% on an annual average basis. The evidence shows that the OM&A budgets are largely based on historical spending levels and then increased to reflect additional activities or increased costs for ongoing activities. There is scant evidence of increased efficiency in CWH's operations. The only cost reductions have come in the area of meter reading, which are the result of smart meters. And the 2013 OM&A budget would in fact be even higher but for the shift of about $160,000 to capital expenditures. The Board expects to see evidence of efficiency improvements. The Board also expects to see a bottom up budget exercise balanced with a top down review. A "top-down" review is an important component of the assessment process as it demonstrates that some level of overall restraint has been considered, and potentially brought to bear. It is CWH's responsibility to manage its cost increases over time by prioritizing initiatives and activities. The Board finds that CWH has not demonstrated a sufficient level of control of its overall budget level, including the magnitude of the increase.

The Board finds merit in VECC's "envelope approach" to deriving an increase that reflects inflation, customer growth, productivity, and efficiency improvements. The Board accepts VECC's proposal which yields an OM&A amount of $1,886,605. The Board also accepts that CWH has incremental responsibilities and increasing cost pressures that cannot be completely met through efficiency improvements in other areas. The Board will therefore allow an additional $170,000, which is the amount identified by VECC and which represents the additional of two staff for specific roles. The Board is not approving those expenditures explicitly; rather it is accepting that amount as being reasonably representative of an appropriate level of incremental cost

over and above what would otherwise be an appropriate level of OM&A for 2013. The total OM&A budget will be $2,056,605 ($1,886.605 + $170,000). This results in an 2013 OM&A level which represents an average annual increase of 5% since 2009. The Board finds that this is a reasonable level of increase.

The Board's mandate is not to direct an applicant on how to manage its utility and therefore the Board will not comment on specific areas in which CWH should curtail OM&A spending. Rather the Board will leave it to the discretion of CWH to manage its activities within the spending envelope.

In response to a request from CWH, the Board confirms that the LEAP amount should be derived based on 0.12% of the approved Service Revenue Requirement. CWH shall update and document the LEAP expense in the draft Rate Order.

*LRAM and LRAMVA*

CWH proposed recovery of an LRAM balance of $5,997.11 and an LRAMVA balance of $15,130.95. CWH proposed to recover the amounts over a one-year period. Board staff submitted that CWH had provided all relevant rate riders by customer class, that the request was consistent with the CDM Guidelines and that the LRAMVA claim is eligible for recovery. VECC made no submission. In its reply submission, CWH stated that its total LRAM and LRAMVA amount had decreased from $21,128.06 to $10,800.85. A revised balance for the 2011 LRAMVA of $4,803.74 was discovered as part of the 2012 year-end audit.

The Board approves the disposition of the LRAM balance of $5997.11. With respect to the LRAMVA balance, the Board understands that circumstances may change and new information may come to light after the close of the evidentiary portion of the hearing. However, it is inappropriate to seek recovery of a revised amount through reply submissions. The Board has two options: to re-open the proceeding to address the new information; or reach a decision on the basis of the evidence which has been tested. Given the LRAMVA is a variance account and the balance is relatively small, the Board will not dispose of the LRAMVA balance at this time. It can be addressed in CWH's next proceeding.

## Cost of Capital

CWH proposed a cost of capital of 5.99% based on a deemed capital structure of 60% debt (56% long-term debt and 4% short-term debt) and 40% equity. CWH applied the Board's cost of capital parameters updated on February 14, 2013 with the exception of a long-term capital project loan at 4.23% from a third party, resulting in a weighted average long-term debt rate of 4.14%.

| Board's Cost of Capital Parameters | Rate |
|---|---|
| Return on Equity | 8.98% |
| Deemed Short-term Debt | 2.07% |
| Deemed Long-Term Debt | 4.12% |

Board staff submitted CWH's proposal conformed with Board policy and practice. The Board accepts CWH's cost of capital of 5.99%.

## Cost Allocation

CWH conducted a Cost Allocation study and proposed new revenue-to-cost ("R/C") ratios for its customer classes.

**Revenue-to-Cost Ratios – 2011 IRM and 2013 Proposed**

| Customer Class | Range (%) | | 2011 IRM | 2013 Cost Allocation | 2013 Proposed |
|---|---|---|---|---|---|
| | Low | High | | | |
| **Residential** | 85 | 115 | 101.70 | 97.49 | 99.65 |
| **GS < 50 kW** | 80 | 120 | 105.30 | 95.56 | 99.00 |
| **GS 50-2999 kW** | 80 | 120 | 104.70 | 90.41 | 99.65 |
| **GS 3000-4999 kW** | 80 | 120 | 87.0 | 100.96 | 100.96 |
| **Streetlighting** | 70 | 120 | 70.0 | 305.88 | 120.00 |
| **Sentinel Lighting** | 80 | 120 | 70.0 | 124.72 | 120.00 |
| **Unmetered Scattered Load** | 80 | 120 | 103.70 | 271.84 | 120.00 |

The study produced the R/C ratios in the 2013 Cost Allocation column. CWH proposed to reduce those above the "high" target rate to 120, and distribute the difference to the other classes. Board staff took no issue with the proposed R/C ratios for all customer classes. VECC submitted the cost allocation methodology was appropriate and agreed with CWH's proposal to reduce R/C ratios to the ceiling. However, VECC submitted

that any shortfall be collected by increasing the R/C ratios of the other classes to the same level.

The Board accepts CWH's proposal to move streetlighting and sentinel lighting to the top of the range (120%) and to allocate the shortfall to the remaining classes. The Board does not agree with VECC's proposal to distribute R/C shortfalls to all other classes such that all ratios for the other classes are the same. VECC provided no rationale to support why this approach would be superior to CWH's approach. In any event, the resulting range under CWH's proposal (99% to 101%) is small, so equalizing them would, in the Board's view, have a minimal impact.

## Rate Design

*Fixed/Variable Split*

CWH proposed to retain the existing fixed/variable split for all customer classes as follows:

| Customer Class | Fixed<br>% of class revenues | Volumetric<br>% | Volumetric Billing Determinant |
|---|---|---|---|
| Residential | 62.88% | 37.32% | kWh |
| GS < 50 kW | 29.52% | 70.48% | kWh |
| GS 50-2,999 kW | 19.12% | 80.88% | kW |
| GS 3,000-4,999 kW | 8.77% | 91.23% | kW |
| Streetlighting | 57.76% | 42.24% | kW |
| Sentinel Lighting | 57.54% | 42.46% | kW |
| USL | 11.17% | 88.83% | kWh |

Board staff took no issue with CWH's proposal. VECC proposed to cap the monthly service charge for the GS 50-2999 kW class at the ceiling value and maintain the monthly service charge for the GS 3000-4999 kW at the approved value as the ceiling value derived from the Cost Allocation Model was negative. CWH replied it would be inappropriate to make adjustments without a rate design analysis for all classes. CWH noted the Board has approved monthly service charge increases above the ceiling for other utilities. The Board accepts CWH's proposal to maintain the existing fixed/variable split in the absence of an updated rate design analysis.

*MicroFIT*
CWH requested an increase of the MicroFIT rate from $5.25/month to $5.40/month, in accordance with the Board's letter of September 20, 2012. No parties opposed CWH's proposal. The Board approves the MicroFIT service charge as proposed.

*Low Voltage*
CWH proposed Low Voltage ("LV") rates to recover $243,490.91 of LV charges from Hydro One. Board staff and VECC supported CWH's proposal. CWH increased its proposal to $332,775 in reply submission to recover additional rate riders from Hydro One. The Board will allow the recovery of $243,490.91 and will not increase the recovery amount as proposed by CWH in reply submission. As indicated previously, the Board will not base decisions on untested evidence presented for the first time in reply submission. Any difference will be captured in the LV variance account.

*Retail Transmission Service Rates*
CWH proposed Retail Transmission Service Rates ("RTSRs") as follows:

| Customer Class | RTSR $ | Volumetric Billing Determinant |
|---|---|---|
| Residential | 0.0018 | kWh |
| GS < 50 kW | 0.0016 | kWh |
| GS 50-2,999 kW | 0.6334 | kW |
| GS 3,000-4,999 kW | 0.7471 | kW |
| Streetlighting | 0.4897 | kW |
| Sentinel Lighting | 0.5000 | kW |
| USL | 0.0016 | kWh |

Board staff and VECC submitted the proposed rates were appropriate. The Board accepts the RTSR as proposed.

*Loss Factor*
CWH used its 5-year average loss of 3.55% from 2007 to 2011 to derive its proposed total loss factor of 1.0497 for Secondary Metered customers less than 5,000 kW of demand, an increase from the current loss factor of 1.0449. Board staff and VECC supported CWH's proposal. The Board accepts the total loss factor of 1.0497 for secondary metered customers < 5,000 kW. CWH should document the corresponding total loss factor for primary metered customers < 5,000 kW in its draft Rate Order Filing.

*Transformer Ownership Allowance*

CWH proposed to maintain the current approved Transformer Ownership Allowance credit of $0.60/kW. No parties opposed CWH's proposal. The Board accepts CWH's proposal.

## Deferral and Variance Accounts

CWH proposed a 1-year disposition period for Group 1 and Group 2 Deferral and Variance Account ("DVA") balances as at December 31, 2011. CWH requested the continuation of some of its Group 1 and Group 2 accounts, its Deferred MIFRS Transition Costs account and several new sub-accounts of Account 1595 to deal with the recovery and true-up of DVA amounts approved for disposition.

| Account Description | Account Number | Total Claim ($) |
|---|---|---|
| LV Variance Account | 1550 | 243,561 |
| RSVA – Wholesale Market Service Charge | 1580 | (348,494) |
| RSVA – Retail Transmission Network Charge | 1584 | (156,146) |
| RSVA – Retail Transmission Connection Charge | 1586 | (116,294) |
| RSVA – Power (Excluding Global Adjustment) | 1588 | (13,987) |
| RSVA – Power (Global Adjustment sub-account) | 1588 | 244,428 |
| Recovery of Regulatory Asset Balances – Shared Taxes | 1595 | (4,054) |
| **Total Group 1** | | **(150,987)** |
| | | |
| Other Regulatory Assets | 1508 | 81,797 |
| Retail Cost Variance Account – Retail | 1518 | 26,232 |
| Retail Cost Variance Account – STR | 1548 | 812 |
| RSVA – One Time | 1582 | 21,460 |
| PILs and Tax Variance – Sub-Account HST/OVAT ITCs | 1592 | (20,017) |
| **Total Group 2** | | **110,283** |
| | | |
| **Total (Group 1 and Group 2)** | | (40,703) |

Board staff and VECC agreed with CWH's proposal except for Account 1508, sub-account Deferred IFRS Transition Costs. Accounts 1555 and 1556 for Smart Meters are discussed below. The Board accepts the proposed disposition of Group 1 and Group 2 accounts subject to the Board's decisions regarding Accounts 1508 sub-account Deferred IFRS Transition Costs, discussed below. In its draft Rate Order, CWH is directed to update the DVA Continuity Schedule to reflect the Board's finding

and to calculate and propose suitable DVA rate riders taking into account the effective date of July 1, 2013 and impacts on CWH's customers.

The Board accepts CWH's request to withdraw the use and disposal of Account 1575 until it adopts IFRS.

*Account 1508 – Deferred IFRS Transition Costs*
CWH proposed a 1-year recovery period for the Deferred IFRS Transition Costs in Account 1508. Board staff submitted it was inappropriate to recover any IFRS transition costs until after CWH adopted IFRS, currently planned for January 1, 2015. Alternatively, Board staff suggested the Board dispose the sub-account balance of $75,704 on an interim basis, conditional on CWH completing its IFRS transition and after total transition costs were known. VECC supported Board staff's submission and suggested that, if the Board allowed disposition, it should limit recovery to 50% of the balance as the costs were not examined in this proceeding. In reply submission, CWH agreed to Board staff's suggestion to dispose of the balance on an interim basis.

The Board will not dispose of this account at this time, either on a final or interim basis. The Board finds that it is more appropriate to consider this account in total after the transition to IFRS has been made.

*Accounts 1555 and 1556 - Smart Meters*
CWH proposed a 4-year disposition of Accounts 1555 and 1556 related to the capital and operating costs of deploying smart meters to Residential and GS < 50 kW customers. CWH originally proposed a 2-year recovery period for both customer classes yet extended it to 4 years to ensure the total bill increase for GS < 50 kW customers did not exceed the 10% bill impact threshold.

| Rate Class | Rate ($/month) | Recovery Period | Rate ($/month) | Recovery Period |
|---|---|---|---|---|
| Residential | $1.29 | 2 years | $0.57 | 4 years |
| GS < 50 kW | $8.55 | 2 years | $4.08 | 4 years |

Smart meter conversion costs for GS > 50 kW customers are included in regular metering capital investments under Account 1860.

Board staff agreed with the 4-year recovery period for the GS < 50 kW class, yet suggested CWH maintain the 2-year period for Residential customers. VECC

supported a 4-year recovery period for GS<50 kW customers and a 2-year period for Residential customers to match the recovery period for stranded meters. In reply submission, CWH accepted Board staff's and VECC's proposal for a 2-year recovery period for the Residential SMDR.

The Board notes that authorization to procure and deploy smart meters has been done in accordance with Government regulations, including successful participation in the London Hydro RFP process, overseen by the Fairness Commissioner, to select (a) vendor(s) for the procurement and/or installation of smart meters and related systems. There is thus a significant degree of cost control discipline that distributors, including CWH, are subject to in smart meter procurement and deployment.

The Board finds that CWH's documented costs, as revised in response to interrogatories, related to smart meter procurement, installation and operation, and including costs related to TOU rate implementation, are reasonable. As such, the Board approves the recovery of the costs applied for related to smart meter deployment and operation as of December 31, 2012, and the addition of the documented smart meter assets into the 2013 test year rate base. The Board accepts the proposed recovery of 2 years for Residential customers and 4 years for GS < 50 kW customers, adjusted to 22 and 46 months respectively to reflect the implementation of rates on July 1, 2013.

In granting its approval for the historically incurred costs and the costs projected for 2012, the Board considers CWH to have completed its smart meter deployment. Going forward, no capital and operating costs for new smart meters and the operations of smart meters shall be tracked in Accounts 1555 and 1556. Instead, costs shall be recorded in regular capital and operating expense accounts (e.g. Account 1860 for meter capital costs) as is the case with other regular distribution assets and costs.

*Stranded Meters*

CWH proposed a Stranded Meter Rate Rider ("SMRR") of $0.90 per month for Residential customers and $2.79 per month for GS < 50 kW customers to recover the net book value of $175,247.80 over 2 years. Board staff and VECC agreed with CWH's proposal. The Board accepts the proposed recovery of 2 years adjusted to 22 months to reflect the implementation of rates on July 1, 2013.

## Updated RRRP, WMSC and Smart Metering Entity Charges

*Rural or Remote Electricity Rate Protection Charge*
On March 21, 2013, the Board issued a Decision with Reasons and Rate Order (EB-2013-0067) establishing that the Rural or Remote Electricity Rate Protection ("RRRP") used by rate regulated distributors to bill their customers shall be $0.0012 per kilowatt hour effective May 1, 2013. The proposed Tariff of Rates and Charges to be filed as part of the draft Rate Order should reflect this RRRP rate effective July 1, 2013.

*Wholesale Market Service Charge*
On March 21, 2013, the Board issued a Decision with Reasons and Rate Order (EB-2013-0067) establishing that the Wholesale Market Service Charge ("WMSC") used by rate-regulated distributors to bill their customers shall be $0.0044 per kilowatt hour effective May 1, 2013. The proposed Tariff of Rates and Charges to be filed as part of the draft Rate Order should reflect this WMSC rate effective July 1, 2013.

*Smart Meter Entity Charge*
On March 28, 2013, the Board issued a Decision and Order (EB-2012-0100/EB-2012-0211) establishing a Smart Metering Entity charge of $0.79 per month for Residential and General Service < 50kW customers for those distributors identified in the Board's annual *Yearbook of Electricity Distributors* effective May 1, 2013. The draft Tariff of Rates and Charges flowing from this Decision and Order should reflect the addition of this Smart Metering Entity charge effective July 1, 2013.

## Implementation

The Board has made findings in this Decision which change the 2013 revenue requirement and therefore change the distribution rates from those proposed by CWH. In filing its draft Rate Order, the Board expects CWH to file detailed supporting material, including all relevant calculations showing the impact of the implementation of this Decision on its proposed revenue requirement, the allocation of the approved revenue requirement to the classes and the determination of the final rates and all approved rate riders, including bill impacts. Supporting documentation shall include, but not be limited to, the filing of a completed version of the Revenue Requirement Work Form Excel spreadsheet which can be found on the Board's website.

A Rate Order will be issued after the steps set out below are completed.

**THE BOARD ORDERS THAT:**

1. Centre Wellington Hydro Ltd. shall file with the Board, and shall also forward to the Vulnerable Energy Consumers Coalition, a draft Rate Order attaching a proposed Tariff of Rates and Charges and other filings reflecting the Board's findings in this Decision and Order within 10 days of the date of this Decision and Order.

2. The Vulnerable Energy Consumers Coalition and Board staff shall file any comments on the draft Rate Order with the Board and forward to Centre Wellington Hydro Ltd. within 7 days of the date that Centre Wellington Hydro Ltd. files the draft Rate Order.

3. Centre Wellington Hydro Ltd. shall file with the Board and forward to the Vulnerable Energy Consumers Coalition responses to any comments on its draft Rate Order within 4 days of the date of receipt of Board staff and intervenor comments.

**Cost Awards**

The Board will issue a separate decision on cost awards once the following steps are completed:

1. The Vulnerable Energy Consumers Coalition shall submit its cost claims no later than **7 days** from the date of issuance of the final Rate Order.

2. Centre Wellington Hydro Ltd. shall file with the Board and forward to the Vulnerable Energy Consumers Coalition any objections to the claimed costs within **14 days** from the date of issuance of the final Rate Order.

3. The Vulnerable Energy Consumers Coalition shall file with the Board and forward to Centre Wellington Hydro Ltd. any responses to any objections for cost claims within **21 days** from the date of issuance of the final Rate Order.

4. Centre Wellington Hydro Ltd. shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote the file number, **EB-2012-0113**, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.
With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Keith Ritchie at keith.ritchie @ontarioenergyboard.ca and Board Counsel, Maureen Helt at maureen.helt@ontarioenergyboard.ca.

## ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

**DATED** at Toronto, May 28, 2013

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli
Board Secretary

# TAB 4

**Ontario Energy Board**
P.O. Box 2319

**Commission de l'énergie de l'Ontario**

Ontario

**EB-2013-0139**

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

**AND IN THE MATTER OF** an application by Hydro Hawkesbury Inc. for an order approving rates and other charges for the distribution of electricity to be effective January 1, 2014.

**BEFORE:** Ellen Fry
Presiding Member

Allison Duff
Member

# DECISION AND ORDER
**January 30, 2014**

Hydro Hawkesbury Inc. ("Hydro Hawkesbury") has filed an application with the Ontario Energy Board ("the Board") under section 78 of the *Ontario Energy Board Act, 1998* (the "Act") seeking approval for the rates and other charges that Hydro Hawkesbury charges for electricity distribution, to be effective January 1, 2014.

The Vulnerable Energy Consumers Coalition ("VECC") was granted intervenor status. The Board granted Hydro Hawkesbury's request not to hold a settlement conference and to proceed by written hearing. VECC and Board staff filed interrogatories and written submissions. Hydro Hawkesbury filed interrogatory responses and written submissions in addition to the evidence included in its application.

Hydro Hawkesbury originally submitted a base revenue requirement of $1,633,225 to be recovered in rates effective January 1, 2014. In response to interrogatories, Hydro

Hawkesbury revised its base revenue requirement to $1,627,681. Based on this updated revenue requirement, Hydro Hawkesbury's proposed rates would recover a revenue deficiency of $280,667.

The following issues are addressed below in considering Hydro Hawkesbury's application:

- Alignment of Rate Year with Fiscal Year;
- Effective Date for Rates;
- Operating Revenue (Customer Forecast, Load Forecast and Other Distribution Revenue);
- Operating, Maintenance & Administration Expenses;
- Depreciation;
- Rate Base and Capital Expenditures (Incremental Capital Module, Working Capital Allowance and Green Energy Plan);
- Cost of Capital;
- Cost Allocation and Rate Design (Cost Allocation, Monthly Service Charges, Retail Transmission Service Rates, Low Voltage Charges, Loss Factors and Specific Service Charges);
- Deferral and Variance Accounts; and
- Implementation.

## ALIGNMENT OF RATE YEAR WITH FISCAL YEAR

Hydro Hawkesbury requested an alignment of its fiscal and rate years to both start on January 1, in order to reduce administrative and accounting cost burdens, improve budget planning and align rates with costs. Neither VECC nor Board staff made any submissions on this issue.

The Board approves Hydro Hawkesbury's request to align its fiscal and rate years.

## EFFECTIVE DATE FOR RATES

Hydro Hawkesbury applied for rates effective January 1, 2014. In Procedural Order No. 2 and Order for Interim Rates, the Board declared Hydro Hawkesbury's current rates interim effective January 1, 2014.

VECC submitted that Hydro Hawkesbury's rates should be effective January 1, 2014

only if the regulatory process is completed in sufficient time. Board staff made no submission on this matter.

In a letter dated December 11, 2012, the Board established a target date of April 26, 2013 for applications with rates effective January 1, 2014. Hydro Hawkesbury filed its initial application on May 30, 2013 and a revised application on June 13, 2013. On June 24, 2013 the Board informed Hydro Hawkesbury that its application was incomplete. On July 24, 2013 Hydro Hawkesbury filed a revised and complete application that addressed the areas of incompleteness identified by the Board.

In light of the fact that Hydro Hawkesbury ultimately filed a complete application on July 24 rather than April 26, the Board has determined that Hydro Hawkesbury's new rates will become effective March 1, 2014.

## OPERATING REVENUE

### Customer Forecast

Hydro Hawkesbury forecast 6,923 customers and connections (including street lighting and sentinel lights connections) for 2014. The forecast was derived by applying the class-specific historic annual growth rate for 2013 and 2014. VECC submitted that the forecast customer counts by class for 2014 were reasonable. Board staff agreed and submitted that the customer forecast proposed by Hydro Hawkesbury was consistent with the 0.8% average annual customer growth experienced during the 2010 to 2012 period.

The Board accepts Hydro Hawkesbury's proposed customer forecast for 2014.

### Load Forecast

Hydro Hawkesbury's load forecast was developed in four steps. First, Hydro Hawkesbury developed a multivariate regression model that incorporates historical load and weather data from January 2004 to December 2012. Second, Hydro Hawkesbury produced 2013 bridge year and 2014 test year weather normalized purchased energy forecasts, using 9-year heating degree days and cooling degree days as inputs. Third, Hydro Hawkesbury derived the billed load forecasts from the purchased forecast and then allocated purchases to each rate class based on its shares of the historic billing trends. Fourth, Hydro Hawkesbury adjusted the 2014 forecast to account for impact of Conservation and Demand Management ("CDM") activity.

Hydro Hawkesbury's proposed load forecast for 2014 is as follows, after incorporating changes made in response to interrogatories:

**Table 1: Load Forecast**

| Rate Class | kWh |
|---|---|
| Residential | 53,488,924 |
| GS < 50 kW | 19,235,278 |
| GS 50 to 4,999 kW | 80,703,727 |
| Street Lighting | 1,136,738 |
| Sentinel Lights | 104,646 |
| Unmetered Scattered Load | 220,649 |
| **TOTAL** | **154,889,963** |

VECC submitted that Hydro Hawkesbury should not have used a 10 year employment level average in its model; instead, it should have used an economic conditions variable as at the close of 2012. Hydro Hawkesbury submitted that an employment level average is more reflective of the economic uncertainty in its region, and provided figures indicating a downward trend in labour force and employment. Hydro Hawkesbury indicated that it tested a 5-year rather than a 10-year average of the economic conditions variable, but it had the effect of increasing its revenue requirement.

Board staff submitted that while the proposed load forecast increase over two years is significant, it did not have any concerns as the difference is driven mostly by weather normalization. Board staff did not express any concerns with Hydro Hawkesbury's regression model.

The Board accepts Hydro Hawkesbury's argument that its economic conditions variable is appropriate given the economic uncertainty in the region and accepts its regression model as reasonable.

Hydro Hawkesbury initially made the CDM adjustment to its load forecast on the basis of gross energy savings rather than net savings, and included 2011 and 2012 CDM savings in the adjustment. In response to an interrogatory, Hydro Hawkesbury provided a revised calculation of the CDM adjustment, using net rather than gross savings, not deducting 2011 CDM savings, and deducting 50% rather than 100% of the 2012 CDM savings.

Both VECC and Board staff submitted that using net rather than gross CDM savings is the appropriate approach, consistent with the Board's decision in EB 2012-0113 concerning Centre Wellington Hydro. Hydro Hawkesbury submitted that it is agreeable to applying the net approach, but that the net approach is not reflected in the Board's July 2013 Filing Requirements.

The Board notes that Appendix 2-I of the Board's Filing Requirements refers to the decision in the Centre Wellington case, but indicates the possibility that a utility could provide support to the Board for applying a CDM adjustment on a gross basis. The Board notes that Hydro Hawkesbury has not advanced any convincing reason to use gross rather than net CDM savings in this proceeding. Accordingly, the Board has determined that, consistent with the Centre Wellington decision, that Hydro Hawkesbury should use net CDM savings.

VECC submitted that the CDM adjustment should exclude the 2011 and 2012 CDM savings because they are already captured in the historical data used Hydro Hawkesbury to develop its load forecast model. VECC submitted there should be no adjustment for 50% of the 2012 CDM program because the Board has denied the inclusion of such an adjustment in its Sioux Lookout Hydro decision (EB-2012-0165). Board staff agreed with Hydro Hawkesbury's revised calculation of the CDM adjustment, in which 50% of the 2012 CDM savings was deducted.

The Board agrees with VECC that the savings from both the 2011 and 2012 CDM programs should be excluded from the CDM adjustment. It is clear that the savings from the 2011 CDM program and from activity in 2012 under the 2012 CDM program have been embedded in the 2012 historical data and incorporated into the regression model. Concerning Hydro Hawkesbury's 2012 CDM program, the information on the record does not indicate that there was any new activity in 2013 under the 2012 CDM program.

VECC submitted that there were two errors in Hydro Hawkesbury's load forecast calculation. First, VECC submitted that Hydro Hawkesbury should have used the 2014 forecast customer count rather than the actual 2012 customer count to determine the average use per customer to apply to the increase in customers between 2013 and 2014. The Board agrees. Second, VECC submitted that in calculating the 2014 load forecast, Hydro Hawkesbury has added the new customer forecast for 2014 but omitted

to add the new customer forecast for 2013. The Board agrees. The Board requires Hydro Hawkesbury to correct these two errors in the calculations for its draft Rate Order.

**Other Distribution Revenue**

Hydro Hawkesbury forecast total other distribution revenue of $157,139 for 2014. During the interrogatory process, Hydro Hawkesbury confirmed that the revenues from interest and dividends that were included in the forecast for other distribution revenue included carrying charges on its Retail Settlement Variance Account ("RSVA"). VECC submitted that these carrying charges should not be included in other distribution revenue, but instead should be recorded and dealt with via the RSVA. Board staff did not make submissions on this issue.

The Board agrees with VECC, and requires Hydro Hawkesbury to make this change in the calculations for its draft Rate Order.

## OPERATIONS, MAINTENANCE & ADMINISTRATION ("OM & A")

Hydro Hawkesbury's proposed 2014 OM & A of $1,126,665 represents an 11.9% increase over the actual 2012 OM & A and a 19.1% increase over the 2010 Board approved OM & A. Smart meter costs comprise 50% of the overall increase in proposed OM & A. Board staff noted that Hydro Hawkesbury's average annual OM & A increase would be 2.3% if costs associated with smart metering were excluded.

VECC submitted that if Hydro Hawkesbury's 2010 OM & A was adjusted only for customer growth, inflation and incremental responsibilities it would be expected to increase by between $60,738 and $66,191, rather than the $181,073 increase proposed by Hydro Hawkesbury. VECC submitted that there were several elements in Hydro Hawkesbury's proposed OM & A budget that could be reduced without causing "undue hardship". However VECC submitted that specific reductions in the OM & A budget should be left to the discretion of Hydro Hawkesbury's management. Board staff submitted that Hydro Hawkesbury's proposed 2014 OM & A level was reasonable.

Hydro Hawkesbury submitted that even with two new transformer stations included in its proposed 2014 OM & A budget, it would still have rates at the lowest in Ontario. It submitted that its proposed 2014 OM & A budget produced one of the lowest OM & A costs per customer, a cost lower than the 2010 level for its cohort utilities.

The Board agrees with Hydro Hawkesbury that despite the increase reflected in its proposed 2014 OM & A budget, its proposed OM & A cost per customer in 2014 would still be lower than the 2010 level for other utilities of a similar size. Taking this into consideration, the Board approves Hydro Hawkesbury's proposed 2014 OM & A of $1,126,665.

## DEPRECIATION

Hydro Hawkesbury proposed a depreciation expense of $222,217 in 2014. In calculating depreciation, it proposed useful lives and asset componentization in accordance with the Board's *Depreciation Study for Electricity Distributors – Transition to International Financial Reporting Standards* (EB-2010-0178).

VECC made no submissions on the proposed amount of the depreciation expense. Board staff submitted that it had no concerns with the proposed depreciation expense.

The Board approves the proposed depreciation expense of $222,217 for 2014, subject to the Board's findings in the ICM section below.

## RATE BASE AND CAPITAL EXPENDITURES

Hydro Hawkesbury proposed a rate base of $7,099,556, which would represent an 87% increase from the 2012 actual amount and a 66.6% increase from the 2010 Board approved amount. Hydro Hawkesbury stated the proposed increase was primarily due to the inclusion of capital expenditures previously approved in its 2012 Incentive Regulation Mechanism ("IRM") application (EB-2011-0273) and smart meter application (EB-2012-0198).

Hydro Hawkesbury proposed capital expenditures of $272,300 in 2014. The major capital expenditure projects include pole and conductor replacement and transformer repair and exclude expenditures related to the previously approved ICM and smart meters.

Board staff submitted that Hydro Hawkesbury's capital expenditures were relatively stable and that Hydro Hawkesbury had provided sufficient support for the capital program. VECC noted that the average non-ICM expenditure was $210,000 between 2010 and 2012, lower than the average of $278,000 between 2013 and 2014. VECC submitted that Hydro Hawkesbury had increased its spending on pole replacement,

similar to other Ontario electric distribution utilities, and that its capital budget was reasonable.

The Board approves capital expenditures of $272,300 and rate base of $7,099,556 in 2014, subject to the Board's findings in the following ICM section.

**ICM**

Hydro Hawkesbury's 2012 Incentive Regulation Mechanism ("IRM") application (EB-2011-0273) included an ICM for two projects: replacement of a 44 kV distribution transformer at a capital cost of 712,919 (the "44 kV project") and replacement of two transformers at the 110 kV substation at a capital cost of $1,517,813 (the "110 kV project"). In its decision, the Board approved the two projects and allowed Hydro Hawkesbury to recover the associated annual revenue requirement through a rate rider to start on May 1, 2012.

As part of this application, Hydro Hawkesbury filed a Fixed Asset Continuity Schedule that included $790,136 for the 44 kV project and $1,517,813 for the 110 kV project as 2013 additions.

In interrogatory responses and a letter to the Board dated January 9, 2014, Hydro Hawkesbury clarified that the 44 kV project was in service as of May 2012 as indicated in its ICM application. However, it indicated that the actual cost of the project was $790,137, which was higher than forecast. For financial reporting purposes, Hydro Hawkesbury recorded the assets in 2013 rather than 2012, as it was too late to include the assets in its 2012 audited financial statements. Hydro Hawkesbury decided to add the actual costs and accumulated depreciation to its Fixed Asset Continuity Schedule in 2013 to maintain consistency between its audited financial statements and regulatory reporting.

Hydro Hawkesbury has indicated that the increased cost for the 44 kV project was necessary in order to build a stable foundation for the transformer given poor soil conditions. VECC did not make a submission on this matter. Board staff submitted that it had no concerns with the increased costs for the 44 kV project.

Hydro Hawkesbury's IRM application indicated the 110 kV project would be in service in 2012 and would cost $1,517,813. In this proceeding, Hydro Hawkesbury indicated that

the in-service date is now expected to be March 2014 with a total forecast cost $1,547,900. Hydro Hawkesbury forecast that $1,200,000 would be spent by the end of 2013 and $347,900 would be spent in 2014. However, Hydro Hawkesbury added $1,547,900 to its Fixed Asset Continuity Schedule in 2013, with accumulated depreciation.

The Board requires that Hydro Hawkesbury's 2014 rates be calculated on a set of accurate and consistent assumptions and inputs. The Fixed Asset Continuity Schedule must reflect the year in which assets go into service and are used and useful. It is important that Hydro Hawkesbury's draft Rate Order and supporting schedules include the actual dates and dollars associated with the ICM projects in order to establish just and reasonable rates.

The Board directs Hydro Hawkesbury to update its Fixed Asset Continuity Schedule as part of its draft Rate Order, to record the actual costs in the years the 44 kV and 110 kV projects are in service, with the associated accumulated depreciation. The Board notes that the cost of the two projects should include the cost of capitalized interest during the construction phases of the projects before they are placed in service. The Board directs Hydro Hawkesbury to include the capitalization of the interest during construction using the Board's prescribed Construction Work In Progress ("CWIP") interest rates posted on the Board's website (the DEX Mid Term Corporate Bond Index Yield) in the costs of these assets, if applicable, and to update the asset values in all applicable schedules. The impact of any changes would also require the updating of the balances in the subaccounts of Account 1508 for "Incremental Capital Expense" and the associated accumulated depreciation. These accounts are discussed below in the ICM-Related Variance Sub-Account section.

Accordingly, the actual 44 kV project cost is to be recorded in 2012 with accumulated depreciation and the net book value added to the 2014 rate base as of January 1, 2014.

The forecast 110 kV project cost of $1,547,900 is to be added to the 2014 rate base using the half-year rule, as it is expected to be in service in April 2014.

The Board understands that as a result of these changes Hydro Hawkesbury's regulatory and corporate financial reporting may not align. However these changes are necessary to correctly calculate the net addition to rate base in 2014 and match the

timing of ICM-related charges and expenses. The Board's findings with respect to the ICM-related deferral accounts are in the Deferral and Variance Account section of this decision.

### Working Capital Allowance

Hydro Hawkesbury proposed a $2,282,270 Working Capital Allowance based on the Board's default rate of 13%.

VECC submitted that a rate of 12% would be more appropriate because Hydro Hawkesbury bills its customers on a monthly basis. VECC submitted that the Board's default rate was established when most utilities offered bi-monthly billing and that monthly billing utilities have a lower need for cash than bi-monthly utilities. VECC referred to a lead-lag study completed by London Hydro, a monthly billing utility, which indicated a lower working capital requirement close to 11%. Board staff took no issue with Hydro Hawkesbury's proposal.

Hydro Hawkesbury submitted that the 13% default rate was consistent with the Board's requirements. Hydro Hawkesbury submitted that it is often forced to borrow against its line of credit in peak months to meet its obligations to Hydro One and the IESO. Hydro Hawkesbury submitted that it would be incorrect to use an arbitrary proxy as proposed by VECC rather than evidence resulting from an actual Hydro Hawkesbury lead-lag study.

The Board accepts Hydro Hawkesbury's proposal to use a 13% working capital allowance, consistent with Board policy. The Board finds no compelling reason to depart from its default rate. The Board does not consider it appropriate to adopt the results of a lead-lag study from another utility without a thorough analysis concluding that the two utilities are comparable.

### Green Energy Act Plan

Hydro Hawkesbury applied for approval of its Green Energy Act Plan ("GEA Plan"). Given the low uptake of the Feed-in Tariff ("FIT") and micro-FIT programs in its service area, Hydro Hawkesbury proposed no capital investments or OM & A expenditures in its GEA Plan and did not seek any recovery of associated costs in this application. Hydro Hawkesbury sought an exemption from the Board's filing requirement that a distributor must submit its GEA Plan to the Ontario Power Authority (the "OPA") for comment prior

to filing the plan with the Board. Hydro Hawkesbury indicated that it did not consider an OPA review to be warranted.

VECC did not make any submissions on Hydro Hawkesbury's GEA Plan. Board staff submitted that Hydro Hawkesbury's GEA Plan provided a comprehensive view of the capabilities of its distribution system. However, Board staff submitted that in the absence of an OPA review, the Board has no ability to verify the information that is typically verified by the OPA. Therefore, Board staff submitted that the Board should not grant Hydro Hawkesbury an exemption and should not approve Hydro Hawkesbury's GEA Plan. In its reply submission, Hydro Hawkesbury agreed to file its GEA Plan with the OPA and to file the letter of comment from the OPA when it becomes available.

The Board directs Hydro Hawkesbury to file its GEA Plan with the OPA as soon as possible and to file a copy of the OPA's response with the Board when received.

## COST OF CAPITAL

Hydro Hawkesbury's original application included the following cost of capital parameters:

**Table 2: Proposed Cost of Capital Parameters**

| Cost of Capital Parameter | Hydro Hawkesbury's Proposal |
|---|---|
| Capital Structure | 60.0% debt (composed of 56.0% long-term debt and 4.0% short-term debt) and 40.0% equity |
| Short-Term Debt | 2.07% |
| Long-Term Debt | 3.94% |
| Return on Equity (ROE) | 8.98% |
| Weighted Average Cost of Capital | 5.88% |

On November 25, 2013, the Board issued a letter with the updated cost of capital parameters to be used in 2014 cost of service applications for rates effective January 1, 2014. These are summarized in the following table:

**Table 3: Updated Cost of Capital Parameters**

| Cost of Capital Parameter | Updated Value for 2014 Cost of Service Applications for rates effective January 1, 2014 |
|---|---|
| Return on Equity | 9.36% |
| Deemed Long-term Debt Rate | 4.88% |
| Deemed Short-term Debt Rate | 2.11% |

Board staff submitted that Hydro Hawkesbury should update its 2014 cost of capital calculation with the new rates, except for the cost of long-term debt. Board staff agreed with Hydro Hawkesbury's proposal to use its Infrastructure Ontario debt cost of 3.94% rather than the default long-term debt rate. VECC agreed with Board staff's submission. Hydro Hawkesbury agreed to update its cost of capital parameters as submitted by Board staff as part of its draft Rate Order.

The Board finds that it is appropriate for Hydro Hawkesbury to use the Board's deemed rate of 9.36% for equity and 2.11% for short-term debt. The Board approves a long-term debt rate of 3.94% based on Hydro Hawkesbury's actual Infrastructure Ontario debt cost. As indicated in the December 2009 *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, the Board's default rate for long-term debt should only be used in the absence of third-party loans. Where there are third party loans, the actual interest rates should be used.

## COST ALLOCATION AND RATE DESIGN

### Cost Allocation

Hydro Hawkesbury updated its cost allocation model in accordance with the Board's *Review of Electricity Distribution cost Allocation Policy EB-2010-0219*. Hydro Hawkesbury used its own weighting factors, replacing the default values used in its previous cost of service application. In addition, Hydro Hawkesbury proposed to move the revenue-to-cost ratios to 100% for all rate classes. The following table summarizes Hydro Hawkesbury's current and proposed revenue-to-cost ratios compared to the Board's target range for each customer class.

**Table 4: Revenue-to-Cost Ratios**

| Customer Class | 2010 Board Approved % | Cost Allocation Model % | Proposed 2014 % | Board Target Range % |
|---|---|---|---|---|
| Residential | 111.0 | 101.8 | 100.0 | 85 – 115 |
| GS < 50 kW | 111.0 | 107.8 | 100.0 | 80 - 120 |
| GS 50 to 4,999 kW | 80.0 | 87.4 | 100.0 | 80 - 120 |
| Street Lighting | 70.0 | 167.7 | 100.0 | 70 - 120 |
| Sentinel Lights | 120.0 | 147.0 | 100.0 | 80 - 120 |
| Unmetered Scattered Load | 80.0 | 104.3 | 100.0 | 80 - 120 |

VECC submitted that Hydro Hawkesbury's cost allocation model and methodology had not improved sufficiently to justify moving its revenue to cost ratios to 100%. In particular, VECC submitted that Hydro Hawkesbury had not updated the kW values for load profiles and had allocated over 50% of the distribution plant fixed assets on the basis of demand, which was "a serious flaw". VECC submitted that Hydro Hawkesbury should simply adjust the ratios to be within the Board-approved ranges. VECC referred to the Board's findings in the Toronto Hydro 2011 rates proceeding (EB-2010-0142) and the Horizon 2011 rates proceeding (EB-2010-0131) in which the Board adjusted the revenue-to-cost ratios to be within the Board-approved ranges and did not approve adjustments to 100%. VECC proposed that the revenue-to-cost ratios for the Street Lighting and Sentinel Lighting should be reduced to the upper end of the Board's approved range, that the GS>50 ratio should be increased to maintain revenue neutrality and that the other class ratios should remain unchanged.

Board staff submitted that Hydro Hawkesbury's evidence provided a good foundation for its proposed revenue re-balancing. Board staff deferred to Hydro Hawkesbury's knowledge of its own situation and did not disagree with the proposed weighting factors. However, Board staff identified an anomaly for the Unmetered Scattered Load ("USL") class. Because the USL class has no connections to the distribution system, no service costs were allocated to the USL rate class. Board staff submitted that the discrepancy was minor; however, Hydro Hawkesbury should correct the data in its cost allocation model. Hydro Hawkesbury agreed to make this change.

Board staff supported Hydro Hawkesbury's cost allocation proposal as it was designed to match revenue with the revenue requirement for each rate class. However, Board

staff submitted that the proposed cost allocation changes were substantial and quite different from what the Board approved in the previous rates case. Board staff submitted that while the distribution rate increase for Residential and GS 50 to 4,999 kW was quite large, the total bill impact was attenuated or even reversed by the other components of the customer bill.

Hydro Hawkesbury submitted that its cost allocation study provided the opportunity to restore inequities and eliminate any cross subsidization that may have been in place since its last cost of service proceeding. Hydro Hawkesbury acknowledged that its load profile data may be slightly outdated, based on 2006 data, but submitted it was the best information available. Using 2006 load profile data was not a sufficient reason to leave the resulting ratios unchanged within the target range, in Hydro Hawkesbury's submission.

Hydro Hawkesbury termed its proposal an "unusually aggressive adjustment", but submitted the rate increase would not be as noticeable to customers as in other circumstances as it would be offset by a drop in the revenue requirement resulting from new capitalization policies.

The Board accepts the results of Hydro Hawkesbury's cost allocation study using utility-specific data. The results of the study indicate inequities among the rate classes in terms of cost recovery. The Board agrees that it is desirable to reduce the degree of cross subsidization, but is reluctant to move revenue-to-cost ratios to 100% for each rate class. The Board is aware that there are data limitations inherent in cost allocation models, and notes that as a practical matter, there may be little difference between a revenue-to-cost ratio of near 100% and the theoretical ideal of 100%.

The Board agrees with VECC's proposal and directs Hydro Hawkesbury to reduce the revenue-to-cost ratios for the Street Lighting and Sentinel Lighting to 120%, which is the upper end of the Board-approved range. To offset this, the Board directs Hydro Hawkesbury to increase the ratio of the GS 50 to 4,999 kW, to fully recover its costs from all rate classes.

### Monthly Service Charges ("MSC")

Hydro Hawkesbury proposed to move the proportions of fixed and variable costs for all customer classes closer to 50% fixed and 50% variable (a "50/50 split"). The proposed

MSC are below the Board's ceiling rates, except for the GS 50 to 4,999 kW class. Hydro Hawkesbury's current and proposed MSC and the applicable Board ceilings are as follows:

**Table 5: Current and Proposed Monthly Service Charges**

| Rate Class | Monthly Service Charges | | |
|---|---|---|---|
| | Current | Proposed | Board Ceiling |
| Residential | $5.99 | $10.00 | $13.33 |
| GS < 50 kW | $13.84 | $15.00 | $20.38 |
| GS 50 to 4,999 kW | $97.35 | $97.35 | $26.50 |
| Street Lighting | $0.62 | $1.00 | $1.55 |
| Sentinel Lights | $1.63 | $1.00 | $2.99 |
| Unmetered Scattered Load | $6.39 | $8.50 | $12.11 |

VECC disagreed with Hydro Hawkesbury's proposal and submitted that the current fixed/variable split should be maintained for each rate class, even though the current GS 50 to 4,999 kW MSC exceeds the Board ceiling. VECC agreed with the Hydro Hawkesbury proposal to maintain the current fixed charge of $97.35 for GS 50 to 4,999 kW for 2014 as it was consistent with Board policy to maintain the current rate even if the ceiling was exceeded. VECC noted that the Board has initiated a project (EB-2012-0410) regarding revenue decoupling for electricity distributors and submitted that the Board should not adopt Hydro Hawkesbury's proposed changes until the project is complete as it would establish a precedent.

Board staff submitted that the rationale for a 50/50 split is arbitrary and therefore should not be used as a reference point for rate design. Board staff further submitted that if Hydro Hawkesbury's proposal is approved by the Board, the proposed increase in the MSC for the Residential Class should be phased in over a 2-year period to reduce the total bill impact in 2014 below 10%. Applying this approach, the 2014 MSC for Residential customers would be $8.00.

In reply submission, Hydro Hawkesbury agreed with the Board staff recommendation to set its Residential MSC initially at $8.00 and phase in the proposed MSC of $10.00 over two years.

The Board does not find Hydro Hawkesbury's arguments compelling to justify a change in its rate design to a 50/50 split. The Board directs Hydro Hawkesbury to maintain its existing fixed/variable split for each customer class with the exception of the GS 50 to 4,999 kW class, as the monthly service charge already exceeds the ceiling.

### Retail Transmission Service Rates ("RTSR")

Hydro Hawkesbury proposed RTSRs to reflect the Uniform Transmission Rates ("UTR") and the host distributor rates of Hydro One effective January 1, 2013. Electricity distributors are charged the UTRs at the wholesale level and subsequently pass these charges on to their distribution customers through the RTSRs. As a partially embedded distributor whose host is Hydro One, Hydro Hawkesbury is also charged Sub-Transmission rates by Hydro One. The proposed RTSRs are as follows:

**Table 6: Proposed RTSRs**

| Rate Class | Hydro Hawkesbury Updated Proposal | |
|---|---|---|
| | RTSR Network | RTSR Connection |
| Residential ($/kWh) | $0.0070 | $0.0032 |
| GS < 50 kW ($/kWh) | $0.0064 | $0.0028 |
| GS 50 to 4,999 kW ($/kW) | $2.5888 | $1.1437 |
| Street Lighting ($/kW) | $1.9526 | $0.8842 |
| Sentinel Lighting ($/kW) | $1.9532 | $1.8053 |
| Unmetered Scattered Load ($/kWh) | $0.0064 | $0.0028 |

Since the filing of Hydro Hawkesbury's application, the Board has issued its Rate Order for Hydro One Transmission (EB-2012-0031) which adjusted the UTRs effective January 1, 2014. The Board has also approved new rates for Hydro One Sub-Transmission class RTSRs effective January 1, 2014 (EB-2013-0141).

VECC submitted that Hydro Hawkesbury's revised RTSRs should be approved by the Board. Board staff submitted that Hydro Hawkesbury should update its RTSRs to reflect the new UTR's and Sub-Transmission rates.

The Board directs Hydro Hawkesbury to revise its RTSRs to incorporate the new UTRs and host distributor rates of Hydro One effective January 1, 2014, as part of its draft Rate Order. In accordance with standard practice, Variance Accounts 1584 and 1586 will continue to capture timing differences and differences in the wholesale transmission

service and host distributor rates paid by Hydro Hawkesbury compared to the retail rate Hydro Hawkesbury is authorized to charge its customers.

**Low Voltage Charges**

Hydro Hawkesbury proposed to increase its Low Voltage ("LV") rates by 50% to 77%, depending on the class of customers, to recover its forecast LV costs of $99,595. Hydro Hawkesbury based its LV forecast on the average of its 2011 and 2012 costs and adjusted upward to reflect the projected load growth. Based on Hydro Hawkesbury's response to interrogatory 8.0-Staff-28, the average shortfall with current LV rates is $38,102 and $47,720 in those years.

Board staff submitted that Hydro Hawkesbury has justified the need for the increased LV costs in 2014 based on its actual experience in 2011 and 2012. VECC submitted that while the forecast could be refined, the cost was reasonable.

The Board approves the LV costs of $99,595 for recovery in 2014.

**Loss Factors**

The Distribution Loss Factor ("DLF") measures energy losses that occur within the distributor's distribution system by comparing the wholesale energy with the retail energy delivered by distributor. Similarly, the Supply Facilities Loss Factor ("SFLF") measures energy losses that occur at the point of supply, upstream of the distributor's distribution system. The Total Loss Factor ("TLF") measures the totality of these losses and is equal to the product of the DLF and SFLF. Hydro Hawkesbury applied for a TLF of 1.0541 for secondary metered customers < 5,000 kW, which is based on an underlying DLF of 1.0480 and SFLF of 1.0058. The proposed DLF and SFLF are based on the average of five historical years from 2008 to 2012. The current approved TLF for secondary metered customers < 5,000 kW is 1.0446.

VECC submitted that distribution loss factors had been declining over the last five years and it would be more appropriate for Hydro Hawkesbury to base its calculation on a three year average. VECC did not support Board staff's submission for a lower SFLF as the issue was not explored in the proceeding and there was no information on the record regarding the actual loss factors billed to Hydro Hawkesbury. As a result, VECC submitted that it was not apparent the 1.0058 proposed by Hydro Hawkesbury was inappropriate.

Board staff had no concerns with the proposed DLF, but took issue with the proposed SFLF. Board staff indicated that it appeared that Hydro Hawkesbury received approximately half of its required power through Hydro One, and that accordingly the SFLF should be adjusted to approximately to 1.02 to reflect the default SFLF for a fully embedded distributor of 1.034.

Hydro Hawkesbury maintained that its SFLF should be approved; provided more details of its 2012 SFLF; and indicated the actual percentage is 1.0055, not 1.02 as suggested by Board staff.

The Board accepts the proposed TLF of 1.0541 for secondary metered customers < 5,000 kW as submitted by Hydro Hawkesbury. The Board finds no compelling reason to accept Board staff's submission for a higher SFLF.

**Specific Service Charges**

Hydro Hawkesbury proposed to increase four of its specific service charges. The changes are shown in the following table.

**Table 7: Existing and Proposed Specific Service Charges**

| Specific Service Charge | Existing Charge | Proposed Charge |
|---|---|---|
| Change of Occupancy | $30 | $40 |
| Disconnect/Reconnect at Meter – after regular hours | $130 | $170 |
| Install/Remove Load Control Device – after regular hours | $130 | $170 |
| Service Call – after regular hours | $130 | $170 |

Hydro Hawkesbury provided the actual costs of providing the above services and submitted that the existing charges were not sufficient to fully recover the actual costs.

VECC agreed that the existing charges are insufficient. VECC agreed with the proposed charge of $40 for a change of occupancy, but disagreed with Hydro Hawkesbury's proposed charges for the other service rates. VECC submitted that since the actual costs related to services after regular hours were only $162.50, the charges to Disconnect/Reconnect at Meter, Install/Remove Load Control Devise and provide a Service Call should be $165 rather than $170. Board staff submitted that it had no concerns with Hydro Hawkesbury's proposal.

Hydro Hawkesbury agreed to VECC's proposed change. The Board approves Hydro Hawkesbury's revised specific service charges of $40 and $165.

## DEFERRAL AND VARIANCE ACCOUNTS

### Balances Proposed for Disposition

Hydro Hawkesbury is requesting disposition of the Group 1 and Group 2 deferral and variance account principal balances as at December 31, 2012 and the forecasted interest to December 31, 2013, over a one year period.

**Table 8: Proposed Group 1 and 2 Account Balances for Disposition**

| Account # | Account Description | Disposition Amount[1] |
|---|---|---|
| 1550 | LV Variance Account | $48,843 |
| 1580 | RSVA – Wholesale Market Service Charge | ($116,610) |
| 1584 | RSVA – Retail Transmission Network Charge | ($7,433) |
| 1586 | RSVA – Retail Transmission Connection Charge | ($21,499) |
| 1588 – Pwr | RSVA – Power (excluding Global Adjustment) | $117,602 |
| 1589 – GA | RSVA –Global Adjustment | $271,751 |
| 1595 | Disposition and Recovery/Refund of Regulatory Balances (2008) | ($195,709) |
| 1508 | Other Regulatory Assets – Incremental Capital Charges | $3,359 |
| 1518 | Retail Cost Variance Account – Retail | $1,857 |
| 1535 | Smart Grid OM&A Deferral Account | $1,901 |
| 1548 | Retail Cost Variance Account – STR | $9,591 |
| 1568 | LRAM Variance Account | $5,265 |
| 1576 | Accounting Changes Under CGAAP Balances plus Return component | ($25,155) |
| | **Total Proposed for Disposition excluding Global Adjustment** | **($177,988)** |
| | **Total Proposed for Disposition** | **$93,763** |

VECC had no comments on the proposed disposition amount and period. Board staff had no concerns with Hydro Hawkesbury's updated proposed balances and disposition period.

[1] Debit amounts are recoverable from Hydro Hawkesbury's customers and credit amounts are refunded by Hydro Hawkesbury back to its customers.

## BOARD FINDINGS

The Board approves the Group 1 and 2 deferral and variance accounts balances, to be disposed over a 10-month period given the implementation of rates on March 1, 2014, subject to any approved rate mitigation plan as required under Implementation, below.

### Stranded Meters

Hydro Hawkesbury is requesting recovery of the net book value of $61,500 of meters removed from service when they were replaced with smart meters. Hydro Hawkesbury proposed recovery from all customer classes through stranded meter rate riders ("SMRRs"), over a two-year period. Hydro Hawkesbury requested the SMRRs shown in the table below.

**Table 9: Proposed Stranded Meter Rate Riders**

| Rate Class | SMRR ($/month) |
|---|---|
| Residential | $0.46 |
| GS < 50 Kw | $1.64 |

VECC supported Hydro Hawkesbury's proposal for recovery of stranded meter costs. Board staff made no submissions on this issue.

The Board approves the recovery of the stranded meter cost of $61,500 to be collected over a 10 month period to reflect the implementation of rates on March 1, 2014, subject to any approved rate mitigation plan as required under Implementation below.

## ICM-RELATED VARIANCE SUB-ACCOUNT

Initially, Hydro Hawkesbury did not propose to dispose of the variance sub-account balances in Account 1508 related to its ICM rate rider, ICM 44 kV project costs and 110 kV project costs.

VECC submitted that Hydro Hawkesbury has clearly over collected the amount required by the current ICM rate rider as the 110 kV project was not in service in 2012 as planned. VECC was in agreement with Board staff's submission that variances in ICM riders and actual in-service amounts should be subject to reconciliation.

Board staff submitted that as the incremental revenue recovery began on May 1, 2012, a true-up calculation should take place, to reconcile the revenue recovered from

ratepayers to the actual costs and in-service dates of the 44 kV and 110 kV projects. Board staff submitted that the difference should be refunded to customers by way of a rate rider.

In its reply submission, Hydro Hawkesbury agreed to true-up the difference in the revenue requirement provided it was permitted to transfer the balances from Account 1508 to Account 4080 Distribution Services Revenue. Hydro Hawkesbury requested guidance from the Board regarding the specific accounting treatment to perform the true-up.

The Board's objective is to finalize the balances in the ICM-related deferral accounts in order to dispose of the balances and close the accounts in this proceeding.

The Board directs Hydro Hawkesbury to determine the actual ICM rate rider amount collected from May 1, 2012 to February 28, 2014 associated with the 110 kV project (the "110 kV rate rider refund amount"). The Board appreciates that the rate rider balance as at December 31, 2013 is not audited and does not include amounts collected from January 1, 2014 to February 28, 2014. As a result, Hydro Hawkesbury must forecast the amount collected for two months, January and February 2014.

Once the 110 kV rate rider refund amount is determined, Hydro Hawkesbury is directed to include it in its draft Rate Order for the purpose of refunding the 110 kV rate rider refund amount to customers. The refund would occur over a 10-month period, subject to any approved rate mitigation plan as required under implementation below. In order to allow for the clearance of the rate rider collected in relation to the 44 kV project and its recognition as distribution revenue, the residual balance in Account 1508 "Incremental Capital Charge – Rate Rider" will be deemed to relate to the 44 kV project and transferred to Account 4080 Distribution Services Revenue.

In order to clear the recorded capital expenditures for the ICM projects, Hydro Hawkesbury should transfer the balances in Account 1508 "Incremental Capital Expense – Sub 110 kV Expenses" and the associated accumulated depreciation to the applicable fixed asset accounts on the completion of the project in 2014. In addition, Hydro Hawkesbury should transfer the "Incremental Capital Expense – Sub 44 kV Expenses" and the associated accumulated depreciation to the applicable fixed asset accounts as at December 31, 2013. As a result, the Board expects the balances in the

three sub-accounts within Account 1508 related to the ICM projects will be cleared, resulting in zero balances and the accounts will be closed.

These accounting adjustments allow for the transfer of the approved balances from the deferral accounts to their respective operating accounts on the income statement and balance sheet.

## IMPLEMENTATION

The Board has made findings in this decision which change the proposed 2014 revenue requirement and therefore change the distribution rates from those proposed by Hydro Hawkesbury. In filing its draft Rate Order, the Board expects Hydro Hawkesbury to file detailed supporting material, including all relevant calculations showing the impact of this decision on Hydro Hawkesbury's revenue requirement, the allocation of the approved revenue requirement to the classes of customer and the determination of the final rates. Supporting documentation shall include, but not be limited to, filing a completed version of the Revenue Requirement Work Form Excel spreadsheet. If as a result of these calculations the total bill increase for any customer class would exceed 10%, the Board requires Hydro Hawkesbury to file a mitigation plan as contemplated by the Board's Filing Requirements.

The Board will issue a Rate Order after the steps set out below are completed.

1. Hydro Hawkesbury shall file with the Board, and serve on VECC, a draft Rate Order attaching a proposed Tariff of Rates and Charges reflecting the Board's findings in this Decision within **14 days** of the date of the issuance of this Decision.

2. VECC and Board staff shall file any comments on the draft Rate Order with the Board and serve them on the parties within **7 days** of the date of filing of the draft Rate Order.

3. Hydro Hawkesbury shall file with the Board and serve on VECC responses to any comments on its draft Rate Order within **4 days** of the date of receipt of VECC's and Board staff's comments.

## COST AWARDS

1. The Board may grant cost awards to eligible parties pursuant to its power under section 30 of the Act. In this proceeding VECC is eligible for a cost award. In determining the amount its cost award, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards* and the maximum hourly rates set out in the Board's Cost Awards Tariff. VECC shall file with the Board and serve on Hydro Hawkesbury, its cost claim within **7 days** from the date of issuance of the final Rate Order.

2. Hydro Hawkesbury shall file with the Board and serve on VECC any objections to the claimed costs within **14 days** from the date of issuance of the final Rate Order.

3. VECC shall file with the Board and serve on Hydro Hawkesbury any responses to any objections for cost claims within **21 days** of the date of issuance of the final Rate Order.

4. Hydro Hawkesbury shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings with the Board must quote the file number EB-2013-0139, and be made through the Board's web portal at www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@ontarioenergyboard.ca.

**DATED** at Toronto, January 30, 2014

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary

# TAB 5

**CITATION:** Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc., 2012 ONSC 1001
**DIVISIONAL COURT FILE NO.:** 463/11
**DATE:** 20120209



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**LEDERMAN, SWINTON AND HARVISON YOUNG JJ.**

| | |
|---|---|
| **BETWEEN:** | |
| THE CORPORATION OF THE MUNICIPALITY OF GREY HIGHLANDS<br>Appellant | *Michael M. Miller*, for the Appellant |
| **– and –** | |
| PLATEAU WIND INC. and ONTARIO ENERGY BOARD<br>Respondents | *John Terry* and *Alexander C. W. Smith*, for the Respondent, Plateau Wind Inc.<br>*Michael D. Schafler* and *Kathleen Burke*, for the Respondent, Ontario Energy Board |
| | **HEARD at Toronto:** February 9, 2012 |

**SWINTON J.** (ORALLY)

[1] The Corporation of the Municipality of Grey Highlands ("the Municipality") appeals the decision of the Ontario Energy Board ("the Board") dated April 21, 2011, in which the Board declined to review a previous decision dated January 12, 2011. In the original decision the Board had held that Plateau Wind Inc. is a "distributor" under s.41 of the *Electricity Act, 1998,*

S.O. 1998, c. 15, Sched. A, and therefore Plateau was entitled to build distribution facilities on the Municipality's road allowances.

[2] An appeal lies to this Court on a question of law or jurisdiction (see s. 33(2) of the *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B). Rather than appeal the original decision, the Municipality sought a review of that decision pursuant to Rule 42.01 of the Board's *Rules of Practice and Procedure*.

[3] Rule 44.01 sets out the criteria for a notice of motion to review a decision stating:

> 44.1 Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
>
> (ii) change in circumstances;
>
> (iii) new facts that have arisen;
>
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

[4] Pursuant to Rule 45.01, the Board held a hearing in writing to determine the threshold question of whether the original decision should be reviewed. It held that a review was not warranted. The Municipality had not shown an error of fact and, in any event, the one alleged error of fact was not material to the decision. In the Board's view, the Municipality essentially restated the legal arguments made in its original submissions. As the Municipality had failed to raise a question as to the correctness of the original decision, the review was refused.

[5] The Municipality submits that the Board erred in law by interpreting its review power too narrowly, as its review power permits it to consider alleged errors of law.

[6] The standard of review of the Board's decision is reasonableness, as the Board was exercising its expertise and discretion, determining questions of fact and applying its own rules.

[7] The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.

[8] We do not agree that the word "may" in Rule 44.01 requires the Board to consider errors of law. This is not consistent with the plain meaning of the rule or the nature of a review or reconsideration process. We see no reason to interfere with the Board's exercise of discretion.

[9] The appellant argued that the participation of a Board member in the review process gave rise to a reasonable apprehension of bias when that member had participated in the original decision. This argument fails to take into account the difference between an appeal and a review or reconsideration. The participation of a member of the original panel ensured that the review panel would have at least one member familiar with the facts of the case to provide context and to determine the impact of alleged factual errors or new facts and circumstances. Given the highly technical nature of matters before the Board, it makes sense that one of the original members would be present on the reconsideration. Therefore, we would not give effect to this ground of appeal.

[10] The Board's reasons clearly set out the basis for the decision and were transparent and intelligible. Therefore, the appeal is dismissed.



**LEDERMAN J.**

[11] I have endorsed the Record to read, "This appeal is dismissed for the oral reasons delivered by Swinton J. The Board does not seek costs. Counsel for the appellant and the respondent, Plateau, have agreed that costs be fixed at $20,000.00 all inclusive, payable by the appellant to Plateau. So ordered.

**SWINTON J.**

**LEDERMAN J.**

**HARVISON YOUNG J.**

**Date of Reasons for Judgment: February 9, 2012**
**Date of Release: February 23, 2012**

**CITATION:** Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc., 2012 ONSC 1001
**DIVISIONAL COURT FILE NO.:** 463/11
**DATE:** 20120209



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**LEDERMAN, SWINTON AND HARVISON YOUNG JJ.**

**BETWEEN:**

THE CORPORATION OF THE MUNICIPALITY OF GREY HIGHLANDS

Appellant

**– and –**

PLATEAU WIND INC. and THE ONTARIO ENERGY BOARD

Respondents

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**ORAL REASONS FOR JUDGMENT**

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**SWINTON J.**

**Date of Reasons for Judgment: February 9, 2012**

**Date of Release: February 23, 2012**

# TAB 6

Ontario Energy Board

Commission de l'Énergie de l'Ontario


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

# MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

## DECISION WITH REASONS

May 22, 2007

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

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

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

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

**BEFORE:** Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

**DECISION WITH REASONS**

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## EXECUTIVE SUMMARY

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

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

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

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

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

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

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## Section A: Introduction

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

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

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

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

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

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

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

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

**The NGEIR Decision**

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

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

2) Storage regulation.

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

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

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

Kitchener

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

APPrO

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

IGUA/CCC/VECC

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

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

**Organization of the Decision**

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

The sections of this Decision are:

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

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

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

## Section B: Board Jurisdiction to Hear the Motions

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

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

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

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

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

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

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

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

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

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

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error of law or jurisdiction, including a breach of natural justice;

(ii) error in fact;

(iii) a change in circumstances;

(iv) new facts that have arisen;

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

(vi) an important matter of principle that has been raised by the order or decision;

(b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, ...

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

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

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

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

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

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

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

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

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

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

**Findings**

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

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

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

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

- The right to counsel (s 10)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

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

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

*The Board's Rules*

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

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

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

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

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

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

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

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

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

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

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

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

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

## Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

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

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

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

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

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

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

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

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

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

**Findings**

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

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

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

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

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

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

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

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

## Section D: Board Process

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

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

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

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

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

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

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

Examples of the alleged behaviour objected to by IGUA include:

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

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

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

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

The other parties largely supported the position of Board Staff.

**Findings**

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

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

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

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

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

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

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

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

Section 21 of the OEB Act provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

natural justice against the NGEIR hearing panel itself.

## Section E: Board Jurisdiction under Section 29

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

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

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

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

IGUA also alleged that:

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

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

**Findings**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Section F: Status Quo

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

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

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

### Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

## Section G: Onus

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

### Findings

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

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

## Section H: Competition in the Secondary Market

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

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

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

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

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

**Findings**

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

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

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

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

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

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

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

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

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

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

## Section I: Harm to Ratepayers

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

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

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

### Findings

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

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

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

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

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

## Section J: Union's 100 PJ Cap

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

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

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

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

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

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

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

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

Page 7 of the CCC/VECC factum states:

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

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

**Findings**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Board therefore finds that this is a reviewable matter.

## Section K: Earnings Sharing

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

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

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

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

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

**Findings**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The NGEIR Decision stated:

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

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

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

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

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

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

**Findings**

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

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

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

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

The Board further noted:

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

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

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

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

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

## Section M: Aggregate Excess Method of Allocating Storage

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

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

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

### Findings

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

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

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

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

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

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

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

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

The NGEIR Decision also states:

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

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

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

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

## Section N: Orders

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

**The Board Orders That:**

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

## Section O: Cost Awards

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

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

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

**DATED** at Toronto, May 22, 2007

*Original signed by*

Pamela Nowina
Presiding Member and Vice Chair

*Original signed by*

Paul Vlahos
Member

*Original signed by*

Cathy Spoel
Member

# TAB 7

A-38-06

2007 FCA 198

**The Minister of Citizenship and Immigration** (*Appellant*)

*v.*

**Daniel Thamotharem** (*Respondent*)

and

**The Canadian Council For Refugees** and **The Immigration Refugee Board** (*Interveners*)

INDEXED AS: THAMOTHAREM v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Décary, Sharlow and Evans JJ.A.—Toronto, April 16; Ottawa, May 25, 2007.



Citizenship and Immigration — Immigration Practice — Appeal from Federal Court decision setting aside decision of Refugee Protection Division (RPD) of Immigration and Refugee Board (IRB) dismissing respondent's claim for refugee protection — Cross-appeal from Federal Court's finding Guideline 7 of Guidelines Issued by the Chairperson pursuant to the Immigration and Refugee Protection Act (IRPA) 159(1)(h) not invalid on ground depriving refugee claimants of right to fair hearing — Guideline 7 providing that, except in exceptional circumstances, Refugee Protection Officer (RPO) to start questioning claimant in refugee protection claim — Per Evans J.A. (Décary J.A. concurring): (1) Refugee claimants deserving high degree of procedural protection but tailored to fit inquisitorial, informal nature of hearing — Fair adjudication of individual rights compatible with inquisitorial process — Procedure in Guideline 7 not breaching IRB's duty of fairness — (2) Administrative agency not requiring express grant of statutory authority to issue guidelines, policies to structure exercise of discretion or interpretation of enabling legislation — *Although* language of Guideline 7 more than "recommended but optional process", not unlawful fetter on discretion, as long as deviation from normal practice in exceptional circumstances not precluded — Evidence not establishing reasonable person would think RPD members' independence unduly constrained by Guideline 7 — (3) Power granted by IRPA, s. 159(1)(h) to Chairperson to issue guidelines broad enough to include guideline concerning exercise of members' discretion in procedural, evidential or substantive matters — Chairperson's guideline-issuing, rule-making powers overlapping — Not unreasonable for Chairperson to choose to implement standard order of questioning through guideline rather than rule of procedure — Appeal allowed, cross-appeal dismissed — Per Sharlow J.A. (concurring): Chairperson's powers under IRPA to issue guidelines, make rules respecting activities, practice, procedure of Board not interchangeable — Standard procedure outlined in Guideline 7 should have been implemented by means of a rule, but neither procedurally unfair nor unlawfully fettering IRB members' discretion.

This was an appeal from a Federal Court decision granting an application for judicial review to set aside a decision of the Refugee Protection Division (RPD) dismissing the respondent's claim for refugee protection. The respondent cross-appealed the finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* (IRPA) is not invalid because it deprives refugee claimants of the right to a fair hearing. Guideline 7 was 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" as outlined in the *Immigration and Refugee Protection Act* (IRPA), paragraph 159(1)(*h*). The IRPA also empowers the Chairperson to make rules for each of the three Divisions of Board but these rules must be approved by the Governor in Council and laid before Parliament. The key paragraphs of Guideline 7 provide that the standard practice in a refugee protection claim will be for the Refugee Protection Officer (RPO) to start questioning the claimant (paragraph 19), although paragraph 23 states that the RPD member hearing the claim may, in exceptional circumstances, vary the order of questioning. Guideline 7 was challenged on the grounds that (1) it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel; and (2) even if does not breach the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under the IRPA, paragraph 161(1)(*a*). While the Federal Court 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 the IRPA or the *Refugee Protection Division Rules* (Rules), it rejected the respondent's argument that it deprives refugee claimants of the right to a fair hearing and distorts the "judicial" role of the member hearing the claim. It remitted the matter for re-determination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing.

The respondent is a Sri Lankan Tamil who claimed refugee protection in Canada but his claim was rejected. Before the issue of Guideline 7, which was applied during the respondent's hearing despite the respondent's objection,

neither the IRPA nor the Rules addressed the order of questioning at a hearing. The order of questioning was within the individual members' discretion and practice thereon was not uniform across Canada.

The main issues in the present case were: (1) whether Guideline 7 prescribes a hearing procedure that is in breach of claimants' right to procedural fairness; (2) whether Guideline 7 is unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings; and (3) whether Guideline 7 is invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*).

*Held*, the appeal should be allowed, and the cross-appeal should be dismissed.

*Per* Evans J.A. (Décary J.A. concurring): (1) At a general level, 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. Although a relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, 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. Furthermore, 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 the person who is informed of the facts and has thought the matter through. Guideline 7 does not curtail counsel's participation in the hearing since 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 any other aspect of the procedure to be followed at the hearing. Although fairness may require a departure from the standard order of questioning in some circumstances, the procedure prescribed by Guideline 7 does not, on its face, breach the Board's duty of fairness.

(2) Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion. Through the use of "soft law" (policy statements, guidelines, manuals and handbooks), 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. 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. Although not legally binding on a decision maker, guidelines may validly influence a decision maker's conduct. 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 Immigration and Refugee Board (IRB).

Despite the express statutory authority of the Chairperson to issue guidelines under IRPA, paragraph 159(1)(*h*), 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.

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. The Federal Court correctly concluded that the language of Guideline 7 is more than "a recommended but optional process". 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. While RPD members must perform their adjudicative functions without improper influence from others, case law also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions. Evidence that the IRB "monitors" members' deviations from the standard order of questioning does not create the kind of coercive environment that would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. Nor did the evidence establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7.

(3) 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. Structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159. The exercise of the Chairperson's power to issue guidelines is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) that is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid. Thus, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. Provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, that the

subject of a guideline could have been enacted as a rule of procedure issued under IRPA, paragraph 161(1)(*a*) will not normally invalidate it. It was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the guideline, rather than through a formal rule of procedure.

*Per* Sharlow (concurring): The two powers the IRPA gives the Chairperson to issue guidelines in writing to assist members in carrying out their duties (paragraph 159(1)(*h*)) and to make rules respecting the activities, practice and procedure of the Board, subject to the Governor in Council's approval (paragraph 161(1)(*a*)) differ substantively and functionally and are not interchangeable at the will of the Chairperson. 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 should have been implemented by means of a rule rather than a guideline. But the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and Guideline 7 does not unlawfully fetter the discretion of members. 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.



statutes and regulations judicially considered

*An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49.
*Canadian Human Rights Act*, R.S.C., 1985, c. H-6, ss. 27(2) (as am. by S.C. 1998, c. 9, s. 20), (3) (as am. *idem*), 49(2) (as am. *idem*, s. 27).
*Department of the Environment Act*, R.S.C., 1985, c. E-10, s. 6.
*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 74(*d*), 159, 161, 162(2), 165, 170(*a*),(*g*),(*h*).
*Inquiries Act*, R.S.C., 1985, c. I-11, ss. 4, 5.
*Refugee Protection Division Rules*, SOR/2002-228, rr. 16(*e*), 25, 38, 69, 70.
*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 25.1(1) (as am. by S.O. 1994, c. 27, s. 56).

cases judicially considered

applied:

*Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107; (2006), 40 Admin. L.R. (4th) 159; 290 F.T.R. 161; 54 Imm. L.R. (3d) 27; 2006 FC 461; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; (1990), 68 D.L.R. (4th) 524; 42 Admin. L.R. 1; 90 CLLC 14,007; 105 N.R. 161; 38 O.A.C. 321.

distinguished:

*Bell Canada v. Canadian Employees Association*, [2003] 1 S.C.R. 884; (2003), 227 D.L.R. (4th) 193; [2004] 1 W.W.R. 1; 3 Admin. L.R. (4th) 163; 109 C.R.R. (2d) 65; 306 N.R. 34; 2003 SCC 36; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321.

considered:

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104; 121 D.L.R. (4th) 79; 28 Admin. L.R. (2d) 1; 77 O.A.C. 155 (C.A.).

referred to:

*Benitez v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C.R. 155; 2007 FCA 199; *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1; (1993), 94 DTC 6069; 69 F.T.R. 63 (F.C.T.D.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268; 2002 SCC 3; *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741; (1994), 29 Admin. L.R. (2d) 211; 87 F.T.R. 46 (T.D.); *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn.*, [1978] 2 S.C.R. 141; (1977), 81 D.L.R. (3d) 609; 36 C.P.R. (2d) 1; 18 N.R. 181; *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 49 Admin. L.R. 118; 41 F.T.R. 118; 13 Imm. L.R. 118 (F.C.T.D.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121; (1959), 16 D.L.R. (2d) 689; *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146; (1999), 180 D.L.R. (4th) 95; [2000] CLLC 230-002; 176 F.T.R. 161 (T.D.); *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195; (2004), 236 D.L.R. (4th) 485; 11 Admin. L.R. (4th) 306; 34 Imm. L.R. (3d) 157; 316 N.R. 299; 2004 FCA 49; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; (1992), 90 D.L.R. (4th) 609; 3 Admin. L.R. (2d) 173; 136 N.R. 5; 147 Q.A.C. 169.

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APPEAL from a Federal Court decision ([2006] 3 F.C.R. 168; (2006), 40 Admin. L.R. (4th) 221) granting an application for judicial review to set aside a decision of the Refugee Protection Division ([2004] R.P.D. No. 613 (QL)) dismissing the respondent's claim for refugee protection. CROSS-APPEAL from that decision's finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* is not invalid because it deprives refugee claimants of the right to a fair hearing. Appeal allowed and cross-appeal dismissed.

appearances:

*Jamie R. D. Todd* and *John Provart* for appellant.

*John W. Davis* for respondent.

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

*Catherine F. Bruce* and *Angus Grant* for intervener, the Canadian Council for Refugees.

solicitors of record:

*Deputy Attorney General of Canada* for appellant.

*Davis & Grice*, Toronto, for respondent.

*Borden Ladner Gervais LLP*, Toronto, for intervener, the Immigration and Refugee Board.

*The Law Offices of Catherine F. Bruce* and *Ms. Barbara Jackman*, Toronto, for intervener, the Canadian Council for Refugees.

The following are the reasons for judgment rendered in English by

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 *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act: Guideline 7: Concerning 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" (paragraph 19), although the member of the Refugee Protection Division (RPD) hearing the claim "may vary the order of questioning in exceptional circumstances" (paragraph 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] 3 F.C.R. 168 (F.C.).

[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)*, [2007] 1 F.C.R. 107 (F.C.). 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*, [2008] 1 F.C.R. 155 (F.C.A.) 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 18, 2004 [[2004] R.P.D.D. No. 613 (QL)], 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 redetermination 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 Montréal 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 1997-1998 to 2001-2002 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, December 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 pages 74-75) 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.

**159.** (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson

(*a*) has supervision over and direction of the work and staff of the Board;

. . .

(*g*) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;

(*h*) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties; [Underlining added.]

[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.

**161.** (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting

(*a*) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(*b*) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;

(*c*) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and

(*d*) any other matter considered by the Chairperson to require rules.

(2) The Minister shall cause a copy of any rule made under subsection (1) to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the approval of the rule by the Governor in Council. [Underlining added.]

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

**162.** . . .

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

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

**165.** The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing. .

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

**4.** The commissioners have the power of summoning before them any witnesses, and of requiring them to

(*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

**5.** The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

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

**170.** The Refugee Protection Division, in any proceeding before it,

(*a*) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;

. . .

(*g*) is not bound by any legal or technical rules of evidence;

(*h*) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

(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.

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

20. In a claim for refugee protection where the Minister intervenes on an issue other than exclusion, for example, on a credibility issue, the RPO starts the questioning. If there is no RPO at the hearing, the member will start the questioning, followed by the Minister's counsel and then counsel for the claimant.

21. In proceedings where the Minister intervenes on the issue of exclusion, Minister's counsel will start the questioning, followed by the RPO, the member, and counsel for the claimant. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

22. In proceedings where the Minister is making an application to vacate or to cease refugee protection, Minister's counsel will start the questioning, followed by the member, and counsel for the protected person. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*. [Underlining added; endnote omitted.]

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 paragraphs 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 paragraphs 38-53). He then considered (at paragraphs 68-90) the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 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 paragraph 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 paragraphs 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*, [1994] 1 C.T.C. 1 (F.C.T.D.), at page 1. 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] 1 S.C.R. 84, at paragraph 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 RPO 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*); *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 (T.D.), at pages 757-778; *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250, at paragraph 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 40 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] Through 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), 21 O.R. (3d) 104 (C.A.) at pages 108-109 (*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*, Scarborough: Carswell, 1992, page 259; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 374-379; Craig, Paul P., *Administrative Law*, 5th ed. (London: Thomson, 2003), at pages 398-405, 536-540; *Capital Cities Communications Inc. et al. v. Canadian radio-Telivision Commn.*, [1978] 2 S.C.R. 141, at page 171; *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 49 Admin. L.R. 118 (F.C.T.D.), at page 131; *Ainsley*, at pages 107-109.

[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 page 140 (*per* Rand J.). Conversely, few, if any, legal rules admit of no element of discretion in their interpretation and application: *Baker*, at paragrah 54.

[59] Although not legally binding on a decision maker in the sense that it may 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. Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at page 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 paragraph 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 *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at page 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 [TRANSLATION]"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, administra-tive 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 page 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 [at page 110] 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 page 111), 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 Employees Association*, [2003] 1 S.C.R. 884, at paragraph 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 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pages 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) [as am. by S.C. 1998, c. 9, s. 20] 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 paragraphs 136-141; *Bell Canada*, at paragraphs 35-38.

[70] In *Bell Canada*, LeBel J. held (at paragraph 37), "[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) [as am. by S.C. 1998, c. 9, s. 20] 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) [as am. *idem*, s. 27] 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 [Policy No. 2003-07], 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 are 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 [at paragraph 23] "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 paragraph 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] 3 F.C.R. 195 (F.C.A.).

[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 page 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. Quebec (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 standard 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 by 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, subsection 162(2). 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* [R.S.C., 1985, c. I-2] by Bill C-86 [*An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49]. 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 (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-86*, 3rd Sess., 34th Parl., July 30, 1992, at page 80.):

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.]

[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 page 110). 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) [as am. by S.O. 1994, c. 27, s. 56]. 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, paragraph 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.

DÉCARY J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[112] SHARLOW J.A.: 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.

# TAB 8

**Newfoundland and Labrador Nurses' Union** *Appellant*

*v.*

**Her Majesty The Queen in Right of Newfoundland and Labrador, represented by Treasury Board, and Newfoundland and Labrador Health Boards Association, on behalf of Labrador-Grenfell Regional Health Authority** *Respondents*

**INDEXED AS: NEWFOUNDLAND AND LABRADOR NURSES' UNION *v.* NEWFOUNDLAND AND LABRADOR (TREASURY BOARD)**

**2011 SCC 62**

File No.: 33659.

2011: October 14; 2011: December 15.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

*Administrative law — Role and adequacy of reasons — Procedural fairness — Whether reasons satisfy Dunsmuir requirements for "justification, transparency and intelligibility".*

The union disputed an arbitrator's award which involved the calculation of vacation benefits. The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In his decision, the arbitrator concluded that it was not to be included in calculating the length of vacation entitlements. On judicial review, the arbitrator's reasons were found to be insufficient and therefore unreasonable and the decision was set aside. The majority of the Court of Appeal agreed with the arbitrator.

*Held*: The appeal should be dismissed.

*Dunsmuir* confirmed that in determining whether a decision is reasonable, the inquiry for a reviewing court is about "justification, transparency and intelligibility".

**Newfoundland and Labrador Nurses' Union** *Appelante*

*c.*

**Sa Majesté la Reine du chef de Terre-Neuve-et-Labrador, représentée par le Conseil du Trésor, et Newfoundland and Labrador Health Boards Association, au nom de Labrador-Grenfell Regional Health Authority** *Intimées*

**RÉPERTORIÉ : NEWFOUNDLAND AND LABRADOR NURSES' UNION *c.* TERRE-NEUVE-ET-LABRADOR (CONSEIL DU TRÉSOR)**

**2011 CSC 62**

N° du greffe : 33659.

2011 : 14 octobre; 2011 : 15 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

*Droit administratif — Rôle et suffisance des motifs — Équité procédurale — Les motifs répondaient-ils aux critères de la justification de la décision et de la transparence et l'intelligibilité du processus décisionnel établis dans Dunsmuir?*

Le syndicat a contesté une décision de l'arbitre ayant trait au calcul du nombre de congés annuels payés. La question que l'arbitre devait trancher était de savoir s'il pouvait être tenu compte, dans le calcul du nombre de congés annuels payés auxquels l'employé occasionnel ayant acquis sa permanence avait droit, des heures durant lesquelles il avait travaillé à ce titre avant d'obtenir sa permanence. Dans sa décision, l'arbitre a conclu qu'il ne fallait pas tenir compte de ces heures dans ce calcul. En contrôle judiciaire, les motifs de l'arbitre ont été jugés insuffisants et, par conséquent, déraisonnables, et sa décision a été annulée. Les juges majoritaires de la Cour d'appel se sont dits d'accord avec l'arbitre.

*Arrêt* : Le pourvoi est rejeté.

*Dunsmuir* a confirmé que la cour de révision appelée à statuer sur le caractère raisonnable d'une décision s'attache à « la justification de la décision, à la

This represents a respectful appreciation that a wide range of specialized decision-makers render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decision that are often counter-intuitive to a generalist. *Dunsmuir* does not stand for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result. It is a more organic exercise — the reasons must be read together with the outcome, and serve the purpose of showing whether the result falls within a range of possible outcomes. Reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. It is an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness. Any challenge to the reasoning/result of the decision should be made within the reasonableness analysis. Here, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes.

transparence et à l'intelligibilité du processus décisionnel ». Cela témoigne d'une reconnaissance respectueuse du vaste éventail de décideurs spécialisés qui rendent des décisions — qui paraissent souvent contre-intuitives aux yeux d'un généraliste — dans leurs sphères d'expertise, et ce en ayant recours à des concepts et des termes souvent propres à leurs champs d'activité. *Dunsmuir* ne signifie pas que l'« insuffisance » des motifs permet à elle seule de casser une décision, ou que les cours de révision doivent effectuer deux analyses distinctes, l'une portant sur les motifs et l'autre, sur le résultat. Il s'agit d'un exercice plus global : les motifs doivent être examinés en corrélation avec le résultat et ils doivent permettre de savoir si ce dernier fait partie des issues possibles. Il n'est pas nécessaire que les motifs fassent référence à tous les arguments ou détails que le juge siégeant en révision aurait voulu y lire, mais cela ne met pas en doute leur validité ni celle du résultat. S'ils permettent à la cour de révision de comprendre le fondement de la décision du tribunal et de déterminer si la conclusion fait partie des issues possibles acceptables, les motifs répondent alors aux critères établis dans *Dunsmuir*. Il est inutile d'expliciter l'arrêt *Baker* en indiquant que les lacunes ou les vices dont seraient entachés les motifs appartiennent à la catégorie des manquements à l'obligation d'équité procédurale. Le raisonnement qui sous-tend la décision/le résultat ne peut être remis en question que dans le cadre de l'analyse du caractère raisonnable de celle-ci. En l'espèce, il ressort des motifs que l'arbitre avait bien saisi la question en litige et qu'il est parvenu à un résultat faisant sans aucun doute partie des issues possibles raisonnables.

### Cases Cited

**Referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382; *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, rev'd in part 2011 SCC 57, [2011] 3 S.C.R. 572; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Cameron, Welsh and Mercer JJ.A.), 2010 NLCA 13, 294 Nfld. & P.E.I.R. 161, 908 A.P.R. 161, 190 L.A.C. (4th) 385, 2010 CLLC ¶220-017, [2010] N.J. No. 63 (QL), 2010 CarswellNfld 49, reversing a decision of Orsborn J., 2008 NLTD 200, 283 Nfld. & P.E.I.R. 170, 873 A.P.R. 170, [2008] N.J. No. 364 (QL), 2008 CarswellNfld 332. Appeal dismissed.

*David G. Conway* and *Tracey L. Trahey*, for the appellant.

*Stephen F. Penney* and *Jeffrey Beedell*, for the respondents.

The judgment of the Court was delivered by

[1] ABELLA J. — The transformative decision of this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, explained that the purpose of reasons, when they are required, is to demonstrate "justification, transparency and intelligibility" (para. 47). The issues in this appeal are whether the arbitrator's reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness.

Brown, Donald J. M., and John M. Evans, with the assistance of Christine E. Deacon. *Judicial Review of Administrative Action in Canada*, vol. 3. Toronto : Canvasback, 1998 (loose-leaf updated August 2011).

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POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (les juges Cameron, Welsh et Mercer), 2010 NLCA 13, 294 Nfld. & P.E.I.R. 161, 908 A.P.R. 161, 190 L.A.C. (4th) 385, 2010 CLLC ¶220-017, [2010] N.J. No. 63 (QL), 2010 CarswellNfld 49, qui a infirmé une décision du juge Orsborn, 2008 NLTD 200, 283 Nfld. & P.E.I.R. 170, 873 A.P.R. 170, [2008] N.J. No. 364 (QL), 2008 CarswellNfld 332. Pourvoi rejeté.

*David G. Conway* et *Tracey L. Trahey*, pour l'appelante.

*Stephen F. Penney* et *Jeffrey Beedell*, pour les intimées.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — Dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, qui a transformé le droit administratif, notre Cour a expliqué que l'objet des motifs, dans les cas où il faut en exposer, est d'établir « la justification de la décision [ainsi que] la transparence et [. . .] l'intelligibilité du processus décisionnel » (par. 47). Les questions en litige dans le présent pourvoi sont de savoir si les motifs de l'arbitre en l'espèce répondaient à ces critères et s'ils soulevaient la question de l'équité procédurale.

[2] The dispute underlying the arbitrator's award involved the calculation of vacation benefits. The arbitrator concluded that under the collective agreement, the grievors' time as casual employees was not to be included in calculating the length of their vacation entitlement when they became permanent employees.

[3] The definition of "Employee" in the collective agreement includes all paid employees, including casual employees. Casual employees are defined in Article 2.01(b) as employees who work on an "occasional or intermittent basis". They are under "no obligation . . . to come [to work] when they are called" and the Employer, in turn, has "no obligation" to call them.

[4] Notably, that definitional provision states that while casual employees are generally entitled to the benefits of the collective agreement, they are *expressly excluded* from a number of benefits, including the vacation entitlement calculations applicable to permanent employees under Article 17. Instead, they receive 20 percent of their basic salary in lieu.

[5] The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In the 12-page decision, the arbitrator outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, a number of applicable interpretive principles, and ultimately agreed with the Employer that the time an employee spent as a casual could not be used in calculating that employee's length of service towards vacation entitlement when he or she became a permanent, temporary or part-time employee.

[6] The arbitrator reasoned that casual employees, defined in Article 2.01(b), work on an occasional,

[2] Le conflit à l'origine de la décision de l'arbitre avait trait au calcul du nombre de congés annuels payés. L'arbitre a conclu qu'aux termes de la convention collective il ne fallait pas, dans le calcul du nombre de congés annuels payés auxquels les plaignantes avaient droit lorsqu'elles ont obtenu la permanence, tenir compte des heures durant lesquelles elles avaient travaillé à titre occasionnel.

[3] Dans la convention collective, « Employé » s'entend de tout employé rémunéré, y compris l'employé occasionnel. À l'alinéa 2.01b), l'employé occasionnel s'entend de l'employé qui travaille [TRADUCTION] « de façon occasionnelle ou intermittente ». Il « n'est pas tenu [. . .] de se présenter [au travail] lorsqu'il est appelé » et l'employeur, pour sa part, « n'est pas tenu » de l'appeler.

[4] Il convient de souligner qu'aux termes de cette disposition définitoire l'employé occasionnel bénéficie, de façon générale, des avantages de la convention collective, mais il n'a *expressément pas droit* à un certain nombre d'avantages, notamment les congés annuels payés dont l'employé permanent bénéficie selon le calcul prévu à l'art. 17. Il a plutôt droit, à ce titre, à une somme équivalant à 20 pour 100 de son salaire de base.

[5] La question que l'arbitre devait trancher était de savoir s'il pouvait être tenu compte, dans le calcul du nombre de congés annuels payés auxquels l'employé occasionnel ayant acquis la permanence avait droit, des heures durant lesquelles il avait travaillé à ce titre avant d'obtenir la permanence. Dans sa décision, qui comporte 12 pages, l'arbitre énonce les faits, les arguments des parties, les dispositions pertinentes de la convention collective ainsi qu'un certain nombre de principes d'interprétation applicables, et, en dernière analyse, il dit convenir avec l'employeur qu'il ne peut être tenu compte, dans le calcul de ses états de service ouvrant droit à des congés annuels payés, des heures durant lesquelles l'employé ayant acquis le statut d'employé permanent, temporaire, ou à temps partiel, avait travaillé à titre occasionnel avant d'obtenir ce statut.

[6] Selon l'arbitre, l'employé occasionnel au sens de l'al. 2.01b) travaille de façon occasionnelle ou

intermittent basis, and are not required to come to work even when called. Article 2.01(b) also sets out a list of benefits to which casual employees are *not* entitled. In lieu of those benefits, casual employees receive the benefit of 20 percent of their basic salary. One of the benefits from which they are expressly excluded and for which they receive the additional 20 percent is Article 17, which determines the length of vacation time to which an employee is entitled.

[7] These points, it seems to me, provided a reasonable basis for the arbitrator's conclusion, based on a plain reading of the agreement itself.

[8] On judicial review, the parties acknowledged that the standard of review was reasonableness. The chambers judge was of the view that such a review is based not only on whether the outcome falls within the range of possible outcomes, in accordance with *Dunsmuir*, but also requires that the reasons set out a line of analysis that reasonably supports the conclusion reached. The chambers judge concluded that the arbitrator's reasons required "more cogency" and that his conclusion was "unsupported by any chain of reasoning that could be considered reasonable". They were, in short, insufficient. As a result, the chambers judge found the result to be unreasonable and set it aside.

[9] The majority in the Court of Appeal overturned the decision of the chambers judge, concluding that while "a more comprehensive explanation" would have been preferable, the reasons were "sufficient to satisfy the *Dunsmuir* criteria" of "justification, transparency and intelligibility". In their words:

> . . . reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal

intermittente et n'est pas tenu de se présenter au travail même s'il est appelé. Cet alinéa énumère aussi certains avantages auxquels il *n'*a *pas* droit. Au lieu d'obtenir ces avantages, il touche une somme équivalant à 20 pour 100 de son salaire de base. L'un des avantages auxquels il n'a expressément pas droit et à l'égard duquel il touche une telle somme est celui que prévoit l'art. 17, qui fixe les modalités servant au calcul du nombre de congés annuels payés dont les employés bénéficient.

[7] Il me semble que ces éléments donnent un fondement raisonnable à la conclusion de l'arbitre quand on considère les dispositions de la convention collective.

[8] En contrôle judiciaire, les parties ont reconnu que la norme de contrôle qu'il convenait d'appliquer était celle de la décision raisonnable. Selon le juge siégeant en cabinet, un contrôle de cette nature vise non seulement à établir si le résultat fait partie des issues possibles, comme l'exige l'arrêt *Dunsmuir*, mais il exige aussi que les motifs fournissent une analyse qui permet raisonnablement d'étayer la conclusion. Le juge siégeant en cabinet a conclu que les motifs de l'arbitre devaient être [TRADUCTION] « plus solides » et que sa conclusion « ne reposait sur aucun raisonnement pouvant être qualifié de raisonnable ». Bref, les motifs étaient insuffisants. Par conséquent, il a estimé que le résultat était déraisonnable et l'a annulé.

[9] Les juges majoritaires de la Cour d'appel ont infirmé la décision du juge siégeant en cabinet, concluant que même s'il aurait été préférable de donner [TRADUCTION] « une explication plus détaillée », les motifs étaient « suffisants pour répondre aux critères établis dans *Dunsmuir* », soit ceux de « la justification de la décision [ainsi que de] la transparence et [de] l'intelligibilité du processus décisionnel ». Pour reprendre leurs propos :

> [TRADUCTION] . . . les motifs doivent être suffisants pour permettre aux parties de comprendre le fondement de la décision du tribunal et pour procéder au contrôle judiciaire de celle-ci. Ils doivent être examinés dans leur ensemble et leur contexte, et doivent être à même

grappled with the substantive live issues necessary to dispose of the matter.

[10] The dissenting judge agreed with the chambers judge. In her view, the arbitrator's reasons disclosed no line of reasoning which could lead to his conclusion. As a result, there were "no reasons" to review.

Analysis

[11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of

de convaincre la cour de révision que le tribunal s'est penché sur les questions de fond en litige nécessaires pour trancher l'affaire.

[10] La juge dissidente s'est dite d'accord avec le juge siégeant en cabinet. Selon elle, les motifs de l'arbitre ne faisaient ressortir aucun raisonnement susceptible de mener à la conclusion à laquelle il était parvenu. Il n'y avait donc « pas de motifs » à contrôler.

Analyse

[11] Il convient de reprendre les passages clés de l'arrêt *Dunsmuir* qui établissent le cadre de cette analyse :

> La norme déférente du caractère raisonnable procède du principe à l'origine des deux normes antérieures de raisonnabilité : certaines questions soumises aux tribunaux administratifs n'appellent pas une seule solution précise, mais peuvent plutôt donner lieu à un certain nombre de conclusions raisonnables. Il est loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables. La cour de révision se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité. Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit.
>
> . . . Que faut-il entendre par déférence dans ce contexte? C'est à la fois une attitude de la cour et une exigence du droit régissant le contrôle judiciaire. Il ne s'ensuit pas que les cours de justice doivent s'incliner devant les conclusions des décideurs ni qu'elles doivent respecter aveuglément leurs interprétations. Elles ne peuvent pas non plus invoquer la notion de raisonnabilité pour imposer dans les faits leurs propres vues. La déférence suppose plutôt le respect du processus décisionnel au regard des faits et du droit. Elle « repose en partie sur le respect des décisions du gouvernement de constituer des organismes administratifs assortis de pouvoirs délégués » [. . .] Nous convenons avec David Dyzenhaus que la notion de [TRADUCTION] « retenue au sens de respect » n'exige pas de la cour de révision [TRADUCTION] « la soumission, mais une attention respectueuse aux motifs donnés ou qui

a decision" .... [Emphasis added; citations omitted; paras. 47-48.]

[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]

(David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

[13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering

pourraient être donnés à l'appui d'une décision » ... [Je souligne; références omises; par. 47-48.]

[12] Il importe de souligner que la Cour a souscrit à l'observation du professeur Dyzenhaus selon laquelle la notion de retenue envers les décisions des tribunaux administratifs commande [TRADUCTION] « une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision ». Dans son article cité par la Cour, le professeur Dyzenhaus explique en ces termes comment le caractère raisonnable se rapporte aux motifs :

> [TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étayent, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de première ligne, la connaissance directe qu'a le tribunal du différend, son expertise, etc., il est aussi vrai qu'on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Je souligne.]

(David Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans Michael Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Voir aussi David Mullan, « *Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants : Let's Try Again! » (2008), 21 *C.J.A.L.P.* 117, p. 136; David Phillip Jones, c.r., et Anne S. de Villars, c.r., *Principles of Administrative Law* (5e éd. 2009), p. 380; et *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 63.

[13] C'est dans cette optique, selon moi, qu'il faut interpréter ce que la Cour voulait dire dans *Dunsmuir* lorsqu'elle a parlé de « la justification de la décision [ainsi que de] la transparence et [de] l'intelligibilité du processus décisionnel ». À mon avis, ces propos témoignent d'une reconnaissance respectueuse du vaste éventail de décideurs spécialisés qui rendent couramment

decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

[14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

des décisions — qui paraissent souvent contre-intuitives aux yeux d'un généraliste — dans leurs sphères d'expertise, et ce en ayant recours à des concepts et des termes souvent propres à leurs champs d'activité. C'est sur ce fondement que notre Cour a changé d'orientation dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, où le juge Dickson a insisté sur le fait qu'il y avait lieu de faire preuve de déférence en appréciant les décisions des tribunaux administratifs spécialisés. Cet arrêt a amené la Cour à faire preuve d'une déférence accrue envers les tribunaux, comme en témoigne la conclusion, tirée dans *Dunsmuir*, qu'il doit être « loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables » (par. 47).

[14] Je ne suis pas d'avis que, considéré dans son ensemble, l'arrêt *Dunsmuir* signifie que l'« insuffisance » des motifs permet à elle seule de casser une décision, ou que les cours de révision doivent effectuer deux analyses distinctes, l'une portant sur les motifs et l'autre, sur le résultat (Donald J. M. Brown et John M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), §§12:5330 et 12:5510). Il s'agit d'un exercice plus global : les motifs doivent être examinés en corrélation avec le résultat et ils doivent permettre de savoir si ce dernier fait partie des issues possibles. Il me semble que c'est ce que la Cour voulait dire dans *Dunsmuir* en invitant les cours de révision à se demander si « la décision et sa justification possèdent les attributs de la raisonnabilité » (par. 47).

[15] La cour de justice qui se demande si la décision qu'elle est en train d'examiner est raisonnable du point de vue du résultat et des motifs doit faire preuve de « respect [à l'égard] du processus décisionnel [de l'organisme juridictionnel] au regard des faits et du droit » (*Dunsmuir*, par. 48). Elle ne doit donc pas substituer ses propres motifs à ceux de la décision sous examen mais peut toutefois, si elle le juge nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57, [2011] 3 S.C.R. 572) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

[16] Il se peut que les motifs ne fassent pas référence à tous les arguments, dispositions législatives, précédents ou autres détails que le juge siégeant en révision aurait voulu y lire, mais cela ne met pas en doute leur validité ni celle du résultat au terme de l'analyse du caractère raisonnable de la décision. Le décideur n'est pas tenu de tirer une conclusion explicite sur chaque élément constitutif du raisonnement, si subordonné soit-il, qui a mené à sa conclusion finale (*Union internationale des employés des services, local n$^{o}$ 333 c. Nipawin District Staff Nurses Assn.*, [1975] 1 R.C.S. 382, p. 391). En d'autres termes, les motifs répondent aux critères établis dans *Dunsmuir* s'ils permettent à la cour de révision de comprendre le fondement de la décision du tribunal et de déterminer si la conclusion fait partie des issues possibles acceptables.

[17] Le fait que la convention collective puisse se prêter à une interprétation autre que celle que lui a donnée l'arbitre ne mène pas forcément à la conclusion qu'il faut annuler sa décision, si celle-ci fait partie des issues possibles raisonnables. Les juges siégeant en révision doivent accorder une « attention respectueuse » aux motifs des décideurs et se garder de substituer leurs propres opinions à celles de ces derniers quant au résultat approprié en qualifiant de fatales certaines omissions qu'ils ont relevées dans les motifs.

[18] Dans *Société canadienne des postes c. Alliance de la Fonction publique du Canada*, 2010 CAF 56, [2011] 2 R.C.F. 221, le juge Evans précise, dans des motifs confirmés par notre Cour (2011 CSC 57, [2011] 3 R.C.S. 572), que l'arrêt *Dunsmuir* cherche à « [éviter] qu'on [aborde] le contrôle judiciaire sous un angle trop formaliste » (par. 164). Il signale qu'« [o]n ne s'atten[d] pas à de la perfection » et indique que la cour de révision doit se demander si, « lorsqu'on les examine à la lumière des éléments de preuve dont il disposait et de la nature de la tâche que la loi lui confie, on constate que les motifs du Tribunal expliquent de façon adéquate le fondement de sa décision » (par. 163). J'estime que la description de l'exercice que donnent les intimées dans leur mémoire est particulièrement utile pour en décrire la nature :

When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[19] The Union acknowledged that an arbitrator's interpretation of a collective agreement is subject to reasonableness. As I understand it, however, its argument before us was that since the arbitrator's reasons amounted to "no reasons", and since the duty to provide reasons is, according to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, a question of procedural fairness, a correctness standard applies.

[20] Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).

[21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and

[TRADUCTION] La déférence est le principe directeur qui régit le contrôle de la décision d'un tribunal administratif selon la norme de la décision raisonnable. Il ne faut pas examiner les motifs dans l'abstrait; il faut examiner le résultat dans le contexte de la preuve, des arguments des parties et du processus. Il n'est pas nécessaire que les motifs soient parfaits ou exhaustifs. [par. 44]

[19] Le syndicat a reconnu que l'interprétation qu'un arbitre donne à une convention collective est soumise à la norme de la décision raisonnable. Mais, d'après ce que je crois comprendre, il a soutenu devant nous que puisque les motifs de l'arbitre étaient assimilables à une « absence de motifs » et que, selon *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, l'obligation de fournir des motifs relève de l'équité procédurale, c'est la norme de la décision correcte qu'il convient d'appliquer.

[20] La question de l'équité procédurale n'a été soulevée ni devant le juge siégeant en révision, ni devant la Cour d'appel, et notre Cour peut la trancher aisément. L'arrêt *Baker* établit que, « dans certaines circonstances », l'obligation d'équité procédurale requiert « une forme quelconque de motifs écrits » à l'appui d'une décision (par. 43). Il n'y est pas affirmé que des motifs s'imposent *dans tous les cas*, ni que leur *qualité* relève de l'équité procédurale. En fait, après avoir jugé que des motifs s'imposaient dans la situation qui l'occupait, la Cour a conclu dans *Baker* que les simples notes d'un agent d'immigration suffisaient pour remplir l'obligation d'équité procédurale (par. 44).

[21] Il m'apparaît inutile d'expliciter l'arrêt *Baker* en indiquant que les lacunes ou les vices dont seraient entachés les motifs appartiennent à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils sont soumis à la norme de la décision correcte. Je fais mienne la mise en garde du professeur Philip Bryden selon laquelle [TRADUCTION] « les cours de justice doivent se garder de confondre la conclusion que le raisonnement du tribunal n'est pas adéquatement exposé et le désaccord au sujet des conclusions tirées par le tribunal sur la base de la preuve dont il disposait » (« Standards of Review and Sufficiency of Reasons : Some Practical Considerations » (2006), 19 *C.J.A.L.P.* 191, p. 217; voir aussi Grant

Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).

[22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[23] The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, *under the collective agreement*, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. They are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible.

[24] As George W. Adams noted:

> The hallmarks of grievance arbitration are speed, economy and informality. Speedy dispute resolution is important to the maintenance of industrial peace and the ongoing economic needs of an enterprise. Adjudication that is too expensive contributes to industrial unrest by preventing the pursuit of meritorious grievances that individually involve small monetary values but collectively constitute a weathervane of employee satisfaction with the rules negotiated. The relative informality of grievance arbitration is facilitated by much less stringent procedural and evidentiary rules than those applicable to court proceedings. Informality permits direct participation by laymen, enhances the parties' understanding of the system and minimizes potential points of contention permitting everyone to focus on the merits of a dispute and any underlying problem. . . .

Huscroft, « The Duty of Fairness : From Nicholson to Baker and Beyond », dans Colleen M. Flood et Lorne Sossin, dir., *Administrative Law in Context* (2008), 115, p. 136).

[22] Le manquement à une obligation d'équité procédurale constitue certes une erreur de droit. Or, en l'absence de motifs dans des circonstances où ils s'imposent, il n'y a rien à contrôler. Cependant, dans les cas où, comme en l'espèce, *il y en a*, on ne saurait conclure à un tel manquement. Le raisonnement qui sous-tend la décision/le résultat ne peut donc être remis en question que dans le cadre de l'analyse du caractère raisonnable de celle-ci.

[23] L'arbitre en l'espèce avait pour tâche de se livrer à un simple exercice d'interprétation : *la convention collective accordait-elle* aux employés occasionnels le droit d'accumuler des congés annuels payés? Pour les arbitres en relations de travail, il s'agit d'un cas classique d'interprétation d'une convention collective. Lorsqu'ils rendent des décisions, les arbitres s'adressent non pas aux cours de justice, mais aux parties, qui doivent se côtoyer pour la durée de la convention collective. Bien que cela ne soit pas toujours facilement réalisable, le but est de rendre des décisions le plus rapidement possible.

[24] Comme l'a fait remarquer George W. Adams :

> [TRADUCTION] La célérité, l'économie et l'absence de formalisme caractérisent l'arbitrage des griefs. Il importe de régler rapidement les différends pour maintenir la paix industrielle et répondre aux besoins économiques permanents de l'entreprise. Un traitement trop coûteux des griefs favorise les conflits de travail en empêchant la poursuite de griefs fondés qui, pris individuellement, portent sur de faibles sommes d'argent mais qui, collectivement, donnent une idée de la satisfaction des employés à l'égard des règles négociées. Des règles beaucoup moins strictes en matière de procédure et de preuve que celles applicables aux instances judiciaires contribuent à l'absence relative de formalisme de l'arbitrage des griefs. Or, cette absence de formalisme favorise la participation directe de profanes, accroît la connaissance qu'ont les parties du système et minimise les points de désaccord éventuels, ce qui donne à tous les intéressés l'occasion de se concentrer sur le fond d'un différend et les problèmes qui en sont la cause. . .

. . . appeal to a higher authority by way of judicial review may be needed to correct egregious errors, to prevent undue extension of arbitral power and to integrate the narrow expertise of arbitrators into the general values of the legal system. The very existence of judicial review can be a healthy check on the improper exercise of arbitral responsibility and discretion. [Emphasis added.]

(*Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 1, at §§4.1100 to 4.1110)

[25] Arbitration allows the parties to the agreement to resolve disputes as quickly as possible knowing that there is the relieving prospect not of judicial review, but of negotiating a new collective agreement with different terms at the end of two or three years. This process would be paralyzed if arbitrators were expected to respond to every argument or line of possible analysis.

[26] In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitor for the appellant: David G. Conway, St. John's.*

*Solicitors for the respondents: Stewart McKelvey, St. John's.*

. . . il peut être nécessaire de faire appel, par voie de contrôle judiciaire, à une autorité supérieure en vue de corriger des erreurs flagrantes, prévenir l'accroissement indu du pouvoir des arbitres et intégrer l'expertise restreinte de ceux-ci aux valeurs générales du système juridique. L'existence même du contrôle judiciaire peut se révéler un obstacle salutaire à l'exercice irrégulier, par les arbitres, de leurs fonctions et de leur pouvoir discrétionnaire. [Je souligne.]

(*Canadian Labour Law* (2e éd. (feuilles mobiles)), vol. 1, §§4.1100 à 4.1110)

[25] L'arbitrage permet aux parties à la convention collective de régler leurs différends dans les plus brefs délais, tout en sachant que la solution de rechange consiste non pas à se pourvoir en contrôle judiciaire, mais à négocier dans deux ou trois ans une nouvelle convention collective contenant des modalités différentes. Ce processus serait paralysé si l'on exigeait des arbitres qu'ils répondent à tous les arguments ou modes possibles d'analyse.

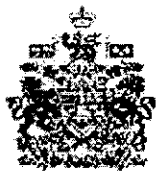
[26] En l'espèce, il ressort des motifs que l'arbitre avait bien saisi la question en litige et qu'il est parvenu à un résultat faisant sans aucun doute partie des issues possibles raisonnables. Je suis d'avis de rejeter le pourvoi avec dépens.

*Pourvoi rejeté avec dépens.*

*Procureur de l'appelante : David G. Conway, St. John's.*

*Procureurs des intimées : Stewart McKelvey, St. John's.*

# TAB 9



**SUPREME COURT OF CANADA**

**CITATION:** Agraira *v.* Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559

**DATE:** 20130620
**DOCKET:** 34258

**BETWEEN:**

**Muhsen Ahmed Ramadan Agraira**
Appellant
and
**Minister of Public Safety and Emergency Preparedness**
Respondent
- and -
**British Columbia Civil Liberties Association, Ahmad Daud Maqsudi, Canadian Council for Refugees, Canadian Association of Refugee Lawyers, Canadian Arab Federation and Canadian Tamil Congress**
Interveners

**CORAM:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

**REASONS FOR JUDGMENT:** (paras. 1 to 103)

LeBel J. (McLachlin C.J. and Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)

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Agraira *v.* Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559



**Muhsen Ahmed Ramadan Agraira** *Appellant*

*v.*

**Minister of Public Safety and Emergency Preparedness** *Respondent*

and

**British Columbia Civil Liberties Association,**
**Ahmad Daud Maqsudi,**
**Canadian Council for Refugees,**
**Canadian Association of Refugee Lawyers,**
**Canadian Arab Federation and Canadian Tamil Congress** *Interveners*

**Indexed as: Agraira *v.* Canada (Public Safety and Emergency Preparedness)**

**2013 SCC 36**

File No.: 34258.

2012: October 18; 2013: June 20.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL



*Administrative law — Judicial review — Standard of review — Ministerial decisions — Immigration — Citizen of Libya found to be inadmissible based on membership in terrorist organization — Application for ministerial relief denied — Appropriate standard of review to apply to Minister's decision — Whether, in light of this standard, Minister's decision is valid — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 34(2).*

*Administrative law — Natural justice — Doctrine of legitimate expectations — Citizen of Libya found to be inadmissible based on membership in terrorist organization — Application for ministerial relief denied — Whether there was failure to meet legitimate expectations — Whether there was failure to discharge duty of procedural fairness.*

*Immigration — Inadmissibility and removal — Ministerial relief — Citizen of Libya found to be inadmissible based on membership in terrorist organization — Application for ministerial relief denied — Interpretation of term "national interest" — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 34(2).*

A, a citizen of Libya, has been residing in Canada continuously since 1997, despite having been found to be inadmissible on security grounds in 2002. The

finding of inadmissibility was based on his membership in the Libyan National Salvation Front ("LNSF") — a terrorist organization according to Citizenship and Immigration Canada ("CIC"). A applied in 2002 under s. 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for ministerial relief from the determination of inadmissibility, but his application was denied in 2009. The Minister of Public Safety and Emergency Preparedness ("Minister") concluded that it was not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. A's application for permanent residence was denied.

A applied to the Federal Court for judicial review of the Minister's decision regarding relief. The Federal Court granted the application for judicial review. The Federal Court of Appeal allowed the appeal, dismissed the application for judicial review and concluded the Minister's decision was reasonable.

*Held*: The appeal should be dismissed and the Minister's decision under s. 34(2) of the *IRPA* allowed to stand.

A court deciding an application for judicial review must engage in a two-step process to identify the proper standard of review. First, it must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence. The second inquiry becomes relevant if the first is unfruitful or if the relevant precedents

appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage, the court performs a full analysis in order to determine what the applicable standard is. The standard of review applicable in the case at bar has been satisfactorily determined in past decisions to be reasonableness.



The Minister, in making his decision, did not expressly define the term "national interest". Although this Court is not in a position to determine with finality the actual reasoning of the Minister, it may consider what appears to have been the ministerial interpretation of "national interest", based on the Minister's "express reasons" and Chapter 10 of CIC's *Inland Processing Operational Manual*: "Refusal of National Security Cases/Processing of National Interest Requests" (the "Guidelines"), which inform the scope and context of those reasons, and whether this implied interpretation, and the Minister's decision as a whole, were reasonable. Had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations. The Guidelines did not constitute a fixed and rigid code. Rather, they contained a set of factors, which appeared to be relevant and reasonable, for the evaluation of applications for ministerial relief. The Minister did not have to apply them formulaically, but they guided the exercise of his discretion and assisted in framing a fair administrative process for such applications.

The Minister is entitled to deference as regards this implied interpretation of the term "national interest". The Minister's interpretation of the term "national interest" is reasonable. The plain words of the provision favour a broader reading of the term "national interest" rather than one which would limit its meaning to the protection of public safety and national security. The words of the statute, the legislative history of the provision, the purpose and context of the provision, are all consistent with the Minister's implied interpretation of this term. Section 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy. Section 34 should not be transformed into an alternative form of humanitarian review; however, it does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review. An analysis based on the principles of statutory interpretation reveals that a broad range of factors may be relevant to the determination of what is in the "national interest", for the purposes of s. 34(2) of the *IRPA*.

The Minister's reasons were justifiable, transparent and intelligible. Although brief, they made clear the process he had followed in ruling on A's application for ministerial relief. He reviewed and considered all the material and evidence before him. Having done so, he placed particular emphasis on: A's contradictory and inconsistent accounts of his involvement with the LNSF, a group that has engaged in terrorism; the fact that A was most likely aware of the LNSF's previous activity; and the fact that A had had sustained contact with the LNSF. The

Minister's reasons revealed that, on the basis of his review of the evidence and other submissions as a whole, and of these factors in particular, he was not satisfied that A's continued presence in Canada would not be detrimental to the national interest. The Minister's reasons allow this Court to clearly understand why he made the decision he did.



The Minister's decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law. The burden was on A to show that his continued presence in Canada would not be detrimental to the national interest. The Minister declined to provide discretionary relief to A, as he was not satisfied that this burden had been discharged. His conclusion was acceptable in light of the facts which had been submitted to him. Courts reviewing the reasonableness of a minister's exercise of discretion are not entitled to engage in a new weighing process. The Minister reviewed and considered (i.e. weighed) all the factors set out in A's application which were relevant to determining what was in the "national interest" in light of his reasonable interpretation of that term. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.

The Minister's decision was not unfair, nor was there a failure to meet A's legitimate expectations or to discharge the duty of procedural fairness owed to him. In this case, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate

expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that they are used by employees of both CIC and the Canada Border Services Agency for guidance in the exercise of their functions and in applying the legislation. The Guidelines are and were publicly available, and they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, A could reasonably expect that his application would be dealt with in accordance with the process set out in them. A has not shown that his application was not dealt with in accordance with this process outlined in the Guidelines. If A had a legitimate expectation that the Minister would consider certain factors, including the Guidelines and humanitarian and compassionate factors, in determining his application for relief, this expectation was fulfilled.



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APPEAL from a judgment of the Federal Court of Appeal (Blais C.J. and Noël and Pelletier JJ.A.), 2011 FCA 103, 415 N.R. 121, 96 Imm. L.R. (3d) 20, [2011] F.C.J. No. 407 (QL), 2011 CarswellNat 639, setting aside a decision of Mosley J., 2009 FC 1302, 357 F.T.R. 246, 87 Imm. L.R. (3d) 135, [2009] F.C.J. No. 1664 (QL), 2009 CarswellNat 4438. Appeal dismissed.



*Lorne Waldman*, *Jacqueline Swaisland* and *Clare Crummey*, for the appellant.

*Urszula Kaczmarczyk* and *Marianne Zoric*, for the respondent.

Written submissions only by *Jill Copeland* and *Colleen Bauman*, for the intervener the British Columbia Civil Liberties Association.

*Leigh Salsberg*, for the intervener Ahmad Daud Maqsudi.

*John Norris* and *Andrew Brouwer*, for the interveners the Canadian Council for Refugees and the Canadian Association of Refugee Lawyers.

*Barbara Jackman* and *Hadayt Nazami*, for the interveners the Canadian Arab Federation and the Canadian Tamil Congress.

The judgment of the Court was delivered by

LEBEL J. —

## I. Introduction

[1] The appellant, Muhsen Ahmed Ramadan Agraira, a citizen of Libya, has been residing in Canada continuously since 1997, despite having been found to be inadmissible on security grounds in 2002. The finding of inadmissibility was based on the appellant's membership in the Libyan National Salvation Front ("LNSF") — a terrorist organization according to Citizenship and Immigration Canada ("CIC"). The appellant applied in 2002 under s. 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for ministerial relief from the determination of inadmissibility, but his application was denied in 2009. The Minister of Public Safety and Emergency Preparedness ("Minister") concluded that it was not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. The appellant's application for permanent residence was accordingly denied, and he is now at risk of deportation.

[2] Mr. Agraira appeals to this Court from a decision in which the Federal Court of Appeal dismissed an application for judicial review of the Minister's decision denying relief from the determination of inadmissibility. He contends that the Minister took an overly narrow view of the term "national interest" in s. 34(2) of the *IRPA* by equating it with national security and public safety. He adds that the Minister's decision failed to meet his legitimate expectations that certain procedures

would be followed and certain factors would be taken into account in determining his application for relief.



[3] The question raised by this appeal is whether the Minister's decision to deny relief can be successfully challenged. Two central issues are raised. First, what is the appropriate standard of review to apply to the Minister's decision? Second, in light of this standard, should the Minister's decision be set aside? This appeal also raises two other issues incidental to these central issues, namely the interpretation of the term "national interest" in s. 34(2) of the *IRPA* and the impact of any legitimate expectations created by Chapter 10 of CIC's *Inland Processing Operational Manual*: "Refusal of National Security Cases/Processing of National Interest Requests" (the "Guidelines").

[4] I agree with the Federal Court of Appeal, but for reasons differing in part, that the Minister's decision was reasonable and that the application for judicial review should be dismissed.

## II. Background

[5] The appellant left Libya in 1996. He first sought refugee status in Germany on the basis of his connection with the LNSF, but his application was denied. He entered Canada in 1997, at Toronto, using a fake Italian passport. He applied for Convention Refugee status in this country on the basis of his affiliation

with the LNSF. On his personal information form, he described his activities with that organization as follows: as a member of an 11-person cell, he had delivered envelopes to members of other cells, raised funds, and watched the movements of supporters of the regime then in power. As part of his training, he was taught how to engage people in political discourse and how to raise funds.



[6] The appellant was heard by the Convention Refugee Determination Division of the Immigration and Refugee Board. At the hearing, he provided a letter from the LNSF confirming his membership in that organization. On October 24, 1998, he was denied Convention Refugee status on the basis that he lacked credibility.

[7] While his application for refugee status was pending, the appellant married a Canadian woman in a religious ceremony in December 1997. He later married her in a civil ceremony in March 1999. His wife sponsored his application for permanent residence in August 1999.

[8] In May 2002, the appellant was advised by CIC that his application for permanent residence might be refused, because there were grounds to believe that he was or had been a member of an organization that was or had been engaged in terrorism, contrary to s. 19(1)(*f*)(iii)(B) of the *Immigration Act*, R.S.C. 1985, c. I-2 ("*IA*"), which was then in force.

[9] Later in May 2002, the appellant was interviewed by an immigration officer. In the course of that interview, he confirmed that he had been a member of the LNSF, but claimed that he had previously exaggerated the extent of his involvement in order to bolster his refugee claim. Although he now claimed that he did not know very much about the LNSF, he was able to name its founder and its current leader. Also, after stating that he had attended LNSF meetings in Libya, he said that he had only discussed the group with friends. Finally, he stated that he had had no contact with the LNSF after leaving Libya, but then acknowledged having received newsletters from chapters in the United States since that time. These contradictions led the immigration officer to conclude that the appellant was or had been a member of an organization that engaged in terrorism. He was found to be inadmissible on that basis.

[10] On May 22, 2002, CIC sent the appellant a letter advising him of the possibility of requesting ministerial relief. In July of that year, the appellant applied for that relief. The immigration officer noted, while preparing her report on the interview, that, once again, there were statements in the appellant's application for relief that contradicted earlier statements he had made. For example, the appellant indicated in this application that he had attended meetings of the LNSF at which he had been trained to approach potential members and raise funds. However, in his interview with the immigration officer, the appellant said that he was unaware how the LNSF funded itself or how it recruited members. The officer concluded that the appellant had been and continued to be a member of the LNSF, but that his

involvement had been limited to distributing leaflets and enlisting support for the organization. She therefore recommended that he be granted relief.



[11] At the same time (July 2002), the officer prepared a Report on Inadmissibility regarding the appellant under s. 44(1) of the *IRPA*. Her report indicated that he was inadmissible to Canada pursuant to s. 34(1)(*f*) of the *IRPA* because he was a member of a terrorist organization.

[12] Next, in August 2005, a briefing note for the Minister was prepared by the Canada Border Services Agency ("CBSA"). After having been reviewed by counsel for the appellant, who made no further comment, the note was submitted to the Minister on March 9, 2006. It contained a recommendation that the appellant be granted relief, as there was "not enough evidence to conclude that Mr. Ramadan Agraira's continued presence in Canada would be detrimental to the national interest" (A.R., vol. I, at p. 9). This recommendation was based on the following considerations:

> Mr. Ramadan Agraira admitted to joining the LNSF but was only a member for approximately two years. There is some information to suggest that he became a member at a time when the organization was not in its most active phase and well after it was involved in an operation to overthrow the Libyan regime. He initially stated that he had participated in a number of activities on behalf of the organization but later indicated that he had exaggerated the extent of his involvement so that he could make a stronger claim to refugee status in Canada. This is supported to some extent by the fact that his attempts to obtain refugee status in Germany and Canada were rejected on the basis of credibility. Mr. Ramadan Agraira denied having been involved in any acts of violence or terrorism and there is no evidence to the contrary. He appears

> to have been a regular member who did not occupy a position of trust or authority within the LNSF. He does not appear to have been totally committed to the LNSF specifically as he indicated to the immigration officer at CIC Oshawa that he would support anyone who tried to remove the current regime in Libya through non-violent means. [A.R., vol. I, at p. 9]



[13] On January 27, 2009, the Minister rejected the recommendation in the briefing note. The response he gave was as follows:

> After having reviewed and considered the material and evidence submitted in its entirety as well as specifically considering these issues:
>
> - The applicant offered contradictory and inconsistent accounts of his involvement with the Libyan National Salvation Front (LNSF).
>
> - There is clear evidence that the LNSF is a group that has engaged in terrorism and has used terrorist violence in attempts to overthrow a government.
>
> - There is evidence that LNSF has been aligned at various times with Libyan Islamic opposition groups that have links to Al-Qaeda.
>
> - It is difficult to believe that the applicant, who in interviews with officials indicated at one point that he belonged to a "cell" of the LNSF which operated to recruit and raise funds for LNSF, was unaware of the LNSF's previous activity.
>
> It is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. Ministerial relief is denied. [A.R., vol. I, at p. 11]

[14] On March 24, 2009, the appellant received notice that his application for permanent residence was denied. He then applied to the Federal Court for judicial review of the Minister's decision regarding relief.



## III. Judicial History

### A. *Federal Court, 2009 FC 1302, 357 F.T.R. 246*

[15] Mosley J. began his analysis by ruling on the standard of review. He held that the appropriate standard was reasonableness, citing the discretionary nature of the decision, the fact that it was not delegable, and the Minister's expertise in matters of national security and the national interest. He added that the political nature of the decision and the Minister's special knowledge involving sensitivity to the imperatives of public policy and the nuances of the legislative scheme also weighed in favour of deference.

[16] In applying the reasonableness standard, Mosley J. considered the fact that the Minister had focused on evidence that the LNSF had engaged in terrorism and been aligned with Libyan Islamic groups that had links to Al-Qaeda. He found, on the contrary, that the evidence of the LNSF's engagement in terrorism was minimal at best. In particular, the LNSF did not appear on the lists of terrorist organizations of the United Nations, Canada and the United States. Although several Libyan opposition groups had direct links with Al-Qaeda, there was no evidence in

the record that LNSF was one of them. Because it had been previously determined that the LNSF was a terrorist group for the purposes of s. 34(1)(*f*) of the *IRPA*, the court could not review that finding. However, Mosley J. found it difficult to understand why the Minister had given so much weight to the LNSF's engagement in terrorism and its alignment with Libyan Islamic groups that had links to Al-Qaeda.



[17] Mosley J. then referred to the Federal Court's decision in *Abdella v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1199, 355 F.T.R. 86, in which Gibson J. had relied on the Guidelines to set aside the Minister's decision to deny relief under s. 34(2). Appendix D to the Guidelines contains five questions to be addressed in the context of an application for such relief:

> 1. Will the applicant's presence in Canada be offensive to the Canadian public?
>
> 2. Have all ties with the regime/organization been completely severed?
>
> 3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?
>
> 4. Is there any indication that the applicant might be benefiting from previous membership in the regime/organization?
>
> 5. Has the person adopted the democratic values of Canadian society?

[18] Mosley J. noted that in the instant case, the Minister had not addressed these questions in the reasons he gave for his decision, nor had he balanced the factors the Federal Court had in past cases identified as being relevant to the determination of what is in the national interest, namely: whether the appellant posed

a threat to Canada's security; whether the appellant posed a danger to the public; the period of time the appellant had been in Canada; whether the determination is consistent with Canada's humanitarian reputation of allowing permanent residents to settle in Canada; the impact on both the appellant and all other members of society of the denial of permanent residence; and adherence to all Canada's international obligations. He criticized the Minister for not considering in his decision the facts that the appellant had been residing in Canada since 1997 and had been a productive member of society, that he had no criminal record, and that he owned a business earning over $100,000 a year. In Mosley J.'s view, the exercise of the Minister's discretion seemed to have been rendered meaningless by the Minister's "simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest" (para. 27).

[19] Mosley J. granted the application for judicial review and certified the following questions for consideration by the Federal Court of Appeal:

> When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP 10? [para. 32]

B. *Federal Court of Appeal, 2011 FCA 103, 415 N.R. 121*

[20] In the Federal Court of Appeal, Pelletier J.A. (Blais C.J. and Noël J.A. concurring) considered the issues separately in ruling on the standard of review. He held that establishing the meaning of the term "national interest" for the purposes of s. 34(2) is a question of law in respect of which the Minister has no particular expertise and for which the appropriate standard is therefore correctness. The appropriate standard for reviewing the exercise of the Minister's discretion, on the other hand, is reasonableness.

[21] Pelletier J.A. confirmed that, in an application for ministerial relief, the onus is on the applicant to satisfy the Minister that his or her presence in Canada would not be detrimental to the national interest. Because this onus was reversed in the briefing note, he held that it was open to the Minister to disregard the recommendation made in the note.

[22] Pelletier J.A. next turned to the interpretation of s. 34(2) of the *IRPA*. He tracked the legislative evolution of s. 34(2) to find what, in his view, was the correct interpretation of this subsection. He noted that Parliament had transferred the responsibility for exercising the discretion from the Minister of Citizenship and Immigration ("MCI") to the Minister. As a result of this change, s. 34(2) has to be read in light of the objects of the *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10 ("*DPSEPA*") (the Minister's enabling statute), the *Canada Border Services Agency Act*, S.C. 2005, c. 38 ("*CBSAA*") (the statute governing the CBSA, the organization that assists the Minister in his or her duties),

and the *IRPA*. These statutes work together as part of a statutory scheme to which the presumption of coherence must be applied.



[23] In May 2002, when the appellant's admissibility interview took place, the *IA* was in force. Under the *IA*, the MCI was responsible both for the determination of inadmissibility and for the decision on granting relief. He or she was also responsible for deciding whether to grant exemptions from the *IA* on humanitarian and compassionate ("H&C") grounds.

[24] On June 28, 2002, the *IRPA* replaced the *IA*. Under the transitional provisions of the *IRPA*, the appellant's application for relief would now be governed by the *IRPA*, and more specifically by s. 34 of that Act. At that time, the MCI was still responsible for deciding whether to grant relief under s. 34(2). After the *CBSAA* was passed in 2005, the responsible minister became "[t]he Minister as defined in section 2" of the *CBSAA* (*IRPA*, s. 4(2), repl. by S.C. 2005, c. 38, s. 118). In 2008, the Minister was specifically identified as the responsible minister. The MCI retained the ability to grant exemptions from the *IRPA* on H&C grounds.

[25] This review led Pelletier J.A. to conclude that under the statutory scheme, the Minister was responsible for deciding whether to grant relief, whereas the MCI continued to be responsible for deciding whether to grant exemptions on the basis of H&C considerations. Hence, Parliament intended that ministerial relief would be granted or denied on the basis of considerations other than those that could support an

application for H&C relief. The proper procedure for making an application based on H&C considerations is that under s. 25 of the *IRPA*, not that of an application for ministerial relief under s. 34(2).



[26] Pelletier J.A. then equated the "national interest", for the purposes of s. 34(2), with national security and public safety. He found support for this proposition in the *DPSEPA* and the *CBSAA*. The *DPSEPA* emphasizes the Minister's responsibility for public safety and emergency preparedness. Under the *CBSAA*, the Minister is also responsible for the CBSA, whose purpose is, *inter alia*, to provide "integrated border services that support national security and public safety priorities" (*CBSAA*, s. 5). Pelletier J.A. found that this statutory scheme supports the view that the exercise of the Minister's discretion under s. 34(2) must be primarily, if not exclusively, guided by his or her national security and public safety role.

[27] Pelletier J.A. next considered the effect of the Guidelines, in which the following definition of the term "national interest" appears: "The consideration of national interest involves the assessment and balancing of all factors pertaining to the applicant's admission against the stated objectives of the Act as well as Canada's domestic and international interests and obligations" (s. 6).

[28] Pelletier J.A. noted that the Guidelines cannot alter the law as enacted by Parliament and found that they are of limited application now that the Minister, as opposed to the MCI, has become responsible for decisions on granting ministerial

relief under s. 34(2). This conclusion was based on s. 4(2)(*c*) of the *IRPA*, which provides that the Minister is responsible for the establishment of policies regarding "inadmissibility on grounds of security". As a consequence, the five factors set out in the Guidelines need not be considered in disposing of relief applications. For Pelletier J.A., this Court's dictum in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 72, to the effect that guidelines are "a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section" does not apply in the case of the Guidelines. This is because the Guidelines serve to identify foreign nationals whose presence in Canada would be detrimental to the national interest, and thus to eliminate unsuitable candidates for relief. They do not serve, as was the case in *Baker*, to identify suitable candidates for relief.



[29] Pelletier J.A. then went on to hold that the fact that a finding of inadmissibility under s. 34(1) might negate the possibility of relief under s. 34(2) does not render that relief illusory. Rather, on the basis of *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, the relief under s. 34(2) was meant to apply only in exceptional cases in which the applicant's association with a terrorist group was innocent or coerced.

[30] Finally, Pelletier J.A. concluded that the Minister's decision was reasonable. The Minister had addressed the appellant's submission that his involvement with the LNSF was either non-existent, innocent or trivial and had found

the appellant's account of his involvement to be "contradictory and inconsistent" (para. 69). Ultimately, because the appellant lacked credibility as a result of these contradictions and inconsistencies, the Minister had had no faith in any of his representations. Accordingly, the Minister had not acted unreasonably in reaching the conclusion he had. The application for judicial review was dismissed, and the certified questions were answered as follows:

> 1- When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest?
>
> Answer: National security and public safety, as set out in para. 50 of these reasons.
>
> 2- Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?
>
> Answer: No. [para. 74]

## IV. Analysis

### A. *Issues*

[31] The issues to be resolved in this appeal are as follows:

(1) Is the standard of review for the Minister's decision reasonableness or correctness?

(2) Is the Minister's decision valid?

(3) Was the decision unfair, and did it fail to meet the appellant's legitimate expectations?



[32] As I mentioned above, a corollary issue related to the first and second issues is the meaning of the term "national interest" in s. 34(2) of the *IRPA*.

B. *Positions of the Parties*

(1) Position of the Appellant

[33] The appellant submits that the standard of review applicable to all the issues before this Court is correctness, because they all constitute questions of pure law and natural justice. The Minister's decision was incorrect in that it was based on an erroneous view of the meaning of the term "national interest" in s. 34(2) of the *IRPA* and it failed to meet the appellant's legitimate expectations as to what factors would be considered in assessing his application for relief.

[34] The appellant contends that the Federal Court of Appeal relied too heavily on the legislative transfer of ministerial responsibility in interpreting the term "national interest" for the purposes of s. 34(2). This shift in responsibility between governmental departments does not indicate a concomitant legislative intent to change the interpretation of the *IRPA*. He also argues that the term "national interest" should be given a broader meaning than the one ascribed to it by the Federal Court of

Appeal. Although public security and national defence should both be taken into account as relevant factors in the Minister's exercise of discretion, they should not be the only factors considered in applying the "national interest" test. In taking an unduly narrow view of the term "national interest" by equating it with one aspect of that interest (national security and public safety), the Federal Court of Appeal set a precedent which unlawfully fetters the Minister's discretion by requiring that he or she consider only that one aspect when dealing with future applications for relief.



[35] Finally, the appellant submits that the Minister's decision was unfair in that it failed to meet legitimate expectations created by the Guidelines. The Guidelines were clear and unambiguous representations made by the government to the public inasmuch as they were publicly available, had been routinely used by the Minister, and had been issued to ensure consistency. They created an expectation that certain factors extrinsic to national security would be considered in assessing s. 34(2) applications by instructing applicants to address, *inter alia*, the following factors in their submissions: the reason why the applicant is seeking admission to Canada, any special circumstances related to the application, and any current activities in which the applicant is involved. The appellant further contends that a letter he received from CIC in May 2002 created a legitimate expectation that H&C factors would be considered in assessing his application for relief. It stated that a decision under s. 34(2) would require the Minister to assess both the detriment the appellant posed to the national interest of Canada and any H&C circumstances pertinent to his situation. According to the appellant, this legitimate expectation was not met, because the

Minister did not, in assessing his application, consider the factors he had been told were relevant.



(2) Position of the Respondent

[36] The respondent submits that the standard of review is reasonableness and that the Minister's decision was reasonable. The Minister's interpretation of the term "national interest" is entitled to deference, as the *IRPA* does not specify any factors that must be considered in this regard, and the term is found in the Minister's enabling statute, with which the Minister has particular familiarity. A decision on an application for relief under s. 34(2) falls at the political end of the spectrum, is discretionary, and concerns matters in which the Minister has expertise.

[37] According to the respondent, the legislative history of the *IRPA* and the related legislation supports the view that the national security and public safety aspects of the national interest are to be the predominant considerations in determining whether to grant s. 34(2) relief, but these remain subject to any other considerations the Minister deems appropriate, except for H&C factors. The purpose of s. 34 is to ensure the safety and security of Canadians, while s. 34(2) provides for relief for innocent or coerced members of terrorist organizations who would otherwise be inadmissible. Section 34(2) must be seen as complementary to s. 34(1). Since s. 34(1) deals with inadmissibility on security grounds, the dominant considerations under s. 34(2) must be national security and public safety. H&C

factors are not relevant to a determination of the "national interest" under s. 34(2), as they are properly dealt with in H&C applications under s. 25 of the *IRPA*. This interpretation of s. 34(2) is bolstered by the legislative transfer of responsibility for decisions on applications for relief to the Minister, whose mandate is the protection of public safety.



[38] Ultimately, the respondent argues, the Minister's decision in this case was reasonable. It was transparent, intelligible and justifiable. It also fell within the range of possible acceptable outcomes that meet the standard of reasonableness in accordance with *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. The appellant had offered self-serving and contradictory explanations of his role in, and activities for, the LNSF, and therefore lacked credibility. It was also clear that he had had sustained contact with a group that had committed terrorist acts.

[39] The respondent also contends that there was no failure to meet legitimate expectations in this case. The Guidelines emphasize the exceptional and discretionary nature of ministerial relief, and their stated objectives emphasize national security and public safety. They created expectations with respect to procedures, but not to substantive rights. They could not alter the law as laid down by Parliament and so could not mandate the consideration of factors not relevant to the national interest analysis. In any event, immigration officials did follow the procedures they were expected to follow in this case. A letter sent from CIC to the appellant in May 2002 stated that the ministerial relief process would require an

assessment of the detriment he posed to the national interest, and of any relevant H&C circumstances. The appellant had a sufficient opportunity to present evidence and submissions in support of his case. He was then provided with a further opportunity to respond to information officials had obtained and provided to the Minister. The Minister reviewed the application and the briefing note, and exercised his statutory discretion as he saw fit. He provided sufficient reasons for his decision, in which he indicated that he had "reviewed and considered the material and evidence submitted in its entirety".



C. *Forms of Ministerial Relief*

(1) Sections 25 and 25.1 of the *IRPA*

[40] Before I turn to the Minister's decision, it will be helpful to explain the two forms of ministerial relief currently available to foreign nationals in Canada who are deemed to be inadmissible. The first form, H&C relief, is provided for in ss. 25 and 25.1 of the *IRPA*:

> **25.** (1) Subject to subsection (1.2), the [MCI] must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the [MCI] is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

. . .

> **25.1** (1) The [MCI] may, on the [MCI's] own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the [MCI] is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.



[41] These provisions contemplate the granting of ministerial relief to foreign nationals seeking permanent resident status who are inadmissible or otherwise do not meet the requirements of the *IRPA*. Under them, the MCI may, either upon request or of his own accord, "grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of" the *IRPA*. However, relief of this nature will only be granted if the MCI "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national". H&C considerations include such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (see *Baker*, at paras. 67 and 72).

(2) Section 34(2) of the *IRPA*

[42] Section 34(2) of the *IRPA* contemplates a different form of ministerial relief based upon the "national interest". Section 34 reads as follows:

> **34.** (1) [Security] A permanent resident or a foreign national is inadmissible on security grounds for
>
> (*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
>
> (*b*) engaging in or instigating the subversion by force of any government;
>
> (*c*) engaging in terrorism;
>
> (*d*) being a danger to the security of Canada;
>
> (*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).
>
> (2) [Exception] The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

[43] As I mentioned above, the appellant was found to be inadmissible on security grounds for having been, in the words of s. 34(1)(*f*), "a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph . . . (*c*)", namely acts of terrorism. He sought relief under s. 34(2), which provides that the Minister may make an exception where a person has been found to be inadmissible, on being satisfied that the person's continued "presence in Canada would not be detrimental to the national interest". As the wording of the section ("who satisfies the Minister") implies, the onus is on the

person who applies for relief to prove that his or her continued presence in Canada would not be detrimental to the national interest.



[44] In short, s. 34(2) of the *IRPA* establishes a pathway for relief which is conceptually and procedurally distinct from the relief available under s. 25 or s. 25.1. It should be borne in mind that an applicant who fails to satisfy the Minister that his or her continued presence in Canada would not be detrimental to the national interest under s. 34(2) may still bring an application for H&C relief. Whether such an application would be successful is another matter.

D. *Standard of Review*

(1) Relationship Between the Administrative Law Standards of Review and the Appellate Standards of Review

[45] The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:

> Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.



[46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).

[47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

(2) What Is the Standard of Review?

[48] As this Court held in *Dunsmuir*, a court deciding an application for judicial review must engage in a two-step process to identify the proper standard of review. First, it must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence. The second inquiry becomes relevant if the first is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage,

the court performs a full analysis in order to determine what the applicable standard is.



*Determination of the Standard in Light of the Jurisprudence*

[49] In my view, the standard of review applicable in the case at bar has been satisfactorily determined in past decisions to be reasonableness. A host of cases from the Federal Court indicate that reasonableness is the standard for reviewing decisions on applications for ministerial relief under s. 34(2) of the *IRPA*: *Esmaeili-Tarki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 509 (CanLII); *Miller v. Canada (Solicitor General)*, 2006 FC 912, [2007] 3 F.C.R. 438; *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, [2007] 4 F.C.R. 658; *Al Yamani v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 381, 311 F.T.R. 193; *Soe v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 461 (CanLII); *Kanaan v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 241, 71 Imm. L.R. (3d) 63; *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 405, 327 F.T.R. 39; *Tameh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 884, 332 F.T.R. 158; *Kablawi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1011, 333 F.T.R. 300; *Ramadan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1155, 335 F.T.R. 227; *Afridi v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 1192, 75 Imm. L.R. (3d) 291; *Ismeal v. Canada (Minister of Public Safety &*

*Emergency Preparedness)*, 2008 FC 1366, 77 Imm. L.R. (3d) 310; *Abdella*. This jurisprudence is well established, and the appellant has not shown why it should not be relied on in this appeal.



[50] The applicability of the reasonableness standard can be confirmed by following the approach discussed in *Dunsmuir*. As this Court noted in that case, at para. 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". Since a decision by the Minister under s. 34(2) is discretionary, the deferential standard of reasonableness applies. Also, because such a decision involves the interpretation of the term "national interest" in s. 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54). This factor, too, confirms that the applicable standard is reasonableness.

(3) Meaning of Reasonableness

[51] In *Dunsmuir*, the Court defined reasonableness as follows:

> . . . a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating

> the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

[52] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, Abella J., for a unanimous Court, returned to the meaning of reasonableness and deference. She stated:

> This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. . . .
>
> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

> . . . if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. [paras. 13-16]

[53] In one of its most recent comments on this point, in *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, the Court emphasized that the reviewing court must consider the tribunal's decision as a whole, in the context of the underlying record, to determine whether it was reasonable:

> . . . administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708). [para. 3]

[54] I will now consider whether the Minister's decision was reasonable. The remainder of my reasons will focus on this issue.

E. *Meaning of "National Interest" Under Section 34(2) of the IRPA*

[55] The meaning of the term "national interest" in s. 34(2) of the *IRPA* was central to the Minister's exercise of discretion in this case. As is plain from the statute, the Minister exercises this discretion by determining whether he or she is satisfied by the applicant that the applicant's presence in Canada would not be detrimental to the national interest. The meaning of "national interest" in the context

of this section is accordingly key, as it defines the standard the Minister must apply to assess the effect of the applicant's presence in Canada in order to exercise his or her discretion.



[56] The Minister, in making his decision with respect to the appellant, did not expressly define the term "national interest". The first attempt at expressly defining it was by Mosley J. in the Federal Court, and he also certified a question concerning this definition for the Federal Court of Appeal's consideration. We are therefore left in the position, on this issue, of having no *express* decision of an administrative decision maker to review.

[57] This Court has already encountered and addressed this situation, albeit in a different context, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In that case, Rothstein J. held that a decision maker's decision on the merits may imply a particular interpretation of the statutory provision at issue even if the decision maker has not expressed an opinion on that provision's meaning.

[58] The reasoning from *Alberta Teachers' Association* can be applied to the case at bar. It is evident from the Minister's holding that "[i]t is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations" that the Minister made a determination of the meaning of "national interest". An interpretative decision as to that term is

necessarily implied within his ultimate decision on ministerial relief, although this Court is not in a position to determine with finality the actual reasoning of the Minister. In these circumstances, we may "consider the reasons that could be offered for the [Minister's] decision when conducting a reasonableness review" of that decision (*Alberta Teachers' Association*, at para. 54). Accordingly, I now turn to consider what appears to have been the ministerial interpretation of "national interest", based on the Minister's "express reasons" and the Guidelines, which inform the scope and context of those reasons. I will then assess whether this implied interpretation, and the Minister's decision as a whole, were reasonable.



[59] The Minister stated in his reasons that he had "reviewed and considered the material and evidence submitted in its entirety". This material included the following information set out in the CBSA's briefing note, which addressed many of the questions presented in the Guidelines:

1. The extent of the appellant's membership in, and activities on behalf of, the LNSF are in question.

2. At most, the appellant was a "passive member" of the LNSF who carried out "basic functions". He was never involved in violent acts.

3. The appellant joined the LNSF in 1994 to support democracy, freedom of speech, and human rights in Libya. At that time, the organization was, by and

large, no longer engaged in violence. In any event, the appellant claimed to have no knowledge of the LNSF's involvement in violence and would not have supported the LNSF had it espoused the use of violence to achieve political change.

4. There is evidence to suggest that the appellant severed all ties with the LNSF when he came to Canada in 1997.

5. Throughout, the appellant's goal has been to support the establishment of a democratic system of government in Libya.

6. The appellant has two children, attended English as a second language classes, and owns his own transport business.

(A.R., vol. I, at pp. 5-9)

[60] The Guidelines did not constitute a fixed and rigid code. Rather, they contained a set of factors, which appeared to be relevant and reasonable, for the evaluation of applications for ministerial relief. The Minister did not have to apply them formulaically, but they guided the exercise of his discretion and assisted in framing a fair administrative process for such applications. As a result, the

Guidelines can be of assistance to the Court in understanding the Minister's implied interpretation of the "national interest".



[61] Moreover, the Minister placed particular emphasis on matters related to national security and public safety in the reasons he gave for his decision. These included: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF, a group that has engaged in terrorism; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF.

[62] Taking all the above into account, had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations (see Appendix 1 (the relevant portions of the Guidelines)).

[63] As a result of my comments above on the standard of review, I am of the view that the Minister is entitled to deference as regards this implied interpretation of the term "national interest". As Rothstein J. stated, "[w]here the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear" (*Alberta Teachers' Association*, at para. 50).

[64] In my view, the Minister's interpretation of the term "national interest", namely that it is focused on matters related to national security and public safety, but also encompasses the other important considerations outlined in the Guidelines and any analogous considerations, is reasonable. It is reasonable because, to quote the words of Fish J. from *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, it "accords . . . with the plain words of the provision, its legislative history, its evident purpose, and its statutory context" (para. 46). That is to say, the interpretation is consistent with Driedger's modern approach to statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to 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 Parliament.

(*Construction of Statutes* (2nd ed. 1983), at p. 87)

(1) Plain Words of the Provision

[65] There is no dispute between the parties that the term "national interest" refers to matters which are of concern to Canada and to Canadians. There is no doubt that public safety and national security are matters which are of concern to Canada and to Canadians. It is equally clear, however, that more than just public safety and national security are of concern to Canada and to Canadians. For example, the plain meaning of the term "national interest" would also include the preservation of the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of the Canadian federation, and in particular the protection of

the equal rights of every person to whom its laws and its Constitution apply. The plain words of the provision therefore favour a broader reading of the term "national interest" than the one suggested by the respondent and by the Federal Court of Appeal, which would limit its meaning to the protection of public safety and national security. The words of the statute are consistent with the Minister's implied interpretation of this term, which relates predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations. The legislative history of the provision is also relevant to an understanding of the range of values and interests underlying the concept of the national interest.



(2) Legislative History of the Provision

[66] The legislative history of s. 34(2) is a long one. In these reasons, I will only discuss the salient points of this history, those which serve to demonstrate that the Minister's implied interpretation of the term "national interest" is consistent with it.

[67] Ministerial relief from a finding of inadmissibility first became available in 1952. Relief was available to persons who were members of or associated with any organization, group or body that was or had been involved in the subversion by force or other means of democratic government, institutions or processes. Those who sought such relief had to satisfy the minister that they had ceased to be members of or

associated with the organization, group or body in question and that their admission "would not be detrimental to the security of Canada" (*Immigration Act*, R.S.C. 1952, c. 325, s. 5(*l*)). Parliament made it clear at the time that it intended the focus of an application for ministerial relief to be national security.



[68] In 1977, the provisions of the *Immigration Act* on inadmissibility were revised to read, in part, as follows:

> **19.** (1) No person shall be granted admission if he is a member of any of the following classes:
>
> . . .
>
> (*e*) persons who have engaged in or who there are reasonable grounds to believe will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, except persons who, having engaged in such acts, have satisfied the Minister that their admission would not be detrimental to the national interest;

(*Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 19(1)(*e*))

[69] Thus, in 1977, Parliament made a clear decision to change the approach to ministerial relief. The test would no longer focus solely on national security, as access to relief would instead be premised on a broader array of domestic and international considerations constituting the "national interest". Since then, the provisions on ministerial relief in both the *IA* and the *IRPA* have at all times referred to the "national interest".

[70] Parliament was (or at least must be taken to have been) aware of the previous "detrimental to the security of Canada" test when it decided to enact, and later to keep, the "national interest" test for ministerial relief. The fact that, at all material times, the wording of s. 34(2) referred to the applicant's not being detrimental to the "national interest", as opposed to not being detrimental to the "security of Canada", strongly suggests that Parliament did not intend the term "national interest" to relate exclusively to national security and public safety. Had that been the case, Parliament could have returned to the expression "security of Canada" in enacting s. 34(2).

[71] The *IRPA* replaced the *IA* in 2002. As it was enacted in a post-9/11 world, the *IRPA* was clearly in part a response to the threats of the complex and dangerous environment which had been developing internationally. In support of his contention that the interpretation of the term "national interest" should focus on national security and public safety, the respondent quotes the following passage from a Senate Committee report in his factum:

> The Committee recognizes that Bill C-11 represents a major overhaul of Canada's immigration and refugee protection legislation, and it will thus likely set the standard for many years to come. The Committee also fully appreciates that the current context in which the Bill is being considered is one of heightened security concerns following the profoundly tragic events of 11 September 2001 in the United States. In this context the Committee realizes that the Bill must embody a balance that will respect the needs and rights of individuals while simultaneously serving the public interest particularly with respect to security concerns and meeting Canada's international obligations. [Emphasis added.]

(Standing Senate Committee on Social Affairs, Science and Technology, "Ninth Report", 1st Sess., 37th Parl., October 23, 2001 (online))



[72] This passage certainly highlights the *IRPA*'s role in "serving the public interest . . . with respect to security concerns". However, it does not limit the national interest to security concerns. It also highlights the fact that meeting Canada's international obligations (including, presumably, obligations stemming from rules of customary and conventional international human rights law) is an important part of the national interest.

[73] In 2005, the *DPSEPA* formally established both the Department of Public Safety and Emergency Preparedness and the Minister's post. The respondent submits that the creation of this new department and of the CBSA, as well as the transfer of ministerial responsibility for decisions under s. 34(2), formed part of a new national security policy instituted by Parliament in response to the events of September 11, 2001. In particular, he argues that the legislative transfer of the responsibility for making such decisions from the MCI to the Minister, occurring as it did in the broader context of national security and public safety, supports the Federal Court of Appeal's interpretation of the term "national interest".

[74] I am not persuaded that the transfer of ministerial responsibility for s. 34(2) applications serves as a sufficient basis for upholding the Federal Court of Appeal's interpretation of the term "national interest". On its own, this transfer should not be read as changing, nor does it change, the substantive law governing

relief applications under s. 34(2). Ministerial responsibilities may be reassigned for a wide variety of reasons. If this argument was valid, it would imply that the meaning of a law might change whenever ministerial responsibilities are reassigned. This would be a new and perplexing principle of interpretation. There is a presumption against the implicit alteration of the law according to which, absent an explicit change in the wording of a provision, it is presumed that Parliament did not intend to amend its meaning. Although the ministerial responsibility for deciding relief applications under s. 34(2) was transferred in 2005, Parliament did not amend the wording of this provision. Therefore, the presumption against implicit alteration applies, and there was no intent to amend the meaning of the term "national interest". As the appellant points out in his factum, this presumption is not rebutted by a mere transfer of ministerial responsibility:

> It does not make sense that every time Parliament decides to change the responsibilities of particular Ministers for administrative purposes, or without indicating that there is a substantive reason for a change, the words of a statute should be given different meanings. A mere transfer in Ministerial responsibility is not sufficient to establish that the change is meant to have a substantive effect on the rights of persons who are affected by legislation administered by the various ministers. The Court of Appeal's interpretation of national interest effectively amends section 34(2). Amending legislation is a legislative function, and falls outside of the judicial function. [para. 76]

[75] In summary, this review demonstrates that the Minister's implied interpretation of the term "national interest" — that it relates predominantly to national security and public safety, but does not exclude the other important

considerations outlined in the Guidelines or any analogous considerations — is consistent with the legislative history of the provision.



(3) Purpose of the Provision

[76] The respondent argues that the *IRPA* is concerned with public safety and national security. More specifically, he argues that the purpose of s. 34(1)(*c*) and (*f*) is to ensure the safety and security of Canadians, while s. 34(2) provides for relief only for innocent or coerced members of terrorist organizations who would otherwise be inadmissible.

[77] The respondent is correct in saying that the *IRPA* is concerned with national security and public safety. In fact, the Court recognized this in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539:

> The objectives as expressed in the *IRPA* indicate an intent to prioritize security. . . . Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act. [para. 10]

[78] That said, the respondent's argument that s. 34(2) is focused exclusively on national security and public safety, and that it provides for relief only for innocent or coerced members of terrorist organizations, fails to give adequate consideration to

the other objectives of the *IRPA*. Section 3(1) of the *IRPA* sets out 11 objectives of the Act with respect to immigration. Only two of these are related to public safety and national security: to protect public health and safety and to maintain the security of Canadian society (s. 3(1)(*h*)), and to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks (s. 3(1)(*i*)). The other nine objectives relate to other factors that properly inform the interpretation of the term "national interest" (e.g., "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration" (s. 3(1)(*a*))). The explicit presence of these other objectives in the *IRPA* strongly suggests that this term is not limited to public safety and national security, but that the Parliament of Canada also intended that it be interpreted in the context of the values of a democratic state. Section 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy.



[79] Accordingly, the Minister's broad implied interpretation of the term "national interest" is also consistent with the purpose of the provision.

(4) Context of the Provision

[80] As the Court noted in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, "[t]he preferred approach [to statutory interpretation]

recognizes the important role that context must inevitably play when a court construes the written words of a statute" (para. 27). The context of s. 34(2) provides much guidance for the interpretation of the term "national interest".



[81] First, according to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings. The term "national interest" is used in s. 34(2), which suggests that what is to be considered by the Minister under that provision is broader than the considerations of whether the individual is "a danger to the security of Canada" (s. 34(1)(*d*)) or whether he or she "might endanger the lives or safety of persons in Canada" (s. 34(1)(*e*)), both of which appear in s. 34(1). If Parliament had intended national security and public safety to be the only considerations under s. 34(2), it could have said so using the type of language found in s. 34(1). It did not do so, however.

[82] In a similar vein, the terms "national security", "danger to the public" and "endanger the safety of any person" each appear several times elsewhere in the *IRPA*. In light of the presumption of consistent expression, "national interest" cannot be synonymous with any of these terms. Rather, the use of the term "national interest" implies that the Minister is to carry out a broader analysis under s. 34(2). Contrary to what the Federal Court of Appeal held in the case at bar, in determining whether a person's continued presence in Canada would not be detrimental to the national

interest, the Minister must consider more than just national security and whether the applicant is a danger to the public or to the safety of any person.



[83] Second, if s. 34(2) were concerned solely with the danger an applicant poses to the security of Canada, it would be impossible for a person found to be inadmissible under s. 34(1)(*d*) ("being a danger to the security of Canada") to obtain relief under s. 34(2). This is an absurd interpretation which must be avoided.

[84] Third, the respondent argues that, because of the possibility of H&C relief under s. 25 of the *IRPA*, the principle of consistent expression dictates that H&C factors should not be relevant to a determination of what is in the national interest under s. 34(2). I agree, but with some qualifications. H&C considerations are more properly considered in the context of a s. 25 application, and s. 34 should not be transformed into an alternative form of humanitarian review. But s. 34 does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review. For example, such considerations may have an impact on the assessment of the applicant's personal characteristics for the purpose of determining whether he or she can be viewed as a threat to the security of Canada. Of the considerations in the Guidelines unrelated to national security and public safety which formed part of the Minister's implied interpretation, only very few are H&C factors. The fact that the Minister considered such factors did not render his interpretation of the term "national interest" unreasonable.

[85] Finally, the broader context of s. 34(2) of the *IRPA* also includes the Guidelines. Although not law in the strict sense, and although they are liable to evolve over time as the context changes, thus giving rise to new requirements adapted to different contexts, guidelines are "a useful indicator of what constitutes a reasonable interpretation of the . . . section" (*Baker*, at para. 72). The Guidelines were published in 2005, and they applied to applications for ministerial relief under s. 34(2) at the time the Minister reached his decision on the appellant's application. As is evident from the numerous considerations contained in Appendix 1, the Guidelines represent a broad approach to the concept of the "national interest". They do not simply equate the "national interest" with national security and public safety, as the Federal Court of Appeal did. Rather, they suggest that the national interest analysis is broader than that, although its focus may properly be on national security and public safety.

[86] Thus, the Minister's implied interpretation of the term "national interest" — that it relates predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations — is consistent with all these contextual indications of the meaning of this term.

[87] In summary, an analysis based on the principles of statutory interpretation reveals that a broad range of factors may be relevant to the determination of what is in the "national interest", for the purposes of s. 34(2). Even excluding H&C

considerations, which are more appropriately considered in the context of a s. 25 application, although the factors the Minister may validly consider are certainly not limitless, there are many of them. Perhaps the best illustration of the wide variety of factors which may validly be considered under s. 34(2) can be seen in the ones set out in the Guidelines (with the exception of the H&C considerations included in the Guidelines). Ultimately, which factors are relevant to the analysis in any given case will depend on the particulars of the application before the Minister (*Soe*, at para. 27; *Tameh*, at para. 43).



[88] This interpretation is compatible with the interpretation of the term "national interest" the Minister might have given in support of his decision on the appellant's application for relief. It is consistent with that decision. The Minister's implied interpretation of the term related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations. In light of my discussion of the principles of statutory interpretation, this interpretation was eminently reasonable.

F. *Is the Minister's Decision Valid?*

[89] Having concluded that the Minister's implied interpretation of the term "national interest" is reasonable, I should also confirm that the decision as a whole is valid. The Minister's reasons were justifiable, transparent and intelligible. Although brief, they made clear the process he had followed in ruling on the appellant's

application. He reviewed and considered all the material and evidence before him. Having done so, he placed particular emphasis on: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF, a group that has engaged in terrorism; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF. The Minister's reasons revealed that, on the basis of his review of the evidence and other submissions as a whole, and of these factors in particular, he was not satisfied that the appellant's continued presence in Canada would not be detrimental to the national interest. In short, his reasons allow this Court to clearly understand why he made the decision he did.

[90] Furthermore, the Minister's decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law. The burden was on the appellant to show that his continued presence in Canada would not be detrimental to the national interest. The Minister declined to provide discretionary relief to the appellant, as he was not satisfied that this burden had been discharged. His conclusion was acceptable in light of the facts which had been submitted to him.

[91] As this Court held in *Suresh*, a court reviewing the reasonableness of a minister's exercise of discretion is not entitled to engage in a new weighing process (para. 37; see also *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 39). As the Minister stated in his reasons, he had "reviewed and considered" (i.e. weighed) all the factors set out in the appellant's application which

were relevant to determining what was in the "national interest" in light of his reasonable interpretation of that term. He gave particular weight to certain factors pertaining to national security and public safety and emphasized them in his reasons, namely: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.



[92] In all the circumstances, it cannot be said that either the result or the Minister's decision as a whole was unreasonable. But a final issue remains: it relates to an allegation of a failure to meet the requirements of procedural fairness.

G. *Was the Decision Unfair, and Did It Fail to Meet the Appellant's Legitimate Expectations?*

[93] As this Court noted in *Dunsmuir*, at para. 79, "[p]rocedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual." The Court's comment that "[p]rocedural fairness has many faces" (*Dunsmuir*, at para. 77) is also relevant to this case.

[94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)



[96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131 (emphasis added)).

[98] In the case at bar, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that

they are "used by employees of [both] CIC and the CBSA for guidance in the exercise of their functions and in applying the legislation" (R.F., at para. 108). The Guidelines are and were publicly available, and, as Appendix 2 to these reasons illustrates, they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, the appellant could reasonably expect that his application would be dealt with in accordance with the process set out in them. In brief, this process is as follows:

1. Following the receipt of an application for relief, the CIC officer provides the applicant with a copy of the "National Interest Information Sheet". The applicant is given 15 days to send his or her submission to the local CIC office.

2. Upon receipt of the applicant's submission, the CIC officer prepares a report which discusses the current situation regarding the applicant's ground for inadmissibility, the details of the applicant's application for relief, and any personal or exceptional circumstances of the applicant that should be considered.

3. The CIC report is forwarded to the National Security Division, Intelligence Directorate, CBSA, along with the applicant's submission and all supporting documents. The CBSA may conduct further investigations at this stage.

4. The CBSA analyst prepares a recommendation to the Minister, which includes all supporting documentation.

5. A copy of the recommendation to the Minister is disclosed to the applicant, who may then make additional submissions or provide additional documents in response.

6. The applicant's original submission and its supporting documentation, the CIC officer's report, the CBSA's recommendation, and any additional submissions or documents received from the applicant in response to that recommendation are all forwarded to the Minister.

7. The Minister renders a decision on the application. The decision is entirely within the Minister's discretion.

8. If the decision is negative, CIC issues a refusal letter to the applicant.

[99] The appellant has not shown that his application was not dealt with in accordance with this process outlined in the Guidelines. In May 2002, he was advised of the ministerial relief process by way of a letter akin to the National Interest Information Sheet. He responded to this letter by making submissions through his counsel, and CIC then prepared its report. The CBSA prepared a briefing note for the

Minister, which contained its recommendation, and this note was disclosed to the appellant. The appellant declined to make additional submissions or provide additional documents in response to the recommendation. The appellant's submission and its supporting documentation, the CIC officer's report, and the CBSA's recommendation were all forwarded to the Minister, and the Minister rendered a decision on the application. As counsel for the appellant rightly acknowledges, "[i]n the Appellant's case, the Ministerial relief process followed the process set out in the IP 10 guidelines" (A.F., at para. 53). His legitimate expectation in this regard was therefore fulfilled.



[100] The appellant raises a further argument to the effect that he had a legitimate expectation that the Minister would consider certain factors in determining his relief application. The source of this alleged expectation is twofold. First, the appellant argues that the Guidelines created an expectation that the pertinent factors set out in Appendix 1 to these reasons would be considered. Second, he alleges that he had a legitimate expectation that H&C factors would be considered in determining his application as a result of a letter CIC had sent him on May 22, 2002. That letter read, in part, as follows:

> The Minister will consider whether granting you permanent residence to Canada would be contrary to the National Interest to Canada. This will require an assessment of the detriment that you pose to the National Interest of Canada, as well as any humanitarian and compassionate circumstances pertinent to your situation. [Emphasis added; A.R., vol. III, at p. 287.]

[101] Even were I to assume that the Guidelines and the letter unambiguously promised the appellant that certain factors would be considered in assessing his application for relief and that, at law, someone in his position might in fact have a legitimate expectation that certain factors would be considered in making a discretionary decision, his argument would nevertheless fail. As I mentioned above, the Minister's implied interpretation of the term "national interest" encompasses all the factors referred to in the Guidelines. Also as I mentioned above, and as the appellant acknowledges, these factors include H&C factors (A.F., at para. 122). In a manner consistent with this interpretation of the term "national interest", the Minister "reviewed and considered the material and evidence submitted in its entirety". Therefore, if the appellant had a legitimate expectation that the Minister would consider certain factors, including H&C factors, in determining his application for relief, this expectation was fulfilled.

[102] In my opinion, there was no failure to meet the appellant's legitimate expectations or to discharge the duty of procedural fairness owed to him. The Minister's decision cannot therefore be set aside on this basis.

## V. Conclusion

[103] As a result, I would dismiss the appeal and allow the Minister's decision under s. 34(2) of the *IRPA* to stand. In the circumstances, and taking particular

account of the Minister's inordinate delay in rendering a decision that was of the utmost importance to Mr. Agraira, I would make no order as to costs.



**Appendix 1 — Relevant Portions of the Guidelines re: "National Interest"**

**9.2. Processing the request**

. . .

Upon receipt of the applicant's submission, the officer should prepare a report, which consists of the following:

- the applicant's current situation regarding the ground of inadmissibility (refer to Appendix D for an outline of the questions and considerations that must be addressed in preparing this information);
- the details of the application and any personal or exceptional circumstances to be taken into consideration; this would include:
  - details of immigration application;
  - basis for refugee protection, if applicable;
  - other grounds of inadmissibility, if applicable;
  - activities while in Canada;
  - details of family in Canada or abroad;
  - any Canadian interest.

. . .

**Appendix B** National interest information sheet

. . .

You may be exempted from this ground of inadmissibility if the Minister decides that your presence in Canada would not be detrimental to Canada's national interest. The consideration of national interest involves the assessment

and balancing of all factors pertaining to your admission to Canada against the stated objectives in Canada's *Immigration and Refugee Protection Act*, as well as Canada's domestic and international interests and obligations.

If you wish to be considered for this exemption, you must prepare a submission along with any supporting documentation that you deem relevant. To assist you in preparing your submission, it is suggested that you address the following:

- Why are you seeking admission to Canada?
- Are there any special circumstances surrounding your application?
- Provide evidence that you do not constitute a danger to the public.
- Explain current activities you are involved in (employment, education, family situation, involvement in the community, etc.).

If the ground of inadmissibility involves membership in a regime or organization, explain the purpose of the organization, your role in the organization and activities in which you were involved. You must provide extensive detail and be very thorough in explaining this, including dates, locations and impact of these activities. When and for how long were you a member? Did these activities involve violence? If you are claiming to no longer be a member of this regime or organization, you must provide evidence. Explain when and why you disassociated yourself from the regime/organization and whether you are still involved with persons who are members of the regime/organization.

Lastly, explain your current attitude towards this regime/organization, its goals and objectives and how you feel about the means it has chosen to achieve its objectives.

Your submission need not be restricted to the above. You may provide any information and documents that you think may strengthen your request for an exemption. . . .

**Appendix D** Preparing the request for relief report

A request to the Minister should consist of three parts:

1. The client's submission and all supporting documentation;

2. A report prepared by the officer addressing the applicant's current situation with respect to the ground of inadmissibility and any exceptional circumstances to be taken into account. This includes:

- details of the immigration application;
- basis for refugee protection, if applicable;
- other grounds of inadmissibility, if applicable;
- activities while in Canada;
- details of family in Canada or abroad;
- any Canadian interest;
- any personal or exceptional circumstances to be considered.

3. A recommendation to the Minister prepared by the CBSA, NHQ. In order to assess the current situation regarding the ground of inadmissibility, evidence must be produced to address the questions stated in the following table:

| **Question** | **Details** |
|---|---|
| Will the applicant's presence in Canada be offensive to the Canadian public? | • Is there satisfactory evidence that the person does not represent a danger to the public?<br>• Was the activity an isolated event? If not, over what period of time did it occur?<br>• When did the activity occur?<br>• Was violence involved?<br>• Was the person personally involved or complicit in the activities of the regime/organization?<br>• Is the regime/organization internationally recognized as one that uses violence to achieve its goals? If so, what is the degree of violence shown by the organization? |

| | |
|---|---|
| | • What was the length of time that the applicant was a member of the regime/organization?<br><br>• Is the organization still involved in criminal or violent activities?<br><br>• What was the role or position of the person within the regime/organization?<br><br>• Did the person benefit from their membership or from the activities of the organization?<br><br>• Is there evidence to indicate that the person was not aware of the atrocities/criminal/terrorist activities committed by the regime/organization? |
| Have all ties with the regime/organization been completely severed? | • Has the applicant been credible, forthright, and candid concerning the activities/membership that have barred admission or has the applicant tried to minimize their role?<br><br>• What evidence exists to demonstrate that ties have been severed?<br><br>• What are the details concerning disassociation from the regime/organization? Did the applicant disassociate from the regime/organization at the first opportunity? Why?<br><br>• Is the applicant currently associated with any individuals still involved in the regime/organization?<br><br>• Does the applicant's lifestyle demonstrate stability or is there a pattern of activity likely associated with a criminal lifestyle? |
| Is there any indication that the applicant might be benefiting | • Is the applicant's lifestyle consistent with Personal Net Worth (PNW) and current |

| | |
|---|---|
| from assets obtained while a member of the organization? | employment?<br><br>• If not, provide evidence to establish that the applicant's PNW did not come from criminal activities. |
| Is there any indication that the applicant may be benefiting from previous membership in the regime/organization? | • Does the applicant's lifestyle demonstrate any possible benefits from former membership in the regime/organization?<br><br>• Does the applicant's status in the community demonstrate any special treatment due to former membership in the regime/organization? |
| Has the person adopted the democratic values of Canadian society? | • What is the applicant's current attitude towards the regime/organization, their membership, and their activities on behalf of the regime/organization?<br><br>• Does the applicant still share the values and lifestyle known to be associated with the organization?<br><br>• Does the applicant show any remorse for their membership or activities?<br><br>• What is the applicant's current attitude towards violence to achieve political change?<br><br>• What is the applicant's attitude towards the rule of law and democratic institutions, as they are understood in Canada? |

**Appendix 2 — Relevant Portions of the Guidelines re: Legitimate Expectations**

**1. What this chapter is about**

In addition to the general procedures for processing applications for permanent residence in Canada this chapter outlines procedures to be applied in cases involving possible inadmissibility on grounds of national security. It describes the process to be followed when an applicant requests relief under the national interest provisions. These guidelines are issued to ensure consistency in the application of procedural fairness requirements.



## 7.2. Specific requirements

The procedural fairness requirements when assessing inadmissibility and processing requests for ministerial relief are as follows:

- The decision-maker must make the decision on complete information. All documents provided by the applicant must be considered by the decision-maker. It is not acceptable that the contents of such documentation be summarized for the decision-maker without attaching the primary documentation.

- The applicant is entitled to be provided with all the relevant information that will be considered by the decision-maker to challenge the information and to present evidence and submissions. This entitlement is limited where disclosure of the information would be injurious to national security or to the safety of any person.

- The applicant is entitled to be made aware of concerns raised by the officer and to respond to those concerns.

## 9. Procedure – Requests for relief

At the interview with CIC, the applicant may request information about the national interest provision or apply for ministerial relief. The officer should be guided by the following principles and guidelines.

## 9.1. Principles

The national interest provisions are intended to be exceptional. A6(3) precludes any delegation from the Minister. The following principles apply:

- The decision to grant relief is entirely within the discretion of the Minister. The role of the officer is primarily to ensure that accurate and complete information is placed before the Minister so that the Minister can make an informed decision.

- The officer should not encourage or discourage the applicant from applying for relief, nor should the officer provide an opinion regarding the merits of the application.

The request for relief under the national interest provisions must be initiated by the applicant. The request for relief is usually made after the applicant has been informed that they may be inadmissible to Canada on grounds of national security. Officers are not required to notify or advise the applicant of the possibility of requesting ministerial relief.



**9.2. Processing the request**

. . .

Following the receipt of an application for relief, the officer should provide the applicant with a copy of the *National Interest Information Sheet* (Appendix B). The applicant should normally be given 15 days (excluding mailing time) to send their submission to the local CIC office.

Upon receipt of the applicant's submission, the officer should prepare a report, which consists of the following:

- the applicant's current situation regarding the ground of inadmissibility (refer to Appendix D for an outline of the questions and considerations that must be addressed in preparing this information);

- the details of the application and any personal or exceptional circumstances to be taken into consideration; this would include:

    - details of immigration application;

    - basis for refugee protection, if applicable;

    - other grounds of inadmissibility, if applicable;

    - activities while in Canada;

    - details of family in Canada or abroad;

    - any Canadian interest.

This report should be signed by the officer and forwarded to the National Security Division, Intelligence Directorate, CBSA, with the applicant's submission and all supporting documents. A recommendation should not be provided at this stage as the CBSA NHQ may conduct further investigations and acquire additional information before the matter is put before the Minister. For this reason, the recommendation to the Minister will be made by the National Security Division, Intelligence Directorate, CBSA at that time.



### 9.3. Disclosure to client

The CBSA NHQ analyst will conduct any further inquiries that may be necessary and then prepare a recommendation to the Minister. The recommendation will include all supporting documentation. At this juncture, a copy of the recommendation to the Minister and all the supporting documentation (except classified information) will be returned to the CIC for disclosure to the client.

The CIC will deliver these documents by courier with a covering letter as provided in Appendix E. The person must sign the acknowledgment of receipt.

### 9.4. After disclosure

The CIC should return the following documents to the National Security Division, Intelligence Directorate, CBSA:

- a copy of the letter sent to the client;
- any additional submissions or documents received from the client.

### 9.5. After issuance of Minister's decision

A faxed copy of the Minister's decision will be forwarded to the CIC. Where the decision is positive, the client should be informed that they are not inadmissible on grounds of national security and processing of the application for permanent residence should continue.

Where the decision is negative, the client should be issued a refusal letter and action taken pursuant to section 8.8 above. The refusal letter (see Appendix F) should indicate that the application for permanent residence is refused as the applicant was determined to be inadmissible and the Minister did not grant relief.

**Appendix B** National interest information sheet

You have asked to be considered by the Minister of Public Safety and Emergency Preparedness for relief under paragraph _____ of Canada's *Immigration and Refugee Protection Act* which reads as follows: *(Insert appropriate paragraph)*

You may be exempted from this ground of inadmissibility if the Minister decides that your presence in Canada would not be detrimental to Canada's national interest. The consideration of national interest involves the assessment and balancing of all factors pertaining to your admission to Canada against the stated objectives in Canada's *Immigration and Refugee Protection Act*, as well as Canada's domestic and international interests and obligations.

If you wish to be considered for this exemption, you must prepare a submission along with any supporting documentation that you deem relevant. To assist you in preparing your submission, it is suggested that you address the following:

- Why are you seeking admission to Canada?
- Are there any special circumstances surrounding your application?
- Provide evidence that you do not constitute a danger to the public.
- Explain current activities you are involved in (employment, education, family situation, involvement in the community, etc.).

If the ground of inadmissibility involves membership in a regime or organization, explain the purpose of the organization, your role in the organization and activities in which you were involved. You must provide extensive detail and be very thorough in explaining this, including dates, locations and impact of these activities. When and for how long were you a member? Did these activities involve violence? If you are claiming to no longer be a member of this regime or organization, you must provide evidence.

Explain when and why you disassociated yourself from the regime/organization and whether you are still involved with persons who are members of the regime/organization. Lastly, explain your current attitude towards this regime/organization, its goals and objectives and how you feel about the means it has chosen to achieve its objectives.

Your submission need not be restricted to the above. You may provide any information and documents that you think may strengthen your request for an exemption.

Your submission, in English or French, should be provided to the local immigration office within 15 days. If we do not receive your submissions, your request for relief may be considered abandoned.

An officer will review your request, seek any required clarification and forward it to our National Headquarters with a report. National Headquarters will review the matter and make a recommendation to the Minister. You will be provided an opportunity to review the recommendation for any errors or omissions prior to it being referred to the Minister.



**Appendix D** Preparing the request for relief report

A request to the Minister should consist of three parts:

1. The client's submission and all supporting documentation;

2. A report prepared by the officer addressing the applicant's current situation with respect to the ground of inadmissibility and any exceptional circumstances to be taken into account. This includes:

- details of the immigration application;
- basis for refugee protection, if applicable;
- other grounds of inadmissibility, if applicable;
- activities while in Canada;
- details of family in Canada or abroad;
- any Canadian interest;
- any personal or exceptional circumstances to be considered.

3. A recommendation to the Minister prepared by the CBSA, NHQ. . . .

**Appendix E** Final disclosure letter

*(Insert letterhead)*

Our ref:

*(Insert address)*

Dear:

This is further [to] your request to seek relief under the national interest provisions of Canada's immigration legislation.

You will find attached a copy of releasable information* on this matter that will be presented to the Minister. This consists of:

• a report with relevant documents from the immigration office handling your file;

• a recommendation from the President, Canada Border Services Agency, to the Minister of Public Safety and Emergency Preparedness;

• *(other documents as applicable)*.

Your original submission and supporting documentation, which are not attached to this letter, will also be presented to the Minister.

The Canada Border Services Agency is prepared to present this matter to the Minister for a decision. However, before doing so, we invite you to review these documents and provide us with any further comments you deem necessary. These comments will be included for consideration by the Minister.

We would request that your comments be provided to this office within 15 days. Should we not receive any comments from you by that time, we will proceed to put the matter before the Minister.

Sincerely,

* Confidential information cannot be disclosed if the disclosure would be injurious to national security or to the safety of any person.

**Appendix F** Refusal letter (Application for permanent residence refused based on A34, A35 or A37; request for ministerial relief denied)

*(Insert letterhead)*

Our ref:

*(Insert address)*

Dear:

This refers to your application for permanent residence. A letter dated (*insert date*) was sent to you inviting you to respond to concerns about your admissibility. The information you provided (*in your letter of ___ or at the interview on ____*) has been carefully reviewed together with all other information in your application.

It appears that you are a person described in section (*34, 35 or 37*) of the *Immigration and Refugee Protection Act*. I have come to the conclusion that you are inadmissible to Canada based on (*provide details concerning individual circumstances as they relate to the finding of inadmissibility. Exact content may be developed in consultation with NHQ*).

*When client has requested ministerial relief and the Minister has not granted relief, officers should insert the following paragraph:*

Furthermore, you have not satisfied the Minister of Public Safety and Emergency Preparedness that your presence in Canada would not be detrimental to the national interest. As a result, your application for permanent residence is refused.

Sincerely,

[Text in italics in original.]

*Appeal dismissed.*

*Solicitors for the appellant: Waldman & Associates, Toronto.*

*Solicitor for the respondent: Attorney General of Canada, Toronto.*

*Solicitors for the intervener the British Columbia Civil Liberties Association: Sack Goldblatt Mitchell, Toronto.*

*Solicitor for the intervener Ahmad Daud Maqsudi: Leigh Salsberg, Toronto.*

*Solicitors for the interveners the Canadian Council for Refugees and the Canadian Association of Refugee Lawyers: Simcoe Chambers, Toronto; Refugee Law Office, Toronto.*

*Solicitors for the interveners the Canadian Arab Federation and the Canadian Tamil Congress: Jackman Nazami & Associates, Toronto.*