

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Motion to Review and Vary by Council of
Canadians pursuant to the Ontario Energy Board's *Rules of Practice and
Procedure* for a review of the Board's Decision and Order on Cost Awards in the
combined proceeding EB-2012-0451, EB-2012-0433 and EB-2013-0074.

MOTION RECORD

of the INTERVENOR, COUNCIL OF CANADIANS

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ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Motion to Review and Vary by Council of Canadians pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order on Cost Awards in the combined proceeding EB-2012-0451, EB-2012-0433 and EB-2013-0074.

COC SUBMISSIONS ON THRESHOLD QUESTION ON A MOTION TO REVIEW AND VARY DECISION AND ORDER ON COST AWARDS

Pursuant to Rule 43.01 of the
Board's Rules of Practice and Procedure

On April 17, 2014, the Council of Canadians ("COC") filed a motion¹ with the Board pursuant to Rules 8, 42 and 44 of the Board's Rules of Practice and Procedure (now Rules 8, 40, and 42 in the current Rules²), which was served on the Applicants Union Gas Limited and Enbridge Gas Distribution. That motion sought the following relief:

- 1) An order varying the Board's Decision and Order on Cost Awards, Issued on March 31, 2014 and revised on April 3, 2014, to permit the COC to recover its full costs claim in the amount of \$215,124.61 for its participation in the proceedings; and
- 2) Such further relief as the Board may deem just.

The motion materials set out in detail the grounds upon which the motion was being brought and submitted that "the presiding Board panel (the "Board") made errors of fact in making its Cost Award in respect of the COC which call into question the correctness of its Decision."³ That motion record is attached as Appendix "A" to these submissions.

¹ EB-2012-0451, EB-2012-0433 and EB-2013-0074, Notice of Motion of the Council of Canadians, 15 May 2014, Appendix A. The Board assigned the Motion file number EB-2014-0183.

² The Rules were last amended April 24, 2014.

³ Appendix A, Notice of Motion, at para. 1.

On May 15, 2014 the Board issued its “Notice of Motion to Review and Vary and Procedural Order No. 1”, which stated:

The Board has determined that before considering the merits of the Motion, it will first consider the threshold issue of whether the matter should be reviewed pursuant to section 45.01 of the Board’s *Rules of Practices and Procedure* (the “Rules”). Under Rule 45.01, 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.

The Board seeks submissions with respect to the threshold question as to whether the Motion should be reviewed on its merits.⁴

In accordance with the Board’s Order, the moving party makes the following submissions.

The Facts

1. The COC is a national citizens’ organization whose supporters reside in every Canadian province and territory. More than 26,000 of them live in Ontario, where many participate in one of the 17 local Ontario chapters of the Council.⁵ The Council's work is focused on a few key areas which it considers to be of strategic importance, one of these being energy use and policy. In this regard, it promotes strategies to ensure Canadian energy security that are consistent with meeting climate change and other environmental imperatives, and which respect First Nation rights. These are the interests that motivated and informed its participation in these proceedings to address the need for the proposed facilities, the appropriateness of project costs, and the energy efficiency and conservation alternatives to the projects.⁶
2. The Applications in issue in these proceedings sought various approvals for major system expansion projects which the proponents advanced on the grounds that they were needed to respond to system demands, to diversify their supply portfolios, to address short haul market access requirements for natural gas transportation, and to address integrity issues on the Enbridge distribution system.
3. In support of these applications both proponents made prominent mention of the benefits of diversifying the supply portfolio for Ontario consumers by creating greater access to the United States (US) in light of the abundance of natural gas produced by hydraulic fracturing (“fracking”) in US shale deposits.

⁴ EB-2014-0183, Notice of Motion to Review and Vary and Procedural Order No. 1, 15 May 2014, at page 2.

⁵ EB-2012-0451, EB-2012-0433, EB-2013-0074, Submissions of the Council of Canadians (15 November 2013), at page 1 (“Final argument”).

⁶ *Ibid*, at p. 1-2.

4. For the purpose of assisting the Board, COC retained three experts - David Hughes, Lisa Sumi, and Professor Anthony Ingraffea - to assess the supply, regulatory and cost risks of increasing the reliance of Ontario consumers on natural gas derived from shale reserves in the United States. All three experts prepared reports for these proceedings, responded to interrogatories from both Applicants, and appeared before the Board for cross-examination.
5. COC was alone among the interveners in addressing issues surrounding the supply, regulatory and cost risks associated with increasing the reliance of Ontario on natural gas derived from shale reserves in the United States. COC was also alone among the parties in addressing the Board's jurisdiction and mandate to consider the upstream environmental impacts associated with the development of energy resources in another jurisdiction when these are projected to provide a major source of supply to Ontario consumers.
6. On March 31, 2014, the Board issued its Decision and Order on Cost Awards reducing the fees claimed by the COC from \$206,572 to \$144,777.⁷ The Board stated:

COC claimed \$206,572, of which \$30,789 was claimed for the experts who provided testimony. The Board finds the claims for the experts to be reasonable. The balance of \$229,783 is claimed for legal fees, and is driven primarily by the 451 hours attributable to Mr. Shrybman. This claim can be compared to the claims by GEC and ED, which claimed 284 hours and 244 hours, respectively, for legal fees. Each of these three intervenors is a policy advocacy group and each sponsored expert testimony. In some respects, COC's scope was narrower than either GEC or ED. The Board finds that the claim for 451 hours by COC for senior counsel is excessive. The level of involvement by COC and its contribution to the Board's understanding of the issues in the proceeding was not significantly greater than GEC or ED. Therefore, the significantly higher number of hours is not justified. The Board will reduce the fees for COC to \$144,777. This level reflects a reduction in the hours claimed for senior counsel to 290 hours. This adjusted level will be allocated between Union and Enbridge in the same proportions as the original claim.

7. The Board subsequently, on April 3, 2014, issued an errata,⁸ correcting a typographical error found in the Decision. The error and correction were as follows:

⁷ EB-2012-0451, EB-2012-0433, EB-2013-0074, Decision and Order on Cost Awards (Issued 31 March 2014, revised 3 April 2014), Appendix A, Motion Record, TAB 2, at page 5 ("Cost decision").

⁸ EB-2012-0451, EB-2012-0433, EB-2013-0074, Errata in the Decision and Order on Cost Awards, by E-mail, 3 April 2014.

“...The balance of ~~\$229,783~~ \$175,783 is claimed for legal fees, and is driven primarily by the 451 hours attributable to Mr. Shrybman.”

8. The rest of the Decision and Order of March 31, 2014 remained unchanged.

The Issue

9. Whether, pursuant to Rule 43.01 (formerly Rule 45.01) of the Board’s *Rules of Practice and Procedure* (the “Rules”), the COC has met the threshold test to warrant a review of the motion on its merits.

The Law

10. In Rule 2.01, the Board is given direction with respect to the interpretation of its rules. Rule 2.01 states:

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

11. Rule 42.01 (formerly Rule 44.01) of the Board’s Rules provides that every motion to review, in addition to being timely in accordance with the Board’s directions 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; [...]

12. Rule 43.01 (formerly Rule 45.01) sets out that for 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.

13. The leading case on meeting this threshold test is the Board's Decision on a Motion to Review the Natural Gas Electricity Interface Review decision ("NGEIR").⁹ At page 18 of its decision, the panel described the requirements of this test as follows:

[...] 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.¹⁰

14. *NGEIR* has been relied on by Board in several cases including in "Grey Highlands" decision¹¹, which was subsequently upheld by the Divisional Court.¹² In that case, the Board held that the error alleged by the moving party must be material and relevant to the outcome of the decision.¹³

15. However, the Board has held that the threshold test is not an onerous for the moving party to meet. In EB-2011-0090, the Board stated:

⁹ EB-2006-0322/0388/0340, Motions to Review the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007 ("NGEIR Decision").

¹⁰ *Ibid.* at page 18.

¹¹ EB-2011-0053, Decision and Order on Motion to Review, April 21, 2011 ("Grey Highlands Decision").

¹² *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc.*, [2012] O.J. No. 847 (Div. Court), 2012 ONSC 1001 (CanLII).

¹³ Grey Highlands Decision, at page 4. In this case, the moving party was unsuccessful, partly because its arguments for requesting review were the same as in its original submissions.

if it is *reasonably arguable* that the original panel erred, and that the error is of sufficient materiality to result in a reversal, variance or suspension of the original decision, the threshold is met.”(emphasis added)¹⁴

Argument

Could A Review of the Issues Raised Result in a Decision to Vary the Award of the Board

16. As elaborated below, the COC submits that the Board made several errors in fact that caused it to incorrectly assess the COC costs claim.

17. In a case which is similar in some respects to the present one, the Board held that review and variance of a cost award decision was warranted. In EB-2012-0337, Decision and Order on APPRO’s Motion to Review and Vary Cost Award Decision, the Board found that the hearing panel had mischaracterized the purpose of a survey conducted by the moving party, a finding which had caused the Board to reduce the party’s cost claim. On review, the Board found that the Panel had erred in characterizing the intervenor’s evidence, and increased the costs allowed to the intervenor.¹⁵

Does the Decision contain an identifiable and material error?

18. In its motion materials, the COC submits that the Board erred in fact in several material respects that warrant a variance to the costs order.

The Board Erred in its Comparison of the COC costs claim with those of GEC and ED

19. The first is that in comparing the costs claim of COC to those of GEC and ED, and finding COC’s counsel fees to be excessive and unjustified, the Board erred by failing to consider the very different division of labour that existed between COC witnesses and its legal counsel, than was the case for GEC and ED. When the overall time claimed for both experts and counsel is considered, the total of the hours claimed by the COC is actually lower than that claimed by GEC and ED.¹⁶

20. The reasons for the significant difference in the roles played by COC legal counsel and its experts was the inevitable consequence of the lack experience of those experts with

¹⁴ EB-2011-0090, Decision and Order on Motion (23 June 2011), at page 6.

¹⁵ EB-2012-0337, Decision and Order on Motion to Review and Vary Cost Award Decision (29 October 2013), at pp. 4-5.

¹⁶ See Appendix A, Notice of Motion, at page 2, Table 1.

regulatory proceedings in general, or with the practices and hearing modalities on the Ontario Energy Board, in particular. While highly qualified in their respective fields the experts relied upon counsel to:

- review and summarize the applications;
- provide relevant documents for their review;
- prepare IRs to solicit information to support their analysis;
- provide guidance concerning the parameters for their analysis in light of the Board's jurisdiction and mandate;
- review and comment on their draft reports;
- assist with the preparation of, and to review and comment on the responses to IRs from the Applicants, which in the cases of Professor Ingraffea and Mr. Hughes, were extensive; and
- to make necessary logistical and travel arrangements.¹⁷

21. By comparison, GEC had well-established relationships with the experts it retained, each of whom had considerable prior experience with OEB proceedings, including those concerning natural gas utilities.¹⁸ They were therefore able to operate far more independently of counsel than the COC experts. Similarly, the consulting firm ED retained to prepare the report it introduced into evidence is based in Ontario. Mr. Jarvis, who was the principal author of that report, had considerable familiarity with Ontario energy policy and serves on the Ontario Energy Minister's Advisory Committee.¹⁹

22. While it was appropriate for the Board to adopt a comparative approach to assessing the costs claims before it, in comparing the COC claim with that of ED and GEC, it erred in failing to recognize an underlying and fundamental difference among the groups with respect to the assignment of tasks between counsel and experts the caused it to make a material error in finding the COC costs claim to be excessive.

23. The COC respectfully submits that this error warrants a review of the motion.

The Board Erred In Characterizing The Scope Of COC's Intervention

24. In comparing the interventions of the COC with those of ED and GEC, the Board found: "In some respects, COC's scope was narrower than either GEC or ED." It is the COC's contention that this finding is not only unsupported on the record of the proceedings, but

¹⁷ *Ibid*, at para 6. No fees were claimed by the COC in respect of the assistance of administrative staff in his firm. .

¹⁸ *Ibid*. at paras. 6 and 7; and see GEC evidence EB-2012-0451/0433/0074 Exhibit L.EGD.GEC.3, at pp. 28, 30, 33, 34, 38 (CV of Paul L. Chernick).

¹⁹ EB-2012-0451, ED_CostClaim_Enbridge_Union_20140304, CV for Ian Jarvis.

is also inconsistent with the Board's finding that COC's intervention was somewhat greater than that of ED and GEC.

25. All three parties introduced expert evidence, participated in the exchange of interrogatories, conducted limited cross-examination, and submitted final argument. GEC introduced two expert reports concerning i) DSM Potential in the GTA; and ii) the impact of potential load reductions on expansion plans proposed by the Applicants.²⁰ ED introduced an expert report concerning DSM management potential in the GTA.²¹
26. The three expert reports introduced by the COC addressed the cost, regulatory and supply risks associated with increasing the reliance of Ontario consumers on shale gas supply from the United States. In particular these reports:
 - (i) examined the production history and profile of shale gas development in several regions of the United States and in particular those regions identified as providing a major source of supply to Ontario;
 - (ii) assessed the extent to which the environmental and public health impacts of shale gas development have been adequately regulated by U.S. federal and state governments, and the potential cost and supply constraints associated with more effective regulation; and
 - (iii) offered a summary of the technical and peer-reviewed reports co-authored by Professor Ingraffea concerning the greenhouse gas footprint of shale gas development and its role as a purported "bridging fuel".
27. As previously noted, the COC was alone in raising these issues, as it was in addressing a significant legal issue concerning the Board's mandate to consider the upstream environmental impacts associated with U.S. gas, and in particular the greenhouse gas emissions caused by U.S. shale development.²²
28. It is submitted that the Board's characterization of the scope of COC's intervention was unsupported by the evidence before it and was in error. It was also inconsistent with the Board's finding that "The level of involvement by COC and its contribution to the Board's understanding of the issues was not significantly greater than GEC or ED",

²⁰ EB-2012-0451/0433/0074, Exh. L.EGD.GEC.1 ("DIRECT TESTIMONY OF PAUL CHERNICK ON BEHALF OF THE GREEN ENERGY COALITION").

²¹ EB-2012-0451, EB-2012-0433, EB-2013-0074, Filed: 2013-06-28, UPDATED: 2013-09-11, Exhibit L.EGD.ED.1.

²² COC Final argument, at pp. 6, 30.

which indicates that COC's contribution was at least equal to if not slightly greater than that of GEC or ED.

29. The COC respectfully submits that these errors and inconsistent findings also warrant a review of the motion.

The Board Erred in Failing to Compare the COC Costs Claim with those of APPrO and BOMA

30. The Board apparently based its decision to compare the costs claim of the COC with those by ED and the GEC, but not other parties, on the finding that each is a "policy advocacy group".²³
31. While the Council's interests certainly include broader public policy issues, they also explicitly concern the security of energy supply to Canadian consumers, including the 26,000 supporters and members of the Council who reside in Ontario.²⁴ Indeed, a central focus of its evidence and argument before the Board was the risk to the security of supply for Ontario consumers arising from an overreliance on U.S. shale gas, and the consequent reduction in the availability of supply over TransCanada Pipeline facilities providing access to western Canadian natural gas resources.
32. In its concern for supply and related cost risks to Ontario consumers, COC shares common ground with APPrO and BOMA. Therefore, the Board's failure to compare the COC costs claim with those of APPrO and BOMA appears to have been based on an erroneous characterization of COC's interests.
33. In its decision, the Board reduced the fees for COC to \$144,777, of which, as the Board notes, \$30,789 was claimed for experts. The remainder, \$113,994, was for counsel fees. The corresponding amount allowed to each of BOMA and APPrO was \$160,000. In other words, counsel fees allowed to the COC were substantially lower than those allowed to BOMA and APPrO, parties which adduced no expert evidence.²⁵
34. As noted, it is appropriate for the Board to use comparison as a means for assessing the reasonableness of any costs claims before it. However, the failure of the Board to recognize the unique demands of the COC's intervention, or to correctly characterize its interests, lead the Board to error by comparing apples to oranges in the cases of ED and

²³ Costs decision, at page 5.

²⁴ COC Final argument, at p. 6.

²⁵ The same holds true in relation to the Canadian Manufacturers and Exporters ("CME"), as the Board's order indicates: the counsel fees allowed to COC were substantially lower than those allowed to CME, despite the fact that the CME did not adduce expert evidence.

GEC, and the further error of failing to compare apples with apples in the cases of Appro and BOMA.

35. It is respectfully submitted that these alleged inconsistencies, also warrant a review of the COC motion on its merits.

Is the COC Attempting To Reargue Its Case?

36. The arguments set out in the COC's Notice of Motion have not previously been made to the Board.

37. In fact, no objection to its cost claim was made by either of the applicants. The only reference to its cost claim by either Applicant was a brief comment by Union Gas, in which it noted that "BOMA's hours of preparation are 27% higher than that of COC at 494 hours", and, "the hours of preparation for COC includes preparation time for consultants it retained to prepare intervenor evidence".²⁶ Since there was no objection to its cost claim or to the hours claimed on account of counsel fees, the COC could not have reasonably anticipated that it would be necessary to submit more than a brief letter to the Board providing additional details of its account, as it did.

38. Moreover, the COC's submissions in the Notice of Motion arise specifically from errors that were made in the Board's Decision, which the COC could not have reasonably anticipated, and to which it has had no opportunity to respond.

The Public Interest Importance of the Board's Cost Powers

39. In deciding whether the COC has met its onus under Rules 42.01 and 43.01, the Board is obliged under Rule 2.01 to adopt a liberal interpretation that is the "most just". The Board must also be mindful of its broad public interest mandate, and of the value of facilitating informed public and consumer interest interventions in Board's proceedings.

40. The legislature has also made clear that the Board is to be unconstrained by the approach adopted by the courts in assessing legal costs. Thus s. 30(5) of the *Ontario Energy Board Act* states that:

In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.²⁷

²⁶ EB-2012-0451, EB-2012-0433, EB-2012-0074, Union Gas Limited – Comments on Cost claims (11 March 2014), Appendix A, Motion Record TAB 4, at page 2. See para. 33 of the Notice of Motion.

²⁷ *Ontario Energy Board Act*, 1998, S.O. 1998, CHAPTER 15, SCHEDULE B, at s. 30(5) ("the Act").

41. As frequently repeated by the Supreme Court of Canada, the proper approach to statutory interpretation is contextual:

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”.²⁸

42. Thus, the Board’s Rules should be understood in relation to the mandate of the Board in proceedings such as the present ones, which under S. 2 of the Act states that in relation to gas, the Board has, *inter alia*, the objectives:

- To protect the interests of consumers with respect to prices and the reliability and quality of gas service²⁹
- To facilitate rational expansion of transmission and distribution systems³⁰
- To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario [...] ³¹

43. As noted on the Board website, providing cost awards for eligible expenditures by intervenors in OEB proceedings, “allows for broader public interest groups, such as environmental advocates, to participate and contribute their views”³², and “[f]ostering inclusive participation in its hearing process helps the Board make more informed decisions.” The ability of the Board to award intervenor costs clearly serves an important public interest purpose, and allows the Board to fulfill its mandate.

44. These are overarching principles that should guide the panel’s analysis of whether the threshold test for review has been met in this case, and ultimately whether the decision of the Board to reduce COC’s cost claim was incorrect.

45. In the present case, the purpose of the COC’s intervention was to assist the Board in respect of the protection of consumer interests, ensuring the rational development of transmission and distribution systems, and promoting energy conservation and efficiency.

²⁸ E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), cited in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539, at para. 106, also referring to: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 21 and 23; *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33.

²⁹ The Act, *supra*, at s. 2.2.

³⁰ *Ibid.*, at s. 2.3.

³¹ *Ibid.* at s. 2.5.

³² Ontario Energy Board, “Frequently Asked Questions”, online: <<http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Applications+Before+the+Board/Intervenor+Cost+Awards>>.

To this end, it adduced expert evidence concerning the supply, regulatory and cost risks of highly controversial shale gas development, and was alone in doing so. It was also alone in addressing the question of whether the Panel could properly consider upstream environmental impacts associated with a major new source of shale gas supply to Ontario consumers. COC's intervention was, it is respectfully submitted, undoubtedly in the public interest.

46. Unlike many other interveners, the COC only occasionally intervenes in Board proceedings. It does so only when the issues before the Board represent a significant challenge to COC priorities of promoting Canadian energy security in a sustainable context. In the current case the unique nature of the issues it addressed engaged the work of experts who were unfamiliar with Board proceedings and who relied on legal counsel for more assistance than appears to have been the true for other parties. In such cases it is important that the particular circumstances of an intervener be recognized so as not to discourage the intervention of groups that have an important contribution to Board proceedings but may do so only from time to time.

Conclusion

47. COC respectfully submits that a review of the motion is justified given the nature of Board's errors and the significant materiality of their impact on the Decision on costs at issue.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the motion:

1. Motion Record of Motion to Review and Vary Decision and Order on Cost Awards (EB-2012-0451/EB-2012-0433/EB-2013-0074).

May 23, 2014.



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APPENDIX A

EB-2012-0451
EB-2012-0433
EB-2013-0074

ONTARIO ENERGY BOARD

IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for: an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Town of Milton, City of Markham, Town of Richmond Hill, City of Brampton, City of Toronto, City of Vaughan and the Region of Halton, the Region of Peel and the Region of York; and an order or orders approving the methodology to establish a rate for transportation services for TransCanada Pipelines Limited;

AND IN THE MATTER OF an application by Union Gas Limited for: an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Parkway West site; an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the Town of Milton; an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Brantford-Kirkwall/Parkway D Compressor Station project; an order or orders for pre-approval of the cost consequences of two long term short haul transportation contracts; and an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Cambridge and City of Hamilton.

MOTION RECORD OF THE INTERVENORS, COUNCIL OF CANADIANS

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EB-2013-0074

ONTARIO ENERGY BOARD

IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for: an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Town of Milton, City of Markham, Town of Richmond Hill, City of Brampton, City of Toronto, City of Vaughan and the Region of Halton, the Region of Peel and the Region of York; and an order or orders approving the methodology to establish a rate for transportation services for TransCanada Pipelines Limited;

AND IN THE MATTER OF an application by Union Gas Limited for: an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Parkway West site; an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the Town of Milton; an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Brantford-Kirkwall/Parkway D Compressor Station project; an order or orders for pre-approval of the cost consequences of two long term short haul transportation contracts; and an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Cambridge and City of Hamilton.

NOTICE OF MOTION

Pursuant to Rules 8, 42 and 44 of the
Board's Rules of Practice and Procedure

The Council of Canadians will make a motion to the Ontario Energy Board (the "Board") on a date to be fixed by the Board at 9:30 a.m. or as soon after that time as the motion can be heard at the offices of the Board, 2300 Yonge Street, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

The Council of Canadians ("COC") proposes that this motion be heard in writing. The issues are straightforward and do not require oral representations.

THE MOTION IS FOR:

- 1) An order varying the Board's Decision and Order on Cost Awards, Issued on March 31, 2014 and revised on April 3, 2014, to permit the COC to recover its full costs claim in the amount of \$215,124.61 for its participation in the proceedings; and
- 2) Such further relief as the Board may deem just.

THE GROUNDS FOR THE MOTION ARE

1. As set out below, the COC respectfully submits that the presiding Board panel (the "Board") made errors of fact in making its Cost Award in respect of the COC which call into question the correctness of its Decision.

A. *The Original Panel's Decision and Order on Costs*

2. Following the Board's decision of January 30, 2014, the COC prepared a cost claim¹ seeking reimbursement for the costs it incurred in participating in the proceedings. Neither applicant made any specific objection to its cost claim.
3. On March 31, 2014, the Board issued its decision and costs awards order (revised April 3, 2014) reducing the fees claimed by the COC from \$206,572 to \$144,777.²
4. In doing so, it compared the COC costs claim with those submitted by two other intervenors, the Green Energy Coalition (GEC) and Environmental Defence (ED), and made certain findings of fact which, the COC submits, were in error and upon which its decision to reduce the COC costs claim was based. In this regard it found that:
 - "[...] the claim for 451 hours by COC for senior counsel is excessive."³
 - the COC's "[...] contribution to the Board's understanding of the issues in the proceeding was not significantly greater than GEC or ED. Therefore, the significantly higher number of hours is not justified."⁴
5. The Board's decision to compare the COC costs claim with those of GEC and ED, and not those of other intervenors, was based on the finding that each of COC, GEC and ED, is a "policy advocacy group and each sponsored expert testimony".⁵

¹ COC Cost claim for Hearings, Motion Record, TAB 1.

² EB-2012-0451, EB-2012-0433, EB-2013-0074, Decision and Order on Cost Awards (Issued 31 March 2014, revised April 3, 2014), Motion Record, TAB 2, at page 5 ("Cost decision").

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

B. Background

1) The Applications

6. The Applications in issue in these proceedings sought various approvals for major system expansion projects which the proponents advanced on the grounds that they were needed to respond to system demands, to diversify their supply portfolios, to address short haul market access requirements for natural gas transportation, and to address integrity issues on the Enbridge distribution system.
7. The benefits of diversifying supply portfolios, and in particular of providing greater access to U.S. shale gas supplies, was put forward as an important rationale for the projects. As described by Union Gas Limited (“Union”), technological advancement in horizontal well drilling and hydraulic fracturing (“fracking”) “has resulted in a fundamental change in North American natural gas supply dynamics and a shift in market behavior.”⁶
8. Union also described the particular importance to its plans of shale gas reserves in the U.S. northeast:

One of the most prolific gas supply growth areas in North America has been in the Appalachian basin. Appalachian shale gas is produced mainly from the Marcellus in Pennsylvania, Ohio and West Virginia and more recently from the Utica in eastern Ohio and eastern Pennsylvania. Marcellus shale gas production alone has increased nearly 7 Bcf/d since the beginning of 2007 and has been widely described as “the game changer”.⁷

9. Gaz Metro, an intervener and supporter of the projects, explained why greater access to the Dawn Hub at the US border matters:

Having a greater access to Dawn is important to Gaz Métro for two main reasons. First, Dawn is located closer to its service territory and second, it provides a greater security and diversity of supply to Gaz Métro’ customers as it connects directly with the Marcellus and Utica productions.⁸

2) The COC Intervention

10. The COC was founded in 1985 and is primarily sustained by volunteer energy and financial contributions from its members. Those members reside in every Canadian province and

⁶ EB-2012-0433 SCHEDULE B UPDATED, at page 2 of 3, Adobe 7/392.

⁷ EB-2012-0433, at page 27 of 121, Adobe 39/392.

⁸ Exhibit L.EGB.SCGM.1, at page 11 of 16.

territory. More than 26,000 of them live in Ontario, where many participate in one of the 17 local Ontario chapters of the Council.⁹

11. The Council's work is focused on a few key areas which it considers to be of strategic importance, one of these being energy use and policy. In this regard, it promotes strategies to ensure Canadian energy security that are consistent with meeting climate change and other environmental imperatives, and which respect First Nation rights. These are the interests that motivated and informed its participation in these proceedings to address the need for the proposed facilities, the appropriateness of project costs, and the energy efficiency and conservation alternatives to the projects.¹⁰
12. For the purpose of assisting the Board, COC retained three experts - David Hughes, Lisa Sumi, and Professor Anthony Ingraffea - to assess the supply and cost risks associated with increasing the reliance of Ontario consumers on natural gas derived from shale reserves in the United States. The COC was alone among the interveners in addressing these issues.
13. The evidence of David Hughes¹¹ provided a critical assessment of the Applicants' evidence concerning the supply of shale gas supply from US sources. That assessment addressed supply risks associated with reliance upon U.S. shale gas in light of production data that calls into question projections for future supply growth. The Board accepted Mr. Hughes as qualified to give expert evidence concerning energy resource assessment and the potential contribution of unconventional energy resources such as shale gas and tight oil to North America's energy supply.¹²
14. Lisa Sumi's¹³ evidence addressed the regulatory risks and attendant costs associated with reliance upon US shale gas; and focused on the potential costs of future environmental and other regulation, given the manifest need for much greater regulation of the environmental impacts of shale gas development.¹⁴ The Board accepted Ms. Sumi's qualifications as an expert on the question of U.S. regulatory policy as it applies to shale gas development.

⁹ EB-2012-0451, EB-2012-0433, EB-2013-0074, Submissions of the Council of Canadians (15 November 2013), at page 1 ("Final argument").

¹⁰ *Ibid*, at p. 1-2.

¹¹ Exhibit L, EGD, COC.3 (filed in all three applications.); and IR responses; Exhibits M. COC. EGD.1, M.COC.UGL.1.

¹² Transcript Volume 8, October 9, 2013, at p. 10.

¹³ Exhibit L. UGL.COC.2, (filed in all three applications), and her IR responses Exhibits M. COC. EGD.1, M.COC.UGL.1.

¹⁴ Transcript Volume 8, October 9, 2013, at p. 13.

15. Professor Ingraffea's evidence¹⁵ addressed the greenhouse gas footprint of shale gas development, which his research indicates is significantly higher than the corresponding footprints from other energy sources, including coal. The Board accepted Professor Ingraffea's qualifications as an expert with respect to the recovery of natural gas from high-volume fracturing from shale formations; the assessment of methane emissions; and the greenhouse gas footprint relating to the development, transportation and use of natural gas derived from shale resources.¹⁶
16. All three experts prepared reports for these proceedings, responded to interrogatories from both Applicants, and appeared before the Board for cross-examination.
17. In addition to providing the Board with expert evidence concerning the reliability and costs of the natural gas supply from US shale gas reserves, the COC was alone among the parties in addressing the Board's jurisdiction and mandate to consider the upstream environmental impacts associated the development of energy resources in another jurisdiction when these are projected to provide a major source of supply to Ontario consumers.

C. Errors in Fact in the Original Panel's Decision and Order on Costs

1) The Board erred in fact in finding COC's cost claim was excessive and unjustified

18. In comparing the cost claims of COC in relation to GEC and ED, and finding COC's counsel fees to be excessive and unjustified, the Board erred by failing to consider the very different division of labour that existed between COC witnesses and its legal counsel, than was the case for GEC and ED. When the overall time claimed for both experts and counsel is considered (see Table 1 below), the total of the hours claimed by the COC is actually lower than that claimed by GEC and ED.

¹⁵ Exhibit L, EGD, COC.1 (filed in all three applications), and IR responses, Exhibits M. COC. EGD.1, M.COC.UGL.1.

¹⁶ Transcript of Proceedings, Vol. 8, October 9, 2013, at p. 7.

Table 1: Hours claimed by select intervening parties

	COC		ED		GEC		APPrO	BOMA
	Counsel / Articling student/ paralegal	Expert	Counsel / Articling student/ paralegal	Expert	Counsel / Articling student/ paralegal	Expert	Counsel / Articling student/ paralegal	Counsel / Articling student/ paralegal
Preparation	411.10	83.25	136.39	388.08	180.50	688.70	527.70*	508.90
Attendance – Technical Conference:	--	--	8.25	8.00	15.25	12.00	--	11.70
Attendance – Settlement Conference	13.50	--	--	--	9.50	8.00	--	13.00
Attendance – Oral Hearing	31.30	14.00	24.50	7.50	45.05	12.90	--	55.40
Argument:	62.40	--	79.21	4.08	33.95	10.20	--	119.20
Case Management:	--	--	--	--	--	67.00	--	--
Total:	518.3	97.25	248.35	407.66	284.25	798.80	527.70	708.20
Aggregate total:	615.55		656.01		1083.05		527.70	708.20

*= includes counsel consultant hours

19. The difference among the three parties in this regard was a consequence of the particular circumstances of the COC's experts, and their retainers. As the CVs and testimony of these experts indicate,¹⁷ each is highly or even eminently qualified in their respective fields, but none had prior experience giving evidence in a regulatory proceeding before the OEB, or any other regulatory tribunal. While Ms. Sumi had appeared on one prior occasion before the OEB, that occurred in the context of a consultation process, not a hearing.¹⁸
20. COC experts (two of whom reside in the United States and one in British Columbia) were therefore unfamiliar with the OEB hearing process, including the Board's filing system, and the modalities for presenting or responding to IRs, for appearing before the Board to give evidence, and for being cross-examined under oath. In the case of Professor Ingraffea and Mr. Hughes, constraints on their availability was also a factor in limiting the role they could play.¹⁹ As the report prepared by Professor Ingraffea explicitly acknowledges, he relied upon

¹⁷ See *supra*, footnotes 11 - 16.

¹⁸ Affidavit of Steven Shrybman, sworn April 17, 2014, Motion Record, TAB 3, at para. 5 ("Shrybman affidavit").

¹⁹ *Ibid.*

Counsel's summary of the record rather than conducting his own review, and relied on counsel as well for his understanding of the Board's jurisdiction and mandate.²⁰ The same was true for Ms. Sumi and Mr. Hughes.²¹

21. In consequence of these constraints and limitations, COC experts relied extensively on the assistance of COC counsel to:

- review and summarize the applications;
- provide relevant documents for their review;
- prepare IRs to solicit information to support their analysis;
- provide guidance concerning the parameters for their analysis in light of the Board's jurisdiction and mandate;
- review and comment on their draft reports;
- assist with the preparation of, and to review and comment on the responses to IRs from the Applicants, which in the cases of Professor Ingraffea and Mr. Hughes, were extensive; and
- to make necessary logistical and travel arrangements.²²

22. By comparison, GEC had well-established relationships with the experts it retained, each of whom had considerable prior experience with OEB proceedings, including those concerning natural gas utilities.²³ They were therefore able to operate far more independently of counsel than the COC experts. Similarly, the consulting firm ED retained to prepare the report it introduced into evidence is based in Ontario. Mr. Jarvis, who was the principal author of that report, had considerable familiarity with Ontario energy policy and serves on the Ontario Energy Minister's Advisory Committee.²⁴

23. It is also significant that COC's experts were called upon to address the cost, regulatory, and supply risks associated with U.S. shale supplies, issues that are novel to an OEB regulatory proceeding concerning natural gas infrastructure approvals in Canada. Moreover, the risks in question are in certain respects unprecedented, as are the shale gas developments that Union Gas describes as a "game changer".

24. Therefore, in our respectful submission, the Board erred, in fact, by finding COC counsel costs to be excessive as compared to those of ED and GEC, without considering the very

²⁰ EB 2012-0451/2012-0433/2013-0074, Exhibit L.EGD.COC.1, 26 June 2013, at pp. 1-2.

²¹ Shrybman affidavit, *supra* note 18, at para 5.

²² *Ibid*, at para 6. As noted in fn, 1, no fees were claimed by the COC in respect of the assistance of administrative staff in his firm. .

²³ *Ibid*. at paras. 6 and 7; and see GEC evidence EB-2012-0451/0433/0074 Exhibit L.EGD.GEC.3, at pp. 28, 30, 33, 34, 38 (CV of Paul L. Chernick).

²⁴ EB-2012-0451, ED_CostClaim_Enbridge_Union_20140304, CV for Ian Jarvis.

different division of labour that existed between counsel and experts in the case of the COC which was both necessary and efficient in the circumstances.

2) The Board erred in fact in characterizing the scope of COC's Intervention

25. In comparing the interventions of the COC with those of ED and GEC, the Board found: "In some respects, COC's scope was narrower than either GEC or ED." In our submission, that conclusion is unfounded.
26. All three parties introduced expert evidence, participated in the exchange of interrogatories, conducted limited cross-examination, and submitted final argument. GEC introduced two expert reports. The first concerned DSM Potential in the GTA and was prepared by the Energy Futures Group.²⁵ The second was the evidence of Paul Cherniak about the impact of potential load reductions on expansion plans proposed by the Applicants.²⁶ ED introduced an expert report concerning demand-side management potential in the GTA prepared by Enerlife Consulting.²⁷
27. The three expert reports introduced by the COC have been described in paragraphs 13 to 15 above. These reports concern: i) the production history and profile of shale gas development in several regions of the United States and in particular those regions identified as providing a major source of supply to Ontario; ii) the extent to which the environmental and public health impacts of shale gas development have been adequately regulated by U.S. federal and state governments, and the potential cost and supply constraints associated with more effective regulation; and iii) a summary of the technical and peer-reviewed reports co-authored by Professor Ingraffea concerning the greenhouse gas footprint of shale gas development and its role as a purported "bridging fuel".
28. It is admittedly somewhat difficult to compare the evidence adduced by COC with that presented by ED and GEC, but to characterize it as more limited in scope is in our respectful submission unwarranted. That characterization is also at odds with the Board's finding that "The level of involvement by COC and its contribution to the Board's understanding of the issues was not significantly greater than GEC or ED", which indicates that COC's contribution was at least equal to if not slightly greater than that of GEC or ED. In addition, and as previously noted, the COC was alone in raising a significant legal issue with the Board, which was its mandate to consider the upstream environmental impacts associated

²⁵ EB-2012-0451/0433/0074 , Exhibit L.EGD.GEC.2.

²⁶ EB-2012-0451/0433/0074, Exh. L.EGD.GEC.1 ("DIRECT TESTIMONY OF PAUL CHERNICK ON BEHALF OF THE GREEN ENERGY COALITION").

²⁷ EB-2012-0451, EB-2012-0433, EB-2013-0074, Filed: 2013-06-28, UPDATED: 2013-09-11, Exhibit L.EGD.ED.1.

with U.S. gas, and in particular the greenhouse gas emissions caused by U.S. shale development.²⁸

29. Therefore, we respectfully submit that the reduction of the fees claimed by COC on the basis that its scope was more limited than that of GEC and ED was unwarranted and in error.

3) The Board erred in fact in characterizing the nature of COC's interests in the proceedings

30. The Board apparently based its decision to compare the costs claim of the COC with those by ED and the GEC, but not other parties, on the finding that each is a "policy advocacy group".²⁹

31. While the Council's interests also include broader public policy concerns, they explicitly concern the security of energy supply to Canadian consumers, including the 26,000 supporters and members of the Council who reside in Ontario.³⁰ Indeed, a central focus of its evidence and argument before the Board was the risk to the security of supply for Ontario consumers arising from an overreliance on U.S. shale gas, and the consequent reduction in the availability of supply over TransCanada Pipeline facilities providing access to western Canadian natural gas resources.

32. In its concern for supply and related cost risks to Ontario consumers, COC shares at least some common ground with APPrO and BOMA. Therefore, the Board's failure to compare the COC costs claim with those of APPrO and BOMA appears to have been based on an unduly limited characterization of COC's interests, and was in any event unreasonable.

33. Another reason for the Board to have compared COC's cost claim with that of APPrO and BOMA is that in objecting to the costs claim submitted by BOMA, Union Gas made that comparison. It noted that "BOMA's hours of preparation are 27% higher than that of COC at 494 hours", and, "the hours of preparation for COC includes preparation time for consultants it retained to prepare intervenor evidence".³¹

34. In its decision, the Board reduced the fees for COC to \$144,777, of which, as the Board notes, \$30,789 was claimed for experts. The remainder, \$113,994, was for counsel fees. The corresponding amount allowed to each of BOMA and APPrO was \$160,000. Table 2 summarizes the costs claimed by and costs allowed for these three interveners, each of which had their claims for fees reduced. As the comparison reveals, the counsel fees allowed to the

²⁸ COC Final argument, *supra* note 9, at pp. 6, 30.

²⁹ Costs decision, *supra* note 2, at page 5.

³⁰ COC Final argument, *supra* note 9, at p. 6.

³¹ EB-2012-0451, EB-2012-0433, EB-2012-0074, Union Gas Limited – Comments on Cost claims (11 March 2014), Motion Record TAB 4, at page 2.

COC were substantially lower than those allowed to BOMA and APPrO, parties which adduced no expert evidence.³²

Table 2: Fees (Exclusive of experts) of Parties whose fees were reduced by the Board

	COC	APPrO	BOMA
Claimed	175,783.00	190,610.00	264,106.00
Allowed	113,994.00	160,000.00	160,000.00

35. As described, the Board used comparison as a means of assessing the reasonableness of the COC costs claim. In addition to the errors of fact previously noted, its error in characterizing COC interests in these proceedings appears to explain the Board’s failure to include APPrO and BOMA in its comparative analysis. A broader contextual comparison of the COC costs claim reveals that it is entirely consistent with those of other intervenors that played an active role in the proceedings, and it is indeed more modest than several others. It is respectfully submitted that on this additional ground, the Board’s finding that the COC claim was excessive and unjustified was in error.

36. Finally, the Union Gas reference to the COC costs claim (para. 33 above) is the only specific comment made by either applicant on that claim.³³ While the COC subsequently wrote a brief letter to the Board providing additional details of its account,³⁴ it was not responding to any objection by the Applicants to its costs claims because no such objection had been made.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the motion:

1. COC Cost Claim for Hearings (Motion Record, TAB 1);
2. EB-2012-0451, EB-2012-0433, EB-2013-0074, Decision and Order on Cost Awards- Issued on 31 March 2014 and revised April 3, 2014, (Motion Record, TAB 2);
3. Affidavit of Steven Shrybman (Motion Record, TAB 3);
4. Union Gas Limited – Comments on Cost claims (11 March 2014)(Motion Record, TAB 4);
5. Enbridge Comments on Intervenor Cost Claim Submissions (11 March 2014) (Motion Record, TAB 5);

³² The same holds true in relation to the Canadian Manufacturers and Exporters (“CME”), as the Board’s order indicates: the counsel fees allowed to COC were substantially lower than those allowed to CME, despite the fact that the CME did not adduce expert evidence.

³³ See also Enbridge Comments on Cost claims, Motion Record, TAB 5.

³⁴ COC Costs Claim Response in EB-2012-0451/0433/0074 “GTA pipeline cases” (12 March 2014), Motion Record, TAB 6.

6. COC Costs Claim Response in EB-2012-0451/0433/0074 “GTA pipeline cases” (12 March 2014) (Motion Record, TAB 6); and

7. Such further evidence as the lawyers may advise and the Board may permit.

April 17, 2014.

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Lawyers for Union Gas Limited

TAB 1

Ontario Energy Board COST CLAIM FOR HEARINGS



Affidavit and Summary of Fees and Disbursements

This form should be used by a party to a hearing before the Board to identify the fees and disbursements that form the party's cost claim. Paper and electronic copies of this form and Itemized receipts must be filed with the Board and served on one or more other parties as directed by the Board in the applicable Board order. Please ensure all required fields are filled in and the Affidavit portion is signed and sworn or affirmed.

Instructions:

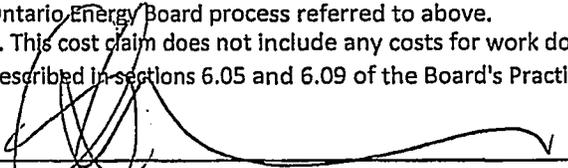
- Required data input is indicated by yellow-shaded fields. Formulas are present in the document to assist with the calculation of the cost claim.
- All claims must be in Canadian dollars. If applicable, state exchange rate and country of initial currency.
Rate: 1.11 Country: United States
- A separate "Detail of Fees and Disbursements Being Claimed" (comprising a "Statement of Fees Being Claimed" and a "Statement of Disbursements Being Claimed") is required for each consultant or lawyer/articling student/paralegal. However, only one "Summary of Fees and Disbursements" covering the whole of the party's cost claim should be provided.
- The cost claim must be supported by a completed Affidavit signed by a representative of the party.
- A CV for each consultant must be attached unless, for a given consultant, a CV has been provided to the Board in another process within the last 24 months.
- Except as provided in section 7.03 of the Practice Direction on Cost Awards, itemized receipts must be provided.

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Conduct</u>												
Party: <u>Council of Canadians</u>	Affiant's Name: <u>Steven Shrybman</u>												
HST Number: _____	HST Rate Ontario: <u>13.00%</u> GST Rate (B.C. 5%)												
<table style="width: 100%; border: none;"> <tr> <td style="width: 30%;">Full Registrant</td> <td style="width: 10%; text-align: center;"><input checked="" type="checkbox"/></td> <td style="width: 30%;">Qualifying Non-Profit</td> <td style="width: 10%; text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td>Unregistered</td> <td style="text-align: center;"><input type="checkbox"/></td> <td>Tax Exempt</td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td>Other</td> <td style="text-align: center;"><input type="checkbox"/></td> <td></td> <td></td> </tr> </table>	Full Registrant	<input checked="" type="checkbox"/>	Qualifying Non-Profit	<input type="checkbox"/>	Unregistered	<input type="checkbox"/>	Tax Exempt	<input type="checkbox"/>	Other	<input type="checkbox"/>			
Full Registrant	<input checked="" type="checkbox"/>	Qualifying Non-Profit	<input type="checkbox"/>										
Unregistered	<input type="checkbox"/>	Tax Exempt	<input type="checkbox"/>										
Other	<input type="checkbox"/>												

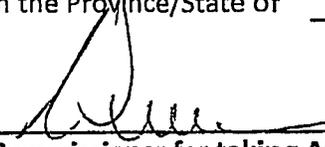
Affidavit

I, Steven Shrybman, of the City/Town of Ottawa
in the Province/State of Ontario, swear or affirm that:

1. I am a representative of the above-noted party (the "Party") and as such have knowledge of the matters attested to herein.
2. I have examined all of the documentation in support of this cost claim, including the attached "Summary of Fees and Disbursements Being Claimed", "Statement(s) of Fees Being Claimed" and "Statement(s) of Disbursements Being Claimed".
3. The attached "Summary of Fees and Disbursements Being Claimed", "Statement(s) of Fees Being Claimed" and "Statement(s) of Disbursements Being Claimed" include only costs incurred and time spent directly for the purposes of the Party's participation in the Ontario Energy Board process referred to above.
4. This cost claim does not include any costs for work done, or time spent, by a person that is an employee or officer of the Party as described in sections 6.05 and 6.09 of the Board's Practice Direction on Cost Awards.


Signature of Affiant

Sworn or affirmed before me at the City/Town of Ottawa,
in the Province/State of Ontario, on February 26/14.
(date)


Commissioner for taking Affidavits

AMANDA MARIE QUINN,
a Commissioner, etc., City of Ottawa,
for Sack Goldblatt Mitchell LLP,
Barristers and Solicitors.
Expires May 1, 2014.

**Ontario Energy Board
COST CLAIM FOR HEARINGS**



Affidavit and Summary of Fees and Disbursements

File # EB- 2012-0451-0433-0074 Process: Hearing re: Application for Leave to Conduct

Party: Council of Canadians

Summary of Fees and Disbursements Being Claimed

Legal/consultant fees	\$183,852.50
Disbursements	\$ 7,623.53
HST	\$23,648.58
Total Cost Claim	\$215,124.61

**Ontario Energy Board
COST CLAIM FOR HEARINGS**



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Construct</u>
Party: <u>Council of Canadians</u>	Name: <u>Steven Shrybman</u>
Completed Years Practising/Years of relevant experience	
Counsel/Articling Student/Paralegal: <input checked="" type="checkbox"/>	_____
Consultant: <input type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST	Total
Preparation	348.60	\$330.00	\$115,038.00	\$14,954.94	\$129,992.94
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference	13.50	\$330.00	\$4,455.00	\$579.15	\$5,034.15
Attendance - Oral Hearing	31.30	\$330.00	\$10,329.00	\$1,342.77	\$11,671.77
Argument	57.60	\$330.00	\$19,008.00	\$2,471.04	\$21,479.04
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES			148,830.00	\$19,347.90	\$168,177.90

Statement of Disbursements Being Claimed

	Net Cost	HST	Total
Photocopies	\$902.50	\$117.33	\$1,019.83
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier	\$20.71	\$2.69	\$23.40
Telephone	\$72.14	\$9.38	\$81.52
Postage	\$11.20	\$1.46	\$12.66
Transcripts		\$0.00	\$0.00
Travel: Air	\$2,379.33	\$309.31	\$2,688.64
Travel: Car		\$0.00	\$0.00
Travel: Rail	\$205.50	\$26.72	\$232.22
Travel (Other):		\$0.00	\$0.00
Parking	\$48.13	included	\$48.13
Taxi or Airport Limo	\$103.43	\$13.45	\$116.88
Accommodation		\$0.00	\$0.00
Meals	\$139.50	\$18.14	\$157.64
Other: Computer searches	\$553.03	\$71.89	\$624.92
TOTAL DISBURSEMENTS:	\$4,435.47	\$570.35	\$5,005.82

BLUELINE

Job #

RECEIPT FOR CAB FARE

Amount

10.4 Date oct-15-13

From

To

Cab No.

102

Driver

H.S.T. Included in meter fare



BECK TAXI



RECEIPT



Cab No.

145

G.S.T.

From

To

Date

15/10/13

Amount

22.00

Signature

[Signature]

416.751.5555

BECK TAXI streetsto

POSITANO RESTAURANT
633 MOUNT PLEASANT M4S2M9
TORONTO ON
20225102
GH2022510202

**** PURCHASE ****

10-08-2013 21:09:37
Acct # *****6076 C
Exp Date **/** Card Type VI
Name: SHRYBMAN/STEVEN
A000000031010 Visa Credit

Trace # 186
Inv. # 160
Auth # 081852 RRN 001169021

Purchase \$131.36
Tip \$26.27
Total \$157.63

(00) APPROVED-THANK YOU

Retain this copy for your records
Customer copy

DINE-IN RECEIPT

POSITANO RESTAURANT
416-9323982

TABLE - 2

SOLD BY #1:
TAG #100949 10/08/2013 8:36:39 PM

1	CASA	6.50	6.50 T
1	CALAMARI	10.50	10.50 T
1	PASTA SPECIAL	21.00	21.00 T
1	SYRÉNUSE	13.50	13.50 T
1	BRANZINO	28.00	28.00 T
1	DESSERT	7.50	7.50 T
1	COFFEE/TEA	2.50	2.50 T
1	CAPPUCCINO	3.75	3.75 T
1	DOUBLE ESPRES	3.75	3.75 T
2	BEER	6.00	12.00 T
1	GL CHARDONNAY	7.25	7.25 T

SUBTOTAL 116.25
SALES TAX 15.11
TOTAL 131.36
BALANCE DUE 131.36

ACCOUNT

GRAZIE!



Best Western
Roehampton Hotel
& Suites

PLUS

\$16.00 plus HST

Room No. _____

THE BEST WESTERN PLUS ROEHAMPTON HOTEL (the "HOTEL") will not be held responsible for loss or damage to the vehicle for which this check has been issued and which damage occurs between the premises and the place at which the vehicle is either picked up from or returned to by the Hotel employees, regardless of how such loss, damage or injury may have been caused. THE BEST WESTERN PLUS ROEHAMPTON HOTEL is also not responsible for loss or damage to any articles left in said vehicle.

Guest Copy

Nº 1945



Best Western
Roehampton Hotel
& Suites

PLUS

\$16.00 plus HST

Room No. _____

THE BEST WESTERN PLUS ROEHAMPTON HOTEL (the "HOTEL") will not be held responsible for loss or damage to the vehicle for which this check has been issued and which damage occurs between the premises and the place at which the vehicle is either picked up from or returned to by the Hotel employees, regardless of how such loss, damage or injury may have been caused. THE BEST WESTERN PLUS ROEHAMPTON HOTEL is also not responsible for loss or damage to any articles left in said vehicle.

Guest Copy

Nº 5111

BLUE LINE TAXI
613-238-1111
CAR 1234
TAXI TAB

TAXI
.11
666

08/11/2013 13:44:00
PURCHASE

07%

Transaction # 14
Card Type: Visa
Proc: *****6076
Entry: Swiped
Terminal ID: 29R30191
Merchant ID: 000293
Bse Amt: 39.85
Tip: 4.00
Total: 39.85

Auth. Code: 052747
Response: APPROVED

CUSTOMER COPY
CUSTOMER SERVICE
1 866 565 8294
help@taxitab.com
DRIVER # 13840

3
he

ICE
94
com



Job #

RECEIPT FOR CAB FARE

Amount \$10.00 Date Sep 11 / 13

From

To

Cab No. 541 Driver EA

H.S.T. included in meter fare



08/01/2013 20:35:01
PURCHASE

BLUE LINE TAXI
613-238-1111
CAR 1132
1611 NR 13840

Transaction # 1
Card Type: Visa
Proc: *****6076
Entry: Swiped
Terminal ID: 29R30191
Merchant ID: 000293
Bse Amt: 17.50
Auth. Code: 054570
Response: APPROVED

CUSTOMER COPY
CUSTOMER SERVICE
1 866 565 8294
help@taxitab.com
DRIVER

38

BECK TAXI
4177 W. UNION LN
Toronto ON, M4A 2S6
www.becktaxi.com
(416)751 5555

13-840
SALE

MID: 5921808
TID: 4391808
Batch: 08/26/13
APPR CODE: 076415
VISA
*****6076C
FID: 00000002
SEC: 372001001002
08:39:20
CVC: Y
/

AMOUNT \$16.75
00 - APPROVED - 001

Visa Credit
AID: A0000000031010
TVR: 00 00 00 80 00
TSE: F8 00

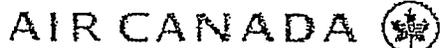
Thank You for Choosing
Beck Taxi
3 Ways to Order
PHONE-WEB-APP

H63P
CAB 1463

1 BLUE LINE TAXI
613-238-1111
CAR 1445
TAXI TAB 13-840
08/26/2013 16:32:09
PURCHASE

Transaction # 1
Card Type: Visa
Acc: *****6076
Entry: Swiped
Terminal ID: 29R31110
Merchant ID: 29RRRR
Batch: 001408
Trace Number: 007396
Bse Amt: 19.00
Auth.Code: 066632
Response: APPROVED

CUSTOMER COPY
CUSTOMER SERVICE
1 866 565 8294
help@taxitab.com
DRIVER #



Book a fare | Manage my bookings | Special

Search

Your booking is confirmed. Booking reference: **PKYZWV**

- ✓ An email booking confirmation has been sent to: davehughes@twincomm.
- Use your booking reference to retrieve your official Itinerary/Receipt at air

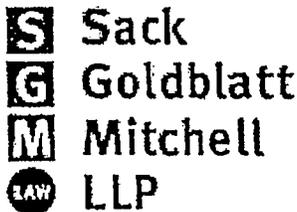
Passengers Mr John David Hughes

Flight	From	To	Departure	Arrival
AC6592	Campbell River (YBL)	Toronto (YYZ)	07:00	16:22
AC034	- Connection in Vancouver -		Mon 30-Sep 2013	Mon 30
AC101	Toronto (YYZ)	Campbell River (YBL)	12:00	16:50
AC6597	- Connection in Vancouver -		Wed 02-Oct 2013	Wed 02

Lynn Ritchie
 Assistant to Mark Wright, Vanessa
 Payne and Steven Shrybman
 T 416.979.6421
 F 416.591.7333
 E lritchie@sqmlaw.com

1244.00
 105.41 tx

 1349.91



20 Dundas Street W., Suite 1100
 Toronto ON M5G 2G8
www.sqmlaw.com

I will SEND this
 EMAIL so you can
 see the total.

THIS E-MAIL MAY CONTAIN CONFIDENTIAL INFORMATION WHICH IS PROTECTED BY LEGAL PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE IMMEDIATELY NOTIFY US BY REPLY E-MAIL OR BY TELEPHONE (COLLECT IF NECESSARY), DELETE THIS E-MAIL AND DESTROY ANY COPIES.

Lisa Purdy

From: Steven Shrybman
Sent: September 5, 2013 10:24 PM
To: Lisa Purdy
Subject: FW: Itinerary - Please do not reply to this email

I have changed my return flight to Ottawa and saved some money. So please substitute this invoice for the previous one – they refunded the difference.

From: PorterAirlines@flyporter.com [mailto:PorterAirlines@flyporter.com]
Sent: September 5, 2013 4:22 PM
To: Steven Shrybman
Subject: Itinerary - Please do not reply to this email

More destinations. More affordably.

Help us reach new destinations. Visit porterplans.com.

porter

Passenger Itinerary

Thank you very much for your business. We have confirmed your reservation in our system. You will not receive a paper ticket. Please review flight information for accuracy and make note of ID requirements and recommended check-in times. You may print this itinerary for your reference.

MR. STEVEN SHRYBMAN
 106 HELENA AVE
 TORONTO, ON M6G 2H2
 CANADA

Confirmation Number:	R3JLXI	Agent Name:	SHRYBMAN
Booking Date:	03 Sep 2013	Booked By:	X

Passenger Information:

Name	VIPorter Number	Flight #/Seat #
Mr. Steven SHRYBMAN	8340000055	255/NA

Flight Information:

Date	Flight	Depart	Arrive	Stops
07 Sep 2013	255	Toronto (YTZ) 10:35	Ottawa (YOW) 11:31	

Fare Summary (CAD):

Base Fare:	\$109.00
NAV and Surcharges:	\$12.00
Air Traveller Security Charge:	\$7.12
Airport Improvement Fee:	\$20.00
Harmonized Sales Tax:	\$19.26
<hr/>	
Total Fare Price:	\$167.38
Visa:	\$410.33
<hr/>	
Balance Due:	\$-242.95

GST/HST Number: 841583271

QST Number: 1212573775

Baggage Policy:

TWO items of carry-on baggage are permitted per fare-paying passenger.

- Carry-on baggage is limited to two pieces:
 - 1 standard article not exceeding 55 cm x 40 cm x 23 cm (21.5" x 15.5" x 9") and weighing less than 9 kg (20 lb)
 - 1 personal article not exceeding 43 cm x 33 cm x 16 cm (17" x 13" x 6") and weighing less than 9 kg (20 lb)
- Items that are not permitted in carry-on baggage aboard the aircraft are those that present a potential hazard. They include, but are not limited to, weapons, tools, restraining devices, toy weapons, cutting and puncturing devices (knives, box cutters, scissors, straight razors) ice skates and other hazardous items as defined and regulated by law including explosives, poisons, and other toxic materials.
- All carry-on baggage must fit in the sizing units located both at check-in and the gate areas.
- On board the aircraft, all carry-on baggage must be stowed under the seat or in the overhead compartments.
- The following items are not counted as carry-on: coats, cameras, receptacles containing human remains, containers carrying life sustaining items, strollers, child restraint systems, crutches, canes, walkers and other such items.
- Porter may require that an item of carry-on baggage travel as checked luggage if the bag

Lisa Purdy

From: Steven Shrybman
Sent: September 2, 2013 9:12 PM
To: Lisa Purdy
Subject: FW: Itinerary - Please do not reply to this email

Please bill this to the COC on the OEB file

From: PorterAirlines@flyporter.com [mailto:PorterAirlines@flyporter.com]
Sent: September 2, 2013 9:11 PM
To: Steven Shrybman
Subject: Itinerary - Please do not reply to this email



Passenger Itinerary

Thank you very much for your business. We have confirmed your reservation in our system. You will not receive a paper ticket. Please review flight information for accuracy and make note of ID requirements and recommended check-in times. You may print this itinerary for your reference.

MR. STEVEN SHRYBMAN
 106 HELENA AVE
 TORONTO, ON M6G 2H2
 CANADA

Confirmation Number: **RCVPQX** **Agent Name:** SHRYBMAN
Booking Date: 03 Sep 2013 **Booked By:**

Passenger Information:

Name	VIPorter Number	Flight #/Seat #
Mr. Steven SHRYBMAN	8340000055	260/NA

Flight Information:

Date	Flight	Depart	Arrive	Stops
11 Sep 2013	260	Ottawa (YOW) 14:20	Toronto (YTZ) 15:20	

Fare Summary (CAD):

Base Fare:	\$194.00
Air Traveller Security Charge:	\$7.12
NAV and Surcharges:	\$12.00
Airport Improvement Fee:	\$20.00
Harmonized Sales Tax:	\$30.31

Total Fare Price:	\$263.43
Visa:	\$263.43

Balance Due:	\$0.00

GST/HST Number: 841583271

QST Number: 1212573775

Baggage Policy:

TWO items of carry-on baggage are permitted per fare-paying passenger.

- Carry-on baggage is limited to two pieces:
 - 1 standard article not exceeding 55 cm x 40 cm x 23 cm (21.5" x 15.5" x 9") and weighing less than 9 kg (20 lb)
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- The following items are not counted as carry-on: coats, cameras, receptacles containing human remains, containers carrying life sustaining items, strollers, child restraint systems, crutches, canes, walkers and other such items.
- Porter may require that an item of carry-on baggage travel as checked luggage if the bag cannot be safely stowed in the cabin.

For travel before August 1, 2013 or for flights booked before July 3, 2013

ONE item of checked baggage is permitted, free of charge, per fare-paying passenger.

- One piece of checked baggage is accepted free of charge for each fare paying passenger.
- The total combined weight of all checked baggage is limited to 23 kg (50 lb).
- The weight of the baggage is combinable for passengers booked under the same reservation file.
- A second piece of checked baggage is permitted for a charge of \$20 CAD/USD per direction.
- There is a \$50 CAD/USD charge per additional bag, over and above 2 pieces of baggage.

Lisa Purdy

From: Steven Shrybman
Sent: August 19, 2013 5:09 PM
To: Lisa Purdy
Subject: FW: Steven Shrybman : Your VIA itinerary and receipt for booking AIF728

-please bill to Gas Pipe – re attendance at settlement conference in Toronto on ^{Aug.} ~~Sept~~ 28

From: VIA Rail Canada [mailto:service@viarail.ca]
Sent: August 19, 2013 5:06 PM
To: Steven Shrybman
Subject: Steven Shrybman : Your VIA itinerary and receipt for booking AIF728

ITINERARY / RECEIPT - NOT VALID FOR TRAVEL

Thank you for choosing
 VIA Rail Canada .



BOOKING CONFIRMATION: AIF728

STEVEN SHRYBMAN, VIA PRÉFÉRENCE: 88***53

IMPORTANT - AN E-BOARDING PASS HAS BEEN ISSUED FOR EACH SEGMENT OF THIS TRIP AND HAS BEEN SENT IN A SEPARATE E-MAIL. Please bring all e-boarding passes on your trip and review this confirmation carefully as it includes some important information about travelling with us.

ITINERARY # 1

TRAIN 59 | [info](#)

From: OTTAWA Mon. Aug 26, 2013 Departure: 17:02 PM

To: TORONTO Mon. Aug 26, 2013 Arrival: 21:01 PM

Class: Business Car : 1 Seat : 5A Window

Remarks: Operated by: VIA Rail Canada. This train goes through Ottawa on the way from Montreal to Toronto.

BAGGAGE ENTITLEMENT

Carry-on baggage

OPTION 1 (Recommended in sleeping cars)

- 2 articles
 Maximum
 11.5 kg (25 lb.) each
 54.5 x 39.5 x 23 cm (21.5 x 15.5 x 9 in.)

- 1 personal article
 Maximum
 11.5 kg (25 lb.)
 43 x 15 x 33 cm (17 x 6 x 13 in.)

For this option, articles of more than 11.5 kg (25 lb.) are not allowed on board.

OR

OPTION 2 (NOT recommended in sleeping cars)

- 1 article
Maximum
18 kg (40 lb.)
158 linear cm (62 linear in.) (length + width + height)

- 1 personal article
Maximum
11.5 kg (25 lb.)
43 x 15 x 33 cm (17 x 6 x 13 in.)

For this option, an article between 41 and 50 lb. (19 and 23 kg) is allowed on board, but is subject to a surcharge of \$20 (taxes included, per one-way trip) for excess weight. An article weighing more than 50 lb. is not allowed on board.

Checked baggage

No checked baggage.

*VIA Rail reserves the right to weigh, strictly enforce baggage allowances and collect excess baggage charges.

CONDITIONS OF CONTRACT

1. Your rail ticket is not transferable and is valid only for travel on the train and date shown. You may exchange or refund this e-boarding pass up until the scheduled departure time indicated on this ticket, subject to the conditions of the applicable fare plan. Please advise VIA Rail in advance of any travel cancellation.
2. Times shown in timetable or elsewhere are not guaranteed.
3. In case of necessity, VIA Rail may cancel a train or substitute alternate transportation without notice.
4. To ensure all passengers' safety, VIA Rail reserves the right to inspect all baggage.
5. You are responsible at all times for your carry-on baggage. VIA Rail assumes a limited liability for loss or damage to checked baggage. Ask VIA Rail personnel for more details.

Other conditions apply to your travel.

RECEIPT

FARE INFORMATION

Steven Shrybman (Adult) ----- \$111.87

FARE: \$99.00 G.S.T/H.S.T.: \$12.87 P.S.T.: \$0.00 TOTAL: \$111.87

TAX INFORMATION

Taxable fare: \$99.00
G.S.T/H.S.T. number: 105521785RT001

PAYMENT 4500*****6076 - AUTHORIZATION # 020642
TRANSACTION DATE: 08/19/2013

ITINERARY FARE PLAN REFUND/EXCHANGE CONDITIONS

OTTAWA /
TORONTO

BUSINESS

Before Departure : Exchangeable and refundable less a \$24.75 plus applicable tax(es) service charge.
After Departure : Non-exchangeable and non-refundable.

Other Useful Information (links)

Lisa Purdy

From: Steven Shrybman
Sent: September 19, 2013 8:41 AM
To: Lisa Purdy
Subject: FW: Itinerary - Please do not reply to this email

This should get billed to the OEB.

From: PorterAirlines@flyporter.com [mailto:PorterAirlines@flyporter.com]
Sent: September 18, 2013 11:20 PM
To: Steven Shrybman
Subject: Itinerary - Please do not reply to this email

porter

More destinations. More affordably.

Help us reach new destinations. Visit porterplans.com.

Passenger Itinerary

Thank you very much for your business. We have confirmed your reservation in our system. You will not receive a paper ticket. Please review flight information for accuracy and make note of ID requirements and recommended check-in times. You may print this itinerary for your reference.

MR. STEVEN SHRYBMAN
 106 HELENA AVE
 TORONTO, ON M6G 2H2
 CANADA

Confirmation Number:	X6FK4M	Agent Name:	SHRYBMAN
Booking Date:	19 Sep 2013	Booked By:	

Passenger Information:

Name	VIPorter Number	Flight #/Seat #
Mr. Steven SHRYBMAN	8340000055	251/NA

Flight Information:

Date	Flight	Depart	Arrive	Stops
20 Sep 2013	251	Toronto (YTZ) 10:10	Ottawa (YOW) 11:06	

Fare Summary (CAD):

Base Fare:	\$109.00
NAV and Surcharges:	\$12.00
Air Traveller Security Charge:	\$7.12
Airport Improvement Fee:	\$20.00
Harmonized Sales Tax:	\$19.26
<hr/>	
Total Fare Price:	\$167.38
Visa:	\$167.38
<hr/>	
Balance Due:	\$0.00

GST/HST Number: 841583271

QST Number: 1212573775

Baggage Policy:

TWO items of carry-on baggage are permitted per fare-paying passenger.

- Carry-on baggage is limited to two pieces:
 - 1 standard article not exceeding 55 cm x 40 cm x 23 cm (21.5" x 15.5" x 9") and weighing less than 9 kg (20 lb)
 - 1 personal article not exceeding 43 cm x 33 cm x 16 cm (17" x 13" x 6") and weighing less than 9 kg (20 lb)
- Items that are not permitted in carry-on baggage aboard the aircraft are those that present a potential hazard. They include, but are not limited to, weapons, tools, restraining devices, toy weapons, cutting and puncturing devices (knives, box cutters, scissors, straight razors) ice skates and other hazardous items as defined and regulated by law including explosives, poisons, and other toxic materials.
- All carry-on baggage must fit in the sizing units located both at check-in and the gate areas.
- On board the aircraft, all carry-on baggage must be stowed under the seat or in the overhead compartments.
- The following items are not counted as carry-on: coats, cameras, receptacles containing human remains, containers carrying life sustaining items, strollers, child restraint systems, crutches, canes, walkers and other such items.
- Porter may require that an item of carry-on baggage travel as checked luggage if the bag cannot be safely stowed in the cabin.

Lisa Purdy

From: Steven Shrybman
Sent: September 2, 2013 9:25 PM
To: Lisa Purdy
Subject: FW: Itinerary - Please do not reply to this email

This gets billed to the same file

COC - OEB

From: PorterAirlines@flyporter.com [mailto:PorterAirlines@flyporter.com]
Sent: September 2, 2013 9:24 PM
To: Steven Shrybman
Subject: Itinerary - Please do not reply to this email



Passenger Itinerary

Thank you very much for your business. We have confirmed your reservation in our system. You will not receive a paper ticket. Please review flight information for accuracy and make note of ID requirements and recommended check-in times. You may print this itinerary for your reference.

MR. STEVEN SHRYBMAN
 106 HELENA AVE
 TORONTO, ON M6G 2H2
 CANADA

Confirmation Number: **R3JLXI** **Agent Name:** SHRYBMAN
Booking Date: 03 Sep 2013 **Booked By:**

Passenger Information:

Name	VIPorter Number	Flight #/Seat #
Mr. Steven SHRYBMAN	8340000055	271/3C

Flight Information:

Date	Flight	Depart	Arrive	Stops
05 Sep 2013	271	Toronto (YTZ) 18:55	Ottawa (YOW) 19:51	

Fare Summary (CAD):

Base Fare:	\$324.00
NAV and Surcharges:	\$12.00
Air Traveller Security Charge:	\$7.12
Airport Improvement Fee:	\$20.00
Harmonized Sales Tax:	\$47.21

Total Fare Price:	\$410.33
Seat Fee:	\$0.00

Total Including Service Charges:	\$410.33
Visa:	\$410.33

Balance Due:	\$0.00

GST/HST Number: 841583271

QST Number: 1212573775

Baggage Policy:

TWO items of carry-on baggage are permitted per fare-paying passenger.

- Carry-on baggage is limited to two pieces:
 - 1 standard article not exceeding 55 cm x 40 cm x 23 cm (21.5" x 15.5" x 9") and weighing less than 9 kg (20 lb)
 - 1 personal article not exceeding 43 cm x 33 cm x 16 cm (17" x 13" x 6") and weighing less than 9 kg (20 lb)
- Items that are not permitted in carry-on baggage aboard the aircraft are those that present a potential hazard. They include, but are not limited to, weapons, tools, restraining devices, toy weapons, cutting and puncturing devices (knives, box cutters, scissors, straight razors) ice skates and other hazardous items as defined and regulated by law including explosives, poisons, and other toxic materials.
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- Porter may require that an item of carry-on baggage travel as checked luggage if the bag cannot be safely stowed in the cabin.

For travel before August 1, 2013 or for flights booked before July 3, 2013

ONE item of checked baggage is permitted, free of charge, per fare-paying passenger.

- One piece of checked baggage is accepted free of charge for each fare paying passenger.

Lisa Purdy

From: Steven Shrybman
Sent: May 1, 2013 11:01 AM
To: Lisa Purdy
Subject: FW: Steven Shrybman : Your VIA itinerary and receipt for booking ZKM398

please bill to gas pipe

(and if I don't indicate otherwise, please also put a claim in for this expense)

From: VIA Rail Canada [service@viarail.ca]
Sent: 01 May 2013 07:26
To: Steven Shrybman
Subject: Steven Shrybman : Your VIA itinerary and receipt for booking ZKM398

ITINERARY / RECEIPT - NOT VALID FOR TRAVEL

Thank you for choosing
 VIA Rail Canada .



BOOKING CONFIRMATION: ZKM398

STEVEN SHRYBMAN

IMPORTANT - AN E-BOARDING PASS HAS BEEN ISSUED FOR EACH SEGMENT OF THIS TRIP AND HAS BEEN SENT IN A SEPARATE E-MAIL. Please bring all e-boarding passes on your trip and review this confirmation carefully as it includes some important information about travelling with us.

ITINERARY # 1

TRAIN 656 | [info](#)

From: TORONTO Thu. May 2, 2013 Departure: 16:20 PM
 To: OTTAWA Thu. May 2, 2013 Arrival: 20:19 PM
 Class: Business Discounted fare Car : 1 Seat : 8C Aisle
 Remarks: Operated by: VIA Rail Canada. Route: Toronto-Ottawa-Montréal

BAGGAGE ENTITLEMENT

Carry-on baggage

OPTION 1 (Recommended in sleeping cars)

- 2 articles
 Maximum
 11.5 kg (25 lb.) each
 54.5 x 39.5 x 23 cm (21.5 x 15.5 x 9 in.)

- 1 personal article
 Maximum
 11.5 kg (25 lb.)
 43 x 15 x 33 cm (17 x 6 x 13 in.)

For this option, articles of more than 11.5 kg (25 lb.) are not allowed on board.

OR

OPTION 2 (NOT recommended in sleeping cars)

- 1 article

Maximum

18 kg (40 lb.)

158 linear cm (62 linear in.) (length + width + height)

- 1 personal article

Maximum

11.5 kg (25 lb.)

43 x 15 x 33 cm (17 x 6 x 13 in.)

For this option, an article between 41 and 50 lb. (19 and 23 kg) is allowed on board, but is subject to a surcharge of \$20 (taxes included, per one-way trip) for excess weight. An article weighing more than 50 lb. is not allowed on board.

Checked baggage

No checked baggage.

*VIA Rail reserves the right to weigh, strictly enforce baggage allowances and collect excess baggage charges.

CONDITIONS OF CONTRACT

1. Your rail ticket is not transferable and is valid only for travel on the train and date shown. You may exchange or refund this e-boarding pass up until the scheduled departure time indicated on this ticket, subject to the conditions of the applicable fare plan. Please advise VIA Rail in advance of any travel cancellation.
2. Times shown in timetable or elsewhere are not guaranteed.
3. In case of necessity, VIA Rail may cancel a train or substitute alternate transportation without notice.
4. To ensure all passengers' safety, VIA Rail reserves the right to inspect all baggage.
5. You are responsible at all times for your carry-on baggage. VIA Rail assumes a limited liability for loss or damage to checked baggage. Ask VIA Rail personnel for more details.

Other conditions apply to your travel.

RECEIPT

FARE INFORMATION

Steven Shrybman (Adult) \$120.35

FARE: \$106.50 G.S.T/H.S.T.: \$13.85 P.S.T.: \$0.00 TOTAL: \$120.35

TAX INFORMATION

Taxable fare: \$106.50

G.S.T/H.S.T. number: 105521785RT001

PAYMENT 4500*****6076 - AUTHORIZATION # 024050

TRANSACTION DATE: 05/01/2013

ITINERARY FARE PLAN REFUND/EXCHANGE CONDITIONS

TORONTO /
OTTAWA

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Other Useful Information (links)

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- [VIA's baggage policy](#)
- [VIA Terms and Conditions](#)

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How to get a refund if paper tickets have already been issued?

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From: PorterAirlines@flyporter.com [PorterAirlines@flyporter.com]

Sent: 02 October 2013 12:59

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To: Steven Shrybman

Subject: Itinerary - Please do not reply to this email

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Passenger Itinerary

Thank you very much for your business. We have confirmed your reservation in our system. You will not receive a paper ticket. Please review flight information for accuracy and make note of ID requirements and recommended check-in times. You may print this itinerary for your reference.

MR. STEVEN SHRYBMAN
500-30 METCALFE ST
OTTAWA, ON K1P 5L4
CANADA

Confirmation
Number:

B7EFTW

Agent Name:

SHRYBMAN

Booking Date:

02 Oct 2013

Booked By:

Passenger Information:

Name	VIPorter Number	Flight #/Seat #
Mr. Steven SHRYBMAN	8340000055	251/NA 274/NA

Flight Information:

Date	Flight	Depart	Arrive	Stops
06 Oct 2013	251	Toronto (YTZ) 10:30	Ottawa (YOW) 11:26	
07 Oct 2013	274	Ottawa (YOW) 20:00	Toronto (YTZ) 21:00	

Fare Summary (CAD):

Base Fare:	\$218.00
NAV and Surcharges:	\$24.00
Air Traveller Security Charge:	\$14.24
Airport Improvement Fee:	\$40.00
Harmonized Sales Tax:	\$38.52

Total Fare Price:

\$334.76

Visa:

\$334.76

Balance Due:

\$0.00

GST/HST Number: 841583271

QST Number: 1212573775

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- Carry-on baggage is limited to two pieces:
 - 1 standard article not exceeding 55 cm x 40 cm x 23 cm (21.5" x 15.5" x 9") and weighing less than 9 kg (20 lb)
 - 1 personal article not exceeding 43 cm x 33 cm x 16 cm (17" x 13" x 6") and weighing less than 9 kg. (20 lb)
- Items that are not permitted in carry-on baggage aboard the aircraft are those that present a potential hazard. They include, but are not limited to, weapons, tools, restraining devices, toy weapons, cutting and puncturing devices (knives, box cutters, scissors, straight razors) ice skates and other hazardous items as defined and regulated by law including explosives, poisons, and other toxic materials.
- All carry-on baggage must fit in the sizing units located both at check-in and the gate areas.
- On board the aircraft, all carry-on baggage must be stowed under the seat or in the overhead compartments.
- The following items are not counted as carry-on: coats, cameras, receptacles containing

1/2 to CoC re: OEB file

Council of Canadians
700 - 170 Laurier Avenue West
Ottawa, Ontario
K1P 5V5

Date: 04 Feb 2014
Invoice # Sample
Matter # 13-840

Attention: Brent Patterson

RE: Council of Canadians re: Enbridge Gas Distribution

FEES		HOURS	
18-Apr-13	Review Board notice and reporting to clients re: same;	0.80	SLS
24-Apr-13	Review of file to briefing S. Hart re: attendance at telephone conference on April 26	1.00	SLS
24-Apr-13	E-mail correspondence with S. Shrybman re: OEB conference call on behalf of Council of Canadians; printing and reviewing information;	0.30	SH
25-Apr-13	Review application; Telephone conversation with D. Poch re: coordination; email correspondence with L. Sumi and clients;	6.80	SLS
25-Apr-13	Review of materials and preparation for OEB conference call to take place April 25, 2013; Discussion with S. Shrybman;	1.00	SH
26-Apr-13	Email exchange with other party re: L. Sumi evidence;	0.40	SLS
26-Apr-13	Participation in Issues and Process conference call re: Enbridge /union applications (OEB);	3.30	SH
26-Apr-13	Preparing notes on conference call and emailing summary to S. Shrybman;	0.30	SH
30-Apr-13	Reporting note to client;	1.00	SLS
30-Apr-13	Discussion with other intervenors;	0.50	SLS
30-Apr-13	Prepare for and attend proceeding before the Board;	6.40	SLS

01-May-13	Email exchanges with client re: nature and scope of intervention;	1.10	SLS
01-May-13	Telephone call with L. Sumi re: retainer and to review her most recent work;	1.00	SLS
01-May-13	Review of file;	0.60	SLS
01-May-13	Debrief clients on hearing day; seek instructions;	1.90	SLS
02-May-13	Review of file in preparation for client contact call;	1.40	SLS
02-May-13	Telephone conversation with D. Poch re: coordination of expert evidence;	0.50	SLS
02-May-13	Further exchanges with client and L. Sumi;	1.80	SLS
06-May-13	Review L. Sumi paper from Gas Market Regulation proceedings;	0.90	SLS
06-May-13	Email correspondence with L. Sumi and D. Poch;	0.40	SLS
06-May-13	Review T. Colborne article to email request for expert evidence;	1.20	SLS
06-May-13	Review A. Ingraffea reports; review letter of inquiry re: possible retainer to give expert evidence;	1.30	SLS
13-May-13	Preparation for telephone call with D. Hughes and L. Sumi re: possible retainer as expert witness;	1.50	SLS
13-May-13	Preparation for telephone call with D. Hughes and D. Roberts re: possible retainer as expert witness;	1.30	SLS
13-May-13	Review email correspondence;	0.80	SLS
13-May-13	Follow up correspondence with D. Hughes and D. Roberts re: retainer, funding and directing both to relevant Board files;	0.90	SLS
15-May-13	Review Enbridge application;	1.50	SLS
15-May-13	Email exchange with E. Lui;	0.50	SLS
16-May-13	Telephone conversation with E. Lui for update and instructions;; exchange with D. Poch re: integration and relevance of bubble evidence; exchange with D. Hughes re:	7.10	SLS

19-May-13	interrogatories; further review of application and supporting documents; review of NEB TCPL toll decision referenced by Enbridge Gas Distribution; email correspondence with clients and consultants re: mandate and interrogatories; review TCPL open season;; Review Union Gas proposal;	3.00	SLS
20-May-13	Review interrogatories and experts comments; prepare information requests;	8.00	SLS
21-May-13	Finalize file and serve information requests;	6.50	SLS
22-May-13	Brief review and filing of information requests by various parties;	1.00	SLS
27-May-13	Review production order;	0.30	SLS
01-Jun-13	Review correspondence;	2.00	SLS
10-Jun-13	Correspondence with L. Sumi and review outline of her report; telephone conversation with D. Poch re: form and format for our evidence; review of file and information requests;	5.20	SLS
11-Jun-13	Review A. Ingraffea articles and prepare memo to him;	1.00	SLS
11-Jun-13	Review responses to information requests; email exchange with L. Sumi;	1.00	SLS
12-Jun-13	Review information request exchanges between Enbridge and other parties;	2.50	SLS
18-Jun-13	Review L. Sumi's draft, related email exchange and correspondence with A. Ingraffea; consultation with D. Poch;	2.20	SLS
18-Jun-13	Review email correspondence of parties;	0.50	SLS
18-Jun-13	Consult with experts;	0.90	SLS
19-Jun-13	Review articles by expert; draft outline for A. Ingraffea report; email correspondence with A. Ingraffea;	4.20	SLS
20-Jun-13	Email exchange with experts; draft A. Ingraffea report; telephone conversation with D. Hughes;	6.90	SLS
20-Jun-13	Telephone conversation with D. Poch re: CH4 leakage in larger system;	0.30	SLS

22-Jun-13	Review motion re: Gaz Metro and Union Gas;	1.00	SLS
23-Jun-13	Exchange with consultants re: their respective reports;	1.10	SLS
23-Jun-13	Review and comment on Ingraffea; email to D. Poch and L. Sumi re: same;	1.80	SLS
24-Jun-13	Further exchanges with D. Poch and his consultants re: TCPL agenda for mainline; receipt of next drafts from A. Ingraffea and L. Sumi;	1.90	SLS
24-Jun-13	Email exchanges with D. Poch and L. Sumi re: A. Ingraffea; prepare first draft and add comments and remit to A. Ingraffea;	2.10	SLS
26-Jun-13	Final review of A. Ingraffea's evidence;	1.50	SLS
26-Jun-13	Review and comment on Ingraffea draft # 3;	2.00	SLS
26-Jun-13	Review and comment on L. Sumi opinion;	3.50	SLS
27-Jun-13	Review of D. Hughes first draft;	3.60	SLS
27-Jun-13	Review of D. Hughes second draft;	1.80	SLS
27-Jun-13	Email exchanges with experts, interveners and to review correspondence from the parties and interveners;	2.10	SLS
27-Jun-13	Review of L. Sumi final response to IR;	2.20	SLS
28-Jun-13	Various exchanges with experts; finalize, file and serve the expert reports of L. Sumi, A. Ingraffea and D. Hughes;	7.40	SLS
30-Jun-13	Serve all Parties;	0.40	SLS
02-Jul-13	Email correspondence with clients; review PO; review POs #4 and #5; email correspondence with experts re: interrogatory timelines; review Union Gas motion; email correspondence with D. Poch re: Union Gas motion;	3.40	SLS
04-Jul-13	Receipt and review of revised Union Gas Application;	1.50	SLS
06-Jul-13	Further review of IRs and email exchange with experts re: same;	2.90	SLS

06-Jul-13	Review Presidents Action Plan re: UGL and EGD IRs; exchanges with A. Ingraffea and L. Sumi re: same;	2.40	SLS
08-Jul-13	Review IRs to D. Hughes and telephone conversation re: same;	1.00	SLS
09-Jul-13	Reviewing correspondence and motion materials filed by the parties; correspondence with experts re: interrogatories;	2.50	SLS
10-Jul-13	Review IRs and Telephone conversation with L. Sumi, A. Ingraffea and D. Hughes; memo to student re: article search; review correspondence and motion materials; exchanges with student re: responses to interrogatories;	9.20	SLS
10-Jul-13	Retrieving academic articles requested by Union Gas interrogatories;	0.70	MS
11-Jul-13	Review correspondence from parties and attend hearing online;	1.20	SLS
11-Jul-13	Exchange with student and staff re: responses to interrogatories;	0.50	SLS
12-Jul-13	Review correspondence and filings of the parties and board; Telephone conversation with D. Poch re: recent developments and potential impacts on approvals; draft interrogatories for TCPL;	4.80	SLS
13-Jul-13	Review file and correspondence with D. Hughes re: IRs;	1.00	SLS
15-Jul-13	Memos to A. Ingraffea and L. Sumi re: their response to IRS;	1.80	SLS
15-Jul-13	Review Enbridge's revised application;	1.20	SLS
15-Jul-13	Review and comment on L. Sumi's IR responses;	0.50	SLS
15-Jul-13	Further review of revised application;	1.50	SLS
15-Jul-13	Review of correspondence from Parties;	0.70	SLS
15-Jul-13	Review letter from Board; exchanges with A. Ingraffea and review of his response to President's Action Plan;	1.50	SLS
15-Jul-13	Review of D. Hughes' response to IRs;	1.25	SLS
16-Jul-13	Review draft IR responses; various exchanges with experts;	7.20	SLS

17-Jul-13	Review correspondence filed by parties;	0.80	SLS
17-Jul-13	Further review of A. Ingraffea IR responses and instructing assistant re: final formatting;	1.30	SLS
17-Jul-13	Prepare for and telephone interview with D. Hughes re: IRs;	2.60	SLS
17-Jul-13	Exchanges with L Sumi re: Union IR File retrieval and review her response;	1.20	SLS
17-Jul-13	Edit D. Hughes' UGL and EGD responses;	1.40	SLS
18-Jul-13	Review and finalize L. Sumi's response;	1.60	SLS
18-Jul-13	Review and finalize D. Hughes' EGD IR response;	0.90	SLS
18-Jul-13	Telephone conversation with D. Poch re: coordination;	0.30	SLS
18-Jul-13	Detailed review of D. Hughes' UGL IR response;	5.20	SLS
19-Jul-13	Finalize responses; arranging for filing and serving responses to UGL, EGD, CCC and Housing Federation;	6.90	SLS
19-Jul-13	Correspondence with and reporting to client;	1.00	SLS
22-Jul-13	Review correspondence and receipt of revised EGD application;	1.50	SLS
23-Jul-13	Review P.O. #6 and to correspondence scheduling with experts;	1.50	SLS
24-Jul-13	Exchanges with clients re: availability for hearing and Telephone conversation with D. Poch re: procedural issues;	1.40	SLS
25-Jul-13	Review revised NOA Enbridge and TLPC Notice of Intent to Revise Evidence;	2.20	SLS
26-Jul-13	Email exchange with L. Sumi re: her availability to attend hearings;	0.30	SLS
26-Jul-13	Review Union and Enbridge Responses to TLPC letter;	1.20	SLS
29-Jul-13	Review of file and procedural order No. 7;	2.10	SLS

29-Jul-13	Exchanges with our experts and Board Counsel re: scheduling of our witness panel;	0.90	SLS
29-Jul-13	Reporting to client;	0.60	SLS
29-Jul-13	Review evidence on fracking;	0.80	SLS
29-Jul-13	Legal research re jurisdiction of OEB;	1.00	MS
30-Jul-13	Email correspondence with A. Ingraffea re: his op-ed in NYT;	0.40	SLS
30-Jul-13	Communication with clients re: preparation for hearing;	0.60	SLS
30-Jul-13	Email correspondence from Board;	0.40	SLS
30-Jul-13	Legal research re jurisdiction of OEB;	1.00	MS
31-Jul-13	Prepare for and telephone conversation with D. Poch re: latest filings by TCPL and to discuss collaboration on the evidence;	0.50	SLS
31-Jul-13	Review correspondence from the parties re: TCPL request for schedule revision and to review Board order arising therefrom;	1.10	SLS
31-Jul-13	Review ED submissions on its motion to have costing information placed on the public record;	0.70	SLS
31-Jul-13	Review EGD notice of revised application;	0.30	SLS
31-Jul-13	Review of EGD revised application;	0.50	SLS
31-Jul-13	Legal research on OEB jurisdiction: review of QL research; OEB cases and divisional court decision;	1.50	MS
01-Aug-13	Review Board IRs to EGD on updated evidence; review TCPL responses to COC IRs re: latest announcement concerning pipeline east; briefing clients re: same; review procedural order # 8	2.90	SLS
01-Aug-13	Review EGD responses to ED motion;	0.40	SLS
01-Aug-13	Review APPRO IRs of EGD;	0.40	SLS

01-Aug-13	Review GEC IRs; motion by Mississaguas;	1.30	SLS
01-Aug-13	Research re OEB jurisdiction;	1.00	MS
02-Aug-13	Review of IRs filed by several parties;	2.30	SLS
02-Aug-13	Email correspondence with clients re: various issues;	0.50	SLS
06-Aug-13	Discussion with student re scope of OEB environmental mandate;	0.40	SLS
06-Aug-13	Exchanges with client re: file;	1.10	SLS
06-Aug-13	Meeting with S. Shrybmann re: research on OEB extra-territorial jurisdiction;	0.30	MS
07-Aug-13	Review correspondence from parties;	0.40	SLS
07-Aug-13	Review student memo re: scope of OEB environmental jurisdiction and to follow up re: same;	1.20	SLS
08-Aug-13	Review correspondence from Board;	0.20	SLS
08-Aug-13	Meetings with client re: impact of project on gas supply to the GTA through TCPL mainline and to follow up correspondence;	2.60	SLS
09-Aug-13	Exchanges with client re: issues relating to the conversation of the TCPL mainline;	1.20	SLS
12-Aug-13	Review TCPL responses to COC and other interrogatories;	2.30	SLS
13-Aug-13	Further review of TCPL responses to COC, Board, and other interrogatories;	1.10	SLS
15-Aug-13	Review of Union Metro and TCPL applications to NEB; review filings and procedural orders;	1.80	SLS
15-Aug-13	Research on OEB jurisdiction and environmental assessment process;	2.00	MS
16-Aug-13	Review correspondence from the Board;	0.40	SLS
16-Aug-13	Legal research;	2.50	MS

19-Aug-13	Review TCPL revised submissions; memorandum to consultants; follow up conversations with D. Hughes and L. Sumi re: possible IRs;	2.60	SLS
20-Aug-13	Email exchange with experts; meeting with student re: Board's environmental mandate; Telephone conversation with D. Poch and Elston re: same; legal research re: extent of OEB jurisdiction re: Greenhouse gas emissions; drafting further IRs in respect of TCPL supplementary evidence;	7.10	SLS
20-Aug-13	Further legal research on scope of OEB's public interest mandate for environmental impact analysis; preparation of memo;	5.50	MS
21-Aug-13	Exchanges with client re: inter-relationship between mainline and GTA project; monitor IRs from parties;	1.80	SLS
26-Aug-13	Review procedural Order 9; review file;	2.80	SLS
26-Aug-13	Review TCPL responses to our IRs and memo to experts re: same;	1.40	SLS
26-Aug-13	Exchanges and Telephone conversation with D. Hughes re: TCPL responses to our IRs;	0.90	SLS
26-Aug-13	Memo to experts re: scheduling;	0.30	SLS
26-Aug-13	Review of file in preparation for settlement conference;	2.50	SLS
26-Aug-13	Further legal research and preparation of revised memo on OEB environmental jurisdiction;	3.00	MS
27-Aug-13	Completion of research and memo on OEB environmental jurisdiction;	3.30	MS
28-Aug-13	Prepare for and attend settlement conference; review M. Sandilands memo;	7.30	SLS
29-Aug-13	Prepare for and attending settlement conference Day II;	6.20	SLS
30-Aug-13	Review correspondence re: hearing schedule and logistics;	1.20	SLS
02-Sep-13	Review file and correspondence from the parties; reporting to client; memo to experts re: scheduling and logistics;	1.60	SLS
03-Sep-13	Review cross estimates and correspondence;	0.80	SLS
03-Sep-13	Correspondence and meetings with other intervener re: issues;	0.90	SLS

04-Sep-13	Review latest estimates; revise my estimates accordingly;	0.50	SLS
04-Sep-13	Review party correspondence; review latest procedural order; facilitate exchange between GEC and D. Hughes re: the spread in gas prices Dawn v. Empress; coordinate schedule of appearance of our panel;	3.20	SLS
05-Sep-13	Prepare for and attend pre-hearing conference and Board proceeding; follow up communications with experts and clients; memorandum to experts re: modalities for their attendance for cross examination;	4.80	SLS
06-Sep-13	Review correspondence from parties; exchanges with clients, experts and other parties re: various matters	1.20	SLS
09-Sep-13	Discussions re: intervener funding; (N/C)	0.50	SLS
11-Sep-13	Preparation of cross; review correspondence from the parties; review of revised evidence of EGB; exchanges re: confidentiality undertaking; consultation with other intervener;	6.30	SLS
12-Sep-13	Prepare for and attend OEB hearing;	4.80	SLS
12-Sep-13	Meeting with counsel for other interveners;	0.20	SLS
13-Sep-13	Various exchanges with experts re: schedule for COC panel (hearing adjourned);	1.00	SLS
14-Sep-13	Review file, Union update and its responses to staff and other IRs; Telephone conversation with D. Poch re: TCPL's evidence; review correspondence from the parties;	7.20	SLS
16-Sep-13	Prepare for and attend OEB hearing;	5.60	SLS
17-Sep-13	Prepare for and attend OEB proceedings including conducting cross of Union panel; follow up correspondence with our experts re: reference to their evidence made during our cross;	6.90	SLS
19-Sep-13	Prepare for and attend OEB hearing;	3.00	SLS
19-Sep-13	Correspondence with experts re: critique by Union of their evidence;	0.90	SLS
24-Sep-13	Monitor proceedings; cross by ED of EGD alternatives panel;	4.60	SLS
27-Sep-13	Correspondence with experts and clients;	0.80	SLS

27-Sep-13	Preliminary review of transcripts;	1.00	SLS
28-Sep-13	Prepare for the appearance of the COC panel; correspondence from Board and with experts re: adjournment of their appearance on Oct. 1;	6.90	SLS
30-Sep-13	Correspondence with Board and experts re: rescheduling their appearance;	2.40	SLS
01-Oct-13	Further exchanges with the Board re: scheduling COC panel; communications with experts re: same; review party correspondence and evidence update by EGD;	2.20	SLS
02-Oct-13	Attending to logistical issues re: attendance of our experts; review incoming undertakings;	1.40	SLS
04-Oct-13	Reporting to clients re: progress of proceeding and scheduling of COC witness panel;	0.90	SLS
05-Oct-13	Review transcripts, evidence and IRs for the purpose of preparing COC witness panel;	8.00	SLS
07-Oct-13	Communications with experts re: pending appearance and to prepare cross examination of joint panel;	6.30	SLS
08-Oct-13	Meet with and prepare our witnesses for their appearance; (no charge)	4.00	SLS
09-Oct-13	Meet with and prepare witness panel; attend hearing to introduce our expert evidence; conduct cross examination of joint panel;	5.70	SLS
24-Oct-13	Preliminary review of EGD and Union Gas final arguments;	0.50	SLS
28-Oct-13	Review transcripts of cross examination;	2.80	SLS
29-Oct-13	Review file and drafting outline for argument;	6.40	SLS
29-Oct-13	Reading email from S. Shrybman re: Energy Board work;	0.10	JL
30-Oct-13	Review file, evidence, cross, IRs, our evidence in chief; drafting outline for argument;	6.80	SLS
31-Oct-13	Researching and writing on Section 2 of the OEB Act;	4.20	JL
01-Nov-13	Review term sheet filed this date by EGD and Union Gas;	1.20	SLS
01-Nov-13	Prepare final argument;	2.00	SLS

01-Nov-13	Communication with clients;	0.40	SLS
01-Nov-13	Writing memo on Section 2 of the Act;	4.40	JL
04-Nov-13	Exchange with K. Elston; email correspondence with A. Ingraffea re: boe equivalence; review correspondence from Board staff and parties concerning issues arising from the "final" term sheet; reviewing the evidence and cross examination; drafting final argument;	8.90	SLS
04-Nov-13	Research and writing submissions on extra-territorial jurisdiction of the OEB;	3.70	JL
05-Nov-13	Prepare final argument; review various exchanges re: questions arising from the filing of the revised term sheet;	8.80	SLS
05-Nov-13	Researching Keystone history and writing memorandum	4.40	JL
06-Nov-13	Review of party and staff exchanges re: revised term sheet; drafting final argument;	7.90	SLS
06-Nov-13	Researching and writing memo;	7.50	JL
07-Nov-13	Review and exchange of correspondence and PO number Sheriff's Certificates;	1.10	SLS
07-Nov-13	Draft final argument;	7.80	SLS
07-Nov-13	Research and distinguishing cases in memorandum;	5.20	JL
08-Nov-13	Looking up legislative history of Section 2;	0.20	JL
13-Nov-13	Draft submissions;	10.90	SLS
13-Nov-13	Research on legislative history of section 2 of OEB Act;	1.90	JL
13-Nov-13	Researching legislative history;	2.10	JL
14-Nov-13	Draft submissions;	14.20	SLS
14-Nov-13	Researching and writing memo on legislative history of s. 2 of OEB Act;	3.10	JL

14-Nov-13	Reading, revising and editing submissions to Board;	3.40	JL
15-Nov-13	Draft submissions	3.00	SLS
15-Nov-13	Final revisions to submissions;	0.40	JL
17-Nov-13	Review Union Metro and TCPL applications to NEB; review filings and procedural orders;	1.80	SLS
10-Jan-14	Review invoices from experts; email correspondence re: same; organizing in preparation for making submissions on costs;	1.80	SLS
22-Jan-14	Review account;	0.40	SLS
28-Jan-14	Receipt and review of Board correspondence;	0.40	SLS
29-Jan-14	Report to client re: release of Board decision;	0.60	SLS
30-Jan-14	Review Board's decision to compose reporting memorandum to clients;	3.40	SLS
31-Jan-14	Teleconference debriefing with E. Lui re: Board decision;	0.80	SLS
03-Feb-14	Prepare account;	2.10	SLS
03-Feb-14	Review correspondence from interveners;	0.30	SLS
04-Feb-14	Further preparation of account;	1.10	SLS
04-Feb-14	Compose reporting memorandum to expert witnesses re: Board's decision;	0.80	SLS
04-Feb-14	Review correspondence from Enbridge;	0.20	SLS
TOTAL HOURS		518.65	
Total Fees	:	\$	155,675.50
GST/HST On Fees	:	\$	20,237.82
Total Fees and GST/HST	:	\$	175,913.32
DISBURSEMENTS			

Computer search	\$	553.03
Photocopies	\$	902.50
Postage	\$	1.97
Telephone - long distance	\$	72.14
PUROLATOR INV # 420281491	\$	20.71
Transportation - Train	\$	99.00 ✓
Transportation - Airfare	\$	148.12 ✓
Transportation - Airfare	\$	233.12 ✓
Transportation - Airfare	\$	1,194.61 ✓
Transportation - Airfare	\$	148.12 ✓
Reimbursement of Expense - Flight Cancellation Fee*	\$	240.00 ✓
Canada Post - Postage	\$	9.23
Transportation - Airfare	\$	233.12 ✓
Transportation - Airfare	\$	274.12 ✓
Transportation - Taxi	\$	35.27 ✓
Transportation - Taxi	\$	15.49 ✓
Transportation - Taxi	\$	16.81 ✓
Transportation - Taxi	\$	14.82 ✓
Transportation - Taxi	\$	8.85 ✓
Reimbursement of Expenses	\$	681.59 ✓
Re-imbusement of expenses*	\$	850.00 ✓
TR FR 13-607 TO 13-840 Train disbursement	\$	106.50 ✓
Transportation - Airfare	\$	148.12 ✓
Total Disbursements	\$	6,007.24
GST/HST On Disbursements	\$	639.24
Total Disbursements and GST/HST	\$	6,646.48
TOTAL INVOICE:		\$ 182,559.80
<i>For reference only - TRUST BALANCE:</i>		\$ 0.00

Total GST/HST on this invoice is \$20,877.06

FEE SUMMARY

Lawyer	:	Hours	Hourly Rate	Amount
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STEVEN SHRYBMAN	:	451.35	\$330.00	\$148,945.50
SASHA HART	:	4.90	\$100.00	\$490.00
MARION SANDILANDS	:	21.80	\$100.00	\$2,180.00
JANINE LESPERANCE	:	40.60	\$100.00	\$4,060.00
Totals	:	518.65		\$155,675.50

**THIS IS OUR ACCOUNT HEREIN
SACK GOLDBLATT MITCHELL LLP**

PER:

STEVEN SHRYBMAN

E.&O.E.

Any disbursements incurred on your behalf and not charged to your account will be billed later
Our firm's GST/HST number is 12231 7019 RT0001.

* items are tax exempt or tax free

In accordance with s.33 of the Solicitors Act, interest will be charged at 1.3% per annum on unpaid fees, charges and disbursements, calculated from a date which is one month after this statement is delivered.

Sack Goldblatt Mitchell LLP *Avocat(e)s/Lawyers*

500 - 30 rue Metcalfé St. Ottawa (Ontario) K1P 5L4
 T 613.235.5327 F 613.235.3041 www.sgmllaw.com

Steven Shrybman
 Direct Line: 613-482-2456
 sshrybman@sgmlaw.com

THE FIRM

Sack Goldblatt Mitchell LLP is one of Canada's leading labour law, civil litigation and criminal law firms. SGM also specializes in public interest law, Charter of Rights litigation, human rights law, and pension and administrative law.

SGM is particularly involved in efforts to resist the privatization of public services and resources. For instance, SGM represented two unions who successfully challenged what would have otherwise been the largest privatization in Canadian history, the proposed sale of Hydro One. We have also headed off schemes to privatize municipal water and sanitation services, and SGM is actively engaged in fighting to preserve the integrity of Medicare in the face of mounting privatization pressures.

STEVEN SHRYBMAN

Steven obtained his law degree from Osgoode Hall Law School and was called to the Bar in 1981. Steven has been a member of the British Columbia Bar. He has been a partner at SGM since leaving his position as the Executive Directive of the West Coast Environmental Law Association in 2000.

Mr. Shrybman's practice focuses on international trade and public interest litigation, including issues concerning the environment, health care, human and labour rights, the protection of public services, natural resources policy, and intellectual property rights. He has prepared numerous legal opinions regarding the impact of international trade law on diverse areas of Canadian policy and law. His clients in this regard have included the Provinces of British Columbia, Manitoba and Ontario; the British Columbia, Ontario and Alberta Federations of Labour; the Canadian Union of Public Employees; the Communications, Energy and Paperworkers Union of Canada; the Canadian Autoworkers; the Romanow Commission and both the Canadian and International Library Associations.

Among dozens of public interest cases that Mr. Shrybman has argued, are the following:

- represented the Canadian Union of Public Employees and the Communications, Energy and Paperworkers Union of Canada in an application that prevented the sale of Ontario's electricity transmission system (the second largest in the world) that would have otherwise been the largest privatization in Canadian history - *Payne v. Wilson*, 2002 CanLII 45002 (ON CA);
- represented a coalition of national and international food safety and security groups as public interest interveners in a landmark Supreme Court of Canada



JUST RESULTS

case involving Monsanto's assertion of patent right to seeds - *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 SCR 902;

- represented the Canadian Labour Congress before the Supreme Court of Canada challenging the constitutionality of Canada's publicly funded, universal health care system, *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791;
- represented a coalition of labour and public interest groups in proceedings before the Federal Court of Canada seeking to preserve the integrity of the Canadian Wheat Board - *Friends of the Canadian Wheat Board et al. v. the Attorney General of Canada*, Federal Court file T-1057-11;
- represented public interest interveners in several proceedings arising under the investor-state dispute procedures of the North American Free Trade Agreement - *UPS v. Canada* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel.aspx?lang=en&view=d>.
S.D Myers v. Canada; <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/SDM.aspx?lang=en&view=d>;
Merrill Ring v. Canada; <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill.aspx?lang=en&view=d>

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Ontario Energy Board

COST CLAIM FOR HEARINGS



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Conduct</u>
Party: <u>Council of Canadians</u>	Name: <u>Sasha Hart</u>
Completed Years Practising/Years of relevant experience	
Counsel/Articling Student/Paralegal: <input checked="" type="checkbox"/>	_____
Consultant: <input type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST	Total
Preparation	4.90	\$100.00	\$490.00	\$63.70	\$553.70
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference			\$0.00	\$0.00	\$0.00
Attendance - Oral Hearing			\$0.00	\$0.00	\$0.00
Argument			\$0.00	\$0.00	\$0.00
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES			\$490.00	\$63.70	\$553.70

Statement of Disbursements Being Claimed

	Net Cost	HST	Total
Photocopies		\$0.00	\$0.00
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier		\$0.00	\$0.00
Telephone		\$0.00	\$0.00
Postage		\$0.00	\$0.00
Transcripts		\$0.00	\$0.00
Travel: Air		\$0.00	\$0.00
Travel: Car		\$0.00	\$0.00
Travel: Rail		\$0.00	\$0.00
Travel (Other):		\$0.00	\$0.00
Parking		included	\$0.00
Taxi or Airport Limo		\$0.00	\$0.00
Accommodation		\$0.00	\$0.00
Meals		\$0.00	\$0.00
Other:		\$0.00	\$0.00
TOTAL DISBURSEMENTS:		\$0.00	\$0.00

Note:

Sasha Hart worked as a summer law student with Sack Goldblatt Mitchell in 2010. She articulated with Sack Goldblatt Mitchell for the 2012/2013 articling term.

SASHA HART

1872 Wolfe St., Montreal, QC H2L 3J8

Tel.: (438)880-6094/ (613) 834-3686 E-mail: sasha.hart@mail.mcgill.ca

EDUCATION

McGill University, Faculty of Law, (Montreal) 2008-Present
B.C.L./L.L.B expected January 2012

Carleton University, Faculty of Arts, (Ottawa) 2004-2008
B.A. - Major(s): Law & Political Science

- Graduated with Highest Honours

St. Matthew High School, (Ottawa) 2000-2004
French Immersion Program – Certificat d'études en français

- Valedictorian – Class of 2004; Female Athlete of the Year; School Letter Award

AWARDS AND ACHIEVEMENTS

- McGill University Entrance Scholarship 2008
- Carleton University Dean's Honour List 2005-2008
- Carleton University Academic All-Canadian 2005-2007
- Carleton University Claude Bissell Scholarship 2007
- Carleton University David J. Bellamy Memorial Scholarship 2007
- Carleton University A. Davidson Dunton Scholarship 2006
- Jayne Peak Carleton University Award 2006
- Carleton University President's Scholars Entrance Scholarship 2004
- Raven Fund Athletic Scholarship 2007
- Ottawa Carleton Catholic School Board Trustee Award 2004
- Ontario Scholar Award 2004

LAW-RELATED EXPERIENCE

Sack, Goldblatt, Mitchell LLP (Ottawa) 2007-2008; Summer 2009
Office Clerk

- Created database of library books; made recommendations for additional books to acquire
- Opened/closed files; updated legal journals
- Performed receptionist duties: answered telephone, greeted clients etc.
- Carleton University Legal Internship completed at SGM (Research on DTCA for Steven Shrybman)

PINAY- The Filipino Women's Organization in Quebec (Montreal) 2008-Present
Student advocate

- Conducted legal research on Canada's 'Live-In-Caregiver' program
- Prepared affidavits for complaint brought before the Quebec Human Rights Commission (QHRC)
- Prepared document presented at QHRC 'Right to Work Without Discrimination' Conference
- Interviewed caregivers in order to obtain information required for Temporary Work Permits

Carleton University, Faculty of Law (Ottawa) 2007-2008
Teaching Assistant

- Graded course papers for 2nd year 'Public Law' course

- McGill Legal Information Clinic** 2009-Present
Volunteer Legal Assistant
- Conducted research on questions of employment, family, immigration, and property law
 - Met with clients
- McGill International Journal of Sustainable Development Law and Policy** 2009-Present
Associate Editor
- Critically assessed articles to determine whether they should be included in Journal
 - Made suggestions regarding text editing
- African and Canadian Women's Human Rights Project (ACWHRP)** 2009-Present
Student Researcher
- Conducted research on the application of customary law in Canada, Ghana, Kenya, Malawi

EXTRA-CURRICULAR ACTIVITIES

- McGill Institute for Health and Social Policy, Research/Policy Fellow** Jan. 2009 –Present
- Qualitative field research conducted in Cameroon on rural women's group empowerment strategies
 - Conducted 49 interviews with group members, community leaders, project managers
 - Writing a case study to be published
- Black Law Students' Association of McGill, Vice-President External** 2009-Present
- Coordinated community outreach initiatives
 - Mentored undergraduate students
- Educational Equity Committee - McGill Law Students Association, Member** 2009-Present
- Helped draft submission to McGill Task Force on Diversity, Excellence and Community Engagement
 - Initiated equity review in Law Faculty
- McGill Law Women's caucus, Member** 2008-Present
- Village of Hope Orphanage – Kitwe, Zambia, Volunteer** Summer 2008
- Taught at community school; Organized sports camps
- Ottawa Community Immigration Services Organization, Volunteer ESL Teacher** 2007-2008
- Prepared and taught ESL lessons to recently immigrated individuals
- Centretown Emergency Food Centre (Ottawa), Volunteer** 2005-2006
- Carleton University varsity women's soccer team, Member** 2004-2007
- Selected for Ontario University Athletics' women's inter-university All-Star soccer team
 - 'Defensive Player of the Year' Award

SKILLS & INTERESTS

- **Languages:** English; French
- **Interests:** International current events; Travel; Soccer; West-African dance

Ontario Energy Board

COST CLAIM FOR HEARINGS



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Conduct</u>
Party: <u>Council of Canadians</u>	Name: <u>Janine Lesperance</u>
Completed Years Practising/Years of relevant experience	
Counsel/Articling Student/Paralegal: <input checked="" type="checkbox"/>	_____
Consultant: <input type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST	Total
Preparation	35.80	\$100.00	\$3,580.00	\$465.40	\$4,045.40
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference			\$0.00	\$0.00	\$0.00
Attendance - Oral Hearing			\$0.00	\$0.00	\$0.00
Argument	4.80	\$100.00	\$480.00	\$62.40	\$542.40
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES			\$4,060.00	\$527.80	\$4,587.80

Statement of Disbursements Being Claimed

	Net Cost	HST	Total
Photocopies		\$0.00	\$0.00
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier		\$0.00	\$0.00
Telephone		\$0.00	\$0.00
Postage		\$0.00	\$0.00
Transcripts		\$0.00	\$0.00
Travel: Air		\$0.00	\$0.00
Travel: Car		\$0.00	\$0.00
Travel: Rail		\$0.00	\$0.00
Travel (Other):		\$0.00	\$0.00
Parking		included	\$0.00
Taxi or Airport Limo		\$0.00	\$0.00
Accommodation		\$0.00	\$0.00
Meals		\$0.00	\$0.00
Other:		\$0.00	\$0.00
TOTAL DISBURSEMENTS:		\$0.00	\$0.00

JANINE LESPÉRANCE

4-91 MACLAREN STREET • OTTAWA, ON • K2P 0K5
613-277-3131 • janine.lesperance@gmail.com

EDUCATION

- Juris Doctor (J.D.) / Master of Arts (M.A.) [joint program]** 2009 - 2013
University of Ottawa Faculty of Law / Carleton University, Norman Paterson School of International Affairs, Ottawa, ON
- Specialization in international law / conflict analysis and resolution
- Bachelor of Arts with First-Class Honours** 2007
St. Francis Xavier University, Antigonish, NS
- Major in Political Science with Development Studies subsidiary
- Dean's List 2003 - 2005, 2007
- Top-ten ranking in Faculty of Arts 2003 - 2005
- Certificat d'Études Politiques** 2006
Institut d'Études Politiques de Lille, Lille, France
- Exchange program for full scholastic year

AWARDS AND ACHIEVEMENTS

- Ontario Graduate Scholarship 2010 - 2011
- Carleton University 2010-2011 Graduate Scholarship, Dean of Graduate Studies Entrance Scholarship
- University of Ottawa Faculty of Law Public Interest Fellowship, Summer 2010

LAW-RELATED EXPERIENCE

- Articling Student** 2013 - present
Sack Goldblatt Mitchell LLP, Ottawa, ON
- Researching case law and writing legal memoranda pertaining to labour law, public interest litigation
- Preparing for legal presentations, assisting lawyers in hearings
- Legal Intern** 2011 - 2012
Canadian Centre for International Justice, and Amnesty International Canada, Ottawa, ON
- Investigated background information and legal principles for specific cases
- Wrote memorandums and reports, including a report to the United Nations Committee Against Torture
- Assisted with client intake by providing oral translation (English-French)
- Monitored the Mungwarere Genocide / Crimes Against Humanity trial in Ottawa
- Volunteer 'Cooperant'** 2011
Public Prosecutor's Office, Human Rights Section, Special Unit for Civil War Cases, Guatemala City, Guatemala
- Researched international jurisprudence on genocide and wrote memorandum with recommendations
- Led training presentation for prosecutors and legal assistants of the section
- Supported organization of evidence (victim testimonies)
- Observed criminal trial for Dos Erres massacre, as part of Avocats Sans Frontières Canada team
- Research Assistant** 2011
University of Ottawa Human Rights Research and Education Centre, Ottawa, ON
- Developed research methodology and conducted primary research on CEDAW treaty committee history
- Compiled and condensed findings, identifying key trends
-

Legal Intern 2010*Bufete Juridico Popular de Rabinal (Rabinal Community Legal Clinic), Guatemala*

- Edited, drafted and translated proposals and petitions in support of civil war victims of Mayan communities
- Researched jurisprudence of Inter-American human rights system
- Supported development of investigation strategy and investigation for land rights cases

Competitor 2009*Nelligan O'Brien Payne First Year Moot Court Competition, Ottawa, ON*

- Prepared factum based on case materials
- Presented arguments orally for mock panel of judges

OTHER WORK EXPERIENCE

Highland Dancing Instructor 2003, 2005, 2008 - 2010*Ellen Cameron School of Dance, Bonville / Ottawa, ON*

- Assisted in teaching and individually taught dance lessons to groups of mixed ages and skill levels
- Choreographed group dances to be performed in competition
- Motivated students in private lessons while providing technical expertise

English as a Foreign Language Teacher 2007 - 2008*Gungnae Public Elementary School, Gunpo, South Korea*

- Led regular classes with Korean co-teachers
- Planned and taught special advanced classes and adult class independently

COMMUNITY INVOLVEMENT AND VOLUNTEER EXPERIENCE

- Member, Law Union at the University of Ottawa 2011 - present
- Guatemala Committee member, *Avocats Sans Frontières Canada* 2010 - present
- Member, *Breaking The Silence Guatemala-Maritimes Solidarity Network* 2010 - present
- Intern, *CANADEM*, Ottawa, ON 2011
- Member, *UOttawa Chapter of Canadian Lawyers for International Human Rights (CLAIHR)* 2009 - 2010
- Las Tolas Community Volunteer Program, Ecuador 2009
- Perucho Organic Agriculture Experience volunteer program participant, Ecuador 2009
- Grant research team member, Canada-Africa Community Health Alliance, Ottawa, ON 2008 - 2009
- Event organizer and performer in Service Learning variety show fundraiser, Antigonish, NS 2007

SKILLS AND PERSONAL INTERESTS

Languages: Fluent in English, French, and Spanish**Travel:** Traveled independently in Western Europe, Eastern Asia, Southeast Asia, and South America; participated in 2007 Service Learning trip to Cuernavaca Centre for Intercultural Dialogue on Development in Mexico**Highland dancing:** Finalist at the 2005 World Championships; competed across Canada, USA, and Scotland; performed in the 2007 Royal Edinburgh Military Tattoo in front of 217,000 spectators and television audience of 100 million; certified as an instructor by the British Association of Teachers of Dance; currently compete on occasion, train regularly.**Other fitness activities:** Have raced 10km and half-marathon distances; climbed Cotopaxi volcano in Ecuador; regularly do yoga and pilates**Folk and Celtic cultural activities:** Play the fiddle and guitar; step-dance; occasionally participate in Ottawa Cape Breton Session musical events

Ontario Energy Board

COST CLAIM FOR HEARINGS



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Conduct</u>
Party: <u>Council of Canadians</u>	Name: <u>Marion Sandilands</u>
Completed Years Practising/Years of relevant experience	
Counsel/Articling Student/Paralegal: <input checked="" type="checkbox"/>	_____
Consultant: <input type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST	Total
Preparation	21.80	\$100.00	\$2,180.00	\$283.40	\$2,463.40
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference			\$0.00	\$0.00	\$0.00
Attendance - Oral Hearing			\$0.00	\$0.00	\$0.00
Argument			\$0.00	\$0.00	\$0.00
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES					
			\$2,180.00	\$283.40	\$2,463.40

Statement of Disbursements Being Claimed

	Net Cost	HST	Total
Photocopies		\$0.00	\$0.00
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier		\$0.00	\$0.00
Telephone		\$0.00	\$0.00
Postage		\$0.00	\$0.00
Transcripts		\$0.00	\$0.00
Travel: Air		\$0.00	\$0.00
Travel: Car		\$0.00	\$0.00
Travel: Rail		\$0.00	\$0.00
Travel (Other):		\$0.00	\$0.00
Parking		included	\$0.00
Taxi or Airport Limo		\$0.00	\$0.00
Accommodation		\$0.00	\$0.00
Meals		\$0.00	\$0.00
Other:		\$0.00	\$0.00
TOTAL DISBURSEMENTS:			
		\$0.00	\$0.00

Marion Sandilands

6097 ave Esplanade
Montreal, QC
438-821-8595
marion.sandilands@mail.mcgill.ca

EDUCATION

- 2011 – April 2014 **B.C.L. / LL.B Candidate (2nd year of 3 years)**
McGill University, Montreal
- CGPA: 3.47 (Top 10%)
 - Hydro-Quebec Entrance Scholarship (2011); Fraser Milner Casgrain Scholarship (2011); Dean's Honour List (2012)
- 2006 – 2008 **M.A. International Affairs (International Development)**
Norman Paterson School of International Affairs
Carleton University, Ottawa
- Dean's Entrance Scholarship and Joubin-Selig Scholarship in International Affairs
- 2003 – 2006 **B.A. Hon. (International Development Studies)**
McGill University, Montreal
- Minor concentration: Philosophy and Western Religions
 - First Class Honours, Dean's Honour List
 - First year completed at *College of the Humanities*, Carleton University, Ottawa

LEGAL EXPERIENCE

- May 2012 – present **McGill Law Journal**
Associate Editor
Reviewing submissions in French and English (first reads), substantive editing (formal and substantive review of citations)
- October 2012 – present **Prof Adelle Blackett**
Research Assistant
Research for country case studies on regulation of decent work for domestic workers in the wake of the new ILO Convention 189
- 2011 – 2012 **McGill International Journal of Sustainable Development Law and Policy**
Associate Editor
Reviewed submissions (first and second reads), substantive editing of articles
- 2012 (summer) **Me Tatiana Gomez**
Intern / Assistant, Immigration & Refugee law (pro bono)
Drafted permanent residency applications and appeal pleadings; prepared books of evidence for IRB refugee claims; research for refugee and immigration applications (jurisprudence and country conditions)
- 2012 (summer) **Legal Information Clinic at McGill**
Volunteer
Interviewed clients in English and French; researched and answered clients' legal questions; prepared and delivered presentation on Employment Law to at-risk youth

- 2011 – 2012 **Association des aides familiales du Québec (AAFQ)**
Pro Bono McGill volunteer
Provided legal information to live-in caregivers (under federal temporary Live-In Caregiver program); prepared a toolkit on immigration rules; gave organizational support including outreach, correspondence, Board meetings

OTHER PROFESSIONAL EXPERIENCE

- May 2012 -- present **Coordinator, Young Leaders Forum**
McGill Centre for Human Rights and Legal Pluralism
 Montreal
Designed and organized an international selection process; designed Forum program to maximize participation and ownership by participants; designed activities to build a virtual community leading up to the Forum
- 2009 – 2011 **Program Management Officer / Research Officer**
International Development Research Centre
 Ottawa (travel to Senegal, Mexico, France and The Netherlands)
Coordinated an \$8-10M per year global research funding program. Managed and analyzed program information; advised Program Leader on operational and programming issues, recruited and supervised interns; lead program reporting and communications strategy.
- 2007 – 2009 **Program Officer**
CHF – partners in rural development
 Ottawa (travel to Kenya, Vietnam and Thailand)
 (promoted from **Development Intern** in 2008)
Administered and monitored rural livelihoods projects in Asia and Africa. Prepared and administered contracts and funding agreements, wrote proposals and progress reports, analyzed financial reports, prepared budgets

ACADEMIC RESEARCH & PUBLICATION

- 2008 Perez-Aleman, P. and Sandilands, M. "Building Value at the Top and the Bottom of the Global Supply Chain: MNC-NGO Partnerships that Include Small Producers in Developing Countries" *California Management Review*, Fall 2008
- 2008 Sandilands, M. "Supermarkets and small farmers: A Value chain analysis of the impact of supermarket procurement strategies on smallholder farmers -- the case of Kenyan fresh fruits and vegetables." Master's Research Paper, Norman Paterson School of International Affairs, Carleton University, 2008.
- 2006 "The Appearance of Consensus: Public Sector Capacity Building in Tanzania" *Latitudes*, Vol. 1 (McGill International Development Studies Undergraduate Journal), 2006.

HOBBIES & INTERESTS

- Music & Theatre** McGill Savoy Society, Cantata Singers of Ottawa; Montreal Symphony Orchestra Chorus, National Art Centre Orchestra Chorus, McGill Chamber Singers, Sock n Buskin Theatre
- Sports** Field hockey, curling, tennis, running
- Travel** Cambodia, France, Kenya, Thailand, The Netherlands, Senegal, UK, Vietnam

Ontario Energy Board

COST CLAIM FOR HEARINGS



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Construct</u>
Party: <u>Council of Canadians</u>	Name: <u>David Hughes</u>
Completed Years Practising/Years of relevant experience	_____
Counsel/Articling Student/Paralegal: <input type="checkbox"/>	_____
Consultant: <input checked="" type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input checked="" type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST (5%)	Total
Preparation	40.75	\$330.00	\$13,447.50	\$672.38	\$14,119.88
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference			\$0.00	\$0.00	\$0.00
Attendance - Oral Hearing	4.00	\$330.00	\$1,320.00	\$66.00	\$1,386.00
Argument			\$0.00	\$0.00	\$0.00
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES			\$14,767.50	\$738.38	\$15,505.88

Statement of Disbursements Being Claimed

	Net Cost	HST (5%)	Total
Photocopies		\$0.00	\$0.00
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier		\$0.00	\$0.00
Telephone		\$0.00	\$0.00
Postage		\$0.00	\$0.00
Transcripts		\$0.00	\$0.00
Travel: Air		\$0.00	\$0.00
Travel: Car	\$160.17	\$8.01	\$168.18
Travel: Rail		\$0.00	\$0.00
Travel (Other): Ferry	\$102.74	\$5.14	\$107.88
Parking		included	\$0.00
Taxi or Airport Limo		\$0.00	\$0.00
Accommodation	\$370.00	\$18.50	\$388.50
Meals	\$48.67	\$2.43	\$51.10
Other:		\$0.00	\$0.00
TOTAL DISBURSEMENTS:	\$681.58	\$34.08	\$715.66



GLOBAL SUSTAINABILITY RESEARCH INC.

PO Box 237, 780 Whaletown Road, British Columbia, V0P 1Z0

451-36th Avenue NW, Calgary, Alberta, T2K 0C4

GST/HST registration number 834974628

250-830-3662 403-276-3056

INVOICE - #2014-010

January 13, 2013

Steven Shrybman, Sack Goldblatt Mitchell LLP

500-30 rue Metcalf St.

Ottawa, ON K1P 5L4

**RE: Preparation of Evidence, Response to Interrogatories, and Attendance
at Enbridge, Union and TCPL Ontario Energy Board Hearings**

Total time spent per attached timesheet:

44.75 hours @ \$330.00/hour - \$14,767.50

Goods and Services Tax (5%) - \$738.38

Total now due: \$15,505.88

Please forward remittance to 451-36 Avenue NW, Calgary, AB, T2K 0C4

Thank You,

David Hughes

President

Date	Work	Time (hours)
Jun-25	Review applications to assess areas for response	1.00
Jun-25	Prepare evidence	3.00
Jun-26	Prepare evidence	8.00
Jun-27	Revise evidence and incorporate Union information	4.50
Jun-28	Revise evidence	1.50
Jul-10	Response to questions EB and Union	1.50
Jul-11	Response to questions EB and Union	5.75
Jul-12	Response to questions EB and Union	4.50
Jul-13	Response to questions EB and Union	4.00
Jul-14	Response to questions EB and Union	2.25
Jul-18	Review response to EB and Union and update	2.75
Jul-19	Finalize response to EB and Union	1.25
Aug-20	Response to TCPL queries	0.75
Oct-08	Preparation for hearing	1.50
Oct-09	Attendance and testimony at hearing	2.5
Total		44.75

Date	Item	Cost
Sep-29	Room in Campbell River - 1 night - first trip which was cancelled	\$83.62
Oct-03	Ferry Cortes Island to Campbell River return - first trip	\$58.05
Oct-07	Room in Campbell River - 4 nights (wife) - second trip for Oct 9 hearing	\$334.48
Oct-08	Taxi to airport Campbell River	\$31.00
Oct-08	Taxi to hotel Toronto	\$75.00
Oct-09	Lunch for T. Ingraffea, L. Sumi and myself including tip	\$55.00
Oct-10	Taxi to airport Toronto	\$60.00
Oct-10	Shuttle to motel from airport Campbell River	\$15.00
Oct-11	Ferry Cortes Island to Campbell River return - second trip	\$58.05
	Total	\$770.20

ROOM # 32 NAME
GUEST REGISTRATION

NAME DAVE HUGHES PHONE 250-330-3662
STREET
CITY PROV./STATE P.C./ZIP
COMPANY REPRESENTING

VEHICLE LICENSE NUM 478 PROVINCE/STATE
MAKE / COLOUR YEAR

NOTICE TO GUESTS: This property is privately owned and management reserves right to refuse service to anyone and will not be responsible for accidents or injury to Guests or for loss of money, jewelry or valuables of any kind.

GUEST SIGNATURE X [Signature]

Table with columns: No. IN PARTY, ARRIVAL DATE, CHECK-OUT DATE

Table with columns: NO OF DAYS, \$ RATE

DAYS OCCUPIED (✓)

Calendar grid for days of the week (SUN-SAT)

CASH TRAVELLERS CHEQUE
VISA M.C. AMEX DEBIT CARD

REC'D BY

ROOM TOTAL
\$ 296.00

HST / GST
\$ 14.80

PROV ROOM TAX
\$ 23.68

SUBTOTAL

CHARGES CREDITS

TOTAL
\$ 334.48

Check-out time is 11:00am
The person registering is responsible for all damages caused to room, furnishings and fixtures.

2603

ABOVE TIDE MOTEL
361 Island Highway
Campbell River, B.C. V9W 2B5
(250) 286-6231 Fax (250) 028-6029

THANK YOU

This is your Receipt
Please Retain

ABOVE TIDE MOTEL
361 ISLAND HWY
CAMPBELL RIVE. BC

Term ID: 28683145

Purchase

XXXXXXXXXX6125

VISA

Entry Method: C

Total:

\$ 334.48

2013/10/07

14:15:20

Seq #: 0014970100

Appr Code: 056412

Resp Code: 01/027

VISA
00000000031010
1C EB 2A FA CB 37 BE 15
00 00 00 00 00
74 91 6B 5B 87 EB 7A 47

APPROVED
Thank You

ROOM # 32 NAME
GUEST REGISTRATION

NAME DAVE HUGHES PHONE 250-330-3662
STREET 780 Whaletown Rd. Center
CITY Whaletown PROV./STATE P.C./ZIP
COMPANY REPRESENTING

VEHICLE LICENSE NUM 478 PROVINCE/STATE
MAKE / COLOUR YEAR

NOTICE TO GUESTS: This property is privately owned and management reserves right to refuse service to anyone and will not be responsible for accidents or injury to Guests or for loss of money, jewelry or valuables of any kind.

GUEST SIGNATURE X [Signature]

Table with columns: No. IN PARTY, ARRIVAL DATE, CHECK-OUT DATE

Table with columns: NO OF DAYS, \$ RATE

DAYS OCCUPIED (✓)

Calendar grid for days of the week (SUN-SAT)

CHARGES CREDITS

TOTAL
\$ 334.48

Check-out time is 11:00am
The person registering is responsible for all damages caused to room, furnishings and fixtures.

2576

ABOVE TIDE MOTEL
361 Island Highway
Campbell River, B.C. V9W 2B5
(250) 286-6231 Fax (250) 028-6029

THANK YOU

This is your Receipt
Please Retain

ABOVE TIDE MOTEL
361 ISLAND HWY
CAMPBELL RIVE. BC

Term ID: 28683145

Purchase

XXXXXXXXXX6125

VISA

Entry Method: C

Total:

\$ 334.48

2013/09/29

14:10:44

Seq #: 0014950030

Appr Code: 013595

Resp Code: 01/027

VISA
00000000031010
94 46 02 30 5B 24 04 EB
00 00 00 00 00
10 04 0E 04 2F EE 6E 62

APPROVED
Thank You

THE 287-TAXI CO.

GST#121705926 RT

July 10

NOM NAME
ADRESSE ADDRESS

VENDEUR PAIÉ PAID BY	C.R. CCID	FACTURE CHARGE	A CREDIT DE COMPTANT	QUANTITÉ AMOUNT PAID
-------------------------	--------------	-------------------	-------------------------	-------------------------

1				
2				
3				
4	<i>Shuttle</i>			
5				<i>1500</i>
6				
7	<i>Car</i>			
8				
9	<i>Car</i>			
10				
N° DE TAXE TAX REG. No:			TPS/GST TVH/HST	
			TVP/PST	
			TOTAL	
REÇU PAR RECEIVED BY		<i>[Signature]</i>		

LIVRET DE VENTE
SALES BOOK

89
Ontario Energy Board
COST CLAIM FOR HEARINGS



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Construct</u>
Party: <u>Council of Canadians</u>	Name: <u>Lisa Sumi</u>
Completed Years Practising/Years of relevant experience	
Counsel/Articling Student/Paralegal: <input type="checkbox"/>	_____
Consultant: <input checked="" type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST	Total
Preparation	34.00	\$230.00	\$7,820.00	\$1,016.60	\$8,836.60
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference			\$0.00	\$0.00	\$0.00
Attendance - Oral Hearing	4.00	\$230.00	\$920.00	\$119.60	\$1,039.60
Argument			\$0.00	\$0.00	\$0.00
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES			\$8,740.00	\$1,136.20	\$9,876.20

Statement of Disbursements Being Claimed

	Net Cost	HST	Total
Photocopies		\$0.00	\$0.00
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier		\$0.00	\$0.00
Telephone		\$0.00	\$0.00
Postage		\$0.00	\$0.00
Transcripts		\$0.00	\$0.00
Travel: Air	\$1,188.57	\$154.51	\$1,343.08
Travel: Car		\$0.00	\$0.00
Travel: Rail		\$0.00	\$0.00
Travel (Other):		\$0.00	\$0.00
Parking		included	\$0.00
Taxi or Airport Limo		\$0.00	\$0.00
Accommodation	\$212.35	\$27.61	\$239.96
Meals	\$25.51	\$3.32	\$28.83
Other:		\$0.00	\$0.00
TOTAL DISBURSEMENTS:	\$1,426.43	\$185.44	\$1,611.87

LISA SUMI

1846 C.R. 207 DURANGO, COLORADO 81301

TELEPHONE: 970-799-1326 • EMAIL: lsumi@earthworksaction.org

INVOICE**Date:** January 11, 2013**To: Council of Canadians**

Attn: Steven Shrybman, Sack Goldblatt Mitchell LLP

500-30 rue Metcalf St.

Ottawa, ON K1P 5L4

From: Lisa Sumi**For:** Testimony prepared on behalf of Council of Canadians for Ontario Energy Board Hearing (Re: Enbridge/Union Applications EB-2012-0451/EB-2012-0333).

Date	Details	Amount
June	Research and writing of report prepared for Council of Canadians as part of their submission to the Ontario Energy Board hearing regarding Enbridge/Union Applications EB-2012-0451/EB-2012-0433. (32 hours) Total: 32 hours @ \$230/hr	\$7,360.00
July - August	Preparation of interrogatory responses, and responses to new TCPL evidence. (2 hours) Total: 2 hours @ \$230/hr	\$460.00
October	Conference calls and in-person meetings with Council of Canadians in preparation for the OEB stakeholder meeting (3 hours) Oct. 9, 2013: Appearance at Ontario Energy Board Oral Hearing for cross-examination related to testimony on Applications EB-2012-0451/EB-2012-0433. (1 hours) Total: 4 hours @ \$230/hr	\$920.00
Invoice Total		
		Total \$8,740.00

Please send a cheque for this invoice to Lisa Sumi at:

1846 C.R. 207
Durango, CO 81301

LISA SUMI

1846 C.R. 207 DURANGO, COLORADO 81301
 TELEPHONE: 970-799-1326 • EMAIL: lsumi@earthworksaction.org

US dollars
 - exchange rate = 1.11
 (Bank of Canada rate
 as of Feb. 4/13)

INVOICE

Date: October 15, 2013

To: Steven Shrybman, Sack Goldblatt Mitchell LLP
 500-30 rue Metcalf St.
 Ottawa, ON K1P 5L4

From: Lisa Sumi

For: Air fare, ticket change and meals related to the October 9, 2013 Ontario Energy Board Hearing (Re: EB-2012-0451 and EB-2012-0333).

Details		Amount (US\$)	
9/5/13	Original ticket for air fare from Durango, Colorado to Toronto, Ontario. (Receipt attached)	680.81	755.70 Cdn.
10/1/13	Ticket change for rescheduled OEB hearing (Receipt attached)	529.18	587.39 Cdn.
10/9/13	Supper Oct. 9, 2013 (19.95 Cdn = 19.17 U.S.) ¹ (Receipt attached)	19.17	21.28 Cdn.
10/10/13	Hotel Oct. 9, 2013 (224.87 Cdn = 216.17 U.S.) ² (Receipt attached)	216.17	239.95 Cdn.
10/10/13	Meals during travel back to Durango (Receipt attached)	6.80	755 Cdn
	Total	\$1,452.13	1611.87 Cdn.

Please forward payment as a \$US money order, to:

Lisa Sumi, 1846 C.R. 207 Durango, CO 81301

¹ Supper of \$19.95 paid in Canadian dollars. Exchange rate for that day was 0.9608 (Bank of Canada: <http://www.bankofcanada.ca/rates/exchange/can-us-rate-lookup/>), so in U.S. dollars $19.95 \times 0.9608 = \$19.17$.

² Hotel fee of \$224.87 was charged in Canadian dollars. Exchange rate for that day was 0.9613 (Bank of Canada: <http://www.bankofcanada.ca/rates/exchange/can-us-rate-lookup/>), so in U.S. dollars $224.87 \times 0.9613 = \$216.17$ U.S.



A STAR ALLIANCE MEMBER

Confirmation:
EN1T0X
[Check-In >](#)

Issue Date: September 05, 2013

Traveler	eTicket Number	Frequent Flyer	Seats
SUMI/LISAMS	0162379037591	UA-AGT7XXXX	14C/38F/---/---/32B/---

FLIGHT INFORMATION

Day, Date	Flight	Class	Departure City and Time	Arrival City and Time	Aircraft	Meal
Thu, 19SEP13	UA4922	S	DURANGO, CO (DRO) 5:45 AM	DENVER, CO (DEN) 7:00 AM		Q400

Flight operated by REPUBLIC AIRLINES doing business as UNITED EXPRESS with turboprop equipment.

Thu, 19SEP13	UA358	S	DENVER, CO (DEN) 8:17 AM	NEW YORK, NY (LGA - LAGUARDIA) 1:59 PM		757-200 Purchase
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Thu, 19SEP13	UA8403	L	NEW YORK, NY (LGA - LAGUARDIA) 3:30 PM	TORONTO, ON CANADA (YYZ) 5:14 PM		ERJ 190
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Flight operated by AIR CANADA.

If this is an originating flight on your itinerary, please check in at the AIR CANADA ticket counter.

Wed, 02OCT13	UA8134	L	TORONTO, ON CANADA (YYZ) 9:40 AM	CHICAGO, IL (ORD - O'HARE) 10:21 AM		ERJ 175
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Flight operated by AIR CANADA.

If this is an originating flight on your itinerary, please check in at the AIR CANADA ticket counter.

Wed, 02OCT13	UA675	K	CHICAGO, IL (ORD - O'HARE) 12:03 PM	DENVER, CO (DEN) 1:37 PM		757-200 Purchase
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Wed, 02OCT13	UA4875	K	DENVER, CO (DEN) 3:43 PM	DURANGO, CO (DRO) 4:56 PM		Q400
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Flight operated by REPUBLIC AIRLINES doing business as UNITED EXPRESS with turboprop equipment.

FARE INFORMATION**Fare Breakdown**

Airfare:	532.94USD
U.S. Customs User Fee:	5.50
U.S. Immigration User Fee:	7.00
U.S. APHIS User Fee:	5.00
U.S. Federal Transportation Tax:	39.97
U.S. Flight Segment Tax:	23.40
September 11th Security Fee:	10.00
Canadian Security Charge:	12.10
Canada Harmonized Sales Tax:	3.10
Canada Airport Improvement Fee:	23.80
U.S. Passenger Facility Charge:	18.00
Per Person Total:	680.81USD

Form of Payment:

VISA
 Last Four Digits 3643

eTicket Total: **680.81USD**

The airfare you paid on this itinerary totals: 532.94 USD

The taxes, fees, and surcharges paid total: 147.87 USD

Fare Rules: Additional charges may apply for changes in addition to any fare rules listed.

NONREF/OVALUAFTDPT/CHGFEE

Cancel reservations before the scheduled departure time or TICKET HAS NO VALUE.

UNITED



A STAR ALLIANCE MEMBER

Confirmation:
EN1T0X
[Check-In >](#)

Issue Date: October 01, 2013

Traveler	eTicket Number	Frequent Flyer	Seats
SUMI/LISAMS	0162381979717	UA-AGT7XXXX	---/---/---/---/---

FLIGHT INFORMATION

Day, Date	Flight	Class	Departure City and Time	Arrival City and Time	Aircraft Meal
Thu, 19SEP13	UA4922	S	DURANGO, CO (DRO) 5:45 AM	DENVER, CO (DEN) 7:00 AM	
Thu, 19SEP13	UA358	S	DENVER, CO (DEN) 8:17 AM	NEW YORK, NY (LGA - LAGUARDIA) 1:59 PM	
Thu, 19SEP13	UA8403	L	NEW YORK, NY (LGA - LAGUARDIA) 3:30 PM	TORONTO, ON CANADA (YYZ) 5:14 PM	
Flight operated by AIR CANADA doing business as UNITED AIRLINES INC.					
Thu, 10OCT13	UA3452	H	TORONTO, ON CANADA (YYZ) 1:59 PM	DENVER, CO (DEN) 3:45 PM	ERJ 170 Purchase
Flight operated by SHUTTLE AMERICA AIRLINES doing business as UNITED EXPRESS.					
Thu, 10OCT13	UA4927	H	DENVER, CO (DEN) 5:43 PM	DURANGO, CO (DRO) 6:56 PM	Q400
Flight operated by REPUBLIC AIRLINES doing business as UNITED EXPRESS with turboprop equipment.					

FARE INFORMATION

Fare Breakdown		Form of Payment:	
Airfare:	846.87USD	VISA	
U.S. Customs User Fee:	5.50	Last Four Digits 3643	
U.S. Immigration User Fee:	7.00		
U.S. APHIS User Fee:	5.00		
U.S. Federal Transportation Tax:	63.52		
U.S. Flight Segment Tax:	19.50		
September 11th Security Fee:	10.00		
Canadian Security Charge:	12.10		
Canada Harmonized Sales Tax:	3.20		
Canada Airport Improvement Fee:	23.80		
U.S. Passenger Facility Charge:	13.50		
Per Person Total:	1,009.99USD		

eTicket Total: 1,009.99USD

The airfare you paid on this Itinerary totals: 846.87 USD

The taxes, fees, and surcharges paid total: 163.12 USD

Fare Rules: Additional charges may apply for changes in addition to any fare rules listed.

NONREF/OVALUAFTDPT/CHGFEE
Cancel reservations before the scheduled departure time or TICKET HAS NO VALUE.

~~Add/Collect:~~ An additional amount for the difference in fare was charged to VISA VXXXXXXXXXXXX3643 on Tuesday, October 01, 2013. \$329.18 USD per ticket for an additional total of ~~\$529.18 USD~~ was collected.

~~Additional Charges:~~ Tue, Oct 1, 2013/Visa:3643 was charged;200.00USD for the following: Change Penalty Fee / EDD 01629264245814



33 Gerrard Street West, Toronto, Ontario, M5G 1Z4
Tel: 416-595-1975 Fax: 416-581-8934

Ms Lisa Sumi
1846 County Road 207
Durango CO 81301
United States

Room: 2425
Folio: 1953191
Cashier: 24
Arrival: 10/09/13
Departure: 10/10/13
Reference:
Booking Ref. #:

Date	Description	Additional Information	Charges	Credits
10/09/13	Room Charge		199.00	
10/09/13	Room - HST 13%		25.87	
10/10/13	Visa	XXXXXXXXXXXX3643 XX/XX		230.84
10/10/13	Visa	credit back due to DMP adjustment XXXXXXXXXXXX3643 XX/XX		-5.97

HST Summary
 Registration No: 887925881
 Room 25.87
 F&B 0.00
 Other 0.00
 Total 25.87

Total	224.87	224.87
Balance Due	0.00	CDN

Queen Mother Cafe
 203 Queen Street W.
 Toronto, Ontario
 416 596-4719
 HST #R104547781

Table #206
 Trans#: 653218 Serv: Liz
 10/09/2013 10:16:29 PM #Cust:z

Qty	Description	Cost
2	Organic Chara gis	\$20.00
2	Mill St. Organic	\$11.50
1	Sticky Rice	\$5.95
1	lacos	\$13.95
1	PadThai Vegetarian	\$13.95
Net Total:		\$71.35
HST		\$9.28

TOTAL: \$80.63
 Food: \$39.85
 Liquor: \$31.50

Amount Due: \$80.63

Guest Signature: _____

I agree that my liability for this bill is for any part of or the full amount

SSP America
 Boccone Pronto T1
 Lester B. Pearson Intl Airport
 GST # 825875560RT001
 416-776-2477

477 GURMIT W

Chk 6289 Oct10'13 10:43A Gst 0

TO GO

1 Breakfast Panini	6.00
Cash	7.00
Food	6.00
HST Tax	0.78
Payment	6.80
Change Due	0.20

FEEDBACK

Dish Up Your Experience.

We appreciate feedback

LISA SUMI

ADDRESS: 1846 CR 207 DURANGO, CO 81301
 TELEPHONE: (970) 799-1326 • EMAIL: lisasumi@gmail.com

EDUCATION AND TRAINING

Managing Environmental and Social Concerns in Mining – 3-week course, Royal Roads University, Victoria, BC (June, 2000)

Master of Science – Physical Geography/Soil Science, University of Toronto (1997)

Bachelor of Science – Environmental Science/Physical Geography, U. Toronto (1995)

WORK HISTORY

ENERGY/EXTRACTIVE INDUSTRIES RESEARCH CONSULTANT, 2007 - present.
 The majority of recent work involves the production of research reports used internally or published by clients. Areas of expertise include: analysis of regulatory and policy measures related to energy and extractive industries (hardrock minerals, coal, tar sands, natural gas, oil); analysis and synthesis of scientific data, government records and industry or academic reports; and production of information related to environmental, social and health impacts and options for minimizing effects related to energy and extractive industries.

Recent clients include: As-You-Sow; Council of Canadians; Earthworks; ForestEthics; Initiative for Responsible Mining Assurance; Massachusetts Institute of Technology Center for Future Civic Media; MiningWatch Canada; and Natural Resources Defense Council.

RESEARCH DIRECTOR, EARTHWORKS OIL AND GAS ACCOUNTABILITY PROJECT, 2004 – 2007. (Durango, CO). Responsibilities included researching oil and gas impacts and technologies to minimize impacts; preparing technical materials on oil and gas regulations and development proposals; and providing community support on water, air and soil contamination, noise, and landowner rights.

ENERGY/EXTRACTIVE INDUSTRIES RESEARCH CONSULTANT, 2002-2004 and part-time COORDINATOR OF THE WESTERN MINING ACTION NETWORK.

RESEARCH DIRECTOR, ENVIRONMENTAL MINING COUNCIL OF BRITISH COLUMBIA. 1998 -2002 (Victoria, BC). Responsibilities included research on mining and its effects on the environment and communities; creation of policy documents and educational materials; community outreach; and technical review of mine proposals and projects.

PUBLICATIONS AND REPORTS

Steinzor, N., Subra, W. and Sumi, L. 2013. "Investigating Links Between Shale Gas Development and Health Impacts Through a Community Survey Project In Pennsylvania," *New Solutions: A Journal of Environmental and Occupational Health Policy*, Vol. 23(1). Available at: <http://baywood.metapress.com/link.asp?id=k243k37712348302>

Gestring, B. and Sumi, L. 2013. *Polluting the Future – how mining companies are polluting our nation's waters in perpetuity*. (Prepared for Earthworks) Available at: <http://www.earthworkSACTION.org/files/publications/Health-Report-Full-FINAL-sm.pdf>

Steinzor, N., Subra, W. and Sumi, L. 2013. *Gas Patch Roulette*. (Prepared for Earthworks). Available at: <http://www.earthworksaction.org/files/publications/Health-Report-Full-FINAL-sm.pdf>

Sumi, L. 2012. *Breaking All the Rules -- the crisis in oil and gas regulatory enforcement*. (Prepared for Earthworks) Available at: <http://www.earthworksaction.org/files/publications/FINAL-US-enforcement-sm.pdf>

Sumi, L. 2012. *Report on the Shortcomings of Exxon Mobil's "Basis for Exclusion" of As You Sow's Shareholder Resolution on Hydraulic Fracturing and Related Natural Gas Development* (Prepared for As You Sow) Internal document.

Sumi, L. 2012. *Draft Standard on Free, Prior and Informed Consent*. (Prepared for the Initiative for Responsible Mining Assurance) Internal document.

Sumi, L. 2010. *Environmental Concerns and Regulatory Initiatives Related to Hydraulic Fracturing in Shale Gas Formations*. (Prepared for Council of Canadians) Available at: <http://canadians.org/energy/documents/fracking/report-fracturing-1010.pdf>

Sumi, L. 2008. *Mining and Health: A Community-centred Health Assessment Toolkit*. (Prepared for MiningWatch Canada) Available at: <http://www.miningwatch.ca/publications/mining-health-community-centred-health-assessment-toolkit>

Sumi, L. 2008. *Shale Gas: Focus on the Marcellus Shale*. (Prepared for Earthworks) Available at: <http://www.earthworksaction.org/pubs/OGAPMarcellusShaleReport-6-12-08.pdf>

Sumi, L. 2007. *Report on Air Sampling Conducted in Monroe, Conecuh and Escambia Counties, Alabama*. (Prepared for Earthworks) Available at: <http://www.earthworksaction.org/publications.cfm>

Sumi, L. 2005. *Our Drinking Water at Risk - What EPA and the oil and gas industry don't want us to know about hydraulic fracturing*. (Prepared for Earthworks) Available at: <http://www.earthworksaction.org/publications.cfm?pubID=90>

Sumi, L. 2004. *Oil and Gas at Your Door? A landowner's guide to oil and gas development*. (Prepared for Earthworks) Available at: <http://www.earthworksaction.org/publications.cfm?pubID=91>

Moodie, S., Sumi, L. and Thomsen, S. 2002. *Lesson Learned on Community Involvement in the Remediation of Abandoned Contaminated Sites*. (Prepared for the Canadian National Orphaned/Abandoned Mines Working Group).

Campbell, K., Young, A. and Sumi, L. 2001. *Undermining the Law -- Addressing the Crisis in Compliance with Environmental Mining Laws in BC* (West Coast Environmental Law/Environmental Mining Council of British Columbia) Available at <http://www.wcel.org/wcelpub/2001/13569.pdf>

Sumi, L. 2001. (Contributed chapter on environmental impacts) *Beneath the Surface -- Aboriginal Law and Mining Rights in British Columbia* (Prepared for Environmental-Aboriginal Guardianship through Law and Education)

Ontario Energy Board

COST CLAIM FOR HEARINGS



Detail of Fees and Disbursements Being Claimed

File # EB- <u>2012-0451-0433-0074</u>	Process: <u>Hearing re: Application for Leave to Construct</u>
Party: <u>Council of Canadians</u>	Name: <u>Anthony Ingraffea</u>
Completed Years Practising/Years of relevant experience	
Counsel/Articling Student/Paralegal: <input type="checkbox"/>	_____
Consultant: <input checked="" type="checkbox"/>	_____
CV attached: <input checked="" type="checkbox"/>	CV not required: <input checked="" type="checkbox"/>

Statement of Fees Being Claimed

	Hours	Hourly rate	Subtotal	HST	Total
Preparation	8.50	\$330.00	\$2,805.00	\$364.65	\$3,169.65
Attendance - Technical Conference			\$0.00	\$0.00	\$0.00
Attendance - Settlement Conference			\$0.00	\$0.00	\$0.00
Attendance - Oral Hearing	6.00	\$330.00	\$1,980.00	\$257.40	\$2,237.40
Argument			\$0.00	\$0.00	\$0.00
Case Management		\$170.00	\$0.00	\$0.00	\$0.00
TOTAL LEGAL/CONSULTANT FEES			\$4,785.00	\$622.05	\$5,407.05

Statement of Disbursements Being Claimed

	Net Cost	HST	Total
Photocopies		\$0.00	\$0.00
Printing		\$0.00	\$0.00
Fax		\$0.00	\$0.00
Courier		\$0.00	\$0.00
Telephone		\$0.00	\$0.00
Postage		\$0.00	\$0.00
Transcripts		\$0.00	\$0.00
Travel: Air	\$953.53	\$123.96	\$1,077.49
Travel: Car	\$117.88	\$15.32	\$133.20
Travel: Rail		\$0.00	\$0.00
Travel (Other):		\$0.00	\$0.00
Parking	\$8.64	included	\$8.64
Taxi or Airport Limo		\$0.00	\$0.00
Accommodation		\$0.00	\$0.00
Meals		\$0.00	\$0.00
Other:		\$0.00	\$0.00
TOTAL DISBURSEMENTS:	\$1,080.05	\$139.28	\$1,219.33



February 4, 2014

Invoice # 1

TO: Steven Shrybman, Esq.

FROM: Dr. A. R. Ingraffea

REF: EB-2012-0451: Enbridge Gas Distribution Inc.; and EB-2012-0333 and EB-2013-0074: Union Gas Limited

Below I claim my time spent for my preparation for, and attendance at, the hearing before the Ontario Energy Board, October 9, 2013:

- I. Preparation of my report entitled, "The Carbon Footprint of Shale Gas Development and the Remedial Measures Necessary to Address It", and for responding to resulting interrogatories:
8.5 Hours

- II. Meeting with you on the eve of hearing and again the following morning, and for attending the hearing itself:
6 hours

TOTAL HOURS CLAIMED BY THIS INVOICE

14.5

Thank you.

US Dollars
 -exchange rate = 1.11
 (Bank of Canada
 rate as of
 Feb. 9/14)

From: Steven Shrybman
Sent: October 14, 2013 7:26 PM
To: 'ari1@cornell.edu'
Cc: Lisa Purdy
Subject: Re: receipts

From: Anthony R. Ingraffea [mailto:ari1@cornell.edu]
Sent: Sunday, October 13, 2013 09:19 PM
To: Steven Shrybman
Cc: Anthony R. Ingraffea <ari1@cornell.edu>
Subject: receipts

Hi Steven

I am sending you by surface mail receipts for:

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A. R. Ingraffea
 309 Cayuga heights Road
 Ithaca, NY
 14850
 USA

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Physicians, Scientists, and Engineers for Healthy Energy, Inc.

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www.psehealthyenergy.org

or send a check to

PSE, Inc.
 C/O Dr. Adam Law
 404 North Cayuga Street
 Ithaca, NY
 14850
 USA

Again, thank you, and look forward to seeing the final documents and hearing of the outcome.

best

tony

A. R. Ingraffea, Ph.D., P.E.
Dwight C. Baum Professor of Engineering
Weiss Presidential Teaching Fellow
Cornell University
www.cfg.cornell.edu
President: Physicians, Scientists, and Engineers for Healthy Energy, Inc.
www.psehealthyenergy.org
607-351-0043

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 Inv#: 00000022 Appr Code: 585831
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 RAYON - DEPARTMENT
 DÉPARTEMENT
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 AUTHORIZATION NO.
 RAYON - DEPARTMENT
 DÉPARTEMENT
 DATE
 M. L. O. A. V.
 N° D'AUTORISATION
 AUTHORIZATION NO.
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 DÉPARTEMENT

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	TVA - PST	6.00
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Travelocity Customer Support [travelocity@travelocity.com]

Sent: Tuesday, October 01, 2013 2:50 PM

To: Anthony R. Ingraffea

THANK YOU! Travel Reservation Confirmation

Dear Anthony R,
Thank you for booking your travel through Travelocity.

Your trip to Toronto, ON Canada (YYZ) is confirmed. A summary of your reservation is provided below. Please be sure to:

- > Review your trip details
- > Confirm your special request or meal request with the airline
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This is an e-ticket, so no paper ticket will be sent. In addition, flight schedules may be changed by the airline.

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ITINERARY

Primary Contact: Anthony R Ingraffea

> Online check-in: <http://leisure.travelocity.com/Promotions/0,,TRAVELOCITY|1741|air main,00.html>.

> Lookup flight status: <http://dps1.travelocity.com/dparrqst.cml?Service=TRAVELOCITY>.

> Change/cancel reservation: <http://www.travelocity.com/>

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All flight times are local to each city.

For your boarding pass, use reference code LYB9B9 for online or airport checkin.

Tue, Oct 8, 2013

Ithaca, (ITH) to Toronto Lester B Pearson International Airport, (YYZ)

Flight: United Flight 4828 operated by COMMUTAIR DBA UNITED EXPRESS (on De Havilland Canada DHC-8 Dash 8-200)

Depart: 04:55 PM, Ithaca, NY (ITH)

Arrive: 06:08 PM, Newark, NJ (EWR)

Requested Seats: 3E

1 Stop - change planes in Newark, (EWR)

Connection Time: 2 hrs 47 mins

Flight: United Flight 8567 operated by AIR CANADA EXPRESS - SKY REGIONAL (on Embraer EMB 175 Jet)

Depart: 08:55 PM, Newark, NJ (EWR)

Arrive: 10:28 PM, Toronto, ON Canada (YYZ)

Please check in with AIR CANADA

Total Travel Time: 5 hrs 33 mins

For your boarding pass, use reference code BCZ5VZ for online or airport checkin.

Wed, Oct 9, 2013

Toronto Lester B Pearson International Airport, (YYZ) to Ithaca, (ITH)

Flight: US Airways Flight 3771 operated by US AIRWAYS EXPRESS-AIR WISCONSIN (on Canadair Regional Jet)

Depart: 05:59 PM, Toronto, ON Canada (YYZ)

Arrive: 07:41 PM, Philadelphia, PA (PHL)

Please check in with US AIRWAYS

Requested Seats: 7F

1 Stop - change planes in Philadelphia, (PHL)

Connection Time: 1 hr 59 mins

Flight: US Airways Flight 4188 operated by US AIRWAYS EXPRESS-PIEDMONT AIRLINES (on De Havilland Canada DHC-8 Dash 8 all models)

Depart: 09:40 PM, Philadelphia, PA (PHL)

Arrive: 10:44 PM, Ithaca, NY (ITH)

Please check in with US AIRWAYS

Total Travel Time: 4 hrs 45 mins

Passenger Name: ANTHONY R INGRAFFEA

Frequent Flyer Information: You can add your frequent flyer number at the airport.

Ticket Number: 0167310141116

TSA Travel Information

The TSA has determined that liquids, aerosols and gels, in limited quantities, are safe to bring aboard an aircraft. When packing, please follow these guidelines:

- >All liquids, gels and aerosols must be in 3.4 ounce (100ml) or smaller bottles.
- >All containers must fit in one quart-sized, clear, plastic, zip-top bag.
- >Each passenger is allowed only one bag.
- >Each bag must be placed in its own screening bin and X-rayed separately.
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Arrive at the airport early. Enhanced security measures may mean longer lines at security checkpoints.

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Cancellation Policies

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ANTHONY R INGRAFFEA \$720.72

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memberservices@travelocity.com
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To: Anthony R. Ingraffea

Your airline reservation has been cancelled.

- You will not receive a refund since you purchased a non-refundable ticket(s).
- You will need to have the ticket number(s) listed in the passenger information section below when you are ready to use any remaining ticket value toward a new reservation. Please call us at 888-872-8356 to book your next trip.
- Please save or print this email for your records, because cancelled reservations are not viewable online at this time.

We're sorry you had to cancel this reservation, but we look forward to helping you plan your next trip!

Cancelled AIRLINE RESERVATION

Trip ID: 132653438217

Passenger Name: ANTHONY INGRAFFEA
Ticket Number (assigned by the airline to your e-ticket): 7308080433

Important Restrictions:

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- Future travel must be completed within a limited time period, Carriers either require you to rebook before your original departure date or may allow 1 year from the date tickets were originally issued. It depends on the fare rules from the original ticket.
- Remaining ticket value can only be used by the individual named on the original ticket.
- If the fare of the new itinerary is greater than the remaining value of the original ticket, the airline will collect the fare difference. In addition, the airline will charge a fee to use your original ticket towards the purchase of the new ticket. You will be advised of the exact charges when you make your new reservations.
- An administrative service charge will be collected at the time of reissuance

CURRICULUM VITAE

Anthony R. Ingraffea

Dwight C. Baum Professor of Engineering
 Weiss Presidential Teaching Fellow
 School of Civil and Environmental Engineering
 Cornell University
 Ithaca, N.Y. 14853 USA

GENERAL

Born: April 4, 1947, Easton, Pennsylvania, USA
 Residence: 309 Cayuga Heights Road, Ithaca, N.Y. 14850
 Telephone: Home 607-257-1104 Office 607-255-3336 Cell 607-351-0043
 Fax: 607-255-9004 E-Mail: ar1@cornell.edu HTTP://www.cfg.cornell.edu

EDUCATION

University of Notre Dame
 B.S., Aerospace Engineering, *Magna Cum Laude*, June 1969.
 Polytechnic Institute of New York
 M.S., Civil Engineering, Grumman Masters Fellow, June 1971.
 University of Colorado/Boulder
 Ph.D., Civil Engineering, May 1977, University Fellow, 1974-1976.

AREAS OF EXPERTISE

Structural Engineering, Structural Mechanics, Computational and Experimental Fracture Mechanics,
 Microstructural Simulation of Fatigue and Fracture Mechanisms, Rock Mechanics, Numerical Methods,
 Engineering Education

PROFESSIONAL EXPERIENCE

June 1969 - June 1971

Grumman Aerospace Corporation, Bethpage, L.I., N.Y.

Rotating traineeship in the following areas: preliminary design on Navy F - 14; loads and dynamic studies, stress analysis, and final design on NASA Space Shuttle proposal. Two in - house technical publications.

July 1971 - June 1973

Peace Corps, Bejuma, Venezuela

County Engineer. Responsible for all technical services to a county of 40,000 people. Directed surveying, design, and construction of farmers' market, tourist hotel, and cemetery. Directed urban planning resource study. Co - directed urban renewal plan and data collection for section of state capital city.

September 1973 - August 1977

University of Colorado/Boulder

Department of Civil, Environmental and Architectural Engineering

Instructor for Courses:

Analytical Mechanics, Theoretical Fluid Mechanics

Teaching Assistant for Courses:

Mechanics of Materials

Materials Testing Laboratory

Research Assistant in Project: Constitutive Relations for Coal

September 1977 - June 1982

Cornell University, Department of Structural Engineering

Assistant Professor

- September 1979 - July 1983
Cornell University, Department of Structural Engineering
Manager of Experimental Research
- July 1982 - June 1987
Cornell University, Department of Structural Engineering
Associate Professor
- August 1983 - August 1984
Lawrence Livermore National Laboratory Livermore, California
Visiting Research Engineer: Rock Fracture Simulation
- January 1986 - September, 1986
Cornell University, Computer Aided Design Instructional Facility,
College of Engineering
Director
- September 1986 - October, 1990
Cornell University, College of Engineering
Faculty Coordinator for Instructional Computing
- July 1987 - Present
Cornell University, School of Civil and Environmental Engineering
Professor
- September 1987 - April 1992
Cornell University, Program of Computer Graphics
Associate Director
- September 1988 - Present
Fracture Analysis Consultants, Inc.
President
- October 1990 - October 1994
Cornell University
Director, NSF-Synthesis National Engineering Education Coalition
- July 1993 - Present
Cornell University
Dwight C. Baum Professor of Engineering
- October 1994 - October 1995
Cornell University
Associate Director, NSF-Synthesis National Engineering Education Coalition
- December 1997 –August 2005
Cornell Center for Theory and Simulation in Science and Engineering
Associate Director
Coordinator, Computational Materials Institute
- July 1998 – December 1999
Cornell University
Coordinator, Infrastructure Group, School of Civil and Environmental Engineering
- November 2002-Present
Cornell University
Member, Graduate Fields of Mechanical and Aerospace Engineering

May 2004-Present

Wright Patterson Air Force Base/AFRL/Air Vehicle Directorate/Structures Division
Structural Sciences Center of Excellence
Visiting Scientist

August 2005 – July 2007

Cornell University
Acting Director, Cornell Center for Theory and Simulation in Science and Engineering

November 2005 – Present

Cornell University
Weiss Presidential Fellow

July 2006 – December 2007

Cornell University
Coordinator, Infrastructure Group, School of Civil and Environmental Engineering

August 2005 – Present

Cornell University
Co-Editor in Chief, *Engineering Fracture Mechanics*

August 2010 – Present

Physicians, Scientists, and Engineers for Sustainable and Healthy Energy, Inc.
President

AWARDS AND HONORS

- 3 - M Corporation Scholarship, 1965 - 1969
- Grumman Masters Fellowship, 1969 - 1971
- University of Colorado Graduate Fellowships, 1974 - 1976
- Cornell School of Civil Engineering "Professor of the Year," 1977 - 78
- National Research Council/U.S. National Committee for Rock Mechanics 1978 Award for Outstanding Research in Rock Mechanics at the Doctoral Level
- Cornell College of Engineering "Professor of the Year," 1978 - 79
- Cornell School of Civil Engineering "Professor of the Year," 1981 - 82
- Presidential Young Investigator Award, National Science Foundation, 1984 - 1989
- Dean's Prize for Innovation in Teaching, Cornell College of Engineering, 1989.
- Dean's Prize for Innovation in Teaching, Cornell College of Engineering, 1991.
- National Research Council/U. S. National Committee for Rock Mechanics 1991 Award for Applied Research for the paper, "Simulation of Hydraulic Fracture Propagation in Poroelastic Rock with Application to Stress Measurement Techniques", co-authored by Dr. T. J. Boone, *Int. J. Rock Mech. Min. Sci. & Geomech. Abstr.*, 28, 1, 1-14, 1991.
- International Association for Computer Methods and Advances in Geomechanics 1994 Significant Paper Award: One of Five Significant Papers in the category of Computational/Analytical Applications in the past 20 years, "A Numerical Procedure for Simulation of Hydraulically-driven Fracture Propagation in Poroelastic Media", co-authored with T. J. Boone, *Int. J. Num. Analyt. Meth. in Geomech.*, 14, 1, 1990.
- The NASA Group Achievement Award for contributions, with former students Drs. Paul Wawrzynek and David Potyondy, to the Fuselage Structural Integrity Analysis Team, NASA Langley Research Center, 1996.
- The First Society of Women Engineer's Professor of the Year Award, Cornell College of Engineering, 1997.
- J. P. and Mary Barger '50 Excellence in Teaching Award, Cornell College of Engineering, 1997.
- The MTS Visiting Professor Chair, Department of Civil Engineering, University of Minnesota, May, 1998.
- Aviation Safety Turning Goals into Reality Award, NASA Airframe Structural Integrity Program Team, NASA Langley Research Center, with Dr. Paul Wawrzynek, 1999.
- 1999 Premier Award for Educational Software for "Cracking Dams-HTTP://www.simsience.org", with Megann Polaha
- Daniel Luzar '29 Excellence in Teaching Award, Cornell College of Engineering, 2001.

- **Honor Award, University of Notre Dame, College of Engineering**, for “Significant Contributions to the Advancement of Engineering”, 2002.
- **Weiss Presidential Teaching Fellow, Cornell University**, 2005.
- **George R. Irwin Medal, American Society for Testing and Materials**, 2006.
- **Richard J. Almeida Award, Project High Jump**, given each year to an individual whose dedication and contribution to High Jump have been extraordinary, 2008.
- **Fellow, International Congress on Fracture**, 2009, “For his pioneering contributions to the advanced computational simulation of fatigue and fracture processes leading to improved understanding for practical applications to integrity assessment of engineering structures”.
- One of **TIME Magazine’s “People That Mattered”** in 2011.

HONORARY/PROFESSIONAL SOCIETY MEMBERSHIP

Tau Beta Pi (1967 -
 Chi Epsilon (1974 -
 Sigma Xi (1977 -
 American Academy of Mechanics (1988 -
 American Society of Civil Engineers (Fellow, 1991)
 Chairman, Committee on Properties of Materials (1983 - 1985)
 Member, Committee on Finite Element Analysis of Reinforced Concrete
 Member, Committee on Computer Applications and Numerical Methods
 International Society for Boundary Elements
 International Society for Rock Mechanics
 Society for Experimental Mechanics
 American Society for Testing and Materials
 Committee E - 8 on Fracture and Fatigue
 Committee D - 18 on Soil and Rock for Engineering Purposes
 Committee C - 9 on Concrete
 American Concrete Institute
 Committee 446 on Fracture Mechanics
 RILEM
 Committee 90 - FMA on Fracture Mechanics Applications
 Member, Committee 89 - FMT on Fracture Mechanics Testing
 American Rock Mechanics Association/Foundation
 Founding Member
 Member of the Board, 1999-2003

PROFESSIONAL REGISTRATION

Colorado PE No. 14837
 New York PE No. 081309-0
 Alaska Professional Fishing Guide

UNITED STATES PATENT

Number 481,826, Hand - held, direct reading, fully mechanical fracture loading device for short-rod/bar specimens

PROFESSIONAL JOURNAL EDITORSHIPS AND ADVISORY BOARDS

Co-Editor-in-Chief:
Engineering Fracture Mechanics, August, 2005-present

Editorial Advisory Board:
International Journal for Numerical and Analytical Methods in Geomechanics
Boundary Element Communications
Engineering with Computers
Engineering Computations
International Journal for Multiscale Computational Engineering

PUBLICATIONS**TEXTS EDITED**

1. **Fracture Mechanics of Concrete: Material Characterization and Testing**, co - edited with A. Carpinteri, Martinus Nijhoff Publishers, 1984.

PUBLISHED IN TEXTS

1. Ingrassia, A R (co - author). Modelling of Reinforcement and Representation of Bond. Chapter 3 in **Finite Element Analysis of Reinforced Concrete**, State - of - the - Art report prepared by the Task Committee on Finite Element Analysis of Reinforced Concrete Structures, Structural Division, ASCE, 1982, pp. 149 - 203.
2. Ingrassia A R (co - author). Concrete Cracking. Chapter 4 in **Finite Element Analysis of Reinforced Concrete**. State-of-the-Art report prepared by the Task Committee on Finite Element Analysis of Reinforced Concrete Structures, Structural Division, ASCE, 1982, pp. 204 - 233.
3. Ingrassia A R. Numerical Modelling of Fracture Propagation. Chapter 4 in **Rock Fracture Mechanics**, H. P. Rossmanith, editor, CISM Courses and lectures No. 275, International Center for Mechanical Sciences, Udine, Italy, Springer - Verlag, Wien - New York, 1983, pp. 151 - 208.
4. Ingrassia A R, Saouma V. Numerical Modeling of Discrete Crack Propagation in Reinforced and Plain Concrete. Chapter 4 in **Application of Fracture Mechanics to Concrete Structures: Structural Application and Numerical Calculation**, G. C. Sih and A. DiTommaso, editors, Martinus Nijhoff Publishers, 1984.
5. Ingrassia A R, Gerstle W. Non - Linear Fracture Models for Discrete Crack Propagation. **Application of Fracture Mechanics to Cementitious Composites**, S. P. Shah, editor, Martinus Nijhoff Publishers, 1985, pp. 171 - 209.
6. Ingrassia A R. Fracture Propagation in Rock. Chapter 12 in **Mechanics of Geomaterials**, Z. P. Bazant, editor, John Wiley & Sons, Limited, 1985.
7. Ingrassia A R. Theory of Crack Initiation and Propagation in Rock. Chapter 3 in **Rock Fracture Mechanics**, B. Atkinson, editor, Academic Press, Inc., 1987.
8. Ingrassia A R, Gerstle W H, Perucchio R. Fracture Analysis with Interactive Computer Graphics. **Boundary Element Methods in Structural Analysis**, D. E. Beskos, Editor, ASCE, 1989, pp. 235 - 271.
9. Ingrassia A R, Sections 9.3, 12.3, 13.4, and 15.2, of **Fracture Mechanics of Concrete Structures: From Theory to Applications**, L. Elfgren, Editor, Chapman and Hall, London, 1989.
10. Ingrassia A R, Boone T J, Swenson D V. Computer Simulation of Fracture Processes. Chapter 22 in **Comprehensive Rock Engineering**, J. Hudson, Editor-in-Chief, Pergamon Press, Oxford, 1993.
11. Carter B J, Desroches J, Ingrassia A R, Wawrzynek P A. Simulating Fully 3D Hydraulic Fracturing. In **Modeling in Geomechanics**, Ed. Zaman, Booker, and Gioda, Wiley Publishers, pp 525-557, 2000.
12. Ingrassia A R, Wawrzynek P A. Crack Propagation. In the **Encyclopedia of Materials: Science and Technology**, Elsevier Science, 2001.
13. Ingrassia A R, Wawrzynek P A. Finite Element Methods for Linear Elastic Fracture Mechanics. Chapter 3.1 in **Comprehensive Structural Integrity**, R. de Borst and H. Mang (eds), Elsevier Science Ltd., Oxford, England, 2003.
14. Ingrassia A R. Computational Fracture Mechanics. Volume 2, Chapter 11, **Encyclopedia of Computational Mechanics**, E. Stein, R. de Borst, T. Hughes (eds.) John Wiley and Sons, 2004, 2nd Edition 2008.

15. Emery J, Ingraffea A R. DDSim: Framework for Multiscale Structural Prognosis, Chapter 13 in *Computational Methods for Microstructure-Property Relationships*, S Ghosh and D Dimiduk (eds), Springer Science, 2011.

PUBLISHED IN JOURNALS

1. Ingraffea AR. Nodal Grafting for Crack Propagation Studies. *Int. J. Num. Meth. Eng.*, 11, 7, 1977, 1185 - 1187.
2. Lynn PP, Ingraffea AR. Transition Element to be Used With Quarter - Point Crack Tip Elements. *Int. J. Num. Meth. Eng.*, 12, 6, 1978, 1031 - 1036.
3. Ingraffea AR, Heuze FE. Finite Element Models for Rock Fracture Mechanics. *Int. J. Num. Analyt. Meth. Geomech.*, 4, 1980, 25 - 43.
4. Ingraffea AR, Manu C. Stress - Intensity Factor Computation in Three Dimensions With Quarter - Point Elements. *Int. J. Num. Meth. Eng.*, 15, 10, 1980, 1427 - 1445.
5. Blandford G, Ingraffea AR, Liggett JA. Two-Dimensional Stress Intensity Factor Calculations Using the Boundary Element Method. *Int. J. Num. Meth. Eng.*, 17, 1981, 387 - 404.
6. Beech J, Ingraffea, AR. Three - Dimensional Finite Element Stress Intensity Factor Calibration of the Short Rod Specimen. *Int. J. Fracture*, 18, 3, 1982, 217 - 229.
7. Perucchio R, Ingraffea AR, Abel JF. Interactive Computer Graphic Preprocessing for Three - Dimensional Finite Element Analysis. *Int. J. Num. Meth. Eng.*, 18, 6, 1982, 909 - 926.
8. Saouma V, Ingraffea AR, Catalano D. Fracture Toughness of Concrete: K_{Ic} Revisited. *J. Eng. Mech. Div., ASCE*, 108, No. EM6, 1982, 1152 - 1166.
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 58. Ingrassia AR, Tuegel E. "Structural Life Forecasting in Extreme Environments", Structural Sciences Center, AFRL/RBSM, Wright Patterson AFB, Dayton, Ohio, October, 2009.
 59. Spear AD, Priest AR, Veilleux MG, Hochhalter JD, Ingrassia AR. Surrogate modeling of high-fidelity fracture simulations for real-time residual strength predictions, NASA TM-2011-216879, 2011.
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FUNDED RESEARCH PROJECTS**Structural Engineering**

1. "An Investigation into Mixed - Mode Fracture Propagation in Rock," National Science Foundation Research Initiation Grant ENG78 - 05402, 4/78 - 3/80, \$25,000, Principal Investigator.
2. "Finite Element Analysis of Reinforced Concrete for Cyclic Loading," National Science Foundation Grant PFR - 7900711, 4/79-3/81, \$84,000, Principal Investigator. P. Gergely and R. N. White, Co - Principal Investigators.
3. "Laboratory Testing of the Crack - at - an - Interface Problem," Sandia National Laboratories Contract No. 13 - 5038, 5/79 - 5/80, \$42,000, Principal Investigator.
4. "Three - Dimensional Interactive Computer Graphics in Structural and Geo - Mechanics," National Science Foundation Grant CME79 - 16818, 1/80 - 6/82, \$500,000, Faculty Investigator. J. F. Abel, D. P. Greenberg, W. McGuire, Co-Principal Investigators; F. H. Kulhawy, Faculty Investigator.
5. "Interaction Between Steel and Concrete for Earthquake-Type Loadings," National Science Foundation Grant CME80 - 20925, 4/1/81 - 9/30/83, \$140,000, Principal Investigator. P. Gergely, Co - Principal Investigator.
6. "Interactive Color Display of Three - Dimensional Engineering Analysis Results," National Aeronautics and Space Administration, Grant NAG3 - 395, 3/1/83 - 2/28/87, \$133,285, Associate Investigator. J. F. Abel, Principal Investigator.
7. "Welded Crane Runway Girder Study," Association of Iron and Steel Engineers, 8/83 - 8/85, \$234,348, Principal Investigator. W. McGuire, T. Pekoz, Co - Principal Investigators.
8. Presidential Young Investigator Award in Structural Mechanics, National Science Foundation Grant 8351914, 6/84 - 6/89, \$500,000, Principal Investigator.
9. "Fatigue Behavior of Thick Steel Plates," Electric Boat Division/General Dynamics, PO# R2041 - 907, 1/86 - 12/88, \$233,218, Co - Principal Investigator. R. N. White, Principal Investigator.
10. "Probabilistic Fracture Mechanics," AFOSR, 4/87 - 4/90, \$269,624, Co - Principal Investigator. M. Grigoriu, Co - Principal Investigator.
11. "CISE Research Instrumentation: Computer Graphics Dynamic Simulation for Scientific Inquiry," National Science Foundation Grant CCR - 8717024, 4/1/88 - 9/30/89, \$145,600, Co - Principal Investigator. M. Cohen, D. Greenberg, and J. Abel, Co - Principal Investigators.
12. "Visualization for Supercomputing: A Graphics Workstation Approach," National Science Foundation, Grant ASC - 8715478, 8/1/88 - 1/31/90, \$202,532, Co - Principal Investigator. D. Greenberg, Principal Investigator. J. Abel, M. Cohen, D. Caughey, Co - Principal Investigators.
13. "Advanced Computational Fracture Mechanics," Digital Equipment Corporation, 7/89 - 7/90, \$100,000, Principal Investigator.
14. "Fatigue and Damage Tolerance", Northrop-Grumman Corporation, 6/89-12/00, \$249,000, Principal Investigator.
15. "Research in Fracture Mechanics", Exxon Education Foundation, 9/89-9/92, \$30,000, Principal Investigator.
16. "Crack Growth Prediction Methodology for Multi-Site Damage", NASA Langley Research Center, 9/90-9/98, \$926,147, Principal Investigator.
17. "Fracture Mechanics Life Analytical Methods Verification Testing", Nichols Research Corp. /NASA MSFC, 8/91 - 8/94, \$183,860, Principal Investigator.

18. "Mode I/III Fatigue Crack Growth Measurements in 2024 Aluminum Sheet", NASA Langley Research Center, 6/91-9/93, \$159,836, Co-Principal Investigator. A. Zehnder, Co-Principal Investigator.
 19. "A Study of Failure Mechanisms of Advanced Flex Cables", IBM Corporation, 1/20/92-1/19/93, \$25,000, Co-Principal Investigator. A. Zehnder, Co-Principal Investigator.
 20. "Detecting Cracks in Concrete Dams", U. S. Army Engineer Waterways Experiment Station, 4/1/94-1/1/95, \$39,339, Co-Principal Investigator. M. Sansalone, Principal Investigator.
 21. "Measurement of Fracture Toughness of Concrete Using the Short-Rod Procedure", NSF CMS 9414243, 9/95-8/98, \$203,854. Principal Investigator.
 22. "Simulation of Damage Tolerance in Honeycomb Core Structure", Boeing Commercial Airplane Co., 5/96-12/98, \$204,000. Principal Investigator.
 23. "Simulation of Crack Growth in Spiral Bevel Gears", NASA Glenn Research Center, 12/96-12/00, \$289,961. Principal Investigator.
 24. "Fracture of Steel Joints", CUREe SAC Phase II Subcontract No. 28, 9/96-12/96, \$23,000. Co-Principal Investigator. Prof. G. Deierlein, Principal Investigator.
 25. "Multidisciplinary Center for Earthquake Engineering Research", NSF, 10/97-9/02, \$1,500,000. Associate Investigator. Prof. R. White, Co-Principal Investigator; Profs. G. Deierlein, M. Grigoriu, Associate Investigators.
 26. "Simulation of Crack Propagation on Teraflop Computers", NSF, 1/98-12/00, \$1,800,000. Co-Principal Investigator. Profs. S. Vavasis and K. Pingali, Co-Principal Investigators.
 27. "Probabilistic Simulation of Fatigue Crack Initiation", AFOSR, 3/98-2/01, \$600,000. Principal Investigator. Profs. M. Grigoriu, M. Miller, P. Dawson, Co-Principal Investigators.
 28. "Development and Implementation of T-Stress Criterion", NASA Langley Research Center, 8/97-3/98, \$20,128. Principal Investigator.
 29. "Crack Turning and Arrest Mechanisms for Integral Structures", NASA Langley Research Center, 1/98-6/00, \$103,642. Principal Investigator.
 30. "Basic Research in Crack Growth Prediction Methodologies", NASA Langley Research Center, 1/98-11/99, \$185,000. Principal Investigator.
 31. "Fatigue Crack Growth in Aluminum Alloys", Alcoa Foundation, 6/97-5/98, \$10,000. Principal Investigator.
 32. "Multiscale Modeling of Defects in Solids", NSF 9873214, 10/98-9/01, \$1,500,000. Co-Principal Investigator. Profs. P. Dawson, and J. Sethna Co-Principal Investigators, C. Myers, Co-Principal Investigator.
 33. "A Two-Tier Computation and Visualization Facility for Multiscale Problems", NSF 9972853, 10/99-9/04, \$1,500,000. Co-Principal Investigator. Profs. K. Pingali, N. Chrisochoides, C. Cruz-Neira, Guang Gao, Co-Principal Investigators.
 34. "Finite Element Stress Analysis Subroutines for RAPID", Federal Aviation Administration, 9/99-4/2000, \$34,438. Principal Investigator.
 35. "Finite Element/Fracture Mechanics Simulation of Trajectories During Slitting of Plastic Films", Eastman Kodak Company, 1/1/99-12/31/01, \$110,000. Principal Investigator.
 36. "ITR: Adaptive Software for Field-driven Simulations", NSF 0085969, 9/1/00-8/31/04, \$5,000,000. Co-Principal Investigator. Prof. K. Pingali, PI, B. K. Soni, J. F. Thompson S. A. Vavasis, Co-PIs.
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37. "Developing Technologies for Modeling Damage in Stiffened Thin Shell Structures", NASA LaRC, 11/1/01-10/31/04, \$160,107. Principal Investigator.
38. "Computational Micro-Mechanical Investigations of Crack Initiation in Metallic Polycrystals", NASA LaRC, 2/1/02-1/31/05, \$230,182. Principal Investigator.
39. "The Institute for Future Space Transport", NASA Marshall RC University Research, Engineering and Technology Institute, 8/1/02-9/15/07, \$15,616,120, Co-Principal Investigator. W. Shyy, Principal Investigator, B. Soni, B. Davidson, J. Olds, Co-Principal Investigators.
40. "Structural Integrity Prognosis System-SIPS", DARPA, 10/1/03-8/31/08, \$1,288,400, Cornell Principal Investigator. J. Madsen, Northrop Grumman Corp. Project Manager.
41. "Fracture Mechanics Analysis of MANPADS-Damaged Aircraft Structures", NASA LaRC, 5/05-9/06, \$74,000. Principal Investigator.
42. "Advanced Digital Material Machine (ADMM) "AFOSR/DURIP, 2006, \$300,000. Principal Investigator.
43. "Multi-Scale Simulation of Cracking Processes in Metallic Materials", NASA LaRC, NNX07AB69A, 1/07-12/10, \$392,526. Principal Investigator.
44. "Constellation University Institute Project: Computational Simulation of Damage Tolerance for Composite and Metallic Structures", NASA, 10/1/07-9/30/10, \$450,000, Principal Investigator.
45. "Multi-scale Simulation of Fatigue Damage", Northrop Grumman Corporation, 1/1/07-12/31/09, \$55,000, Principal Investigator.
46. "Computational Methods in Physics-Based Modeling of Damaged Flight Structures", NASA LaRC NNX08AC50A, 1/1/08-12/31/2010, \$299,972, Principal Investigator.
47. "Collaboration between Cornell Fracture Group and Exponent, Inc.", Exponent Inc., 3/08-12/08, \$29,204, Principal Investigator.
48. "Geometrical Simulation of Complete Process of Microstructurally Small Fatigue Cracking" E DARPA, HR0011-09-1-0002, 1/09-12/09, \$150,000, Principal Investigator.
49. "Parallel File Serving R&D", IBM, \$20,200, 7/09-6/10, Principal Investigator.
50. "Prognosis of Long-Term Load-Bearing Capability in Aerospace Structures: Quantification of Microstructurally Short Crack Growth", Air Force Office of Scientific Research, \$750,000, 5/10/5/13, Co-Principal Investigator.

Geotechnical Engineering

1. "TBM Performance Study," U.S. Dept. of Transportation, 3/80 - 3/82, \$164,000, Associate Investigator. T. D. O'Rourke, Principal Investigator; F. H. Kulhawy, Associate Investigator.
2. "A Study of Cast Iron Gas Main Replacement," New York Gas Group, 8/81 - 12/83, \$287,000, Associate Investigator. T. D. O'Rourke, Principal Investigator; F. H. Kulhawy, Associate Investigator.
3. "Uplift/Compression Transmission Line Structure Foundation Research," Electric Power Research Institute, RP1493 - 4, 1984 - 1988, \$2,450,000, Associate Investigator. F. H. Kulhawy, Principal Investigator; T. D. O'Rourke, M. Grigoriu, Associate Investigators.
4. "Numerical Investigations into Crack Propagation in Rock," National Science Foundation Grant CEE - 8316730, 6/1/84 - 5/30/86, \$150,000. Principal Investigator

5. "Workshop on Interactive Computer Modeling and Graphics for the Design and Optimization of Field and Laboratory Experiments in Geotechnical Engineering." National Science Foundation Grant CEE 8413471, 12/84 - 11/86, \$39,681. Principal Investigator.
6. "Evaluation of Cased and Uncased Gas Distribution and Transmission Piping Under Railroads and Highways, Gas Research Institute, 11/86 - 1/94, \$ 3,602,035. Co-Principal Investigator. T. D. O'Rourke and H. Stewart, Co-Principal Investigators.
7. "Influence of Perforations Upon Subsequent Hydraulic Fracturing," Digital Equipment Corp. and Dowell Schlumberger, 1/88 - 12/96, \$448,000. Principal Investigator.
8. "Computational Simulation of Hydrofracturing", NSF CISE Postdoctoral Associate Award for Dr. K. Shah. 11/95-10/97, \$46,200. Principal Investigator.
9. "3D Crack Initiation and Propagation in Transparent Rock Like Materials Loaded in Compression", NSF, 9/96-8/99, \$148,000. Principal Investigator.

Engineering Education

1. "Study of Complementary Research and Teaching in Engineering Science - PROJECT SOCRATES," U. S. Department of Education, Fund for the Improvement of Post - Secondary Education, G 008642170, 9/15/86 - 9/14/89, \$236,496, Project Director.
 2. "Workstations For Instructional Computing in the College of Engineering," Digital Equipment Corporation, 5/1/88 - 4/31/90, \$664,000. Project Director.
 3. "Workstations for Project SOCRATES," Apollo Computer, Inc., June, 1989, \$87,105. Project Director.
 4. "Workstations for Project SOCRATES", Sun Microsystems, Inc., June, 1990, \$89,415. Project Director.
 5. "Synthesis National Engineering Education Coalition", National Science Foundation, 9/30/90 - 9/30/94, \$12,278,036. Project Director.
 6. "1992 Summer Institute for Computer Graphics", New York State Education Department, \$56,000, 7/19/92-8/8/92, Project Co-Director. C. Mink, Director.
 7. "Support for Educational Computing Equipment", Hewlett Packard, 6/92, \$427,318. Project Director.
 8. "Synthesis Coalition/GE Foundation Faculty Exchange Award", GE Foundation, Spring 1994 - Spring 1997, \$230,000, Principal Investigator.
 9. "Synthesis Coalition/Raytheon Company Student Award" Raytheon Company, 1994-1995, \$24,000, Principal Investigator.
 10. "Application and Infrastructure Linkage to Altoona Area School District and Manhattan Center for Science and Math High School", Synthesis Coalition/NSF/GE Foundation/Mr. A. Misciagna, 10/1/94-9/30/96, \$284,000, Project Director.
 11. "Integration of Information Age Networking and Parallel Supercomputer Simulations into University and General Science K-12 Curricula", NSF, 1/96-12/98, \$102,000, Co-Principal Investigator. J. Sethna, Co-Principal Investigator.
 12. REU Supplement to "Measurement of Fracture Toughness of Concrete Using the Short-Rod Procedure", NSF, 9/95-9/98, \$10,000, Principal Investigator.
 13. REU Supplements to "Integration of Information Age Networking and Parallel Supercomputer Simulations into University and General Science K-12 Curricula", NSF, 9/96-9/98, \$20,000, Co-Principal Investigator with Prof. James Sethna, Physics.
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14. "Tech City Exhibition", NSF, 7/98-6/01, \$639,543, Co-Principal Investigator. Dr. C. Trautmann, Principal Investigator.
15. "An Advanced Interactive Discovery Environment for Engineering Education" NASA/New York State/AT&T, 2/1/01-12/31/07, \$4,300,000, Co-Principal Investigator. Prof. B. Davidson, Principal Investigator, Prof. E. Liddy, Co-PI.
16. "An IGERT Training Program In Sustainable Energy Recovery From The Earth-Education At The Intersection Of Geosciences And Engineering". July 2010-June 2015, National Science Foundation, \$1,137,047. Co-Principal Investigator. Prof. Jeff Tester, Principal Investigator, Profs. Terry Jordan, Paulette Clancy, Co-PI's.

Co-operative Research

1. "Co-operative Agreement between Cornell University and the Technical University of Delft", National Science Foundation Grant PFR-8020924, 1/81 - 12/82, \$25,800, Co - Principal Investigator. P. Gergely, Principal Investigator; R. N. White, Co - Principal Investigator.
2. "Scientific Visit to Plan Co-operative Research in Hydraulic Fracturing," Catholic University of Rio de Janeiro/Cornell University, National Science Foundation Grant INT - 8814466, July 1988, \$2,336, Principal Investigator.
3. "Fracture Mechanics Case Studies of Concrete Dams" Technical University of Vienna, Austria/Cornell University, National Science Foundation Grant INT-8814457, 2/89 - 2/92, \$8,080, Principal Investigator.
4. International Supplement to National Science Foundation Grant "ITR: Adaptive Software for Field-driven Simulations", to collaborate with Czech Technical University, Z. Bittnar, Czech Co-PI, 7/99-8/03, \$24,375, Co-Principal Investigator.

THESES DIRECTED**Master of Science**

1. "A Fracture Mechanics Analysis of the Fontana Dam," John Chappell, May, 1981.
 2. "Mixed-Mode Crack Propagation in Mortar and Concrete." Manrique Arrea, January 1982.
 3. "The Fracture Mechanics of Bond in Reinforced Concrete," Walter Gerstle. May 1982.
 4. "Concrete Fracture: A Linear Elastic Fracture Mechanics Approach," David Catalano, August, 1982.
 5. "Interactive and Graphic Two - Dimensional Fatigue Crack Propagation Analysis Using Boundary Element Method," Kodwo Otsei;du, January, 1983.
 6. "An Experimental Investigation of Fatigue Cracking in Welded Crane Runway Girders Due to Wheel Induced Stresses," Kirk I. Mettam, January, 1986.
 7. "An Investigation of the Failure Process of the STEM - PMMA Interface in Cemented Prostheses," Leonard Daniel - Timmie Topoleski, June 1986.
 8. "Interactive Finite Element Analysis of Fracture Processes: An Integrated Approach," Paul A. Wawrzynek, May 1987.
 9. "Analytical Study of Stresses in Transmission and Distribution Pipelines Beneath Railroads," J. Russell Blewitt, May 1987.
 10. "Case Studies of Cracking of Concrete Dams--A Linear Elastic Approach," Shan - Wern Steve Lin, January 1988.
 11. "Fracture Analysis Code: A Computer - Aided Teaching Tool," Maya Srinivasan, January 1988.
 12. "Two-Dimensional Numerical Evaluation of Near Wellbore Phenomena: Perforation Performance & Interacting Hydraulic Fractures", Stephen James Lamkin, May 1990.
 13. "On Finite Element Analysis of Face Sheet Cracking in Honeycomb Core Sandwich Panels", Kenneth Ferguson, January 1999.
 14. "Simulating Fatigue Crack Growth in Spiral Bevel Gears", Lisa Eron Spievak, August 1999.
 15. "Cracking Dams: An Interactive Web Site for K12", Megann V. Polaha, August 1999.
 16. "Experimental Investigations into Damage Tolerance of Honeycomb Sandwich Panels", Ani Ural, August, 1999.
 17. "Simulations of Crack Initiation in Aluminum Alloys with Inclusions", Ketan Dodhia, January, 2002.
 18. "Decohesion of Grain Boundaries in Statistical Representations of Aluminum Polycrystals", Erin Iesulauro, January, 2002.
 19. "An Evaluation of Surface Cracks in Welded Components of Nuclear Reactor Vessels", John Emery, May, 2003.
 20. "Microstructural Reconstruction and Three-Dimensional Mesh Generation for Polycrystalline 7075-T651 Aluminum Alloy", Michael Veilleux, May, 2007.
 21. "A Two-Dimensional Multiscale Method for Fatigue Crack Nucleation in Polycrystalline Aluminum Alloys ", Jeffrey Bozek, May, 2007.
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Doctor of Philosophy

1. "Three-Dimensional Finite Element Analysis of Cyclic Fatigue Crack Growth of Multiple Surface Flaws." Corneliu Manu, June, 1980. Professor (Retired) University of Toronto.
2. "Automatic Two-Dimensional Quasi-Static and Fatigue Crack Propagation Using the Boundary Element Method." George E. Blandford, January, 1981. Professor, University of Kentucky.
3. "Interactive Finite Element Analysis of Reinforced Concrete: A Fracture Mechanics Approach," Victor E. Saouma, January, 1981. Professor, University of Colorado/Boulder.
4. "An Integrated Boundary Element Analysis System with Interactive Computer Graphics for Three - Dimensional Linear Elastic Fracture Mechanics," Renato S. Perucchio, January, 1984. Professor, University of Rochester.
5. "Finite and Boundary Element Modelling of Crack Propagation in Two- and Three - Dimensions Using Interactive Computer Graphics," Walter H. Gerstle, January, 1986. Professor, University of New Mexico.
6. "Modeling Mixed - Mode Dynamic Crack Propagation Using Finite Elements," Daniel V. Swenson, January 1986. Professor, Kansas State University.
7. "Simulation of Crack Propagation in Poroelastic Rock with Application to Hydrofracturing and *In - Situ* Stress Measurement," Thomas J. Boone, January, 1989. VP of Research, EXXON.
8. "Topological and Geometrical Modeling Approach to Numerical Discretization and Arbitrary Fracture Simulation in Three-Dimensions," Luiz Martha, August, 1989. Professor, Catholic University of Rio de Janeiro, Brazil.
9. "Numerical Methods for Hypersingular and Near-Singular Boundary Integrals in Fracture Mechanics", Earlin Lutz, May, 1991. Senior Research Engineer, Bentley, Inc.
10. "Discrete Modelling of Crack Propagation: Theoretical Aspects and Implementation Issues in Two and Three Dimensions", Paul A. Wawrzynek, August, 1991. Chief Engineer, Fracture Analysis Consultants, Inc.
11. "Three-Dimensional Simulation of Near-Wellbore Phenomena Related to Hydraulic Fracturing from a Perforated Wellbore", José Sousa, May, 1992. Professor, University of Campinas, Brazil.
12. "Computer Simulation of Linear and Nonlinear Crack Propagation in Cementitious Materials", Tulio Bittencourt, May, 1993. Professor, University of Sao Paulo, Brazil.
13. "A Methodology for Simulation of Curvilinear Crack Growth in Pressurized Shells", David Potyondy, August, 1993. Senior Research Engineer, Itasca, Inc.
14. "Experimental Validation Testing of Numerical Prediction Techniques for Three-Dimensional Fracture and Fatigue", William Riddell, June, 1995. Assoc. Professor, Rowan University.
15. "Crack Growth Simulation and Residual Strength Prediction in Thin Shell Structures", Chuin-Shan Chen, January, 1999. Assoc. Prof., National Taiwan University.
16. "Virtual Crack Extension Method for Calculating Rates of Energy Release Rate and Numerical Simulation of Crack Growth in Two and Three Dimensions", Changyu Hwang, January, 1999. Professor, Seoul University of Venture and Information.
17. "Crack Turning in Integrally Stiffened Aircraft Structures", Richard Pettit, August, 2000. Chief Engineer, FractureLab, LLC.
18. "An Experimental-Computational Evaluation of the Accuracy of Fracture Toughness Tests on Concrete", James Hanson, August, 2000. Assoc. Prof., Rose-Hulman Institute of Technology.

19. "Interface Modeling of Composite Material Degradation", Tong-Seok Han, May, 2001 (with Prof. Sarah Billington). Research Engineer, Korea Electric Power Research Institute.
 20. "Modeling and Simulation of Fatigue Crack Growth in Metals Using LEFM and a Damage-Based Cohesive Model", Ani Ural, May, 2004 (with Prof. Katerina Papoulia). Assistant Professor, Villanova University.
 21. "Decohesion of Grain Boundaries in Statistical Representations of Aluminum Polycrystals", Erin Iesulauro, May, 2006. Staff Engineer, Los Alamos National Laboratory.
 22. "A Hierarchical, Probabilistic, Damage and Durability Simulation Methodology", John Emery, May, 2007, Staff Engineer, Sandia National Laboratory.
 23. "Finite Element Simulation of Fatigue Crack Stages in AA 7075-T651 Microstructure", Jacob Hochhalter, May, 2010, Staff Engineer, NASA Langley Research Center.
 24. "Geometrically explicit finite element modeling of AA7075-T651 microstructure with fatigue cracks", Michael Veilleux, August, 2010, Senior Member of Technical Staff, Sandia Livermore National Laboratory.
 25. "Microstructural Simulation of Fracture Processes in Cortical Bone", Erin Oneida, December, 2013 (expected).
 26. "Residual Strength of Damaged Aerostructures", Ashley Spear, NSF Graduate Fellow, May, 2013 (expected).
 27. "DDSim for Composite Structures", Brett Davis, May, 2013 (expected).
 28. "Geometrical Simulation of Complete Process of Microstructurally Small Fatigue Cracking ", Albert Cerrone, December 2013 (expected).
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TAB 2

Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2012-0451
EB-2012-0433
EB-2013-0074

IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for: an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Town of Milton, City of Markham, Town of Richmond Hill, City of Brampton, City of Toronto, City of Vaughan and the Region of Halton, the Region of Peel and the Region of York; and an order or orders approving the methodology to establish a rate for transportation services for TransCanada Pipelines Limited;

AND IN THE MATTER OF an application by Union Gas Limited for: an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Parkway West site; an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the Town of Milton; an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Brantford-Kirkwall/Parkway D Compressor Station project; an order or orders for pre-approval of the cost consequences of two long term short haul transportation contracts; and an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Cambridge and City of Hamilton.

BEFORE: Cynthia Chaplin
Presiding Member

Marika Hare
Member

Peter Noonan
Member

DECISION AND ORDER ON COST AWARDS
Issued on March 31, 2014 and revised on April 3, 2014

Background

Union Gas Limited ("Union") and Enbridge Gas Distribution Inc. ("Enbridge") filed three applications with the Ontario Energy Board requesting approval to construct major system expansion projects. The applications were filed separately, but the Board combined the proceedings and heard them together ("Combined Proceeding").

The Board granted intervenor status to a number of organizations and individuals, and authorized cost award eligibility to the following parties:

- Association of Power Producers of Ontario ("APPoO")
- Building Owners and Managers Association - Toronto ("BOMA")
- Consumers Council of Canada ("CCC")
- Council of Canadians ("COC")
- Canadian Manufacturers and Exporters ("CME")
- Energy Probe Research Foundation ("Energy Probe")
- Environmental Defence ("ED")
- Federation of Rental-housing Providers of Ontario ("FRPO")
- Green Energy Coalition ("GEC")
- Industrial Gas Users Association ("IGUA")
- London Property Management Association ("LPMA")
- Markham Gateway Inc. ("Markham Gateway")
- Mississaugas of the New Credit First Nation ("MNCFN")
- School Energy Coalition ("SEC")
- Six Nations Elected Council ("Six Nations")
- Vulnerable Energy Consumers Coalition ("VECC")

The Board previously determined that intervenors would track their costs for the related issues separately from the costs for the project-specific issues and that the applicants would share the costs for the related issues equally, and bear the project-specific costs individually.

On January 30, 2014, the Board issued its Decision and Order, in which it set out the process for intervenors to file their cost claims, for Union and Enbridge to object to the claims and for intervenors to respond to any objections raised by Union and Enbridge.

The following eligible participants submitted cost claims: APPrO, BOMA, CME, COC, CCC, Energy Probe, ED, FRPO, GEC, IGUA, LPMA, Markham Gateway, SEC and VECC. Both Union and Enbridge responded to the claims. Enbridge noted that there was a wide variation in the hours claimed for the Enbridge portion of the Combined Proceeding. Enbridge requested that the Board take a “normalizing view” of the number of hours claimed in determining cost awards. Union raised concerns with respect to the number of hours claimed by BOMA and the allocation of costs between Union and Enbridge.

GEC responded that it had presented two expert witness reports, covering the demand side management aspects of the case and addressing the need for the pipeline components including, the pressure issues and electricity generation gas demand. GEC maintained that the scope of its evidence was broader than either COC or ED. GEC argued that the total hours, including witness hours, are proportionately in line with the other parties. GEC submitted that Enbridge’s suggestion of a “normalizing view” of the number of hours claimed, if taken without regard to the breadth, complexity, and intensity of interventions, would not result in a fair consideration of the intervenors’ cost claims generally, and it would not lead to a decision based on the facts.

COC responded that it sponsored evidence from three expert witnesses concerning the reliability and cost of supply of gas from U.S. shale deposits.

BOMA responded that it had incorrectly combined its hours for preparation and argument together under the heading “Preparation”. BOMA spent 119.2 hours on argument, reducing the preparation hours to 508.9, as opposed to the 628 hours quoted in Union’s letter. BOMA stated that the argument was long, substantial and integrated and addressed all the issues in the case in considerable depth. BOMA provided additional information on the breakdown of time spent on preparation, indicating the amount of time spent with respect to Enbridge, Union and the combined issues.

CME responded that “normalizing” the number of hours claimed by intervenors would be inappropriate and unfair. CME noted that different parties may have had substantially different levels of involvement, and some intervenors took a lead role on one or more issues while other intervenors did not do so. CME also noted that the level of cooperation in the Combined Proceeding was very high, and that the total hours or total costs claimed by an intervenor should not be used as a mathematical basis to “normalize” cost awards.

Board Findings

The fee claims for the following parties are approved in full: CME, CCC, Energy Probe, ED, FRPO, GEC, IGUA, LPMA, Markham Gateway, SEC and VECC. The Board finds that the proposed allocations between Union and Enbridge are consistent with the Board’s previous determination and will be accepted.

The Board has determined that the fees claimed by APPrO, BOMA and COC are excessive and will be reduced.

APPrO claimed \$190,610 in fees and BOMA claimed \$264,106. Both of these intervenors represent ratepayer interests and neither sponsored expert evidence. These two cost claims can be compared with the cost claims of other similar intervenors, namely the many ratepayer groups active in the proceeding. Cost claims for ratepayer group intervenors for fees (not disbursements) varied between a low of \$35,000 for VECC and a high of \$264,106 for BOMA. The Board finds that the claims which fall in the range of \$35,000 (VECC) to \$160,814 (CME) are reasonable on two measures: (1) the level of involvement by each party in the various processes related to the hearing; and (2) the level of contribution to the Board’s understanding of the issues to be decided. The claims by APPrO and BOMA are outside the range of what the Board considers reasonable. The level of involvement by these intervenors and their contributions to the Board’s understanding of the issues in the proceeding were not significantly superior to those of the other ratepayer intervenors. Therefore, the Board will reduce each of these claims to \$160,000 to be allocated for payment between Union and Enbridge in the same proportions as claimed. This level is at the upper end of the range which the Board considers reasonable.

COC claimed \$206,572, of which \$30,789 was claimed for the experts who provided testimony. The Board finds the claims for the experts to be reasonable. The balance of \$175,783 is claimed for legal fees, and is driven primarily by the 451 hours attributable to Mr. Shrybman. This claim can be compared to the claims by GEC and ED, which claimed 284 hours and 244 hours, respectively, for legal fees. Each of these three intervenors is a policy advocacy group and each sponsored expert testimony. In some respects, COC's scope was narrower than either GEC or ED. The Board finds that the claim for 451 hours by COC for senior counsel is excessive. The level of involvement by COC and its contribution to the Board's understanding of the issues in the proceeding was not significantly greater than GEC or ED. Therefore, the significantly higher number of hours is not justified. The Board will reduce the fees for COC to \$144,777. This level reflects a reduction in the hours claimed for senior counsel to 290 hours. This adjusted level will be allocated between Union and Enbridge in the same proportions as the original claim.

The disbursements claimed by APPrO, BOMA, CME, COC, CCC, Energy Probe, ED, FRPO, GEC, IGUA, LPMA, Markham Gateway, SEC and VECC are approved as filed with minor reductions for the following reasons: errors in HST/Summary of Fees and disbursements calculations; lack of receipts; and non-compliance with the government's *Travel, Meal and Hospitality Expenses Directive*. The Board finds that the adjusted disbursement claims of APPrO, BOMA, CME, COC, CCC, Energy Probe, ED, FRPO, GEC, IGUA, LPMA, Markham Gateway, SEC and VECC shall be reimbursed by Union and Enbridge in the same proportions as the original claim.

THE BOARD THEREFORE ORDERS THAT:

1. Pursuant to section 30 of the Ontario *Energy Board Act, 1998*, Enbridge Gas Distribution Inc. and Union Gas Limited shall pay to the parties the awarded costs in the amount as listed in Appendix A;
2. Enbridge Gas Distribution Inc. and Union Gas Limited shall each pay 50% of the Board's costs and incidental to, this proceeding immediately upon receipt of the Board's invoice.

Ontario Energy Board

EB-2012-0451
Enbridge Gas Distribution Inc.

EB-2012-0433
EB-2013-0074
Union Gas Limited

DATED at Toronto, April 3, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Appendix A
Decision and Order on Cost Awards

Enbridge Gas Distribution Inc. EB-2012-0451
Union Gas Limited EB-2012-0433 & EB-2013-0074

April 3, 2014

Party	Enbridge pays	Union pays	Total
Association of Power Producers of Ontario	\$ 83,137.67	\$ 80,768.07	\$ 163,905.74
Building Owners and Managers Association - Toronto	\$ 80,021.54	\$ 80,021.54	\$ 160,043.08
Canadian Manufacturers and Exporters	\$ 85,379.14	\$ 85,379.13	\$ 170,758.27
Council of Canadians	\$ 76,303.13	\$ 76,303.14	\$ 152,606.27
Consumers Council of Canada	\$ 68,054.25	\$ 34,306.80	\$ 102,361.05
Energy Probe Research Foundation	\$ 56,316.62	\$ 44,638.89	\$ 100,955.51
Environmental Defence	\$ 145,712.58	\$ -	\$ 145,712.58
Federation of Rental-housing Providers of Ontario	\$ 59,904.17	\$ 51,599.54	\$ 111,503.71
Green Energy Coalition	\$ 287,183.14	\$ 32,773.41	\$ 319,956.55
Industrial Gas Users Association	\$ 49,061.74	\$ 42,442.21	\$ 91,503.95
London Property Management Association	\$ 24,660.85	\$ 35,176.64	\$ 59,837.49
Markham Gateway Inc.	\$ 79,435.12	\$ -	\$ 79,435.12
School Energy Coalition	\$ 50,437.00	\$ 40,218.00	\$ 90,655.00
Vulnerable Energy Consumers Coalition	\$ 20,094.80	\$ 16,150.29	\$ 36,245.08

TAB 3

EB-2012-0451

EB-2012-0433

EB-2013-0074

ONTARIO ENERGY BOARD

IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for: an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Town of Milton, City of Markham, Town of Richmond Hill, City of Brampton, City of Toronto, City of Vaughan and the Region of Halton, the Region of Peel and the Region of York; and an order or orders approving the methodology to establish a rate for transportation services for TransCanada Pipelines Limited;

AND IN THE MATTER OF an application by Union Gas Limited for: an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Parkway West site; an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the Town of Milton; an order or orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Brantford-Kirkwall/Parkway D Compressor Station project; an order or orders for pre-approval of the cost consequences of two long term short haul transportation contracts; and an order or orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Cambridge and City of Hamilton.

AFFIDAVIT OF STEVEN SHRYBMAN

I, STEVEN SHRYBMAN, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a partner at the law firm of Sack Goldblatt Mitchell LLP and was retained to act as counsel by the Council of Canadians ("COC") in these proceedings. As such I have knowledge of the matters hereinafter deposed to.
2. In deciding the costs awards that would be made in these proceedings, the Board substantially reduced the COC's claim for costs on account of counsel's fee, finding that its claim was excessive.

3. In light of the Board's findings and comments on the COC account in relation to those submitted by the Green Energy Coalition ("GEC") and Environmental Defense ("ED"), I have reviewed the costs claims submitted by those interveners. As reflected by the table attached as Exhibit "A" to this affidavit, the difference in claims related to counsel fees arises primarily in respect of the time spent in preparation for the hearing.
4. As a comparison of the costs claims submitted by these three parties reveals, these differences are the consequence of the very different division of labour that existed between COC witnesses and its legal counsel, than was the case for GEC and ED. The reasons why that difference was reasonable and in fact necessary in the case of COC are explained below. However, when the overall time claimed for both experts and counsel are considered, I believe the comparison fairly reflects the number of expert reports adduced by the three parties, and the nature of that evidence.
5. Each of the experts retained by the COC was highly or even eminently qualified in their fields, but did not have prior experience giving evidence in a regulatory proceeding before the OEB, or any other regulatory tribunal. They were unfamiliar with the hearing process, the Board's filing system, and the modalities for presenting or responding to IRs. In the case of Professor Ingraffea and Mr. Hughes, constraints on their availability also played a factor in limiting the time they could devote to reviewing the record of the proceedings, assisting counsel to assess that record, formulating Information Requests and assisting Counsel with cross-examination. As the report prepared by Professor Ingraffea explicitly acknowledges, he relied upon Counsel's summary of the record rather than conducting his own review, and relied on counsel as well for his understanding of the Board's jurisdiction and mandate. The same was true in the case of Mr. Hughes and Ms. Sumi.
6. In contrast, I believe the experts retained by GEC all had prior relationships with their client and each had considerable prior experience with OEB proceedings, including those concerning natural gas utilities. ED's expert, while less familiar with the OEB, had extensive prior experience in various Ontario fora in respect of the evidence he adduced.

For these reasons, I believe, and the dockets show, they were able to function far more independently of counsel in carrying out their tasks than was true for the COC's experts who relied on Counsel to:

- i. review and summarize the applications;
- ii. provide relevant documents for their review;
- iii. prepare IRs to solicit information to support their analysis;
- iv. provide guidance concerning the parameters for their analysis in light of the Board's jurisdiction and mandate;
- v. review and comment on their draft reports;
- vi. assist with the preparation of, and to review and comment on the responses to IRs from the Applicants, which in the cases of Professor Ingraffea and Mr. Hughes, were extensive; and to make necessary logistical and travel arrangements.¹

7. I also believe the ED and GEC experts would have clearly understood the parameters for, and relevance of the expert reports they prepared because these primarily concerned the role of DSM as an alternative to the system expansion projects, an issue that is often considered in respect of such undertakings. This was not the case for the COC experts, who were called upon to address issues that were novel in certain respects - namely, the regulatory and supply risks associated with shale gas supply (the development of which is very recent) to Ontario consumers from sources outside the province or country.
8. I believe that in the circumstances it was both necessary and efficient for counsel to play a greater role in providing support to COC experts and in taking on tasks that in the case of GEC and ED experts was unnecessary.
9. Notwithstanding the assistance I provided to the COC experts in respect of the preparation of their reports, each was instructed in respect of their obligation to provide

¹ No cost claim was submitted by the COC in respect of the considerable assistance provided by administrative staff at my firm.

TAB 4



uniongas
A Spectra Energy Company

CELEBRATING
100 YEARS
Est. 1911

March 11, 2014

Ontario Energy Board
2300 Yonge Street, Suite 2700
Toronto, ON
M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Re: EB-2012-0451 – Greater Toronto Area (“GTA”) LTC Project
EB-2012-0433 – Parkway West Project
EB-2013-0074 – Brantford-Kirkwall/Parkway D Project
Union Gas Limited - Comments on Cost Claims

Dear Ms. Walli:

Union Gas Limited (“Union”) has reviewed the cost claims of Association of Power Producers of Ontario (“APPRO”), Building Owners and Managers Association of Greater Toronto (“BOMA”), Consumers Council of Canada (“CCC”), Council of Canadians (“COC”), Canadian Manufacturers & Exporters (“CME”), Energy Probe, Environmental Defence, Federation of Rental-housing Providers of Ontario (“FRPO”), Green Energy Coalition (“GEC”), Industrial Gas Users Association (“IGUA”), London Property Management Association (“LPMA”), Markham Gateway, School Energy Coalition (“SEC”) and Vulnerable Energy Consumer’s Coalition (“VECC”) for the above noted proceeding. The cost claims for Union are summarized below by intervenor.

<u>Intervenor</u>	<u>Cost Claim to Union</u>	<u>Total Cost Claim</u>
VECC	\$ 16,227.53	\$ 36,399.58
GEC	\$ 32,815.03	\$ 320,195.01
CCC	\$ 34,306.80	\$ 102,361.05
LPMA	\$ 35,223.90	\$ 59,932.01
SEC	\$ 40,218.00	\$ 90,655.00
IGUA	\$ 42,442.21	\$ 91,503.95
Energy Probe	\$ 44,641.64	\$ 100,958.26
FRPO	\$ 51,635.94	\$ 111,567.04
CME	\$ 85,544.69	\$ 171,089.37
APPrO	\$ 95,871.28	\$ 194,583.77
COC	\$ 107,562.30	\$ 215,124.61
BOMA	\$ 165,287.93	\$ 264,153.83
Total	\$ 751,777.25	\$ 1,758,523.48

The cost claims of Environmental Defence and Markham Gateway were attributed entirely to Enbridge Gas Distribution (“EGD”).

Union observes that there is a wide range of cost claims for these proceedings. Union, however, is limiting its comments to the cost claim of BOMA. Union’s concerns with the BOMA claim relate to: 1) the number of hours claimed in relation to that of other intervenors; and 2) the allocation of the costs between Union and Enbridge.

Magnitude of Hours Claimed by BOMA

The BOMA cost claim included 628 hours for preparation for the combined projects. In Union’s view this is excessive. At 628 hours, BOMA’s hours of preparation are 27% higher than that of COC at 494 hours. Union notes that the hours of preparation for COC includes preparation time for consultants it retained to prepare intervenor evidence. BOMA did not retain any experts, nor did it call any evidence. Further, BOMA’s hours of preparations are 93% higher than that of CME, the next highest in hours claimed for preparation.¹

Allocation of Costs between Union and EGD

In Procedural Order #2 at page 5, the Board determined that “intervenors will track their costs for the related issues separately from the costs for the project- specific issues. The applicants will share the costs for the related issues equally and be responsible for their own project-specific costs.” Union interpreted this determination by the Board to mean that in the absence of being able to directly attribute costs to projects, costs would be shared 50/50 between the applicants. BOMA has not taken this approach.

Both Mr Brett’s and Ms Fraser’s cost claims are submitted on a total combined basis for the projects. Union submits that these costs should be allocated 50/50 between Union and EGD as agreed to by parties and determined by the Board. In its cost claim, BOMA submitted additional spreadsheet backup for hours billed by Mr Brett allocated to each of the 3 applications. While broken out by project in these back up sheets, the vast majority of the hours billed do not appear to be specific to each project. Rather the hours are allocated equally between the 3 applications (1/3 to Parkway West, 1/3 to Parkway D/Brantford to Kirkwall and 1/3 to the GTA Project). This results in an overall allocation of approximately 2/3 to Union and 1/3 to EGD. In Union’s view this approach is not consistent with what was contemplated in Procedural Order #2 or with the cost claims

¹ In preparing its cost claim APPrO did not separate costs between preparation and other activities. Accordingly, Union is not able to easily compare BOMA’s hours claimed to that of APPrO. The total hours claimed by APPrO was 569 which is less than the hours claimed by BOMA for preparation alone.

submitted by other parties. Further a 2/3 Union, 1/3 EGD split in costs without supporting documentation seems inconsistent with the constituency represented by BOMA i.e. the Building Owners and Managers Association of **Greater Toronto** (*emphasis added*).

Yours truly,

[original signed by]

Karen Hockin
Manager, Regulatory Initiatives

Crawford Smith, Torys
Mark Kitchen, Union Gas
Edith Chin, Enbridge Gas Distribution
EB-2012-0451/EB-2012-0433/EB-2013-0074 Intervenors

TAB 5



500 Consumers Road
North York, Ontario M2J 1P8
PO Box 650
Scarborough ON M1K 5E3

Kevin Culbert
Senior Manager,
Regulatory Accounting and Budgets
Tel: 416-495-5778
Fax: 416-495-6072
Email: kevin.culbert@enbridge.com

March 11, 2014

VIA 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: Enbridge Gas Distribution Inc. GTA application
Ontario Energy Board File Nos. EB-2012-0451
(Combined hearing with Union Gas applications EB-2012-0433 and
EB-2013-0074)
Enbridge Comments on Intervenor Cost Claim Submissions**

Enbridge Gas Distribution Inc. ("Enbridge") has reviewed the cost claims from each of the following interested parties: Association of Power Producers of Ontario ("APPRO"), Building Owners and Managers Association ("BOMA"), Canadian Manufacturers & Exporters ("CME"), Consumers Council of Canada ("CCC"), Council of Canadians ("COC"), Energy Probe, Environmental Defence, Federation of Rental-Housing Providers ("FRPO"), Green Energy Coalition ("GEC"), Industrial Gas Users Association ("IGUA"), London Property Management Association ("LPMA"), Markham Gateway Inc. ("Markham Gateway"), School Energy Coalition ("SEC") and Vulnerable Energy Consumers Coalition ("VECC").

Enbridge has reviewed the claims in comparison to the allowances of prescribed rates within the cost assessment guidelines and finds they are within acceptable tolerances. Enbridge notes however, that there is a wide variation in submitted hours (please see table attached) with respect to claims on the Enbridge portion of the combined application process. Given the variance in hours claimed by intervenors, Enbridge has provided this analysis to inform the Board of this disparity and believes the Board should take a potential normalizing view of the number of hours claimed into consideration in determining eventual cost awards. Enbridge awaits the Board's cost awards and reserves the right to make submissions regarding any outstanding intervenor cost submissions which are subsequently received.

March 11, 2014
Ms. Kirsten Walli
Page 2

Yours Truly,

(Original Signed)

Kevin Culbert
Senior Manager,
Regulatory Accounting and Budgets

cc: APPrO, BOMA, CCC, CME, Energy Probe, Environmental Defence, FRPO, GEC,
IGUA, LPMA, Markham Gateway Inc., SEC, and VECC (via email only)

March 11, 2014
 Ms. Kirsten Walli
 Attachment

Summary of time spent by Intervenors

Intervenor	Hours Claimed (EGD ¹)	Hours Claimed (Total ²)
VECC	56.8	102.4
LPMA	63.2	154.5
FRPO	151.5	285.0
IGUA	151.6	280.8
CCC	182.5	274.5
Energy Probe	192.3	339.1
SEC	256.6	457.7
CME	259.3	518.5
Markham Gateway	260.4	260.4
BOMA	265.0	708.3
APP _r O	288.0	569.4
COC	307.8	615.6
Environmental Defence	656.0	656.0
GEC	991.8	1083.1

¹EB-2012-0451

²EB-2012-0451 and EB-2012-0433 and EB-2013-0074

TAB 6

Sack Goldblatt Mitchell LLP *Avocat(e)s/Lawyers*

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Steven Shrybman
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 Our File No. 13-840

March 12, 2014

Via E-mail

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

Dear Ms Walli:

Re: COC Costs Claim in EB-2012-0451/0433/0074 "GTA pipeline cases"

We are in receipt of the comments of Enbridge and Union in regard to cost claims received in the above-noted matter. We also have Mr. Poch's letter of this date and we share his concerns.

As the Board will know, the COC adduced evidence from three expert witnesses concerning the reliability and cost of supply of gas from U.S. shale deposits. Accordingly, the hours claimed tally offered by Enbridge includes the time spent by counsel, COC experts and by our students (who bill at a more modest rate.)

As for the total cost claim tally provided by Union Gas we only note that this claim includes travel disbursements for our experts, two of whom travelled some considerable distance, to attend the hearing for cross examination. It also includes the costs of having to cancel flights when at the last minute the hearing needed to be rescheduled (one of our experts was in transit from British Columbia).

Please feel free to contact me should any further clarification be required.

Yours very truly,



Steven Shrybman
 SS/aq



F:\13-840\00588129.DOCX



12 March 2014

Ontario Energy Board
2300 Yonge St., 27th Floor
Toronto, ON, M4P 1E4

Attn: Ms Kirsten Walli, Board Secretary

Dear Ms Walli:

Re: GEC Costs Claim in EB-2012-0451/0433/0074 "GTA pipeline cases"

We are in receipt of the comments of Enbridge and Union in regard to cost claims received in the above-noted matter. We note that Union has raised a specific concern with BOMA's claim but has no specific comments about GEC's claim. Enbridge has not raised any specific concern in regard to GEC's claim. However, both Union and Enbridge have asked the Board to consider the wide range of claims made and Enbridge has suggested that "the Board should take a potential normalizing view of the number of hours claimed into consideration in determining eventual cost claims."

While the utilities have not specifically challenged GEC's claim, we are concerned that the manner in which the cost claim data has been presented could lead to a misconception about GEC's claim. In short, both Enbridge's tabulation of total hours and Union's tabulation of total dollars ignore the fact that GEC was one of the few intervenors presenting expert evidence, it brought forward two expert groups covering distinct matters, and both GEC's evidence and argument addressed a wide range of the issues before the Board.

Despite being one of only three intervenors that offered expert witness evidence and being one of the few parties that raised concerns about the entire Enbridge project in both cross and argument, GEC's counsel hours totalled only 284.25 which is comparable or lower (in some cases significantly lower) than the total hours of other intervenors that offered no evidence, such as IGUA (280.8), CCC (274.5), FRPO(285.0), Energy Probe(339.1), SEC(457.7), CME(518.5) etc..

GEC presented two expert witness reports covering both the DSM aspects of the case and addressing the need for the Enbridge pipeline components (and to a lesser extent the Union components) including a review of the pressure issues, the electricity generation gas demand aspects etc.. COC's experts' reports addressed the contextual issues of fracking gas availability and impact, which did not require them to deal with the breadth and details of the utilities' applications. ED's experts dealt with a subset of the DSM issue (and worked with GEC's expert that provide avoided costs). GEC's total hours, including witness hours, are proportionately in line with these other parties that brought evidence before the Board, given that GEC filed

evidence in two distinct areas and particularly in light of the fact that the evidence of Resource Insight Inc. required our experts to digest virtually the entire case of the utilities.

Accordingly, while we agree that a comparison of claimed hours or dollars is a reasonable consideration for the Board, we submit that Enbridge's suggestion that the Board consider a "normalizing view of the number of hours claimed" if taken without regard to the breadth, complexity and intensity of interventions, would not result in a fair consideration of the claims of intervenors generally, or of GEC's claim specifically, and it would not lead to a decision based on the facts. We hope that the added comparisons discussed above will assist the Board in its consideration of the claims.

Please feel free to contact the writer if further clarification is required.

Sincerely,

A handwritten signature in black ink, appearing to read "David Poch", with a stylized flourish at the end.

David Poch

Cc: Enbridge and Union

TAB 1

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 Procedure*.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

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

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

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

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

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

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

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Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding¹ (“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 175ff which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

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

Findings

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

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

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

- That decisions be given in writing with reasons if requested by a party (s 17 (1))
- That parties receive notice of the decision (s 18)
- That the tribunal compile a record of the proceeding (s 20).

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

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if “it has made rules under section 25.1 respecting the use of ADR mechanisms...”
- Prehearing conferences. Section 5.3 provides that “if the tribunal’s rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference...”
- Disclosure of documents. Section 5.4 provides that “if the tribunal’s rules made under section 25.1 deal with disclosure, the tribunal may, ..., make orders for (a) the exchange of documents, ...”
- Written hearings. Section 5.1 (1) provides that “a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding.”
- Electronic hearings. Section 5.2 provides that “a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding.”

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

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

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

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

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

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

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

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

25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under section 25.1

25.1 (1) A tribunal may make rules governing the practice and procedure before it.

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

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

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

The Board's Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

Section D: Board Process

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

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

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

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

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

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

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

Examples of the alleged behaviour objected to by IGUA include:

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

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

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

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

The other parties largely supported the position of Board Staff.

Findings

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

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

- Tribunals must give decisions in writing and must provide reasons if requested by a party (s 17 (1))
- Parties are entitled to notice of the decision (s 18)
- The tribunal must compile a record of the proceeding (s 20)

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

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

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

Section 21 of the OEB Act provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

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

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

8. The moving parties submit that the NGEIR Decision raises the following issues:

(i) Whether the Board correctly interpreted Section 29 of the Ontario Energy Board Act (the “Act”). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;

(ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

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

IGUA also alleged that:

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

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

Findings

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

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

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

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

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

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

There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of “competition sufficient to protect the public interest”; what economists refer to as a “workably competitive” market may well be sufficient.

It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products “is or will be” subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

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

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

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

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

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

The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple “yes” or “no”. The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.

Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between \$50 million and \$174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

The NGEIR panel then proceeds to balance the Board’s public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices and 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 in 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. Stauff’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 2

Ontario Energy
Board

Commission de l'Énergie
de l'Ontario



EB-2011-0053

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

AND IN THE MATTER OF the *Electricity Act, 1998* S.O. 1998, c. 15 (Sched. A) (the "*Electricity Act*");

AND IN THE MATTER OF an application by Plateau Wind Inc. for an order or orders pursuant to section 41(9) of the *Electricity Act* establishing the location of Plateau Wind Inc.'s distribution facilities within certain road allowances owned by the Municipality of Grey Highlands;

AND IN THE MATTER OF a Motion by the Municipality of Grey Highlands, pursuant to Section 42 of the Board's *Rules of Practice and Procedure*, for a review by the Board of its decision EB-2010-0253 dated January 12, 2011;

AND IN THE MATTER OF Rules 42-45 of the Board's *Rules of Practice and Procedure*.

BEFORE: Karen Taylor
Presiding Member

Paul Sommerville
Member

DECISION AND ORDER ON MOTION TO REVIEW

BACKGROUND

On January 12, 2011, the Board issued its Decision and Order in Board File No. EB-2010-0253 (“Decision”), in relation to an application by Plateau Wind Inc. (“Plateau”) under subsection 41(9) of the *Electricity Act, 1998* regarding the location of Plateau Wind Inc.’s distribution facilities within certain road allowances owned by the Municipality of Grey Highlands (“Grey Highlands”). The Board determined the location of Plateau’s distribution facilities within certain public rights-of-way, streets and highways owned by Grey Highlands.

On February 16, 2011, Grey Highlands filed a Notice of Motion with the Board seeking an Order of the Board (the “Motion”) for the following:

1. To review and overturn the Decision of January 12, 2011 wherein the Board determined that the Applicant was a “distributor” for the purposes of section 41 of the *Electricity Act*.
2. As a result of the foregoing, an Order declaring that the Ontario Energy Board has no jurisdiction to determine the location of Plateau’s facilities within the road allowances owned by the Municipality.
3. An Order staying the original decision until such time as a determination on the motion has been issued.

Grey Highlands submitted that the findings of the Board raise a question of the correctness of the Decision on the following grounds:

- a. The Board erred in its interpretation and application of Section 4.0.1 of Ontario Regulation 161/99, which was an error of law;
- b. The Board erred in the determination of its jurisdiction, which was an error of law;
- c. The Board erred in the interpretation of the definitions of “renewable energy generation facility”, “distribution systems” and “distribute” in the *Electricity Act* which was an error of law;
- d. The Board erred in determining the location of the structures under section 41(9) of the Act based on an erroneous conclusion (at paragraph

44 of the Decision that “the two parties [the Municipality and the Applicant] had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances”. The foregoing constitutes a mixed error of fact and law.

In Procedural Order No. 1 issued March 11, 2011 the Board determined that it would proceed with the Motion by way of a written hearing to determine the threshold question of whether the matters should be reviewed before conducting any review on the merits of the Motion. In determining the threshold question the Board noted that it considers the grounds for the motion in relation to the grounds set out in Rule 44.01 (a). In Procedural Order No. 1 the Board stated the following:

Rule 44.01 of the *Rules of Practice and Procedure* states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The Threshold Issue

Under Rule 45.01 of the Board’s *Rules of Practice and Procedure*, 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. Section 45.01 of the Board’s Rules of Practice and Procedure (the “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.

The threshold question was articulated in the Board’s *Decision on a Motion to Review Natural Gas Electricity Interface Review Decision*³ (the “NGEIR Decision”). The Board, in the NGEIR Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raised a question as to the

³ May 22, 2007, EB-2006-0322 / 0388/ 0340, page 18

correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an “identifiable error” in the decision for which review is sought and that “the review is not an opportunity for a party to reargue the case”.⁴

In demonstrating an error, the moving party must show that the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision. The review is not an opportunity to reargue the case. A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

SUBMISSIONS AND FINDINGS

a) Interpretation and application of Section 4.0.1 of Ontario Regulation 161/99

The first ground of the Motion submitted by Grey Highlands is that the Board erred in its interpretation of section 4.0.1 of Ontario Regulation 161/99 which exempts certain distributors from the requirements of the *Ontario Energy Board Act, 1998* including the requirement to obtain a licence. Grey Highlands submitted that the Board, in relying on section 4.0.1 of the Regulation, failed to give consideration to its original submissions on the totality of the statutory and regulatory regime that applies to a “distributor”.

Plateau submitted that Grey Highlands has failed to identify any error or change in fact or circumstances that would present sufficient grounds, within the context of Rule 42.01 of the Board’s *Rules of Practice and Procedure*, to raise questions as to the correctness of the Board’s original Decision. Specifically, Plateau submitted that Grey Highlands not only failed to provide evidence of any error in fact, change in circumstance or new evidence but also, this first ground of review is immaterial to the outcome of the Decision. In addition, Plateau submitted that the Motion makes incorrect, misleading claims that have no bearing on the correctness of the Decision.

⁴ NGEIR Decision, at pages 16 and 18

Board Findings

The Board finds that Grey Highlands' submissions on this ground are a restatement of legal arguments it made in its original submissions in the section 41(9) application and on which the Board ruled in its Decision. As such, it has failed to demonstrate any of the factors or considerations enunciated in Section 42.01 of the Board's Practice Direction, or the NGEIR decision. Motions for Review are not an opportunity to merely re-state the position of the Moving Party. The Moving Party must provide convincing argument that the original Decision was incorrect on grounds that are additional to those urged on the original panel.

- b. The Board erred in the determination of its jurisdiction and its interpretation of the definitions of “renewable energy generation facility”, “distribution systems” and “distribute” in the *Electricity Act* which was an error of law;**

The second and third grounds submitted by Grey Highlands in support of its Motion are interrelated and allege that the Board erred in the determination of its jurisdiction to hear the application and incorrectly interpreted definitions in the *Electricity Act*. Grey Highlands submitted that in the absence of any electricity or any source from which Plateau proposes to “distribute” electricity there can be no “distribution system” and accordingly there can be no matter for resolution pursuant to section 41 of the *Electricity Act*.

Plateau, in its submission, argued that the grounds raised do not pass the threshold test as Grey Highlands is arguing the same position it put forward in the main proceeding and argued that the evidence in the original proceeding ought to have been interpreted differently. In its view Grey Highlands has failed to identify any error or change in the facts or circumstances that could give rise to a different interpretation or any material issue not considered by the Board.

Board Findings

As with the first ground, the Board notes that Grey Highlands' submission in support of these grounds is substantially a restatement of its submissions in the original application. Grey Highlands argues that the evidence in the original application should have been interpreted differently but does not present any error or change in facts or

circumstances indicating that the original application should have been decided differently. At the heart of Grey Highlands' submissions is the notion that the defined terms "distribution system", "generation facility", "transmission system" and "renewable energy generation facility" are mutually exclusive such that, if the subject Distribution Facilities are part of a 'renewable generation facility' then they are not also a 'distribution system' and Plateau is not a 'distributor' that can avail itself of section 41(9) of the *Electricity Act*.

The Board finds, as did the panel in the original Decision, that there is nothing in the applicable legislation and regulation that would support such a restrictive, mutually exclusive interpretation of the definitions in the *Electricity Act* or indicate that a "strict construction" of section 41 of that Act is proper, or would yield the interpretation Grey Highlands argues for in its Notice of Motion.

Accordingly, this panel finds that the Decision and Order in the original application did not err in law in its findings with respect to its jurisdiction or interpretation of the definitions considered in the original application.

c. The Board erred in determining that Plateau and Grey Highlands had reached a mutually acceptable agreement

The fourth ground set out in the Notice of Motion is an alleged error of fact arising from paragraph 44 of the Board's Decision of January 12, 2011 which reads as follows:

[44] *The Board notes Plateau's evidence that, **during the course of negotiations between Plateau and the Municipal Staff regarding a road use agreement, the two parties had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances (the "Proposed Road Use Agreement")** and that the Proposed Road Use Agreement was subsequently rejected by the Grey Highlands Council without apparent explanation. (emphasis added)*

Grey Highlands argues that the Board's Decision and Order on the location of Plateau's distribution facilities was based on "an erroneous statement of fact" that "the two parties had reached a mutually acceptable agreement". Grey Highlands essentially argues that the Municipal Staff and the CAO were not authorized by Grey Highlands' Council to enter into a Proposed Road Use Agreement.

Plateau argues that Grey Highland's has taken the above noted paragraph of the Decision and Order out of context. The position of Plateau is that paragraph 44 explicitly

discusses and agreement between Plateau and the Municipal Staff of Grey Highlands and this agreement resulted in the preparation of a proposed road use agreement.

Board Findings

The Board finds that it is clear that the “two parties” referred to in the above-noted paragraph are “Plateau and Municipal Staff” and accordingly the Board does not find that the Decision and Order contained an error of fact. Furthermore, the Board referenced the agreement between Plateau and Municipal Staff, not for the purpose of finding, as a fact, that there was a binding agreement between Plateau and Grey Highlands, but rather that there was consensus as between Plateau and Municipal Staff as to the proposed *location* of the Distribution Facilities. On a section 41(9) application the Board the only issue before the Board is the location of the Distribution Facilities. The only evidence before the Board on that specific issue of location was that presented by Plateau (and which had previously been acceptable to Municipal Staff). Plateau’s evidence on this issue was never challenged by Grey Highlands at any time.

The Board has decided to dismiss the Motion without a hearing, pursuant to Section 45.01 of the Board’s *Rules of Practice and Procedure*. In the Board’s view, for the reasons outlined above, the Motion does not meet the requirements of Rule 42.01 of the *Rules of Practice and Procedure* or the established Threshold Tests required for further consideration of the motion to review. Accordingly, the Board finds that the Motion of Grey Highlands is without merit, and that the Board did not err in its Decision of January 12, 2011.

Grey Highlands Reply Submission

The Board finds it necessary to discuss one other issue raised by Grey Highlands in its Reply Submission. Specifically, Grey Highlands takes issue with the Board’s application of the Threshold Question and Test for a Rule 42.01 Motion. Specifically Grey Highlands state that: “If the Threshold Test” referenced by Plateau was intended to apply to this review proceeding, the Board should have identified and made reference to such test in its procedural order. Procedural Order No 1 dated March 11, 2011 makes no reference to the specific nature or content of the threshold test that it would engage or apply.”

The Board notes that, as set out above, Procedural Order No. 1 specifically asked parties for submissions on the threshold question and stated the following: “In

determining the threshold question the Board considers the grounds for the motion in relation to the grounds set out in Rule 44.01 (a)". As such, the Board finds that the threshold test was clearly articulated and, in any event, the Board's findings in this proceeding confirm that there is no reason to doubt the correctness of the Decision and Order.

COST AWARD

Plateau submitted that the Motion is frivolous and vexatious and that, therefore, the Board should make an order requiring that Grey Highlands reimburse Plateau for all of its costs associated with the Motion, including all legal fees and disbursements that Plateau has incurred, and will incur, in responding to the Motion.

Section 30 of the *OEB Act* endows the Board with broad powers to make orders respecting costs. It is open to the Board in an appropriate case to order any person or party to pay all or part of another person's or party's costs of participating in a proceeding before the Board. This would include an order requiring a person or party to pay the costs incurred by the Board itself in conducting the proceeding.

Elsewhere in this Decision the Board has concluded that the Motion brought by Grey Highlands was without merit.

The Board finds that, but for one factor, this is a case where it would be appropriate to require Grey Highlands to pay the costs of the Applicant and the Board associated with this Motion. In the Board's view such an order would be a reasonable one.

However, as noted, there is one factor which operates to make the issuance of such an order in this case unreasonable.

It has not been the Board's practice to make such orders in the past. In the absence of past practice, the Board is not inclined to impose such an order here and now.

Henceforth, however, parties bringing motions should be cognizant of this possibility.

This is not meant in any degree to discourage meritorious motions or motions that while unsuccessful in the result contain substantive legal, policy, regulatory, or factual grounds. Motions are an important regulatory instrument which have not infrequently allowed for the correction of error of whatever kind.

This approach is meant to discourage motions, which represent no reasonably arguable grounds or a substantial re-argument of points rejected by the panel with cogent reasons in the first instance. In appropriate cases the Board may deny a party its own costs, or require it to pay the costs of other parties or the Board, or both. Where the moving party is a regulated entity, the Board may order that the shareholder pay such costs, without recourse to the ratepayer.

The Board expects the incidence of such orders to be infrequent. The standard for qualification is high. But the Board considers the possibility of such orders to be a necessary element of its governance of its own processes.

THE BOARD THEREFORE ORDERS THAT:

1. The motion to review is dismissed and Board Decision EB-2010-0253, dated January 12, 2011 is confirmed.

DATED at Toronto, April 21, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

TAB 3

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)	<i>Michael M. Miller, for the Appellant</i>
MUNICIPALITY OF GREY HIGHLANDS)	
)	
Appellant)	
)	
– and –)	
)	
PLATEAU WIND INC. and ONTARIO)	
ENERGY BOARD)	<i>John Terry and Alexander C. W. Smith, for</i>
)	<i>the Respondent, Plateau Wind Inc.</i>
Respondents)	
)	<i>Michael D. Schafler and Kathleen Burke, for</i>
)	<i>the Respondent, Ontario Energy Board</i>
)	
)	
)	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

ORAL REASONS FOR JUDGMENT

SWINTON J.

Date of Reasons for Judgment: February 9, 2012

Date of Release: February 23, 2012

TAB 4

Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2011-0090

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an order or orders determining payment amounts for the output of certain of its generating facilities;

AND IN THE MATTER OF a motion by Ontario Power Generation Inc. pursuant to Rule 42 of the Ontario Energy Board's *Rules of Practice and Procedure* for an order or orders to vary the Decision with Reasons EB-2010-0008 dated March 10, 2011.

BEFORE: Paul Sommerville
Presiding Member

Cathy Spoel
Member

Karen Taylor
Member

DECISION AND ORDER ON MOTION

INTRODUCTION

Ontario Power Generation Inc. ("OPG") filed an application with the Ontario Energy Board (the "Board") on May 26, 2010. The application was filed under section 78.1 of the *Ontario Energy Board Act, 1998*, S.O 1998, c. 15 (Schedule B) (the "Act"), seeking

approval for payment amounts for OPG's prescribed generation facilities for the test period January 1, 2011 through December 31, 2012, to be effective March 1, 2011. The Board assigned the application file number EB-2010-0008. The Board issued its Decision with Reasons ("Decision") on March 10, 2011. On April 11, 2011, the Board issued the final Payment Amounts Order establishing the payment amounts effective March 1, 2011.

On March 30, 2011, OPG filed a Notice of Motion to review and vary the Decision in relation to certain findings with regard to the pension and other post employment benefits ("OPEB") costs, and in relation to OPG's request for a variance account for pension and OPEB costs. The Board assigned the motion file number EB-2011-0090.

The Board issued a Notice of Hearing and Procedural Order No. 1 on April 15, 2011. The procedural order provided for submissions on the threshold question and merits of the motion, and for an oral hearing. On April 18, 2011, OPG filed correspondence with the Board requesting the opportunity to file a full factum to support the motion, and the opportunity to file written reply on the submissions of Board staff and other responding parties. On April 21, 2011, the Board issued Procedural Order No. 2, which made provision for the filing of a factum, and amended the schedule for the filing of submissions.

In addition to the factum filed by OPG, the Board received written submissions from Board staff, the Power Workers' Union ("PWU"), the Vulnerable Energy Consumers Coalition ("VECC"), Canadian Manufacturers & Exporters ("CME"), and the School Energy Coalition ("SEC"). The oral hearing in this matter took place on June 2, 2011.

THE MOTION

In the EB-2010-0008 proceeding, OPG filed an Impact Statement (the "Update") on September 30, 2010, which updated, among other things, the forecast pension and OPEB expense for the 2011-2012 test period, which had originally been filed on May 26, 2010. The Update projected a \$264.2 million increase in expenses for the test period, and was supported by a report from an external actuary (the "Mercer report") which was filed on October 8, 2010. OPG did not propose to revise the proposed payment amounts, but requested a variance account to record the revenue requirement impact of differences between forecast and actual pension and OPEB costs.

The Decision denied the request for a variance account and found that the 2011-2012 payment amounts would be based on the pension and OPEB expenses forecast in the pre-filed evidence.

OPG submitted that the Board erred in fact in concluding that the Update was less rigorous and not internally consistent so that it was not the best evidence of the forecast pension and OPEB costs for the test period. OPG's Notice of Motion was supported by an affidavit from Mr. Nathan Reeve, OPG Vice President, Financial Services. That affidavit included a summary table¹ of seven key assumptions (e.g. discount rate, salary schedule) underpinning pension and OPEB forecasts. The summary table listed the references for the key assumptions for the pre-filed evidence and for the Update, for ease of comparison as the sources of the information are in several places. OPG asserted that the pre-filed evidence and the Update were both prepared on the same basis and used the same methodology. OPG asserted that the discount rate, and hence AA bond yields, was among the seven assumptions reviewed, but not the only assumption reviewed. OPG also noted that there was cross examination in the EB-2010-0008 proceeding on whether a variance account should be established but there was no cross examination or argument about whether the Update was less rigorous or about the methodology used to determine the Update expenses.

With respect to the best evidence, OPG submitted that the Update was prepared closer in time to the test period and is inherently more reliable.

OPG asserted that the Update was the product of a non-selective process. OPG canvassed the business units and corporate groups about material changes prior to the commencement of the oral hearing, and three changes were identified.

OPG submitted that the errors in fact in the Decision were material and that failing to permit OPG to recover the forecast costs in the Update would not result in just and reasonable rates.

Updates are not unprecedented. At the oral hearing, OPG cited a Union Gas case² in which an update based on Union's annual forecasting process was filed part way through that proceeding. OPG noted that the filing included an update to pension and OPEB, which the Board ultimately accepted.

¹ OPG Notice of Motion, March 30, 2011, Tab 2, Exh. B.

² OPG Supplementary Motion Materials, Tabs 2-4.

OPG seeks an order

- varying the finding that the pre-filed evidence was the best evidence of OPG's pension and OPEB costs for the test period on the record; and
- establishing a variance account to record the difference between (i) the pension and OPEB costs reflected in the Decision and the resulting payment amounts order, and (ii) OPG's actual pension and OPEB costs for the test period and associated tax impacts.

In the alternative, OPG seeks

- a finding that the Update was the best evidence of OPG's pension and OPEB costs for the test period and was therefore the appropriate amount to be used for purposes of determining the pension and OPEB costs in OPG's test period revenue requirement; and
- to give effect to the above, establishing a deferral account to record the difference between the pension and OPEB costs in the pre-filed evidence and the Update, including the associated tax impacts, with an opening balance for the deferral account of \$207.3 million.

THRESHOLD ISSUE

OPG stated in its Factum³ that the errors in findings of fact raise a material question as to the correctness of the Decision in respect of pension and OPEB expenses. In its view, the findings are contrary to the evidence that was before the original panel. Once corrected in accordance with the Update, the test period expenses will be materially different than those set out in the Decision. Accordingly, it is OPG's position that the motion satisfies the threshold test in Rule 45.01 of the Board's *Rules of Practice and Procedure*.

Both OPG and Board staff referred in their submissions to the Board's analysis of Rule 45.01 in the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision").⁴ Board staff submitted that the motion passes the threshold test as OPG alleges that the Decision findings improperly determined that the pre-filed evidence was better evidence than the Update – in other words that the panel misapprehended the

³ OPG Factum, May 6, 2011, para. 20-22.

⁴ Motions to Review the *Natural Gas Electricity Interface Review Decision*, EB-2006-0322/0338/0340, May 22, 2007, p. 18.

evidence - and there is a material impact. However, Board staff is ultimately of the view that the motion should be dismissed. The PWU also submitted that the motion passed the threshold test, stating that an identifiable error was made and characterized the review function of the Board as a “get it right” function.

SEC submitted that for a motion to review to proceed based on error of fact, the test should be whether the Board appears to have believed a fact to be true, that could not reasonably be true. In SEC’s view, the motion appears to be nothing more than OPG disagreeing with the original panel’s interpretation of conflicting evidence, and that the motion should fail the threshold test. In its oral submission, SEC differentiated between errors and the exercise of judgement. In SEC’s view, the original panel exercised its judgement and the decision on the facts was not demonstrably unreasonable. In such a case SEC argued, the reviewing panel should not overturn the findings.

CME submitted that there are two reasons supporting its position that the threshold test has not been met.

First, CME stated that there has been no *prima facie* demonstration that the Board made a factual error in preferring the pre-filed evidence to the Update. CME submitted that there must be an arguable case that there was no evidence to support the use of the pre-filed evidence. CME argued that OPG cannot possibly demonstrate that there was no evidence to support the pre-filed evidence and that therefore the threshold test has not been met.

Second, CME noted that OPG’s current appeal to Divisional Court relating to the Decision findings on forecast compensation expenses, is substantively the same issue OPG raises in the current motion. CME submitted that the Board should not consider the motion to review when OPG is appealing the same Decision on similar grounds before Divisional Court. CME’s position is supported by the Consumers Council of Canada. OPG replied that the motion is a matter for Rule 42 of the Board’s *Rules of Practice and Procedure*, while the appeal before Divisional Court is a matter under section 33 of the Act.

Board Findings

In the Board's view, a motion to review must meet the following tests, as set out in the NGEIR Review Decision:

- the grounds must raise a question as to the correctness of the order or decision;
- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision, as a review is not an opportunity for a party to merely reargue the position it took in the original case; and
- 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, or that the panel failed to address a material issue. The applicant must be able to show that the panel made findings that were inconsistent with the evidence, not merely that the Board interpreted evidence in a manner that was different than was urged upon it by the applicant in the original case.

In its argument CME asserted that mere allegations that the tribunal had made an error of fact, or a mere allegation that a finding was contrary to evidence does not justify the holding of a review. It must go further, in CME's submission, and show that there was no relevant evidence in the record capable of supporting such a finding.

The Board disagrees with this assertion and notes that it is inconsistent with the NGEIR Review Decision tests set out above. It is the Board's view that if it is reasonably arguable that the original panel erred, and that the error is of sufficient materiality to result in a reversal, variance or suspension of the original decision, the threshold is met.

As will be seen below, it is the Board's view that the evidence in this case is to the effect that the original panel misapprehended in a material way the evidence that was before it. Specifically, and this will be dealt with in greater detail in subsequent portions of this decision, that the original panel came to an erroneous conclusion respecting the best evidence in relation to the pension and OPEB forecast. The original panel concluded that the Update was prepared using a methodology that was different and less rigorous than that which produced the pre-filed evidence and that OPG had produced the Update by varying only one parameter of the original methodology. The original panel's characterization of the pre-filed evidence as the best evidence on the subject flowed directly and explicitly from this erroneous finding.

In the Board's view this is an identifiable and material error and as such, entitles the moving party to a consideration of its motion on the merits. The evidence in the case does not support the finding made by the original panel, and is in fact inconsistent with its finding.

As noted above, CME urged the Board to find that it was inappropriate and improper for OPG to bring this motion for review at the same time as it has commenced a proceeding in the Divisional Court respecting the same decision by way of judicial review.

In the Board's view, these are distinct remedies available to parties and the prosecution of one in most cases will not have any implications for the prosecution of the other. An exception could arise if the identical subject matter was made the centerpiece of both review processes. That is not the case here.

In this case, OPG asserts that the original panel made an error of fact respecting the methodology used to support the Update, and did not accept the Update explicitly on that basis. The appeal to the Divisional Court, to which the Board is a party, addresses an entirely different issue, which is concerned with the extent to which the Board has jurisdiction to make findings that are inconsistent with the labour relations arrangements in place between OPG and portions of its workforce. The Board finds that there is no incompatibility respecting these respective review proceedings.

MERITS OF THE MOTION

The Test on the Merits

The appropriate test on the merits of the motion, as proposed by OPG, is found in the Board's decision in proceeding EB-2009-0038⁵, which also refers to the NGEIR Review Decision. In OPG's submission, if the reviewing panel finds that the Decision is in error in a material way, then the appropriate remedy is to award a variance account or defer recovery.⁶

⁵ Motion Hearing, Exh. K1.2.

⁶ Tr. Motion Hearing, p. 22.

In oral submissions, Board staff stated that the original panel heard the entire case directly and was in a much better position to judge the quality of evidence overall.⁷ As stated in the Board staff submission, “Only if the review panel determines that the finding reached by the Decision panel was not within the range of reasonable alternatives should its decision be overturned.” In Board staff’s view, it is not the task of the reviewing panel to substitute its own judgement for that of the original panel unless it is convinced that the original panel made a clear and material error, and that the original panel clearly misapprehended the evidence. Similarly, SEC stated that “unless it’s obvious that the original panel made a mistake, you should defer to their broader view and their better ability to assess the facts, because they saw everything.”⁸

CME submitted that the phrase “best evidence” was the original panel’s expression of its preference for the pre-filed evidence instead of the Update. CME maintained that an expression of preference is not necessarily a finding of fact.

Pre-Filed Forecast and Update Forecast

The PWU stated that the Board misapprehended the nature of the Update on pensions and OPEB. While the biggest changes occurred with AA bond yields, there was a complete reassessment of seven factors used to forecast pension and OPEB expenses. The PWU noted that there was no finding that the updated AA bond yield was an inferior input.

SEC observed that of the seven factors, two were changed for the Update, but one of them had negligible effect. SEC argued that the original panel did not misdirect itself as the AA bond yields were the primary driver of the Update.

Board staff submitted that the Decision references to “rigorous”, “internally consistent” and “selective” update, were references by the original panel directed to the application overall and not merely the input assumptions respecting the pension and OPEB forecast.

The Business Plan underpinned the entire application and is referenced throughout the evidence. While OPG canvassed the business units for material changes prior to filing the Update, Board staff suggested that this is far from comparable to the integrated

⁷ Tr. Motion Hearing, p. 47.

⁸ Tr. Motion Hearing, p. 68.

business planning process that underpinned the application as a whole. Staff also noted that the Update was filed after the Minister's request to OPG that it review the application to find cost savings. It was also after OPG's review and response, which ultimately extended the recovery period for a large balance in a tax variance account. It is not known whether a similar review including the Update on pension and OPEB expenses might have impacted the application as a whole.

SEC also argued that the Update was selective in the context of the overall application. SEC also noted that OPG did not give consideration in the Update to discount rate changes and the effect on major cost items such as nuclear waste decommissioning costs and asset retirement obligations.

OPG responded that there is no reference to the business planning process in the Decision findings on pension and OPEB. OPG also argued that pension and OPEB expenses are inputs to the business planning process and are not outputs.

Board staff noted that the caveats and assumptions in the Mercer report are itemized over 3 pages, while those appearing in the pre-filed evidence are less prescriptive and considerably briefer. Notwithstanding OPG's assertion that both pre-filed and Update forecasts were subject to the same caveats, staff submitted that the original panel recognized that some of the assumptions were changing, as noted in the Decision reference to financial market conditions.

Board staff compared the actual 2010 registered pension plan performance⁹ with that forecast in the Mercer report, and found that the plan performed much better than Mercer had forecast, supporting the original panel's observation that market conditions had improved since the Update was filed. OPG replied that the Decision did not state that the caveats were the basis for rejecting the Update. In OPG's view, the caveats are more telling with respect to the pre-filed evidence because the information is older.

CME commented that the impression the original panel formed from the pre-filed evidence and the Update rests with OPG. The detailed affidavit of Mr. Reeve was not before the original Panel. OPG argued that there is nothing in paragraphs 1 to 17 of Mr. Reeve's affidavit that is not on the record of EB-2010-0008.

⁹ Motion Hearing, Exh. K1.3.

Variance Account Requested in Update

Board Staff, VECC, SEC and CME submitted that the original panel made no reviewable error in denying the variance account which OPG had requested in connection with the Update. Board staff submitted that OPG is making the same arguments it made in the original hearing in this motion and is merely hoping for a different outcome. SEC noted that the Board has consistently denied variance accounts for pension and OPEB expense, with only one narrow exception.

CME observed that OPG did not provide a revenue requirement impact related to the Update, and that the only relief OPG requested in connection with the Update was to seek permission to establish a variance account. CME also observed that the Board denied the same request in the previous payment amounts proceeding, EB-2007-0905. OPG did not appeal or seek a review of the previous decision, and in CME's submission, it is not open to OPG to seek a variance account without a convincing demonstration there has been a substantial change in circumstances since the prior decision – specifically demonstrating a substantial change in circumstances with respect to forecastability.

At the oral hearing on this motion, OPG referred to its reply argument in EB-2010-0008 in which it stated that if the Board were to reject the variance account request, that the revenue requirement should incorporate the Update forecast. The original panel denied the request for a variance account and preferred the pre-filed evidence. OPG clarified at the oral hearing that it is not seeking to reargue the establishment of the variance account. The motion concerns the Board's rejection of the Update, and seeks to simply remedy that error.

Options Before the Reviewing Panel

As noted in the Notice of Motion and Factum, if the Board is satisfied that a material error was made in the Decision, OPG seeks an order varying the finding that the pre-filed evidence was the best evidence with respect to the pension and OPEB costs, and an order establishing a variance account. In the alternative, OPG seeks an order that the Update is the best evidence and to give effect to that finding, an order establishing a

deferral account, with an opening balance of \$207.3 million, i.e. \$264.2 million and the associated tax impacts, for the 22 month period March 1, 2011 to December 31, 2012.¹⁰

In the event that the reviewing panel accepts the deferral account option, OPG submitted at the oral hearing that it would be more correct to use OPG's February 2011 projection of 2011 and 2012 pension and OPEB expenses of \$207.7 million as a starting point for the opening balance of the deferral account.¹¹ The starting point would be lower than \$207.7 million following adjustments for associated tax impacts.

Board staff and the responding parties, except the PWU, have submitted that the motion should be dismissed. In the event that the reviewing panel determines that there is an error of fact in the Decision, SEC submitted that the matter should be referred back to the original panel.

Board Findings

The Board agrees with the submissions made by the parties who argued that a reviewing panel should only interfere with an original finding of fact in the clearest of cases. The law has generally afforded original findings of fact considerable deference.

The Board's consideration of this motion to review rests almost exclusively on its interpretation of the following portions of the original Decision where the original panel made its findings with respect to the Update.

The Decision stated¹²:

The request for a variance account is denied. Pension and OPEB costs should be included in the forecast of expenses in the same way as other OM&A expenses, and then managed by the company within its overall operations. The Board finds that the forecast included in the pre-filed evidence was more rigorous because it was based on a set of internally consistent assumptions, while the update is based on the AA bond yields which will change. Accordingly, the Board finds that the allowance for

¹⁰ OPG Notice of Motion, March 30, 2011, Tab 2, Exh. C.

¹¹ Tr. Motion Hearing, p. 33.

¹² Decision with Reasons, EB-2010-0008, p. 91.

pension and OPEB expenses in the pre-filed evidence is appropriate, as it is the best evidence on this matter.

The Board is reluctant to make selective updates to the evidence. The bond yields have changed, and will continue to change, as noted by the actuary in the updated statement. Further, the Board notes that the financial market conditions are variable and have indeed improved since the impact statement was filed. The Board concludes that an adjustment to the allowance is not warranted.

In making this assessment, the Board is guided by the modern rules of interpretation, which essentially consist of giving the passage a plain and purposive reading.

It is clear to the reviewing panel that the original panel made several findings which led, by necessary implication, to its decision to reject the Update and to base its decision on the pre-filed evidence.

Those findings were:

First, that the Update had been performed according to a methodology which was different than that which produced the pre-filed evidence.

Second, that OPG had produced the Update by varying only one parameter of the original methodology, namely the AA bond yield.

Third, that as only one parameter had been updated, this methodology was less rigorous than that used to produce the pre-filed evidence.

Fourth, that because the Update was the product of a less rigorous methodology, the pre-filed evidence was the best evidence respecting the pension and OPEB forecast.

However, none of these findings is supported by the evidence. The evidence supports OPG's position that the Update was conducted using the same methodology as was used to prepare the pre-filed evidence, that more than the AA bond yield was reviewed to arrive at the Update, and that the Update does represent the best evidence respecting the forecast, given that it is based on data that is more recent.

Having found that there is an identifiable and material error, and based on the Board's NGEIR Review Decision, the appropriate test to apply in this case was expressed in the Board's decision in EB-2009-0038, a previous OPG motion for review, which was filed as Exhibit K1.2.

In that case, the Board said the following at page 15:

If the reviewing panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend, or cancel the order or decision, or if they find it appropriate, remit the matter back to the original panel.

Accordingly the Board will grant the motion for review.

In order to assess the key foundational finding, which concerns the extent to which the Update was subject to the same methodology as the originally filed evidence, the original panel had to look at the details of the pre-filed evidence and the Update. While the Mercer report which supported the Update is an important source of information for this analysis, it was also necessary for the original panel to look at various other portions of the evidence to confirm that the Update was conducted using the same methodology and was no less rigorous than the pre-filed evidence. Unfortunately, no detailed mapping of the pre-filed evidence and the Update was provided by OPG or any other party in their submissions to the original panel.

OPG did provide such a detailed mapping of the pre-filed evidence and the Update in support of this motion. This mapping is attached as Exhibit B to the Affidavit of Mr. Reeve.

As can be seen from that Exhibit, the Mercer report provides a good deal of information with respect to the methodology used to prepare the Update. The results of the Mercer report, adjusted for the prescribed generation facilities, and other exhibits and references establish that the record in the original proceeding contains sufficient evidence to support OPG's position.

The Board hereby varies the Decision finding that the pre-filed evidence on OPG's pension and OPEB costs for the test period was the best evidence on the record. The

Board accepts the Update as evidence of OPG's pension and OPEB costs for the test period.

The Board also orders the establishment of a variance account called the Pension and OPEB Cost Variance Account the sole purpose of which is to remedy the error in the Decision. In this account, OPG shall record the difference between (i) the pension and OPEB costs, plus related income tax PILs, reflected in the Decision and the resulting payment amounts order, and (ii) OPG's actual pension and OPEB costs, and associated tax impacts, for the test period for the prescribed generation facilities. The entries in the variance account for 2011 and 2012 will be determined on the same basis and under the same circumstances as the pre-filed evidence. There will be no entries in the variance account related to changes in accounting standards, such as IFRS or US GAAP. There will be no principal entries posted to the variance account after December 31, 2012. However, the entries for the year 2012 may be adjusted when the year end accounting and contribution levels are finalized in early 2013.

In making this provision for a variance account, the Board is not reversing or commenting upon the finding of the original panel on this point, nor is the Board's consideration of a variance account intended to be a general remedy for the forecasting of pension and OPEB expenses. The variance account is being provided for at this time because it offers the most expeditious and simple method of correcting the error we have found was made in the original Decision with respect to the Update.

The Board notes that the establishment of a variance account to remedy the error in the Decision has two advantages versus the use of a deferral account. First, the variance account ensures rate payer symmetry, as both higher and lower pension and OPEB costs are captured over the period the account will be in effect, and second, a further update of forecast pension and OPEB costs is not required.

The clearance of this account will be reviewed in OPG's next payment amounts application hearing. The Board expects OPG to provide an independent actuary's report and an audit opinion which will describe the methodology followed, the assumptions made by management, and the amounts recorded in the account, and which will confirm that the evidence is consistent with the CGAAP standards and actuarial methods that were contained or reflected in the evidence for the 2011-2012 payment amounts application.

COST AWARDS

A decision regarding cost awards will be issued at a later date. Parties eligible for cost awards in the EB-2010-0008 proceeding are eligible for costs in the current proceeding. Eligible intervenors claiming costs should do so as ordered below. OPG shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

THE BOARD THEREFORE ORDERS THAT:

1. The Decision finding that the pre-filed evidence on OPG's pension and OPEB costs for the test period was the best evidence on the record shall be varied;
2. OPG shall establish a variance account called the Pension and OPEB Cost Variance Account to be effective as of March 1, 2011;
3. Intervenors eligible for cost awards shall file with the Board and forward to OPG their respective cost claims within 14 days from the date of this decision;
4. OPG shall file with the Board and forward to intervenors any objections to the claimed costs within 28 days from the date of this decision; and
5. Intervenors, whose cost claims have been objected to, may file with the Board and forward to OPG any responses to any objections for cost claims within 35 days of the date of this decision.

All filings to the Board must quote file number EB-2011-0090, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall 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 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, and be received no later than 4:45 p.m. on the required date.

ISSUED at Toronto, June 23, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TAB 5

Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2012-0337

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

AND IN THE MATTER OF a Motion to Review and Vary by
the Association of Power Producers of Ontario pursuant to
the Ontario Energy Board's *Rules of Practice and Procedure*
for a review of the Board's Decision and Order on Cost
Awards in proceeding EB-2012-0337.

BEFORE: Ken Quesnelle
Presiding Member

Jerry Farrell
Member

Marika Hare
Member

**DECISION AND ORDER ON MOTION TO REVIEW AND VARY
COST AWARD DECISION**

October 29, 2013

Union Gas Limited ("Union Gas") filed an application with the Ontario Energy Board (the "Board") dated August 31, 2012, seeking approval for its 2013-2014 Large Volume Demand Side Management ("DSM") Plan.

On September 27, 2012 the Board issued a Notice of Application and Procedural Order No. 1 and granted intervenor and cost award eligibility status to those parties who were approved as intervenors in the EB-2011-0327 proceeding. The Association of Power Producers of Ontario ("APPo") was one of the parties approved for cost award eligibility.

On March 19, 2013 the Board issued its Decision and Order approving Union Gas' Large Volume DSM Program budget of \$4.664M plus inflation for both 2013 and 2014. Within the Board's Decision and Order it outlined the process and timelines for eligible parties to file their cost claims with the Board.

On May 1, 2013 the Board issued its Decision and Order on Cost Awards (the "Cost Decision"). Within the Board's Cost Decision it denied a portion of APPrO's full cost claim of \$189,546.20. The Board provided APPrO with a cost award of \$117,186.55 (inclusive of HST and disbursements), an amount \$72,359.65 less than that claimed.

On May 21, 2013 APPrO filed a Notice of Motion to Review and Vary the Board's Cost Decision (the "Motion"). The Motion seeks to vary the Board's Cost Decision to permit APPrO to recover its full cost claim amount of \$189,546.20 for its participation in the proceeding. The grounds for the Motion are that the Board made two errors of fact in its Cost Decision that call into question the correctness of the Board's Cost Decision. The Motion alleges that the Board made factual errors when interpreting two elements of APPrO's participation, namely: with respect to the survey that was conducted of APPrO members; and, with respect to the consultant and legal costs APPrO incurred in preparation for the oral hearing.

On June 27, 2013 the Board issued a Procedural Order which set out the dates for parties to file submissions on the Motion.

Navigant Survey

On July 24, 2013 Board staff filed a written submission. Board staff submitted that, as per section 30 of the *Ontario Energy Board Act* and the *Practice Direction on Cost Awards*, cost awards are entirely discretionary and that irrespective of a long standing practice of the Board awarding intervenors their reasonably incurred costs, cost awards are entirely discretionary.

Board staff further submitted that in exercising its discretion to make cost awards, the Board should ensure that the party requesting costs acted appropriately and provided value to the process. Board staff also submitted that even if the original decision was based in part on erroneous facts, this does not automatically mean that the Board should reverse its decision. To the extent that the Board determines it did make errors of fact in the original decision, it should consider APPrO's cost claim in light of the "corrected" facts which may or may not result in a different decision.

Board staff submitted that even if the survey APPrO conducted and presented as evidence may not have been intended to establish its position in the proceeding that appeared to be its actual effect.

On August 9, 2013 APPrO filed its reply submission. APPrO argued that alleged errors of fact were critical factors in the Board's decision on cost awards. APPrO submitted that in this particular case, the Board placed significant emphasis on the purpose of the Navigant survey as a reason for reducing APPrO's cost claim. APPrO submitted that the Board cannot get the facts underpinning the Navigant survey incorrect, without necessitating some change to the cost award as the facts surrounding the purpose of the Navigant survey were material to the Board's decision to reduce APPrO's claimed costs.

APPrO submitted that the Navigant survey was not used to determine, establish or confirm its position and played absolutely no role in its decision to participate in the proceeding or the position it took in the proceeding. APPrO noted that it was going to participate in the proceeding and argue for an opt-out regardless of: (a) whether or not a survey was done; and (b) if a survey was done, the results of that survey.

APPrO further stated that in order to bring a credible opt-out proposal forward, it decided to carry out a broader, empirical survey to determine how many large volume customers would opt-out. APPrO argued that the survey was critical to the evidentiary basis of its case and not done to help APPrO figure out the position it was going to take in the proceeding, as highlighted in Union's pre-filed evidence which states that "some customers, such as power producers, have indicated that they would like to opt-out of the Plan."¹

APPrO further submitted that the fact that the Board erred in understanding the purpose of the survey impacts the outcome of the Cost Award Decision, because the Board asserted that the survey "is not something that should be included in a cost claim but funded by APPrO itself", and that the Board's final cost award reflects adjustments to remove costs claimed for "the survey of APPrO members".

¹ EB-2012-0337, Exhibit A, Tab 1, Page 36, Lines 23-24.

Additional Witness Preparation Costs

With respect to the costs of the substitute Navigant witness, Board staff submitted that APPrO was aware of the potential scheduling conflict in advance of the Board's Procedural Order No. 4 being issued. Board staff submitted that APPrO may have been able to avoid some of the costs associated with preparing a new witness.

APPrO submitted that the costs incurred to prepare its additional Navigant witness were unavoidable due to the schedule of the oral hearing. APPrO noted that it had informed Board staff of its conflict well in advance of Procedural Order No. 4 being issued which set out the hearing dates and times. APPrO submitted it has no incentive to spend money preparing extra witnesses and that in this case, it was unavoidable. It was necessary to have an expert witness present at the oral hearing in order to testify to the Navigant survey and an additional witness needed to be prepared late in the proceeding due to the hearing schedule set by the Board.

In summary, APPrO submitted that the Board should vary its cost award decision and grant APPrO 100% of its claimed legal and consultant costs which total \$189,546.20.

Board Findings

Characterization of APPrO's Survey

The Board finds that it erred in its characterization of APPrO's survey of its members in its Decision on Cost Awards issued May 1, 2013. The Board was incorrect in characterizing the survey as "something that APPrO needed to do in order to determine what position it would take in this proceeding." The Board now recognizes APPrO's intent to put forth a credible and convincing argument, based on empirical and impartial evidence for the ability to achieve an opt-out option for DSM programs.

With this error corrected, the Board has considered APPrO's survey-related costs in the context of the principles enumerated in section 5.01 of the *Practice Direction on Cost Awards*, and, in particular, clause (f): "contributed to a better understanding by the Board of one or more of the issues in the process". The Board has previously referred to this principle in other decisions as the "contribution" or the "value" provided by a cost-eligible intervenor to a proceeding. The Board's hearing panel in this case found that APPrO's opt-out proposal was "contrary to the fundamental class rate-making

methodology that all customers in the class pay the same rates". Class rate-making (i.e. customers with similar service characteristics are grouped together) and postage-stamp rates (i.e. uniform rates within individual customer classes) are the accepted norm in Ontario. APPrO was presumably aware, or at least ought to have been aware, of these rate-making principles.

The Board therefore concurs with the hearing panel that APPrO's survey was of "little value" in reaching its decision on the opt-out issue. The Board nevertheless finds that APPrO did provide some contribution, by means of the survey, to the proceeding by presenting empirical evidence in support of its position on the opt-out issue. However, the Board finds that the value of this contribution was not commensurate with the costs that APPrO incurred to obtain the survey and to present it during the oral hearing, and so those costs in total were excessive and, as such, they were not reasonably incurred.

Additional Witness Preparation Costs

The Board finds that no error was made in its original Decision on Cost Awards with respect to the costs associated with preparing an additional expert to appear at the oral hearing. The Board does not accept APPrO's argument that it did not know until Procedural Order No. 4 was issued on January 25, 2013 that there could be a potential scheduling issue with its expert witness. APPrO should have been prepared for the hearing, with its principal expert witness available, because the start date was known as it was communicated to all parties through Procedural Order No. 2 on November 2, 2012.

Varied Cost Award

In accordance with these findings the Board varies the cost award decision by increasing the award by one third of the amount originally disallowed.

THE BOARD THEREFORE ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Union Gas Limited shall immediately pay the Association of Power Producers of Ontario an additional **\$24,119.88**. This amount is in addition to the cost award amount of \$117,186.55 that was granted by the Board through its Decision on Cost Awards, May 1, 2013.

DATED at Toronto, October 29, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

TAB 6

Minister of Labour for Ontario *Appellant*

v.

**Canadian Union of Public Employees
and Service Employees International
Union** *Respondents*

and

**Canadian Bar Association and National
Academy of Arbitrators (Canadian
Region)** *Interveners*

**INDEXED AS: C.U.P.E. v. ONTARIO (MINISTER OF
LABOUR)**

Neutral citation: 2003 SCC 29.

File No.: 28396.

2002: October 8; 2003: May 16.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major,
Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Labour relations — Hospital labour disputes — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether Minister required to select arbitrators qualified by expertise and acceptance in labour relations community — Whether retired judges, as a class, biased against labour — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Administrative law — Judicial review — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether appointment process for selecting chairs of arbitration boards violates natural justice or infringes institutional independence

Ministre du Travail de l'Ontario *Appelant*

c.

**Syndicat canadien de la fonction publique
et Union internationale des employés des
services** *Intimés*

et

**Association du Barreau canadien et
National Academy of Arbitrators (Canadian
Region)** *Intervenantes*

**RÉPERTORIÉ : S.C.F.P. c. ONTARIO (MINISTRE DU
TRAVAIL)**

Référence neutre : 2003 CSC 29.

N° du greffe : 28396.

2002 : 8 octobre; 2003 : 16 mai.

Présents : La juge en chef McLachlin et les juges
Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour,
LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Relations de travail — Conflits de travail dans des hôpitaux — Constitution d'un conseil d'arbitrage — Loi exigeant que le règlement des différends en matière de convention collective qui surviennent dans les hôpitaux et les maisons de soins infirmiers soit assujéti à l'arbitrage obligatoire — Désignation par le ministre du Travail de juges retraités à la présidence des conseils d'arbitrage — Le ministre était-il tenu de choisir des arbitres ayant une expertise et étant acceptés dans le milieu des relations du travail? — En tant que catégorie, les juges retraités ont-ils un parti pris contre les travailleurs et les travailleuses? — Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14, art. 6(5).

Droit administratif — Contrôle judiciaire — Constitution d'un conseil d'arbitrage — Loi exigeant que le règlement des différends en matière de convention collective qui surviennent dans les hôpitaux et les maisons de soins infirmiers soit assujéti à l'arbitrage obligatoire — Désignation par le ministre du Travail de juges retraités à la présidence des conseils d'arbitrage — Le processus de désignation des présidents des conseils d'arbitrage

and impartiality of arbitration boards — Whether appointment process breached legitimate expectations of unions — Whether appointments caused reasonable apprehension of bias — Whether Minister disqualified or required to delegate task of making appointments because of interest in arbitrations — Whether Minister's appointments patently unreasonable — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Since 1965, Ontario's hospitals, nursing homes and their employees have been required to resolve disputes over collective agreements by compulsory arbitration under the *Hospital Labour Disputes Arbitration Act* ("HLDAA"). If the parties cannot agree on a mutually acceptable arbitrator, a panel of three members is struck, two designated by the parties and the third chosen by the two designates or, if they fail to agree, appointed by the Minister of Labour. Amendments to the *Labour Relations Act* in 1979 facilitated the formation and use of a list of arbitrators with expertise acceptable to both management and the unions. A similar register of arbitrators was dropped from the HLDAA in 1980 but a normal practice was for senior officials of the Ministry of Labour, under delegated authority, to identify appropriate arbitrators. Following the 1995 provincial election, a reorganization of public sector institutions, including schools and hospitals, led to Bill 136. The Bill contained the proposed *Public Sector Dispute Resolution Act, 1997* which included a Dispute Resolution Commission. Organized labour opposed many aspects of the Bill, including the proposed commission. When the Minister announced a return to the sector-based system of appointing arbitrators, the unions believed the selection of HLDAA chairpersons would thereafter be limited to mutually agreed candidates.

In early 1998, the Minister appointed four retired judges to chair several arbitration boards. They were not appointed by mutual agreement nor were they on the "agreed" list compiled under s. 49(10) of the *Labour Relations Act, 1995*. The unions were not consulted. The President of the Ontario Federation of Labour complained to the Minister that the understanding about a return to the *status quo* had been breached without consultation. The unions objected that retired judges lack expertise,

contrevient-il à la justice naturelle ou compromet-il l'indépendance et l'impartialité institutionnelles des conseils d'arbitrage? — Le processus de désignation a-t-il frustré les attentes légitimes des syndicats? — Les désignations ont-elles suscité une crainte raisonnable de partialité? — Le ministre était-il inhabile à faire les désignations et était-il tenu de déléguer la tâche de les faire en raison de l'intérêt qu'il aurait dans les arbitrages? — Les désignations ministérielles étaient-elles manifestement déraisonnables? — Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14, art. 6(5).

Depuis 1965, en Ontario, la *Loi sur l'arbitrage des conflits de travail dans les hôpitaux* (« LACTH ») oblige les hôpitaux, les maisons de soins infirmiers et leurs employés à soumettre à l'arbitrage leurs différends en matière de convention collective. Dans le cas où les parties ne s'entendent pas sur le choix d'un arbitre qui leur est acceptable, il y a alors formation d'un conseil d'arbitrage composé de trois membres, dont deux sont désignés par les parties alors que le troisième est choisi par les deux membres désignés par les parties, ou encore par le ministre du Travail si les parties n'arrivent pas à s'entendre. Les modifications apportées à la *Labour Relations Act* en 1979 facilitaient l'établissement et l'utilisation d'une liste d'arbitres ayant une expertise et acceptables à la fois par le patronat et les syndicats. Un registre d'arbitres similaire a été retiré de la LACTH en 1980, mais les hauts fonctionnaires du ministère du Travail, qui exercent les pouvoirs qui leur sont délégués, avaient coutume de désigner des arbitres compétents. À la suite de l'élection de 1995, une réorganisation des institutions du secteur public, y compris les écoles et les hôpitaux, a abouti au projet de loi 136. Ce projet de loi renfermait le projet de *Loi de 1997 sur le règlement des différends dans le secteur public* qui prévoyait notamment la création d'une commission de règlement des différends. Le mouvement syndical s'est opposé à maints éléments du projet de loi, dont le projet de création de cette commission. Lorsque le ministre a annoncé un retour au système sectoriel de désignation des arbitres, les syndicats ont cru que le choix des présidents visés par la LACTH serait désormais limité aux candidats sur lesquels les parties se seraient entendues.

Au début de 1998, le ministre a désigné quatre juges retraités à la présidence de plusieurs conseils d'arbitrage. Leur désignation ne résultait pas d'un commun accord et leur nom ne figurait pas non plus sur une liste « convenue » dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*. Les syndicats n'ont pas été consultés. Le président de la Fédération du travail de l'Ontario s'est plaint auprès du ministre que l'entente concernant un retour au statu quo avait été violée sans

experience, tenure and independence from government. They also complained the Minister had breached procedural fairness by not delegating the task of making appointments to senior officials. The four judges initially appointed declined to act but other retired judges accepted the appointments. The unions sought declarations that the Minister's actions denied natural justice and lacked institutional independence and impartiality. The Divisional Court dismissed the application for judicial review. The Court of Appeal allowed the unions' appeal, concluding that the Minister had created a reasonable apprehension of bias and interfered with the independence and impartiality of the arbitrators, as well as defeating the legitimate expectation of the unions contrary to the requirements of natural justice. The Minister was ordered not to make any further appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" compiled under s. 49(10) of the *Labour Relations Act, 1995*.

Held (McLachlin C.J. and Major and Bastarache JJ. dissenting): The appeal should be dismissed for reasons that differ somewhat from those of the Court of Appeal. The Minister is required, in the exercise of his power of appointment under s. 6(5) of the *HLDA*, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour relations community as generally acceptable to both management and labour.

Per Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ.: The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *HLDA* was to provide an adequate substitute for strikes and lock-outs. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, "the parties must perceive the system as neutral and credible". This view was fully supported by the *HLDA*'s legislative history.

The Minister was not required to proceed with the selection of chairpersons by way of "mutual agreement" or from the s. 49(10) roster. Nor were retired judges as a "class" reasonably seen as biased against labour. Nevertheless, the Minister was required by the *HLDA*, properly interpreted, to select arbitrators from candidates

qu'il y ait eu des consultations. Les syndicats ont fait valoir que les juges retraités sont dénués d'expertise et d'expérience et qu'ils ne sont ni inamovibles ni indépendants du gouvernement. Ils se sont en outre plaints du fait que le ministre avait manqué à l'équité procédurale en ne déléguant pas à des hauts fonctionnaires la tâche de faire des désignations. Les quatre juges désignés initialement ont refusé d'agir en qualité d'arbitres, mais d'autres juges retraités ont accepté les désignations. Les syndicats ont sollicité un jugement déclarant que les actes du ministre constituaient un déni de justice naturelle et étaient caractérisés par l'absence d'indépendance et d'impartialité institutionnelles. La Cour divisionnaire a rejeté la demande de contrôle judiciaire. La Cour d'appel a accueilli l'appel des syndicats, concluant que le ministre avait suscité une crainte raisonnable de partialité et porté atteinte à l'indépendance et à l'impartialité des arbitres, ainsi qu'à l'expectative légitime des syndicats, contrairement aux exigences de la justice naturelle. Le ministre s'est vu interdire de faire d'autres désignations « à moins que ces désignations ne soient faites à partir de la liste traditionnelle d'arbitres expérimentés en relations du travail », dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*.

Arrêt (la juge en chef McLachlin et les juges Major et Bastarache sont dissidents) : Le pourvoi est rejeté pour des raisons qui diffèrent quelque peu de celles de la Cour d'appel. Dans l'exercice de son pouvoir de désignation conféré par le par. 6(5) *LACTH*, le ministre doit être convaincu que les candidats à la présidence sont non seulement indépendants et impartiaux, mais également qu'ils ont une expertise appropriée en matière de relations du travail et sont reconnus, dans le milieu des relations du travail, comme étant généralement acceptables à la fois par le patronat et par les syndicats.

Les juges Gonthier, Iacobucci, Binnie, Arbour, LeBel et Deschamps : Le ministre était tenu, en droit, d'exercer son pouvoir de désignation d'une manière conforme aux fins et aux objets de la loi qui lui conférait ce pouvoir. L'un des objets fondamentaux de la *LACTH* était de prévoir un moyen adéquat de remplacer la grève et le lock-out. Pour que cet objet de la Loi puisse être réalisé, « les parties doivent percevoir le système comme étant neutre et crédible », comme l'écrivait le ministre lui-même le 2 février 1998. Ce point de vue était entièrement étayé par l'historique législatif de la *LACTH*.

Le ministre n'était pas tenu de choisir les présidents des conseils d'arbitrage d'un « commun accord » ou à partir de la liste dressée en vertu du par. 49(10). En tant que « catégorie », les juges retraités ne pouvaient pas non plus être raisonnablement perçus comme ayant un parti pris contre les travailleurs et les travailleuses. Néanmoins,

who were qualified not only by their impartiality, but by their expertise and general acceptance in the labour relations community.

Section 6(5) of the *HLDA* contemplates the appointment of “a person who is, in the opinion of the Minister, qualified to act”. The Minister’s discretion is constrained by the scheme and object of the Act as a whole, which is to create a “neutral and credible” substitute for the right to strike and lock-out. Labour arbitration has traditionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. Although the s. 6(5) power is expressed in broad terms, the Minister is nevertheless required, in the exercise of that power, to have regard to relevant labour relations expertise, independence, impartiality and general acceptability within the labour relations community. These criteria are neither vague nor uncertain. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill them. The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDA*’s object and purposes. The Minister, under the *HLDA*, is not given a broad policy function. His narrow role is simply to substitute for the parties in naming a third arbitrator in case of their disagreement and, given the context, background and purpose of the Act, his rejection of labour relations expertise and general acceptability as relevant factors was patently unreasonable.

Although, as a member of Cabinet, the Minister was committed to public sector rationalization and had a perceived interest in the appointment process and the outcome of the arbitrations, the legislature specifically conferred the power of appointment on the Minister and, absent a constitutional challenge, clear and unequivocal statutory language conferring that authority prevailed over the common law rule against bias. The Minister’s power to delegate the appointment process under s. 9.2(1) of the *HLDA* was permissive only and to take away his authority to make his own choice would amount to a judicial amendment of the legislation.

The Minister satisfied any duty to consult with the unions about the change in the appointments process.

la *LACTH*, correctement interprétée, exigeait que le ministre désigne comme arbitres des personnes compétentes en raison non seulement de leur impartialité, mais aussi de leur expertise et de leur acceptabilité générale dans le milieu des relations du travail.

Le paragraphe 6(5) *LACTH* prévoit la désignation d’une « personne qui, [de l’avis du ministre], est compétente pour agir en cette qualité [d’arbitre] ». Le pouvoir discrétionnaire du ministre est limité par l’économie et l’objet de la *LACTH* dans son ensemble, laquelle loi établit un système qui, d’après l’intention du législateur, doit servir de moyen « neutre et crédible » de remplacer le droit de grève et de lock-out. L’arbitrage en matière de relations du travail repose traditionnellement sur le consentement, l’arbitre étant choisi par les parties ou étant acceptable par chacune d’elles. Bien que le pouvoir conféré au par. 6(5) soit énoncé en termes généraux, le ministre est néanmoins tenu, en exerçant ce pouvoir, de prendre en considération l’expertise pertinente en matière de relations du travail ainsi que l’indépendance, l’impartialité et l’acceptabilité générale dans le milieu des relations du travail. Ces critères ne sont ni vagues ni incertains. Un grand nombre d’arbitres professionnels en droit du travail dépendent, pour leur subsistance, de leur capacité reconnue de satisfaire à ceux-ci. Il en résulte un cadre tout à fait acceptable à l’intérieur duquel le législateur a voulu accorder au ministre une liberté d’action considérable, mais non illimitée, pour faire des désignations conformes aux fins et aux objets de la *LACTH*. La *LACTH* n’attribue pas au ministre une fonction d’orientation générale. Son rôle limité consiste simplement à remplacer les parties pour désigner un troisième arbitre en cas de désaccord de leur part, et compte tenu du cadre, du contexte et de l’objet de la Loi, son rejet de l’expertise en matière de relations du travail et de l’acceptabilité générale comme facteurs pertinents était manifestement déraisonnable.

Même si, en sa qualité de membre du Cabinet, le ministre était un défenseur de la rationalisation du secteur public et était perçu comme ayant un intérêt dans le processus de désignation et dans l’issue des arbitrages, le législateur lui a expressément conféré le pouvoir de désignation, et en l’absence de contestation constitutionnelle, le texte clair et non équivoque qui confère ce pouvoir primait sur la règle de common law interdisant la partialité. Le pouvoir de déléguer la tâche de faire des désignations, que le par. 9.2(1) *LACTH* confère au ministre, est seulement facultatif, et il y aurait modification judiciaire de la Loi si on lui retirait son pouvoir de faire ses propres choix.

Le ministre s’est acquitté de toute obligation qui pouvait lui incomber de consulter les syndicats au sujet de

There were extensive meetings during which the Minister signalled that the process was subject to reform and that retired judges were potential candidates for appointments. The unions made clear their opposition. Section 6(5) of the *HLDA* did not impose on the Minister a procedural requirement to consult with the parties to each arbitration nor does the evidence establish a firm practice of appointing from a list or by mutual agreement. A general, ambiguous promise to continue an existing system subject to reform does not suffice under the doctrine of legitimate expectation to bind the Minister's exercise of his or her discretion.

The Court of Appeal had concluded that the Minister's approach tainted both the independence and impartiality of the *HLDA* arbitration boards to which the retired judges had been appointed. This conclusion was not justified. The *HLDA* commands the use of *ad hoc* arbitration boards. Such boards are not characterized by financial security or security of tenure beyond the life of the arbitration itself. The independence of arbitrators is guaranteed by training, experience and mutual acceptability. Since s. 6(5) requires the appointment of individuals qualified by training, experience and mutual acceptability, the proper exercise of the appointment power would lead to a tribunal which would satisfy reasonable concerns about institutional independence.

Impartiality raises different considerations. The Court of Appeal did not suggest that the retired judges were in fact biased or partial but concluded that they might reasonably be seen to be "inimical to the interests of labour, at least in the eyes of the appellants". The test, however, is not directed to the subjective perspective of one of the parties but to the reasonable, detached and informed observer. Retired judges as a class have no greater interest than other citizens in the outcome of the arbitrations and there are no substantial grounds to think they would do the bidding of the Minister or favour employers so as to improve the prospect of future appointments. A fully informed, reasonable person would not stigmatize retired judges, as a class, with an anti-labour bias. Allegations of individual bias must be dealt with on a case-by-case basis.

la modification du processus de désignation. Il y a eu de nombreuses rencontres au cours desquelles le ministre a indiqué que le processus faisait l'objet d'une réforme et que les juges retraités étaient des candidats potentiels pour les désignations. Les syndicats ont exprimé clairement leur opposition. Le paragraphe 6(5) *LACTH* n'impose pas au ministre l'obligation procédurale de consulter les parties à chaque arbitrage, et la preuve n'établit pas non plus l'existence d'une pratique bien établie consistant à faire les désignations à partir d'une liste ou à les faire d'un commun accord. Selon la règle de l'expectative légitime, une promesse générale et équivoque de maintenir le système existant, sous réserve d'une réforme, n'est pas suffisante pour obliger le ministre à exercer son pouvoir discrétionnaire.

La Cour d'appel a conclu que l'approche du ministre compromettrait à la fois l'indépendance et l'impartialité des conseils d'arbitrage constitués en vertu de la *LACTH*, pour lesquels des juges retraités avaient été désignés. Cette conclusion n'était pas justifiée. La *LACTH* commande le recours à des conseils d'arbitrage *ad hoc*. Ces conseils ne sont pas caractérisés par une sécurité financière ou une inamovibilité continuant d'exister après la fin de l'arbitrage même. L'indépendance des arbitres est garantie par leur formation, leur expérience et leur acceptabilité par les parties. Vu que le par. 6(5) exige la désignation de personnes compétentes en raison de leur formation, de leur expérience et de leur acceptabilité par les parties, l'exercice approprié du pouvoir de désignation permettra de constituer un tribunal administratif qui répondra aux préoccupations raisonnables concernant l'indépendance institutionnelle.

L'impartialité fait intervenir des considérations différentes. La Cour d'appel n'a pas indiqué que les juges retraités avaient, en fait, des préjugés ou un parti pris, mais elle a conclu qu'ils pourraient raisonnablement être perçus comme étant « hostiles aux intérêts des travailleurs et des travailleuses, du moins aux yeux des appelants ». Toutefois, ce critère est axé non pas sur le point de vue subjectif de l'une des parties, mais sur celui de l'observateur raisonnable, neutre et renseigné. En tant que catégorie, les juges retraités n'ont pas plus d'intérêt que les autres citoyens dans l'issue des arbitrages, et il n'y a aucun motif sérieux de penser qu'ils se plieraient à la volonté du ministre ou favoriseraient les employeurs afin d'améliorer leurs chances de désignation future. Une personne raisonnable et bien renseignée ne reprocherait pas aux juges retraités, en tant que catégorie, d'avoir un parti pris contre les travailleurs et les travailleuses. Les allégations de partialité de la part d'une personne doivent être examinées cas par cas.

The appropriate standard of review is patent unreasonableness. The pragmatic and functional approach applies to the judicial review of the exercise of a ministerial discretion and factors such as the existence of a privative clause, the Minister's expertise in labour relations, the nature of the question before the Minister and the wording of s. 6(5) all call for considerable deference. A patently unreasonable appointment is one whose defect is immediate, obvious and so flawed in terms of implementing the legislative intent that no amount of curial deference can justify letting it stand.

The appointments were not patently unreasonable simply because the Minister did not restrict himself to the s. 49(10) list of arbitrators. Some arbitrators on the list were unacceptable to the unions and some acceptable arbitrators were not on the list, confirming the reasonableness of the Minister's view that candidates could qualify without being on the list. However, in assessing whether the appointments were patently unreasonable, the courts are entitled to have regard to the importance of the factors the Minister altogether excluded from his consideration. In this case, the Minister expressly excluded relevant factors that went to the heart of the legislative scheme. The matters before the boards required the familiarity and expertise of a labour arbitrator. Expertise and neutrality foster general acceptability. Appointment of an inexperienced and inexperienced chairperson who is not seen as generally acceptable in the labour relations community is a defect in approach that is both immediate and obvious. Having regard to the legislative intent manifested in the *HLDAA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable. The qualifications of specific appointees will have to be assessed on a case-by-case basis if challenged.

The appeal is thus dismissed on the limited ground that appointments that excluded from consideration labour relations expertise and general acceptability in the labour relations community were patently unreasonable.

Per McLachlin C.J. and Major and Bastarache JJ. (dissenting): The appropriate standard of review for the exercise of the Minister's appointment power under s. 6(5) of the *HLDAA* is patent unreasonableness. The pragmatic and functional approach focusses on the particular provision being invoked. The Minister exercised power under

La norme de contrôle applicable est celle du caractère manifestement déraisonnable. L'approche pragmatique et fonctionnelle s'applique au contrôle judiciaire de l'exercice d'un pouvoir ministériel discrétionnaire, et des facteurs comme l'existence d'une clause privative, l'expertise que le ministre possède en matière de relations du travail, la nature de la question soumise au ministre et le libellé du par. 6(5) commandent tous une très grande déférence. Une désignation manifestement déraisonnable est celle qui comporte un défaut flagrant et évident et qui est à ce point viciée, pour ce qui est de mettre à exécution l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.

Les désignations n'étaient pas manifestement déraisonnables simplement parce que le ministre ne s'en est pas tenu à la liste d'arbitres dressée en vertu du par. 49(10). Certains arbitres inscrits sur la liste étaient inacceptables par les syndicats, alors que d'autres arbitres acceptables n'étaient pas inscrits sur cette liste, ce qui confirme le caractère raisonnable de l'opinion du ministre selon laquelle des candidats non inscrits sur la liste pouvaient tout de même remplir les conditions requises pour être désignés. Cependant, en déterminant si les désignations étaient manifestement déraisonnables, les tribunaux judiciaires ont le droit de tenir compte de l'importance des facteurs que le ministre n'a pas voulu prendre en considération. En l'espèce, le ministre a expressément exclu des facteurs pertinents qui allaient directement au cœur du régime législatif. Les questions soumises aux conseils requéraient les connaissances et l'expertise d'un arbitre en droit du travail. L'expertise et la neutralité favorisent l'acceptabilité générale. La désignation au poste de président d'une personne inexperte ou inexpérimentée qui n'est pas perçue comme étant généralement acceptable dans le milieu des relations du travail comporte un défaut à la fois flagrant et évident. Compte tenu de l'intention du législateur qui ressort de la *LACTH*, l'approche que le ministre a adoptée en matière de désignations fondées sur le par. 6(5) était manifestement déraisonnable. Si elles sont contestées, les qualifications de certaines personnes désignées devront être évaluées cas par cas.

Le pourvoi est donc rejeté uniquement en raison du caractère manifestement déraisonnable des désignations faites sans tenir compte de l'expertise en matière de relations du travail et de l'acceptabilité générale dans le milieu des relations du travail.

La juge en chef McLachlin et les juges Major et Bastarache (dissidents) : La norme de contrôle applicable à l'exercice par le ministre du pouvoir de désignation que lui confère le par. 6(5) *LACTH* est celle du caractère manifestement déraisonnable. L'approche pragmatique et fonctionnelle met l'accent sur la disposition qui est

a single statute, his enabling legislation, and, absent a constitutional challenge, the patent unreasonableness standard need not make room for a review of statutory interpretation of enabling legislation on a correctness basis. There is no basis for dividing the Minister's decision into component questions subject to different standards of review, nor should the Minister's power be viewed as due less deference because it is circumscribed by legislation. Not every administrative action involves a distinct and identifiable exercise of statutory interpretation. Where, as here, the factors indicate that the question raised by the provision is one intended by the legislators to be left to the exclusive decision of the administrative decision maker, it simply is not one for the courts to make. The presence of a privative clause is compelling evidence that deference is due. The Minister knows more about labour relations than the courts and will be taken to have expertise. Deference is owed to expert decision makers designated by the legislature. The fact-based nature of the question before the Minister also points to deference and empowering the Minister, rather than an apolitical actor, suggests a legislative intent of political accountability.

The Minister did not make appointments that were patently unreasonable. A contextual approach to statutory interpretation of the enabling legislation is necessary for determining the criteria relevant to exercise of the discretion. In some cases, the criteria are spelled out in the legislation, regulations or guidelines or found in the specific purposes of the relevant Act. In others, the relevant factors may be unwritten and derived from the purpose and context of the statute. In this case, there are no relevant regulations, guidelines, or other instruments, and the statute does not say much. The Act stipulates that appointees must be qualified in the opinion of the Minister, expressly contemplating the importance of the Minister's opinion. Labour relations expertise, independence and impartiality, reflected in broad acceptability, are not necessarily dominant or obvious factors and should not be imposed as specific restrictions on the Minister's discretion. The Minister developed an opinion and determined that judging experience was a relevant qualification. The Act called for the Minister to reach his own opinion, not to consider a specific determining factor. Given how much work it takes to identify labour relations experience and broad acceptability as factors and to imply them into s. 6(5), weighing them less heavily than another unwritten qualification, namely judicial experience, does not vitiate the appointments as patently

invoquée. Le ministre a exercé son pouvoir en vertu d'une seule loi, à savoir sa loi habilitante, et en l'absence de contestation constitutionnelle, il n'est pas nécessaire que la norme du caractère manifestement déraisonnable ouvre la porte au contrôle de l'interprétation de la loi habilitante selon la norme de la décision correcte. Rien ne justifie de diviser la décision du ministre en différentes questions assujetties à des normes de contrôle différentes. Il n'y a pas lieu non plus de considérer que le pouvoir du ministre a droit à moins de déférence du fait qu'il est circonscrit par la Loi. Les actions administratives ne comportent pas toutes un exercice distinct et identifiable d'interprétation législative. Lorsque, comme en l'espèce, les facteurs en présence indiquent que la question soulevée par la disposition en cause est une question que le législateur a voulu assujettir au pouvoir décisionnel exclusif de l'instance administrative, il n'appartient tout simplement pas aux tribunaux judiciaires de se prononcer sur cette question. La présence d'une clause privative atteste persuasivement que l'on doit faire montre de déférence. Le ministre a une meilleure connaissance des relations du travail que les tribunaux judiciaires et l'on considérera qu'il a une expertise. Les décideurs spécialisés désignés par le législateur ont droit à la déférence. La nature contextuelle de la question soumise au ministre milite elle aussi en faveur de la déférence et le fait d'habiliter le ministre, au lieu d'un acteur apolitique, indique que le législateur a voulu qu'il y ait responsabilité politique.

Les désignations faites par le ministre n'étaient pas manifestement déraisonnables. Pour déterminer les critères pertinents relativement à l'exercice du pouvoir discrétionnaire, il faut interpréter la loi habilitante selon une méthode contextuelle. Dans certains cas, les critères sont énumérés dans la loi, les règlements ou les lignes directrices applicables, ou encore ressortent des objets particuliers de la loi pertinente. Dans d'autres cas, les facteurs pertinents peuvent être tacites et émaner de l'objet et du contexte de la loi en cause. En l'espèce, il n'y a aucun règlement, aucune ligne directrice ni aucun autre instrument pertinents et la loi applicable ne dit pas grand-chose. La Loi précise que les personnes désignées doivent être compétentes de l'avis du ministre et prévoit ainsi expressément que l'avis du ministre est important. L'expertise en relations du travail, l'indépendance et l'impartialité, que traduit la notion d'acceptabilité générale, ne sont pas nécessairement des facteurs dominants ou évidents et ne doivent pas constituer des restrictions particulières au pouvoir discrétionnaire du ministre. Le ministre s'est formé une opinion et a décidé que l'expérience en tant que juge était une condition requise pertinente. La Loi exigeait que le ministre forme sa propre opinion et non qu'il prenne en considération un facteur déterminant particulier. Compte tenu de la somme de travail nécessaire pour relever les facteurs que sont l'expérience en

unreasonable. It takes significant searching or testing to find the alleged defect or even the factors said to constrain the Minister. It is therefore difficult to characterize the appointments as immediately or obviously defective, not in accordance with reason, clearly irrational, or so flawed that no amount of curial deference could justify letting them stand based on a failure to consider these factors. Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference, and our intervention is not warranted in these circumstances.

Concerns about institutional independence and institutional impartiality do not render the Minister's appointments patently unreasonable. The Act requires that the tribunals be *ad hoc* and retired judges as a class cannot reasonably be seen as so partial that appointing them took the Minister outside the bounds of his statutory discretion. The possibility of a successful challenge to a particular board is not foreclosed but the constraints on the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the boards actually appointed.

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By Binnie J.

Applied: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; **distinguished:** *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; **referred to:** *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC

relations du travail et l'acceptabilité générale et pour supposer qu'ils sont prévus au par. 6(5), le fait de leur accorder moins d'importance qu'à une autre condition requise également tacite, à savoir l'expérience judiciaire, ne vicie pas les désignations en les rendant manifestement déraisonnables. Il faut procéder à un examen ou à une analyse pour déceler le défaut allégué ou même les facteurs qui, dit-on, restreignent la liberté d'action du ministre. Il est donc difficile de considérer que les désignations ministérielles comportent un défaut flagrant ou évident, qu'elles sont non conformes à la raison ou clairement irrationnelles ou qu'elles sont à ce point viciées qu'aucun degré de déférence judiciaire ne pourrait justifier de les maintenir pour le motif que ces facteurs n'ont pas été pris en considération. Si on veut maintenir le principe de la retenue et de la déférence judiciaires, il est essentiel de reconnaître la gravité d'annuler une décision pour le motif qu'elle est manifestement déraisonnable; nous ne sommes pas justifiés à intervenir dans ces circonstances.

Les préoccupations relatives à l'indépendance et à l'impartialité institutionnelles ne rendent pas manifestement déraisonnables les désignations faites par le ministre. La Loi exige que les tribunaux administratifs soient *ad hoc*, et en tant que catégorie, les juges retraités ne peuvent pas être raisonnablement perçus comme étant à ce point partiaux qu'en les désignant le ministre a excédé le pouvoir discrétionnaire que lui confère la Loi. La possibilité de s'attaquer avec succès à un conseil en particulier n'est pas écartée, mais en l'absence d'une contestation mettant directement en cause l'indépendance ou l'impartialité de conseils réellement constitués, les contraintes auxquelles est soumis le pouvoir ministériel discrétionnaire ne permettent pas de procéder à un examen général de l'impartialité et de l'indépendance des conseils, qui serait fondé sur le processus de désignation suivi.

Jurisprudence

Citée par le juge Binnie

Arrêts appliqués : *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157; **distinction d'avec les arrêts :** *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11; **arrêts mentionnés :** *Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control*

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Citée par le juge Bastarache (dissident)

Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration), [1998] 1 R.C.S. 982; *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Toronto Catholic District School Board c. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737, autorisation de pourvoi refusée, [2002] 2 R.C.S. ix; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 566, 2001 CSC 47; *Ajax (Ville) c. TCA, section locale 222*, [2000] 1 R.C.S. 538, 2000 CSC 23; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1; *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, 2001 CSC 70; *Comeau's Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12; *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941; *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793; *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3.

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(QL). Appeal dismissed, McLachlin C.J. and Major and Bastarache JJ. dissenting.

Leslie McIntosh, for the appellant.

Howard Goldblatt, Steven Barrett and Vanessa Payne, for the respondents.

J. Gregory Richards, Jeff G. Cowan and Susan Philpott, for the intervener the Canadian Bar Association.

Michel G. Picher and Barbara A. McIsaac, Q.C., for the intervener the National Academy of Arbitrators (Canadian Region).

The reasons of McLachlin C.J. and Major and Bastarache JJ. were delivered by

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BASTARACHE J. (dissenting) — I adopt Binnie J.’s recital of the facts and judicial history. In my view, however, the Minister of Labour (“Minister”) did not make appointments that were patently unreasonable. In reaching that decision, I would adopt a somewhat different approach to that of Binnie J. with regard to judicial review for abuse of discretion. I also object to Binnie J.’s conclusion that the impartiality and independence of boards can be challenged on the sole basis of the appointment process without any direct attack on a board actually constituted.

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With regard to judicial review for abuse of discretion, as I shall explain, the balance of factors in this case militates unambiguously for the patent unreasonableness standard of review. This deferential standard applies fully to each appointment. In reviewing discretionary appointments, I think it unhelpful and inappropriate, under the pragmatic and functional approach, to separate the Minister’s interpretation of the scope of his power under s. 6(5) of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 (“*HLDA*”), from the ultimate appointments. Instead, what that approach requires is to assess the entire discretionary

O.J. No. 358 (QL). Pourvoi rejeté, la juge en chef McLachlin et les juges Major et Bastarache sont dissidents.

Leslie McIntosh, pour l’appelant.

Howard Goldblatt, Steven Barrett et Vanessa Payne, pour les intimés.

J. Gregory Richards, Jeff G. Cowan et Susan Philpott, pour l’intervenante l’Association du Barreau canadien.

Michel G. Picher et Barbara A. McIsaac, c.r., pour l’intervenante National Academy of Arbitrators (Canadian Region).

Version française des motifs de la juge en chef McLachlin et des juges Major et Bastarache rendus par

LE JUGE BASTARACHE (dissident) — Je souscris à l’exposé des faits et à l’historique des procédures judiciaires figurant dans le motifs du juge Binnie. J’estime, cependant, que les désignations faites par le ministre du Travail (« ministre ») n’étaient pas manifestement déraisonnables. L’approche que j’utilise pour arriver à cette conclusion diffère quelque peu de celle du juge Binnie en ce qui concerne le contrôle judiciaire pour abus de pouvoir discrétionnaire. Je m’oppose également à la conclusion du juge Binnie voulant que l’impartialité et l’indépendance des conseils puissent être mises en doute en raison seulement du processus de désignation suivi, sans que le conseil réellement constitué ne soit directement contesté.

Comme je l’expliquerai, en ce qui concerne le contrôle judiciaire pour abus de pouvoir discrétionnaire, l’importance relative des facteurs en présence milite sans équivoque en faveur de l’application de la norme de contrôle du caractère manifestement déraisonnable. Cette norme qui commande la déférence s’applique parfaitement à chaque désignation. Je pense qu’en appliquant l’approche pragmatique et fonctionnelle à l’examen des désignations discrétionnaires, il n’est ni utile ni approprié de dissocier des désignations que le ministre a faites, en définitive, de son interprétation de l’étendue du pouvoir qui lui est conféré par le par. 6(5) de la *Loi sur*

decision against the standard of patent unreasonableness.

Moreover, the constraints on the exercise of the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the independence or impartiality of boards actually appointed. The respondents' attack on the institutional independence or impartiality of the boards must be levied against a particular board. This attack is not appropriately an argument as to whether the Minister abused his discretion.

I do, however, accept Binnie J.'s analysis and conclusion that the Minister satisfied his duty of procedural fairness.

I. What is the Standard of Review for the Appointment Power?

I do not share Binnie J.'s appreciation of the potential confusion in determining, as separate exercises, the content of the duty of procedural fairness and the standard of review. Both exercises examine the context of an administrative decision. The same factor may be salient for both exercises. Nevertheless, the two inquiries proceed separately and serve different objectives. The content of the duty of procedural fairness seeks to ensure the appropriate relationship between the citizen and the administrative decision maker. In contrast, the standard of review speaks to the relationship between the administrative decision maker and the judiciary. In the former case, there is no need to determine a degree of deference.

Binnie J. and I agree ultimately on the appropriate standard of review. This agreement masks, however, some disagreement on the pragmatic and functional approach adopted by this Court.

l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14 (« LACTH »). Cette approche exige plutôt l'appréciation de l'ensemble de la décision discrétionnaire selon la norme du caractère manifestement déraisonnable.

De plus, en l'absence d'une contestation mettant directement en cause l'indépendance ou l'impartialité de conseils réellement constitués, les contraintes auxquelles est soumis l'exercice du pouvoir ministériel discrétionnaire ne permettent pas de procéder à un examen général de l'impartialité et de l'indépendance des conseils, qui serait fondé sur le processus de désignation suivi. La contestation des intimés, qui met en cause l'indépendance ou l'impartialité institutionnelles des conseils, doit viser un conseil particulier. La présente contestation n'est pas une façon appropriée de se demander si le ministre a abusé de son pouvoir discrétionnaire.

J'accepte toutefois l'analyse et la conclusion du juge Binnie selon lesquelles le ministre s'est acquitté de son obligation d'équité procédurale.

I. Quelle norme de contrôle s'applique au pouvoir de désignation?

Je ne partage pas l'avis du juge Binnie selon lequel le fait de déterminer séparément le contenu de l'obligation d'équité procédurale et la norme de contrôle applicable risque d'engendrer une certaine confusion. Dans les deux cas, il y a examen du contexte d'une décision administrative. Le même facteur peut également ressortir dans les deux cas. Les deux examens sont néanmoins effectués séparément et visent des objectifs différents. L'obligation d'équité procédurale a pour objet d'assurer l'existence de bons rapports entre les citoyens et l'instance décisionnelle administrative. Par contre, la norme de contrôle concerne les rapports entre l'instance décisionnelle administrative et le pouvoir judiciaire. Dans le premier cas, il n'est pas nécessaire d'établir un degré de déférence.

En définitive, le juge Binnie et moi nous entendons sur la norme de contrôle applicable. Cette entente cache toutefois un désaccord au sujet de l'approche pragmatique et fonctionnelle adoptée par la Cour.

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As this Court recognized in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 28, this approach focusses on “the particular, individual provision being invoked and interpreted by the tribunal”. The result is that some provisions within the same statute may require greater deference than others, depending on the factors. It does not follow, however, that exercise of a discretionary power under a single provision, such as s. 6(5) in this appeal, should be viewed as “the product of a number of issues or determinations” (Binnie J.’s reasons, at para. 97) with the decision maker’s statutory interpretation singled out for closer scrutiny. Binnie J.’s citations to this Court’s decision in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 (“*CBC*”), support the impression that a single administrative decision contains within it parts that are independently reviewable on a more or, more likely, less deferential standard. That appeal related to the standard of review for an agency’s decision that required it to interpret a statute other than its enabling legislation. The passage from the plurality, to which Binnie J. refers, concludes that where the standard of review for a decision as a whole is patent unreasonableness, the correctness of the interpretation of an external statute may nevertheless affect the overall reasonableness of that decision. That authority is not apparently relevant to a case such as the present appeal, where the Minister exercises a power under a single statute, his enabling legislation. Given the present context, reference to that authority can only suggest, wrongly, that even in these circumstances a patent unreasonableness standard must make room, within the broader decision, for review of statutory interpretation on a correctness basis. The obvious exception, where a legal question will take a different standard from the global decision, is when an agency’s decision engages constitutional issues. Constitutional questions will necessarily be reviewable on a correctness standard. Special cases like *CBC* will be dealt with on a case-by-case basis. In this case, however, the main issue is that of deciding whether the Minister failed to consider proper

Comme la Cour l’a reconnu dans l’arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1998] 1 R.C.S. 982, par. 28, cette approche met l’accent sur « la disposition particulière invoquée et interprétée par le tribunal ». Par conséquent, selon les facteurs, certaines dispositions d’une même loi peuvent commander plus de déférence que d’autres. Toutefois, il ne s’ensuit pas que l’exercice d’un pouvoir discrétionnaire en vertu d’une seule disposition, comme le par. 6(5) en l’espèce, devrait être perçu comme étant « le fruit d’un certain nombre de questions ou de décisions » (motifs du juge Binnie, par. 97), ni qu’il y a lieu d’examiner de plus près l’interprétation que le décideur a donnée de la loi en cause. Les passages de l’arrêt *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157 (« *SRC* »), que cite le juge Binnie, tendent à confirmer l’impression qu’une même décision administrative comporte des parties qui peuvent être contrôlées indépendamment selon une norme qui commande plus ou moins de déférence ou qui est plus susceptible de commander moins de déférence. Ce pourvoi concernait la norme de contrôle applicable à la décision d’un organisme qui l’a obligé à interpréter une loi autre que sa loi habilitante. Dans le passage mentionné par le juge Binnie, les juges majoritaires concluent que, dans le cas où la norme de contrôle applicable à l’ensemble d’une décision est celle du caractère manifestement déraisonnable, la justesse de l’interprétation d’une loi non constitutive peut néanmoins influencer sur le caractère raisonnable global de cette décision. Ce précédent n’est manifestement pas pertinent dans un cas comme la présente affaire où le ministre exerce son pouvoir en vertu d’une seule loi, à savoir sa loi habilitante. Compte tenu du présent contexte, le renvoi à ce précédent ne peut qu’indiquer à tort que, même dans ces circonstances, la norme du caractère manifestement déraisonnable doit, en ce qui concerne l’ensemble de la décision, ouvrir la porte au contrôle de l’interprétation de la loi selon la norme de la décision correcte. L’exception évidente, où il sera nécessaire d’appliquer à une question de droit une norme différente de celle applicable à l’ensemble de la décision, est le cas où la décision d’un organisme fait intervenir des questions d’ordre constitutionnel,

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factors when making appointments under s. 6(5). It is a single issue.

It is true that some enabling statutes distinguish between the agency's factual and legal determinations. Such statutes may contemplate an appeal from the agency's legal determinations while protecting, with a privative clause, findings of fact. See e.g. *Telecommunications Act*, S.C. 1993, c. 38, s. 64(1). Yet, where there is no basis for dividing a decision into component questions — here the privative clause in s. 7 of the *HLDA* expressly shields the entire appointment —, the single appropriate standard of review, and the deference it dictates, apply to all aspects of the decision. There is no basis for the view that an expert decision maker given due deference with regard to a discretionary appointment power is due less deference because the power is circumscribed by legislation, the suggestion being that there is a statutory interpretation aspect to his or her decision. The authorities that Binnie J. cites for the self-evident proposition that a discretion is never untrammelled and that “there is always a perspective within which a statute is intended to operate” (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.)) do not indicate that each administrative action necessarily involves a distinct and identifiable exercise of statutory interpretation.

Indeed, it is worth recalling the basis on which the *CBC* case that Binnie J. cites, *supra*, discusses the standard for an agency's interpretation of an external statute. The key factor in the analysis in that case was the Canada Labour Relations Board's expertise. The concern was that the Board did not have expertise respecting the interpretation of the external statute. What was lacking was expertise as experience,

qui pourront nécessairement faire l'objet d'un contrôle fondé sur la norme de la décision correcte. Des cas particuliers comme l'affaire *SRC* seront traités au cas par cas. En l'espèce, cependant, la principale question qui se pose est de savoir si, en faisant des désignations en vertu du par. 6(5), le ministre a omis de prendre en considération des facteurs pertinents. Il s'agit là d'une seule question.

Il est vrai que certaines lois habilitantes établissent une distinction entre les décisions qu'un organisme prend sur le plan du droit et celles qu'il prend sur le plan des faits. Ces lois peuvent prévoir un droit d'interjeter appel contre les décisions de l'organisme portant sur des questions de droit, tout en protégeant, au moyen d'une clause privative, ses conclusions de fait. Voir, par exemple, la *Loi sur les télécommunications*, L.C. 1993, ch. 38, par. 64(1). Pourtant, lorsque rien ne justifie de diviser une décision en différentes questions — en l'espèce, la clause privative de l'art. 7 *LACTH* protège expressément la désignation en entier —, la seule norme de contrôle applicable et la déférence qu'elle commande visent tous les aspects de la décision. Rien ne justifie de considérer que, dans l'exercice d'un pouvoir discrétionnaire, un décideur spécialisé a droit à moins de déférence du fait que ce pouvoir est circonscrit par la loi, l'idée étant que sa décision comporte un volet « interprétation législative ». La jurisprudence que le juge Binnie cite à l'appui de la proposition évidente voulant qu'un pouvoir discrétionnaire ne soit jamais illimité et qu' [TRADUCTION] « une loi [soit] toujours censée s'appliquer dans une certaine optique » (*Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.)), n'indique pas que toute action administrative comporte nécessairement un exercice distinct et identifiable d'interprétation législative.

En réalité, il vaut la peine de se rappeler la raison pour laquelle l'arrêt *SRC*, précité, que cite le juge Binnie, analyse la norme de contrôle applicable à l'interprétation qu'un organisme donne d'une loi autre que sa loi constitutive. Le facteur clé de l'analyse dans cette affaire était l'expertise du Conseil canadien des relations du travail. On craignait que le Conseil n'ait pas l'expertise voulue pour

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the kind that a board acquires from applying a statute repeatedly over time. The nature of this expertise as experience is made clear by Iacobucci J.'s caveat: "I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate" (*CBC, supra*, at para. 48; see also *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C.A.), leave to appeal refused June 20, 2002, [2002] 2 S.C.R. ix). Since the Minister has expertise at applying his own statute, it is difficult to see the relevance of discussing the interpretation of the external statute in *CBC*. Where the standard of review for a decision is patent unreasonableness, there is no reason to scrutinize more closely the decision maker's interpretation of its own statute.

interpréter l'autre loi en question. Il lui manquait l'expertise constituée par l'expérience qu'un tel organisme acquiert à force d'appliquer une loi. Le juge Iacobucci définit clairement la nature de cette expertise constituée par l'expérience lorsqu'il fait remarquer « qu'une certaine retenue peut être indiquée dans des cas où la loi non constitutive se rapporte au mandat du tribunal et où celui-ci est souvent appelé à l'examiner » (*SRC*, précité, par. 48; voir aussi *Toronto Catholic District School Board c. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C.A.), autorisation de pourvoi refusée le 20 juin 2002, [2002] 2 R.C.S. ix). Vu que le ministre a l'expertise voulue pour appliquer sa loi habilitante, on voit difficilement l'utilité d'analyser l'interprétation de la loi non constitutive dans l'affaire *SRC*. Dans le cas où la norme de contrôle applicable à une décision est celle du caractère manifestement déraisonnable, rien ne justifie d'examiner de plus près l'interprétation que le décideur donne de sa loi habilitante.

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Indeed, this Court developed the patent unreasonableness standard in the context of agencies engaged in interpreting their enabling legislation. The reviewing court's question will often be whether the statute can bear the agency's interpretation. This frequently requires of the reviewing court that it defer to the agency's interpretation of the enabling legislation. As L'Heureux-Dubé J. wrote for this Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 775, the patent unreasonableness standard ensures "that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision". See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

En fait, la Cour a établi la norme du caractère manifestement déraisonnable dans le contexte d'organismes qui interprétaient leur loi habilitante. La question que se pose souvent le tribunal qui effectue un contrôle judiciaire est de savoir si la loi peut être interprétée de la façon dont l'a fait l'organisme en cause. Pour répondre à cette question, le tribunal qui effectue le contrôle judiciaire doit souvent s'en remettre à l'interprétation que l'organisme donne de sa loi habilitante. Comme la juge L'Heureux-Dubé l'écrivait, au nom de la Cour, dans l'arrêt *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, p. 775, la norme du caractère manifestement déraisonnable permet d'« éviter qu'un contrôle de la justesse de l'interprétation administrative ne serve de paravent, comme ce fut le cas dans le passé, à un interventionnisme axé sur le bien-fondé d'une décision donnée. » Voir aussi *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227.

Where, as here, the factors indicate that the question raised by the provision is one intended by the legislators to be left to the exclusive decision of the administrative decision maker (*Pushpanathan, supra*, at para. 26; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.), it is not one for the courts to make. Assignment of such questions to the decision maker does not serve merely to permit experienced persons to compile the record for the inevitable judicial review proceedings in a superior court. This is particularly clear in the present case, where the decision maker's — the Minister's — function is only to name a chairperson so that arbitration may proceed expeditiously. For the statutory scheme to function, the parties must believe, as a general rule, that where their disagreement requires the Minister to name a chairperson, that chairperson is validly chosen and the arbitration must proceed.

The difficulty may stem from Binnie J.'s importing a practical sense of how decisions are actually made into the specialized judicial review context. Obviously, one could divide nearly every administrative decision into preliminary determinations. Even a purely legal question of statutory interpretation relies on the prior factual determination that the decision maker was reading the correct version of the Act and not some other document. In the course of selecting a chairperson for an arbitral board, the Minister made choices concerning for instance which officials to consult and determined how many options were open to him. But for judicial review to be workable, courts generally operate on the assumption that they can isolate a single decision to be reviewed. They then determine one standard of review for that decision. For present purposes, it is unworkable to view the Minister's naming of an individual as comprising multiple determinations.

Admittedly, the pragmatic and functional approach may require different standards of review

Lorsque, comme en l'espèce, les facteurs en présence indiquent que la question soulevée par la disposition en cause est une question que le législateur a voulu assujettir au pouvoir décisionnel exclusif de l'instance administrative (*Pushpanathan*, précité, par. 26; *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890, par. 18, le juge Sopinka), il n'appartient pas aux tribunaux judiciaires de se prononcer sur cette question. Le fait de confier au décideur le soin de trancher ces questions ne vise pas simplement à permettre à des personnes expérimentées de constituer le dossier nécessaire aux fins de l'inévitable contrôle judiciaire par une cour supérieure. Cela est particulièrement évident dans la présente affaire où l'unique fonction du décideur — à savoir le ministre — est de désigner un président ou une présidente afin que l'arbitrage puisse se dérouler promptement. Pour que le régime législatif fonctionne, les parties doivent croire qu'en règle générale, lorsque leur désaccord force le ministre à désigner une personne à la présidence, cette désignation est valide et l'arbitrage doit avoir lieu.

Le fait que le juge Binnie donne une explication pratique de la manière dont les décisions sont effectivement prises dans le contexte spécial du contrôle judiciaire peut constituer le problème. Manifestement, presque toute décision administrative pourrait être divisée en décisions préliminaires. Même une question purement juridique d'interprétation législative repose sur la décision factuelle préalable que le décideur interprétait la bonne version de la loi en cause, et non quelque autre document. En désignant une personne à la présidence d'un conseil d'arbitrage, le ministre a fait des choix concernant, par exemple, les fonctionnaires à consulter et a décidé combien de possibilités s'offraient à lui. Mais pour que le contrôle judiciaire soit possible, les cours de justice tiennent généralement pour acquis qu'elles peuvent isoler une décision pour la contrôler. Ils déterminent ensuite la norme de contrôle qui sera appliquée à cette décision. Pour les besoins du présent pourvoi, considérer que la désignation ministérielle d'une personne comporte maintes décisions pose des problèmes insurmontables.

Certes, l'approche pragmatique et fonctionnelle peut exiger l'application de normes de contrôle

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for different questions. This recognizes that the diversity of the contemporary administrative state includes different types of decision makers. Parliament and the provincial legislatures have not structured or qualified every agency to determine finally the same types of question. But judicial review would become grossly unwieldy and complex if each decision was to be viewed as a multiplicity of preliminary determinations.

14 The question, then, is the standard of review for the exercise of the Minister's appointment power under s. 6(5) of the *HLDA*. In my view, *Pushpanathan*, *supra*, and this Court's subsequent jurisprudence indicate unambiguously that the appropriate standard is patent unreasonableness.

15 First, as Binnie J. notes, a privative clause (s. 7) precludes judicial review of a ministerial appointment. As noted in *Pushpanathan*, *supra*, at para. 30, the presence of a privative clause "is compelling evidence that the court ought to show deference to the [administrative decision maker's] decision".

16 As Iacobucci J. noted in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50, the second and third factors, expertise and the purpose of the provision and the Act as a whole, often overlap. I will discuss them together. I agree with Binnie J. that the Minister and his officials know more about labour relations than do the courts. This Court has recently confirmed in a labour context that courts owe deference to the expert decision makers designated by the legislature: *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 566, 2001 SCC 47; *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23. Although, as Binnie J. notes, the Minister is asked to make an appointment on behalf of the parties, the particular provision at issue does not simply refer to a "qualified" person. Rather, s. 6(5) states that an appointee is to be qualified "in the opinion of the

différentes à des questions différentes. On reconnaît ainsi que la diversité qui caractérise l'État administratif contemporain comprend l'existence de différents types de décideurs. Le Parlement et les législatures provinciales n'ont pas structuré les organismes de manière à ce qu'ils puissent tous, en définitive, trancher le même genre de questions et ils ne les a pas non plus tous autorisés à le faire. Cependant, le contrôle judiciaire deviendrait excessivement lourd et complexe si chaque décision devait être considérée comme comportant maintes décisions préliminaires.

La question qui se pose est donc celle de la norme de contrôle applicable à l'exercice du pouvoir ministériel de désignation conféré par le par. 6(5) *LACTH*. À mon avis, l'arrêt *Pushpanathan*, précité, et la jurisprudence subséquente de la Cour indiquent sans équivoque que la norme applicable est celle du caractère manifestement déraisonnable.

En premier lieu, comme le souligne le juge Binnie, une clause privative (art. 7) empêche le contrôle judiciaire d'une désignation ministérielle. Comme on le précise l'arrêt *Pushpanathan*, précité, par. 30, la présence d'une clause privative « atteste persuasivement que la cour doit faire montre de retenue à l'égard de la décision » de l'instance décisionnelle administrative.

Comme le juge Iacobucci l'a fait remarquer dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 50, les deuxième et troisième facteurs, à savoir l'expertise et l'objet de la disposition et de la loi dans son ensemble, se confondent souvent. Je vais analyser ces facteurs ensemble. Je partage l'avis du juge Binnie selon lequel le ministre et ses fonctionnaires ont une meilleure connaissance des relations du travail que les tribunaux judiciaires. La Cour confirmait récemment, dans un contexte de relations du travail, que les tribunaux judiciaires doivent faire montre de déférence à l'égard des décideurs spécialisés désignés par le législateur : *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 566, 2001 CSC 47; *Ajax (Ville) c. TCA, section locale 222*, [2000] 1 R.C.S. 538, 2000 CSC 23. Bien que, comme le souligne le juge Binnie, on demande au

Minister”. I shall return to this important distinction in my discussion below of the relevant considerations. This specific language in the enabling provision demands deference: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30, where the legislation at issue referred, as in the present appeal, to the opinion of the Minister. See also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 57, *per* Binnie J.

I wish to emphasize the importance of expertise in determining the standard of review. Iacobucci J. has stated that expertise “is the most important of the factors that a court must consider in settling on a standard of review”: *Southam, supra*, at para. 50. Expertise is the “substantive rationale for deference” (D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 290). The concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters falling within their expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591, *per* Iacobucci J.; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46, *per* Gonthier J. This concept obviously applies to full-time tribunals composed of members possessing special qualifications or who presumptively acquire expertise during their lengthy terms (*Southam, supra*; *Pezim, supra*; *National Corn Growers, supra*; *New Brunswick Liquor Corp., supra*). Yet other decision makers are also to be accorded deference on the basis of an expertise superior to that of the reviewing court. In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 50-53, this Court held that the collegial composition of the New Brunswick Judicial Council,

ministre de faire une désignation au nom des parties, la disposition en cause ne renvoie simplement pas à une personne « compétente ». Le paragraphe 6(5) précise plutôt que la personne désignée doit être compétente « à son avis », c’est-à-dire de l’avis du ministre. Je reviendrai sur cette importante distinction dans l’analyse que je ferai des éléments pertinents qui doivent être pris en considération. Ce libellé particulier de la disposition habilitante commande la déférence : voir l’arrêt *Suresh c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 30, où la loi en cause mentionnait, comme en l’espèce, l’avis du ministre. Voir aussi *Centre hospitalier Mont-Sinai c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41, par. 57, le juge Binnie.

Je tiens à souligner l’importance de l’expertise en ce qui concerne la détermination de la norme de contrôle applicable. Le juge Iacobucci a affirmé que l’expertise « est le facteur le plus important qu’une cour doit examiner pour arrêter la norme de contrôle applicable » : *Southam*, précité, par. 50. L’expertise constitue la [TRADUCTION] « justification fondamentale de la déférence » (D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 290). Le concept de la spécialisation des fonctions commande la déférence à l’égard des décisions que des tribunaux administratifs spécialisés rendent sur des questions relevant de leur champ d’expertise : *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 591, le juge Iacobucci; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1745-1746, le juge Gonthier. Ce concept s’applique manifestement aux tribunaux administratifs à temps plein composés de membres qui possèdent des compétences particulières ou qui sont présumés avoir acquis une expertise au cours de leurs longs mandats (*Southam, Pezim, National Corn Growers* et *Société des alcools du Nouveau-Brunswick*, précités). Pourtant, d’autres décideurs ont également droit à la déférence en raison de leur expertise plus grande que celle du tribunal qui effectue le contrôle judiciaire. Dans

among other factors, amounted to some expertise deserving deference, even though no member of the Council necessarily had qualifications any different from those of the reviewing judge. In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 32, the Court noted that the fact of being a lay person could, in the context of a lawyers' Discipline Committee, amount to a certain expertise distinct from that of a court in the sense that a lay person may better understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the legal profession and confidence in the administration of justice. As for Ministers exercising discretion, this Court's jurisprudence makes clear that they will be taken to have expertise, by virtue of their position, their ability to weigh policy concerns, and their access to information: *Suresh*, *supra*, at para. 31; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 59. In this case, in particular, the labour relations context is one more appropriately left to management by the legislatures and the executive than by the courts. As LeBel J. recently noted, "[t]he management of labour relations requires a delicate exercise in reconciling conflicting values and interests. The relevant political, social and economic considerations lie largely beyond the area of expertise of courts": *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, at para. 239. In the present case, then, the formal rationale for deference provided by the legislative text "in the opinion of the Minister" overlaps with the substantive rationale for deference, the fact that the Minister actually is better positioned to make the assessment than any reviewing court.

l'arrêt *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11, par. 50-53, la Cour a statué que la composition collégiale du Conseil de la magistrature du Nouveau-Brunswick, notamment, représentait une expertise justifiant la déférence, même si aucun membre du Conseil ne possédait nécessairement des compétences différentes de celles du juge effectuant le contrôle judiciaire. Dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 32, la Cour a fait remarquer que le fait d'être un non-juriste pouvait, dans le contexte d'un comité de discipline pour les avocats, représenter une certaine expertise différente de celle d'un tribunal judiciaire, en ce sens qu'un non-juriste peut mieux comprendre en quoi certains comportements et certains choix de sanctions pourraient affecter l'image de la profession juridique dans le public en général et sa confiance dans l'administration de la justice. En ce qui concerne l'exercice d'un pouvoir discrétionnaire par un ministre, la jurisprudence de la Cour établit clairement que l'on considérera que le ministre a une expertise en raison du poste qu'il occupe, de son aptitude à évaluer des préoccupations de politique générale et de l'accès qu'il a à des sources d'information : *Suresh*, précité, par. 31; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 59. En l'espèce particulièrement, il convient davantage que le soin de gérer les relations du travail relève des pouvoirs législatif et exécutif que du pouvoir judiciaire. Comme l'a récemment fait remarquer le juge LeBel, « [l]a gestion des relations du travail exige un exercice délicat de conciliation des valeurs et intérêts divergents. Les considérations politiques, sociales et économiques pertinentes débordent largement du domaine d'expertise des tribunaux » : *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, 2001 CSC 70, par. 239. Donc, en l'espèce, la justification officielle de la déférence qu'expriment les mots « à son avis », c'est-à-dire de l'avis du ministre, se confond avec sa justification fondamentale, à savoir que le ministre est vraiment mieux placé pour procéder à l'évaluation qu'un tribunal qui effectue un contrôle judiciaire.

18 Finally, the fourth factor, the nature of the question, also points to deference. Appointment of a

Enfin, le quatrième facteur, à savoir la nature de la question, milite lui aussi en faveur de la

particular arbitrator to a particular hospital labour dispute is “highly fact-based and contextual”: *Suresh, supra*, at para. 31. More generally, discretionary decision makers are given “substantial leeway” and are presumptively due deference: *Baker, supra*, at para. 56. Furthermore, empowering the Minister, as opposed to an apolitical figure such as the Chief Justice of the province, suggests a legislative intent that political accountability also play a role in policing appointments and the integrity of hospitals interest arbitration. See *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at para. 50, per Major J.

The Minister’s appointments are thus reviewable only on the most deferential, patent unreasonableness standard, and it is this standard I shall now apply.

II. Was Appointing Retired Judges Patently Unreasonable?

A. *The Standard of Patent Unreasonableness*

Before answering this question, it is helpful to review some of the ways that this Court has articulated the test for patent unreasonableness. These are not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?

In *Suresh, supra*, at para. 41, this Court indicated that a patently unreasonable decision is one that is unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures. This linkage of the nominate grounds for abuse of discretion with the patent unreasonableness standard demonstrates the unified approach to review of discretionary decision making set out by L’Heureux-Dubé J. in *Baker, supra*. Other formulations of the test for patent unreasonableness are also helpful. Most relevantly in this appeal, other formulations assist in

déférence. La désignation d’un arbitre pour un conflit de travail dans un hôpital est « largement contextuelle et tributaire des faits » : *Suresh*, précité, par. 31. De manière plus générale, les décideurs discrétionnaires disposent d’« une grande liberté d’action » et sont présumés avoir droit à la déférence : *Baker*, précité, par. 56. En outre, le fait d’habiliter le ministre, au lieu d’une personnalité apolitique comme le juge en chef de la province, indique que le législateur a voulu que la responsabilité politique joue elle aussi un rôle dans la surveillance des désignations et le maintien de l’intégrité des arbitrages de différends dans les hôpitaux. Voir *Comeau’s Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12, par. 50, le juge Major.

Les désignations ministérielles ne peuvent ainsi faire l’objet d’un contrôle que selon la norme commandant la plus grande déférence, à savoir la norme du caractère manifestement déraisonnable, et c’est cette norme que je vais maintenant appliquer.

II. La désignation de juges retraités était-elle manifestement déraisonnable?

A. *La norme du caractère manifestement déraisonnable*

Avant de répondre à cette question, il est utile d’examiner certaines façons dont la Cour a formulé le critère du caractère manifestement déraisonnable. Il s’agit non pas de critères indépendants ou de rechange, mais simplement de façons d’exprimer la seule question qui se pose : qu’est-ce qui fait qu’une chose est manifestement déraisonnable?

Dans l’arrêt *Suresh*, précité, par. 41, la Cour a indiqué qu’une décision manifestement déraisonnable est une décision déraisonnable à première vue qui n’est pas étayée par la preuve ni viciée par l’omission de tenir compte des facteurs pertinents ou d’appliquer la procédure appropriée. Cette corrélation entre les causes énumérées d’abus de pouvoir discrétionnaire et la norme du caractère manifestement déraisonnable démontre l’approche unifiée que la juge L’Heureux-Dubé a exposée, dans l’arrêt *Baker*, précité, relativement au contrôle du processus décisionnel discrétionnaire. D’autres

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construing the terms “vitiated by failure to consider the proper factors”. A reweighing or reconsideration of factors that were originally considered will not suffice to vitiate the decision. Furthermore, it is not necessarily sufficient that a new relevant factor be invoked to vitiate the ministerial decision.

22 In *Ryan, supra*, Iacobucci J. writes that “[a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand” (para. 52).

23 In *Southam, supra*, Iacobucci J. distinguishes the reasonableness *simpliciter* standard from that of patent unreasonableness. He states that the difference lies “in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable.” A decision is not patently unreasonable, he says, “if it takes some significant searching or testing to find the defect”. He says too that “once the lines of the problem have come into focus, . . . the unreasonableness will be evident” (para. 57). Another way of getting at the evident quality of the unreasonableness is to say that once identified, a defect rendering a decision patently unreasonable “can be explained simply and easily” (*Ryan, supra*, at para. 52).

24 In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 (“*PSAC*”), Cory J. states that the “very strict test” of patent unreasonableness is whether the decision is “clearly irrational, that is to say evidently not in accordance with reason” (pp. 963-64).

25 These formulations indicate the high degree of deference in the patent unreasonableness standard. Even where a reasonableness *simpliciter* standard applies, the question is not what decision the

formulations du critère du caractère manifestement déraisonnable sont également utiles. Fait très pertinent en l’espèce, d’autres formulations aident à interpréter les mots « viciée par l’omission de tenir compte des facteurs pertinents ». La réévaluation ou le réexamen des éléments pris en considération initialement ne suffit pas pour que la décision soit viciée. Il ne suffit pas nécessairement non plus d’invoquer un nouveau facteur pertinent pour que la décision ministérielle soit viciée.

Dans l’arrêt *Ryan*, précité, le juge Iacobucci écrit qu’« [u]ne décision qui est manifestement déraisonnable est à ce point viciée qu’aucun degré de déférence judiciaire ne peut justifier de la maintenir » (par. 52).

Dans l’arrêt *Southam*, précité, le juge Iacobucci établit une distinction entre la norme de la décision raisonnable *simpliciter* et celle du caractère manifestement déraisonnable. Selon lui, la différence réside « dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. » Une décision n’est pas manifestement déraisonnable, dit-il, « s’il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut ». Il ajoute qu’« une fois que les contours du problème sont devenus apparents, [. . .] [le] caractère déraisonnable ressortira » (par. 57). Une autre façon d’appréhender l’aspect manifeste du caractère déraisonnable consiste à dire que, dès qu’il est relevé, le défaut qui rend une décision manifestement déraisonnable « peut être expliqué simplement et facilement » (*Ryan*, précité, par. 52).

Dans l’arrêt *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941 (« *AFPC* »), le juge Cory affirme que le « critère très strict » du caractère manifestement déraisonnable consiste à se demander si une décision est « clairement irrationnelle, c’est-à-dire, de toute évidence non conforme à la raison » (p. 963-964).

Il ressort de ces formulations que la norme du caractère manifestement déraisonnable commande une grande déférence. Même lorsque la norme de la décision raisonnable *simpliciter* s’applique, la

reviewing judge would have made in the shoes of the administrative decision maker: *Southam, supra*, at paras 79-80, *per* Iacobucci J. This is even more the case when the standard is patent unreasonableness. Indeed, this Court has stated explicitly that a reviewing court's role is not to reweigh the factors considered by the discretionary decision maker: *Suresh, supra*, at paras. 37-41. Nor is the goal to review the decision or action on its merits: *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at para. 53, *per* L'Heureux-Dubé J.

Having set out this background on the standard, I turn now to apply that standard to the Minister's appointments of chairpersons.

B. *Application of the Standard*

Binnie J. concludes that the appointments were patently unreasonable because the Minister's approach excluded relevant criteria (labour relations experience and broad acceptability) and substituted another criterion (prior judicial experience).

This assessment requires that we determine the relevant criteria for exercise of the discretion, or at least whether the Minister relied upon irrelevant criteria or failed to consider a relevant and important criterion. I agree with Binnie J. that a contextual approach to statutory interpretation of the enabling legislation is necessary for determining the relevant criteria. We disagree, however, as to what the essential criteria ultimately turn out to be. We disagree as to which factor or factors must be given primary importance for an appointment to survive review as not "clearly irrational" or patently unreasonable.

In the clearest of cases, the criteria constraining the exercise of a discretion will be spelled out in the legislation itself. In other cases, the relevant factors to consider will be specified in regulations

question n'est pas de savoir quelle décision aurait rendue le juge qui effectue le contrôle s'il avait été à la place de l'instance décisionnelle administrative : *Southam*, précité, par. 79-80, le juge Iacobucci. Cela est d'autant plus vrai lorsque la norme applicable est celle du caractère manifestement déraisonnable. En fait, la Cour a précisé que le rôle du tribunal qui effectue un contrôle judiciaire n'est pas de réévaluer les facteurs considérés par le décideur discrétionnaire : *Suresh*, précité, par. 37-41. L'objectif n'est pas non plus de contrôler la décision ou l'action quant au fond : *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793, par. 53, la juge L'Heureux-Dubé.

Après avoir exposé le contexte dans lequel elle s'applique, je vais maintenant appliquer la norme aux désignations ministérielles des présidents.

B. *Application de la norme*

Le juge Binnie conclut que les désignations étaient manifestement déraisonnables parce que l'approche adoptée par le ministre excluait les critères pertinents (expertise en matière de relations du travail et acceptabilité générale) et leur substituait un autre critère (expérience judiciaire antérieure).

Cette appréciation oblige à déterminer les critères pertinents pour l'exercice du pouvoir discrétionnaire, ou du moins à se demander si le ministre s'est fondé sur des critères non pertinents ou encore s'il a omis de prendre en considération un critère pertinent et important. Je partage l'avis du juge Binnie selon lequel, pour déterminer les critères pertinents, il faut interpréter la loi habilitante selon une méthode contextuelle. Nous sommes, toutefois, en désaccord sur ce qui, en définitive, s'est révélé être les critères essentiels. Nous ne nous entendons pas sur la question de savoir à quel facteur (ou quels facteurs) il faut accorder une importance primordiale pour qu'une désignation résiste au contrôle pour le motif qu'elle n'est ni « clairement irrationnelle » ni manifestement déraisonnable.

Dans les cas les plus évidents, la loi elle-même énumère les critères qui limitent l'exercice d'un pouvoir discrétionnaire. Dans d'autres cas, des règlements ou des lignes directrices précisent les

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or guidelines. For example, in *Baker, supra*, this Court quashed the immigration officer's decision. In making the decision, the officer had failed to consider a factor expressly included in the relevant guidelines issued by the Minister of Citizenship and Immigration. Other indications of the important considerations were found in the specific purposes of the relevant Act and in international instruments (*Baker, supra*, at para. 67). In that appeal, the appropriate standard of review was the less deferential standard of reasonableness *simpliciter*. In other words, *Baker* says nothing one way or the other as to whether the failure to weigh heavily the interests of the children — a factor explicitly stated in the relevant documents — would have vitiated the decision as patently unreasonable. In yet another category of cases, the relevant factors may be unwritten, derived from the purpose and context of the statute. For example, in *Roncarelli, supra*, this Court reasonably inferred that denying or revoking a liquor permit for reasons irrelevant to the sale of liquor in a restaurant lay beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act*. Note, however, that it was an irrelevant factor that was inferred in *Roncarelli*. A statute cannot reasonably spell out and exclude in advance every irrelevant, bad faith or abusive consideration. It is much simpler for a legislator to spell out the relevant factors, and we often expect it to have done so. I would caution, then, against reviewing courts too easily concluding that implied factors are relevant and that failure, first to perceive them at all, and second to consider them, vitiates a decision. What, then, are the relevant factors in this case?

éléments pertinents qui doivent être considérés. Par exemple, dans l'arrêt *Baker*, précité, la Cour a annulé la décision de l'agent d'immigration. En rendant sa décision, celui-ci n'avait pas tenu compte d'un facteur explicitement prévu dans les lignes directrices pertinentes du ministre de la Citoyenneté et de l'Immigration. D'autres indications des éléments importants devant être pris en considération ressortaient des objets particuliers de la loi applicable, et des instruments internationaux (*Baker*, précité, par. 67). Dans ce pourvoi, la norme de contrôle applicable était celle de la décision raisonnable *simpliciter*, qui commande moins de déférence. Autrement dit, l'arrêt *Baker* ne dit absolument rien au sujet de la question de savoir si l'omission d'accorder de l'importance aux intérêts des enfants — facteur prévu explicitement dans les documents pertinents — aurait vicié la décision en la rendant manifestement déraisonnable. Là encore, dans une autre catégorie de cas, les facteurs pertinents peuvent être tacites et émaner de l'objet et du contexte de la loi en cause. Par exemple, dans l'arrêt *Roncarelli*, précité, la Cour a raisonnablement inféré que le refus ou la révocation d'un permis d'alcool, pour des raisons n'ayant rien à voir avec la vente d'alcool dans un restaurant, outrepassait le pouvoir discrétionnaire conféré à la Commission par la *Loi des liqueurs alcooliques*. Cependant, il y a lieu de noter que l'on a inféré un facteur non pertinent dans l'arrêt *Roncarelli*. Une loi ne peut pas raisonnablement énumérer et exclure d'avance tout facteur non pertinent, caractérisé par la mauvaise foi ou encore abusif. Il est beaucoup plus simple pour le législateur d'énumérer les facteurs pertinents et c'est ce à quoi nous nous attendons souvent. Par conséquent, je déconseille aux tribunaux qui effectuent un contrôle judiciaire de conclure trop facilement que des facteurs implicites sont pertinents et que le défaut, premièrement, de les percevoir et, deuxièmement, de les prendre en considération, a pour effet de vicier une décision. Quels sont donc les facteurs pertinents en l'espèce?

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In this case, the statute does not say very much. It stipulates that appointees must be "qualified to act". It also states, significantly, that it is "in the opinion of the Minister" that such persons must be qualified

Dans la présente affaire, la loi applicable ne dit pas grand-chose. Elle prévoit que les personnes désignées doivent être « compétentes pour agir en cette qualité [d'arbitre]. » Fait révélateur,

to act. In other words, the statute expressly contemplates that the Minister's opinion is important. I have already noted these words in determining the appropriate degree of deference. There are no relevant regulations, guidelines, or other instruments. Are there other relevant factors? In other words, can the reviewing court infer other factors relevant to the Minister in appointing a chairperson under s. 6(5) from the legislative context?

Binnie J. states that the “need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour” (para. 177). I am not persuaded that either repetition of this need by Ministers of Labour or the context in which particular labour relations expertise and broad acceptability may have appeared essential constitutes a basis for implying dominant factors, as if they were stipulated in regulations or guidelines. Nor are these factors obvious, like the fact, in *Roncarelli, supra*, that discretion to renew a liquor licence must not be wielded to punish a person who posts bail for fellow members of a religious minority.

I have already noted that a patently unreasonable decision is one marked by the immediacy or obviousness of the defect. Where the alleged defect is failure to consider relevant factors, I think it important that those factors must themselves be immediately identifiable or obvious. In accordance with their duty, counsel for the respondents have assiduously compiled a record that presents the need for labour relations expertise and broad acceptability in its best light. They have collected excerpts from various reports, the legislative history of the *HLDA*, and statements by Ministers of Labour. The fact that these materials are neatly compiled in the respondents' record makes the significance of those

elle prévoit également que c'est « à son avis », c'est-à-dire de l'avis du ministre, que ces personnes doivent être compétentes pour agir en qualité d'arbitre. En d'autres termes, la loi prévoit expressément que l'avis du ministre est important. J'ai déjà souligné ces mots en déterminant le degré de déférence approprié. Il n'y a aucun règlement, aucune ligne directrice ni aucun autre instrument pertinents. Y a-t-il d'autres facteurs pertinents? En d'autres termes, le tribunal qui effectue le contrôle judiciaire peut-il inférer du contexte législatif l'existence d'autres facteurs pertinents aux fins de désignation ministérielle d'un président ou d'une présidente en vertu du par. 6(5)?

Le juge Binnie dit que « les ministres du Travail qui se sont succédé [. . .] ont constamment réitéré le besoin d'expertise en relations du travail, d'indépendance et d'impartialité, que traduit la notion d'acceptabilité générale » (par. 177). Je ne suis pas convaincu que le fait que des ministres du Travail aient réitéré ce besoin, ou le contexte dans lequel une expertise particulière en matière de relations du travail et une acceptabilité générale peuvent avoir paru essentielles, justifie de supposer l'existence de facteurs dominants, comme s'ils étaient prévus dans des règlements ou des lignes directrices. Ces facteurs ne sont pas évidents non plus, comme le fait, dans l'arrêt *Roncarelli*, précité, que le pouvoir discrétionnaire de renouveler un permis d'alcool ne doit pas servir à punir une personne qui fournit un cautionnement pour des membres de la minorité religieuse à laquelle elle appartient.

J'ai déjà fait remarquer qu'une décision manifestement déraisonnable est caractérisée par le caractère flagrant ou évident du défaut qu'elle comporte. Lorsque le défaut allégué est l'omission de tenir compte de facteurs pertinents, je pense qu'il est important que ces facteurs soient eux-mêmes flagrants ou évidents. Conformément à leur devoir, les avocats des intimés ont pris soin de constituer un dossier présentant sous son aspect le plus favorable le besoin d'acceptabilité générale et d'expertise en matière de relations du travail. Ils ont rassemblé des extraits de divers rapports, l'historique législatif de la *LACTH* ainsi que des déclarations de ministres du Travail. Le fait que

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criteria obvious, or at least much more obvious, than it has ever been. I do not dispute that the respondents made a good case for the importance of reading those factors into the statute, but doing so was a difficult task. In my view, the general affirmations and aspirations Binnie J. refers to in para. 110 came nowhere near the evidentiary threshold for imposing a specific restriction on the wide discretion set out in s. 6(5). Would the factors Binnie J. relies upon have been obvious to a new Minister of Labour called on to exercise his discretion under s. 6(5)? Could the Minister have been expected to compile a thorough history of the *HLDA* before acting? I do not believe so.

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Binnie J. states that there is no need to impute to the Minister a knowledge of the *HLDA*'s legislative history, because the Minister himself summarized the legislative intent in a letter. My difficulty with this comment is that the reviewing court's exercise is simply to determine what is required by the enabling statute. If, as I suggest, we could not reasonably expect that the bare text of s. 6(5) would give to a subsequent Minister of Labour an appreciation of all the factors that Binnie J. finds relevant, this is significant. Binnie J. also characterizes that letter of February 2, 1998, as having "defined" the Minister's mandate (para. 183). I do not think that statements by the Minister expressing his opinion as to his own role should be taken as constraining his discretion or as, effectively, writing new conditions into the statute. The Minister could not eliminate relevant statutory criteria by making a statement or writing a letter; I do not think that by the same means he can add any. The Minister's own letter does not constrain his discretion or define his mandate in the same way that, in *Baker*, official guidelines, the specific purposes of the Act, and the pertinent international instruments framed the relevant considerations for the administrative official. Indeed, the letter of February 2, 1998, is not inconsistent with the Minister's eventual appointments: the Minister was of the opinion that the parties must perceive the process as

ces documents soient soigneusement réunis dans le dossier des intimés rend l'importance de ces critères évidente ou, du moins, beaucoup plus évidente qu'elle ne l'a jamais été. Je ne conteste pas que les intimés ont bien démontré, non sans peine, l'importance de considérer que la loi en cause inclut ces facteurs. À mon avis, les affirmations et les aspirations générales que le juge Binnie mentionne au par. 110 sont loin de correspondre à la norme de preuve requise pour assujettir à une restriction particulière le large pouvoir discrétionnaire prévu au par. 6(5). Les facteurs sur lesquels s'appuie le juge Binnie auraient-ils été évidents aux yeux d'un nouveau ministre du Travail appelé à exercer le pouvoir discrétionnaire que lui confère le par. 6(5)? Pouvait-on s'attendre à ce que le ministre fasse l'historique complet de la *LACTH* avant d'agir? Je ne le crois pas.

Selon le juge Binnie, il n'est pas nécessaire de supposer que le ministre a une connaissance de l'historique de la *LACTH*, étant donné qu'il a lui-même résumé l'intention du législateur dans une lettre. Selon moi, le problème que pose ce commentaire réside dans le fait que le tribunal qui effectue le contrôle judiciaire est simplement tenu de déterminer ce qu'exige la loi habilitante. Cela serait important si, comme je l'indique, nous ne pouvions pas raisonnablement nous attendre à ce que le seul texte du par. 6(5) fournisse à un ministre du Travail subséquent une appréciation de tous les facteurs jugés pertinents par le juge Binnie. Le juge Binnie considère aussi que la lettre du 2 février 1998 « définissait » le mandat du ministre (par. 183). Je ne crois pas qu'il y ait lieu de considérer que les affirmations dans lesquelles le ministre exprime son avis au sujet de son propre rôle limitent son pouvoir discrétionnaire ou qu'elles ont pour effet d'ajouter d'autres conditions dans la Loi. Le ministre ne pouvait pas éliminer des critères légaux pertinents au moyen d'une affirmation ou d'une lettre; je ne crois pas non plus qu'il puisse en ajouter de la même façon. La lettre que le ministre a rédigée ne limite pas son pouvoir discrétionnaire ou ne définit pas son mandat de la même façon que, dans l'affaire *Baker*, les lignes directrices officielles, les objets particuliers de la Loi et les instruments internationaux pertinents énonçaient

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credible; he was also, evidently, of the opinion that the persons he appointed were qualified to act.

Binnie J. notes that the parties brought our attention to subsequent provincial legislation, the *Back to School Act (Toronto and Windsor)*, 2001, S.O. 2001, c. 1, that explicitly enables a Minister to appoint a replacement arbitrator lacking certain characteristics. The unions suggested that where the legislature wishes to rule out relevant experience and the other *indicia* of an objectively qualified chairperson, it knows how to do so. I note that such a provision also shows that, where the legislature so intends, it knows how to specify in some detail the positive or negative attributes of potential chairpersons. In any event, it is an error, in my view, to assume, *a contrario*, that the term “in the opinion of the Minister, qualified to act” in the *HLDA* requires the presence of characteristics that may be dispensed with under the later, unrelated statute.

The Minister in the present appeal developed an opinion as to who was qualified to act. He determined that judging experience was relevant. He valued professional experience as an impartial decision maker. He recognized that judges are typically generalists who quickly learn the necessary substance within the context of each case. The Minister clearly gave experience in the health field less weight than some would have preferred; this is because he was dealing with parties unable to agree on a mutually acceptable qualified person and thought experience as an impartial decision maker was more crucial. All we can presume is that, all things considered, he found independence and experience at judicially resolving disputes to be more important. The *HLDA* called for the

les éléments pertinents que le fonctionnaire de l'organisme administratif devait prendre en considération. En fait, la lettre du 2 février 1998 n'est pas incompatible avec les désignations que le ministre a faites en définitive : le ministre était d'avis que les parties doivent percevoir le processus comme étant crédible; de toute évidence, il estimait aussi que les personnes qu'il a désignées étaient compétentes pour agir en qualité d'arbitre.

Le juge Binnie fait observer que les parties ont attiré notre attention sur une loi provinciale subséquente, la *Loi de 2001 sur le retour à l'école (Toronto et Windsor)*, L.O. 2001, ch. 1, qui habilite explicitement un ministre à nommer un nouvel arbitre qui ne possède pas certains attributs. Les syndicats ont indiqué que, lorsque le législateur souhaite écarter l'expérience pertinente et les autres indices d'un président objectivement compétent, il sait comment s'y prendre. Je souligne qu'une telle disposition démontre également que, lorsque le législateur le souhaite, il sait comment préciser en détail les attributs positifs ou négatifs des présidents potentiels. De toute manière, j'estime qu'il est erroné de présumer au contraire que la condition « à son avis [c'est-à-dire de l'avis du ministre], est compétente pour agir en cette qualité », imposée dans la *LACTH*, exige la présence d'attributs dont il est possible de se passer en vertu de la loi susmentionnée qui n'a aucun lien avec la *LACTH*.

En l'espèce, le ministre s'est formé une opinion quant aux personnes qui étaient compétentes pour agir en qualité d'arbitre. Il a décidé que l'expérience en tant que juge était pertinente. Il a accordé de l'importance à l'expérience professionnelle acquise en tant que décideur impartial. Il a reconnu que les juges sont ordinairement des généralistes qui comprennent rapidement quels éléments de fond doivent être pris en considération dans chaque cas. Il est évident que le ministre a accordé moins d'importance à l'expérience acquise dans le domaine de la santé que l'auraient préféré certaines personnes, et ce, parce qu'il traitait avec des parties incapables de s'entendre sur le choix d'une personne compétente qui leur serait acceptable, et qu'il croyait que l'expérience en tant que décideur impartial était

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Minister to reach his own opinion, not to consider a specific determining factor. In my view, Binnie J. has effectively read out of the provision one of its most important elements, that it is in the Minister's opinion, not viewed objectively by some constant standard, that persons are to be qualified. This is not to say that the opinion of the Minister is totally unfettered, as I will explain later in these reasons.

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Given how much work it takes even to identify the factors at issue in this appeal (labour relations experience and broad acceptability) and to imply them into s. 6(5), I am reluctant to conclude that weighing them less heavily than another factor, also unwritten (judicial experience), vitiated the appointments as patently unreasonable. Using the language of Iacobucci J. in *Southam*, at para. 57, cited above, I would say that the Minister's appointments were not patently unreasonable because "it takes some significant searching or testing to find the defect", if there is one. More problematic for Binnie J.'s approach, in my view, is the fact that it takes "some significant searching" even to find the factors said to constrain the Minister. It is difficult to characterize the Minister's appointments as immediately or obviously defective, particularly when the factors are not themselves immediately or obviously ascertainable. The flaw cannot be explained simply and easily. Or to draw on Cory J.'s approach in *PSAC*, *supra*, at pp. 963-64, it is difficult to argue that the appointments were "evidently not in accordance with reason" or "clearly irrational". Turning to *Ryan*, when the compelling rationale for curial deference is borne in mind — in particular the Minister's superior expertise at labour relations — it becomes difficult to say that the appointments are "so flawed that no amount of curial deference" could justify letting them stand. Returning, finally, to *Suresh*, a failure to consider the proper factors, even if I were to accept them as determinative, fails to vitiate the Minister's decision because the factors themselves were not

plus cruciale. Tout ce que nous pouvons présumer, c'est que, tout compte fait, il a jugé plus importantes l'indépendance et l'expérience en matière de règlement judiciaire des conflits. La *LACTH* exigeait que le ministre forme sa propre opinion et non qu'il prenne en considération un facteur déterminant particulier. J'estime qu'en réalité le juge Binnie a fait abstraction de l'un des plus importants éléments de cette loi, à savoir que les personnes doivent être compétentes de l'avis du ministre et non d'un point de vue objectif conforme à une norme fixe. Cela ne signifie pas que l'avis du ministre n'est assujéti à aucune limite, comme je l'expliquerai plus loin.

Compte tenu de la somme de travail qui est nécessaire ne serait-ce que pour relever les facteurs en cause dans le présent pourvoi (expérience en relations du travail et acceptabilité générale) et supposer qu'ils sont prévus au par. 6(5), j'hésite à conclure que le fait de leur accorder moins d'importance qu'à un autre facteur, également tacite (l'expérience judiciaire), a vicié les désignations en les rendant manifestement déraisonnables. Pour reprendre les propos tenus par le juge Iacobucci dans l'arrêt *Southam*, précité, par. 57, je dirais que les désignations ministérielles n'étaient pas manifestement déraisonnables parce qu'« il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut » qu'elles comportent, à supposer que ce soit le cas. J'estime que la plus grande difficulté que soulève l'approche du juge Binnie est le fait qu'il faut procéder à « un examen en profondeur » ne serait-ce que pour déceler les facteurs qui, dit-on, restreignent la liberté d'action du ministre. Il est difficile de considérer que les désignations ministérielles comportent un défaut flagrant ou évident, particulièrement si les facteurs eux-mêmes ne sont pas flagrants ou évidents. Le défaut ne peut pas être expliqué simplement et facilement. Ou, pour reprendre l'approche du juge Cory dans l'arrêt *AFPC*, précité, p. 963, il est difficile de soutenir que les désignations étaient « de toute évidence non conforme[s] à la raison » ou « clairement irrationnelle[s] ». Quand à l'arrêt *Ryan*, si l'on tient compte de la justification impérieuse de la déférence judiciaire — notamment la plus grande expertise du ministre en matière de

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obvious and uncontroversial. These are all different ways of expressing the conclusion that the appointments were not patently unreasonable.

This is not to say that others would have made the same appointments, nor is it to speculate whether, if polled, the electorate would or would not approve. But in light of the statutory scheme, the context, and the deference due the Minister, I cannot say that the appointments satisfied the “very strict test” (*PSAC, supra*, at p. 964) marking them as patently unreasonable. Moreover, the legislation requires us to give weight to the Minister’s opinion of the factors, or at least of what would make someone qualified to act.

Arguments made by both the appellant and the respondents impel me to make two related further comments.

First, my conclusion respecting the appointments challenged in this appeal does not endorse the appellant’s submission that the sole factors that would disqualify a person from appointment as a chairperson under s. 6(5) are those explicitly set out in s. 6(12) of the *HLDA*. That subsection precludes the Minister from appointing a person who has a pecuniary interest in the matters before the board or who has acted as counsel for one of the parties within the previous six months. I do not accept the appellant’s argument that this is an exhaustive listing of all disqualifying factors or factors that would render an appointment patently unreasonable.

relations du travail —, il devient difficile d’affirmer que les désignations sont « à ce point viciée[s] qu’aucun degré de déférence judiciaire » ne pourrait justifier de les maintenir. Enfin, pour revenir à l’arrêt *Suresh*, l’omission de prendre en considération les facteurs pertinents, même si je devais les reconnaître comme déterminants, ne vicie pas la décision du ministre parce que les facteurs eux-mêmes n’étaient pas évidents et ne soulevaient aucune controverse. Voilà autant de manières différentes de conclure que les désignations n’étaient pas manifestement déraisonnables.

Cela ne signifie pas que d’autres auraient fait les mêmes désignations, et il ne s’agit pas non plus d’émettre des hypothèses quant à savoir si l’électorat les approuverait s’il était consulté. Cependant, compte tenu du régime législatif, du contexte et de la déférence à laquelle a droit le ministre, je ne puis affirmer que les désignations satisfaisaient au « critère très strict » (*AFPC*, précité, p. 964) qui permettrait de les qualifier de manifestement déraisonnables. La Loi nous oblige, en outre, à accorder de l’importance à l’avis du ministre concernant les facteurs ou concernant du moins ce qui rendrait une personne compétente pour agir en qualité d’arbitre.

Les arguments avancés à la fois par l’appellant et par les intimés m’incitent à faire deux autres remarques connexes.

En premier lieu, en tirant ma conclusion relative aux désignations contestées en l’espèce, je ne retiens pas l’argument de l’appellant selon lequel les seuls facteurs qui rendraient une personne inhabile à être désignée à la présidence en vertu du par. 6(5) sont ceux qui sont explicitement énoncés au par. 6(12) *LACTH*. Ce paragraphe interdit au ministre de désigner une personne qui a un intérêt pécuniaire dans les questions dont le conseil est saisi ou qui a exercé des fonctions d’avocat pour l’une des parties au cours des six mois précédents. Je ne retiens pas l’argument de l’appellant voulant qu’il s’agisse là d’une liste exhaustive de tous les facteurs qui rendent une personne inhabile à être désignée ou des facteurs qui rendraient une désignation manifestement déraisonnable.

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Second, as the respondents note, it is of course the case that the Minister's discretion to appoint is not unfettered and must be exercised within the scope of the Act: *Baker, supra; Padfield, supra; Roncarelli, supra*. My conclusions here do not authorize the Minister to decide to appoint only members of his own political caucus, hospital CEOs, or union business agents. These extreme examples are not, however, the facts before us in this appeal.

III. Can the Unions Challenge the Boards' Independence and Impartiality Here?

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Having decided that the appointments were patently unreasonable on the basis of irrelevant considerations, Binnie J. goes on to consider an alternative argument. He considers whether the Minister's appointments were also patently unreasonable on the basis that they resulted in arbitration boards possibly perceived as lacking institutional independence and impartiality.

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Binnie J. addresses this argument primarily on the basis that the Court of Appeal declared that the Minister "created a reasonable apprehension of bias and interfered with the independence and impartiality of boards of arbitration . . . contrary to the principles and requirement of fairness and natural justice" (para. 186).

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I agree with Binnie J. that neither concerns about institutional independence (the *ad hoc* tribunals' lack of security of tenure) nor institutional impartiality (appointment of persons from the class of retired judges) render the Minister's exercise of his appointment power patently unreasonable. The statutory scheme requires that the tribunals be *ad hoc*, constituted to resolve a particular dispute. Retired judges as a class cannot reasonably be seen as so partial that finding them to be "qualified to act" took the Minister outside the bounds of his

En second lieu, comme le font remarquer les intimés, il va de soi que le pouvoir de désignation discrétionnaire du ministre n'est pas illimité et qu'il doit être exercé conformément à la Loi : *Baker, Padfield* et *Roncarelli*, précités. Mes conclusions en l'espèce n'autorisent pas le ministre à désigner seulement des membres de son caucus politique, des directeurs généraux d'hôpitaux ou des agents d'affaires syndicaux. De tels exemples extrêmes ne correspondent toutefois pas aux faits dont nous sommes saisis en l'espèce.

III. Les syndicats peuvent-ils mettre en doute l'indépendance et l'impartialité des conseils en l'espèce?

Après avoir décidé que les désignations étaient manifestement déraisonnables pour le motif qu'elles reposaient sur des facteurs non pertinents, le juge Binnie examine ensuite un argument subsidiaire. Il se demande si les désignations ministérielles étaient également manifestement déraisonnables pour le motif qu'elles ont entraîné la constitution de conseils d'arbitrage susceptibles d'être perçus comme étant dépourvus d'indépendance et d'impartialité institutionnelles.

Le juge Binnie examine cet argument principalement à la lumière du fait que la Cour d'appel a déclaré que le ministre [TRADUCTION] « a suscité une crainte raisonnable de partialité et compromis l'indépendance et l'impartialité des conseils d'arbitrage [. . .] contrairement aux principes et à l'obligation d'équité et de justice naturelle » (par. 186).

Je partage l'avis du juge Binnie selon lequel ni les préoccupations relatives à l'indépendance institutionnelle (l'inamovibilité des tribunaux administratifs *ad hoc*) ni celles relatives à l'impartialité institutionnelle (la désignation de personnes faisant partie de la catégorie des juges retraités) ne rendent manifestement déraisonnable l'exercice par le ministre de son pouvoir de désignation. Le régime législatif exige que les tribunaux administratifs soient *ad hoc*, c'est-à-dire constitués pour résoudre un différend particulier. En tant que catégorie,

statutory discretion: *Baker, supra; Padfield, supra; Roncarelli, supra.*

I also agree with Binnie J. that the unsuccessful challenge to the institutional independence and impartiality of the boards as a group does not foreclose the possibility of a successful challenge to a particular board by a party on the basis of particular facts. Indeed, in my view, it is awkward to raise arguments relating to the boards' independence and impartiality in the context of a challenge to the exercise of the Minister's discretion. In exercising his power of appointment under s. 6(5), the Minister cannot be expected to anticipate and avoid the full set of factors that might, in the context of a particular board, run afoul of the duty of procedural fairness that will bear upon that board. Even for strategic purposes, I would have thought it best for the respondents to save arguments about the natural justice requirements of the boards for any eventual challenge to a particular board. As this Court has noted, attacks on the independence or impartiality of a board are most convincingly made with evidence of how that board operates in practice: *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, at para. 1; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paras. 117-23, *per* Sopinka J. My opinion on this point finds support in the decision of Binnie J. not to apply retrospectively a finding that the boards constituted by the Minister were not impartial.

I note in passing that, in framing the allegations concerning the boards' independence and impartiality as a claim that the Minister exercised his power patently unreasonably, Binnie J. is generous. He presents this line of argument in by far its most favourable light. A reading of the respondents' factum easily suggests that they were making

les juges retraités ne peuvent pas être raisonnablement perçus comme étant à ce point partiaux qu'en les qualifiant de « compétents pour agir » en qualité d'arbitre le ministre a excédé le pouvoir discrétionnaire que lui confère la Loi : *Baker, Padfield* et *Roncarelli*, précités.

Je conviens également avec le juge Binnie que l'échec de la contestation mettant en cause l'indépendance et l'impartialité institutionnelles des conseils, en tant que catégorie, n'empêche pas une partie de mettre en doute avec succès l'indépendance et l'impartialité institutionnelles d'un conseil en se fondant sur des faits particuliers. En fait, j'estime qu'il est malencontreux d'avancer des arguments concernant l'indépendance et l'impartialité des conseils dans le cadre d'une contestation de l'exercice du pouvoir ministériel discrétionnaire. On ne peut pas s'attendre à ce que, en exerçant le pouvoir de désignation que lui confère le par. 6(5), le ministre prévoie et évite tous les facteurs qui, dans le cas d'un conseil particulier, sont susceptibles de contrecarrer l'obligation d'équité procédurale qui incombe à ce conseil. Même pour des raisons stratégiques, je pense qu'il aurait mieux valu que les intimés réservent les arguments portant sur les exigences de la justice naturelle auxquelles les conseils doivent satisfaire pour attaquer éventuellement un conseil particulier. Comme la Cour l'a souligné, les contestations mettant en cause l'indépendance et l'impartialité d'un conseil sont très convaincantes lorsqu'elles s'accompagnent d'une preuve de la manière dont le conseil fonctionne en pratique : *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405, par. 1; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 117-123, le juge Sopinka. Mon opinion à ce sujet est étayée par la décision du juge Binnie de ne pas appliquer rétroactivement la conclusion que les conseils constitués par le ministre n'étaient pas impartiaux.

Je note en passant qu'en formulant les allégations concernant l'indépendance et l'impartialité des conseils sous la forme d'une prétention que le ministre a exercé son pouvoir discrétionnaire d'une manière manifestement déraisonnable, le juge Binnie fait preuve de générosité. Il présente ce type d'argument sous son aspect de loin le plus favorable. Il n'y a pas

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the argument that if the Minister appointed boards that would themselves, in operation, fall short of the demands of natural justice, he thereby breached his own duty of procedural fairness. This is certainly the implication from the respondents' arguments, in this context, that the duty of fairness required the Minister to exercise his appointment power in conformity with the principles of natural justice. As Binnie J. discusses, however, there is no sound argument in this case that the Minister acted unfairly in the sense of violating his duty of procedural fairness.

46 To conclude, a reviewing court should not, in my view, find too readily that a discretionary decision was patently unreasonable. To do so dilutes the value of the patent unreasonableness standard and promotes inappropriate judicial intervention. Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference. This is especially the case where there were few indicators in the enabling legislation of the scope of the power and in an area where this Court has repeatedly counselled deference towards political and other expertise. I do not think that the Minister's appointments demand our intervention.

47 For the reasons given, I would allow this appeal.

The judgment of Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

48 BINNIE J. — In 1965, the Ontario legislature determined that collective bargaining rights must yield to the paramount needs of patient care. The result is that, at present, to avoid disruption in essential services, about 200,000 hospital and nursing home workers in Ontario and their several hundred employers around the province are required to resolve their differences over wages, benefits and other terms of their collective agreements through

de doute, à la lecture du mémoire des intimés, que ceux-ci prétendaient que si le ministre constituait des conseils qui, en pratique, ne satisferaient pas aux exigences de la justice naturelle, il manquerait, de ce fait, à sa propre obligation d'équité procédurale. Dans ce contexte, l'argumentation des intimés laisse certainement supposer que, de par son obligation d'équité, le ministre devait exercer son pouvoir de désignation conformément aux principes de justice naturelle. Comme l'affirme cependant le juge Binnie, rien ne justifie en l'espèce de soutenir que le ministre a agi injustement au sens d'avoir violé l'obligation d'équité procédurale qui lui incombait.

En conclusion, j'estime que le tribunal qui effectue un contrôle judiciaire ne doit pas conclure trop facilement qu'une décision discrétionnaire était manifestement déraisonnable. Agir de cette façon atténue l'importance de la norme du caractère manifestement déraisonnable et favorise une intervention judiciaire inappropriée. Si on veut maintenir le principe de la retenue et de la déférence judiciaires, il est essentiel de reconnaître la gravité d'annuler une décision pour le motif qu'elle est manifestement déraisonnable. Cela d'autant plus vrai lorsque la loi habilitante comporte peu d'éléments indiquant la portée du pouvoir conféré et lorsqu'il est question d'un domaine où la Cour a conseillé à maintes reprises de faire montre de déférence à l'égard de l'expertise politique et autre. Je ne crois pas que les désignations ministérielles requièrent notre intervention.

Pour les motifs exposés, j'accueillerais le présent pourvoi.

Version française du jugement des juges Gonthier, Iacobucci, Binnie, Arbour, LeBel et Deschamps rendu par

LE JUGE BINNIE — En 1965, l'Assemblée législative de l'Ontario a décidé que le droit à la négociation collective devait céder le pas aux besoins primordiaux en matière de soins aux malades. Il s'ensuit qu'à l'heure actuelle, pour éviter l'interruption des services essentiels, environ 200 000 employés d'hôpitaux et de maisons de soins infirmiers en Ontario, ainsi que leurs centaines d'employeurs dans la province, sont tenus de soumettre

compulsory arbitration. The Ontario Court of Appeal, in a unanimous judgment, concluded that the appointment by the Minister of Labour of retired judges in February 1998 as chairpersons of the boards of compulsory arbitration could “reasonably be seen as an attempt to seize control of the bargaining process” and “to replace mutually acceptable arbitrators with a class of persons seen to be inimical to the interests of labour” ((2000), 51 O.R. (3d) 417, at para. 101). The Minister, that court concluded, as a member of the provincial government, had a “significant financial interest” in the outcome of the very arbitration whose chairpersons he selected (para. 21). He was ordered not to make any further appointments “unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators” compiled under s. 49(10) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 49(10) (para. 105).

I would dismiss the appeal, albeit for reasons that differ somewhat from those of the Court of Appeal. The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 (“*HLDA*”), was to provide an adequate substitute for strikes and lockouts. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, “the parties must perceive the system as neutral and credible”. I would reject the unions’ contention that the Minister was required to proceed with the selection of chairpersons by way of “mutual agreement” or from the s. 49(10) roster. Nor do I think that retired judges as a “class” could reasonably be seen as biased against labour. I would nevertheless affirm the fundamental principle underpinning the Court of Appeal’s judgment that the *HLDA* required the Minister to select arbitrators from candidates who were qualified not only by their impartiality, but by their

à l’arbitrage leurs différends relatifs aux salaires, aux avantages sociaux et aux autres conditions de leurs conventions collectives. Dans un arrêt unanime, la Cour d’appel de l’Ontario a conclu que la désignation par le ministre du Travail, en février 1998, de juges retraités à la présidence des conseils d’arbitrage obligatoire pouvait [TRADUCTION] « raisonnablement être perçue comme une tentative de contrôler le processus de négociation » et « de substituer aux arbitres acceptables par les parties une catégorie de personnes perçues comme étant hostiles aux intérêts des travailleurs et des travailleuses » ((2000), 51 O.R. (3d) 417, par. 101). La cour a conclu que le ministre, en sa qualité de membre du gouvernement provincial, avait un [TRADUCTION] « intérêt financier important » dans l’issue des arbitrages mêmes dont il avait choisi les présidents (par. 21). Elle lui a interdit de faire d’autres désignations [TRADUCTION] « à moins que ces désignations ne soient faites à partir de la liste traditionnelle d’arbitres expérimentés en relations du travail », dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail* de l’Ontario, L.O. 1995, ch. 1, ann. A (par. 105).

Je suis d’avis de rejeter le pourvoi, bien que ce soit pour des motifs différant quelque peu de ceux de la Cour d’appel. Le ministre était tenu, en droit, d’exercer son pouvoir de désignation d’une manière conforme aux fins et aux objets de la loi qui lui conférerait ce pouvoir. L’un des objets fondamentaux de la *Loi sur l’arbitrage des conflits de travail dans les hôpitaux*, L.R.O. 1990, ch. H.14 (« *LACTH* »), était de prévoir un moyen adéquat de remplacer la grève et le lock-out. Pour que cet objet de la Loi puisse être réalisé, [TRADUCTION] « les parties doivent percevoir le système comme étant neutre et crédible », comme l’écrivait le ministre lui-même le 2 février 1998. Je suis d’avis de rejeter l’argument des syndicats selon lequel le ministre devait choisir les présidents des conseils d’arbitrage d’un « commun accord » ou à partir de la liste dressée en vertu du par. 49(10). Je ne pense pas non plus que, en tant que « catégorie », les juges retraités puissent raisonnablement être perçus comme ayant un parti pris contre les travailleurs et les travailleuses. Je suis néanmoins d’avis de confirmer le principe fondamental qui sous-tend l’arrêt de la Cour

expertise and general acceptance in the labour relations community.

50 The context here is very important. The *HLDA* is not a broad policy vehicle. The Minister is given a narrow role. He is merely to substitute for the parties in naming a third arbitrator in case of their disagreement.

51 Given the context of the legislation, reinforced by its background and purpose disclosed in the legislative history, I do not think that any Minister, acting reasonably, could have rejected these limitations on his statutory mandate. His approach to his power of appointment on these occasions was, with respect, patently unreasonable.

I. Facts

A. *The Legislative Framework*

52 The *HLDA* requires the hundreds of hospital boards and nursing homes within Ontario to bargain in good faith with the unions (if any) representing their respective employees to conclude a voluntary collective agreement. In the event the parties fail to reach an acceptable collective agreement, the *HLDA* prohibits strikes or lockouts (s. 11(1)). Compulsory arbitration is imposed (s. 4). It takes place before a single arbitrator if the parties can agree (s. 5(1)), or before an arbitral panel of three members, two of whom are appointed by the parties, and a third member to be chosen by the other two members. If the designated members fail to agree on a third member, the *HLDA* provides in s. 6(5) that “the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act”.

53 A distinction must be drawn between “grievance arbitration”, where the arbitrator(s) are required

d’appel, à savoir que la *LACTH* exigeait que le ministre désigne comme arbitres des personnes compétentes en raison non seulement de leur impartialité, mais aussi de leur expertise et de leur acceptabilité générale dans le milieu des relations du travail.

Le contexte est très important en l’espèce. La *LACTH* n’est pas un instrument d’orientation général. Le ministre se voit confier un rôle limité. Il est simplement substitué aux parties pour désigner un troisième arbitre en cas de désaccord de leur part.

Compte tenu du cadre dans lequel s’inscrit la Loi, que renforcent le contexte et l’objet ressortant de son historique législatif, je ne crois pas qu’un ministre, agissant de manière raisonnable, aurait pu rejeter les limites imposées à son mandat légal. En toute déférence, l’approche qu’il a adoptée relativement à son pouvoir de désignation dans les cas en question était manifestement déraisonnable.

I. Les faits

A. *Le cadre législatif*

Aux termes de la *LACTH*, les centaines de conseils d’hôpitaux et de maisons de soins infirmiers situés en Ontario et les syndicats (s’il en est) représentant leurs employés respectifs sont tenus de négocier de bonne foi afin de conclure de leur plein gré une convention collective. Si les parties ne parviennent pas à conclure une convention collective acceptable, la *LACTH* leur interdit de recourir à la grève ou au lock-out (par. 11(1)) et les oblige à aller en arbitrage (art. 4). L’arbitrage obligatoire se déroule devant un seul arbitre lorsque les parties peuvent s’entendre sur ce point (par. 5(1)), ou devant un conseil d’arbitrage composé de trois membres, dont deux sont désignés par les parties alors que le troisième est choisi par les deux membres désignés par les parties. Si les membres désignés ne s’entendent pas sur la désignation du troisième membre, le par. 6(5) *LACTH* prévoit que « [l]e ministre désigne comme troisième membre une personne qui, à son avis, est compétente pour agir en cette qualité. »

Il faut faire la distinction entre les « arbitrages de griefs », où les arbitres doivent interpréter une

to interpret a collective agreement previously arrived at, and “interest arbitration” in which the arbitrator(s) decide upon the terms of the collective agreement itself. The former is adjudicative; the latter is more or less legislative. According to the evidence of Professor Joseph Weiler, who has been actively involved in labour disputes since 1975, experience has shown that successful “interest” arbitrators come to their task familiar with the “current issues in labour relations” and the “bargaining history of the parties to various collective agreements in relevant public sector industries”. Further, “[t]hey are familiar with seniority, compensation and job evaluation systems, work preservation practices, and other work rules. In short, they can readily understand how their judgments in arbitration awards will affect the workplace realities of employees, unions, and management. They do not have to start each arbitration by being ‘educated’ by the parties as to the intricacies of their particular workplaces.”

B. *Legislative History*

Evidence of a statute’s history, including excerpts from the legislative record, is admissible as relevant to the background and purpose of the legislation.

Until 1965, hospital workers in Ontario were covered in the ordinary way by the *Labour Relations Act*, R.S.O. 1960, c. 202. They had the right to bargain collectively and, if no agreement was made, to strike. In the early 1960s, a significant strike occurred at the Trenton Memorial Hospital, which lasted from October 31, 1963 to February 5, 1964. The attendant controversy, fed by an earlier strike at a Windsor hospital, led to the establishment of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees “to inquire into and report upon the feasibility and desirability of applying compulsory arbitration in the settlement of disputes between Labour and Management over the negotiation and settlement of terms of collective

convention collective déjà conclue, et les « arbitrages de différends », où les arbitres fixent les conditions de la convention collective elle-même. La première forme d’arbitrage est de nature décisionnelle alors que la seconde est de nature plus ou moins législative. Suivant le témoignage du professeur Joseph Weiler qui s’intéresse de près aux conflits de travail depuis 1975, l’expérience démontre que les bons arbitres de « différends » sont bien au fait [TRADUCTION] « des enjeux actuels en matière de relations du travail » et « de l’histoire des négociations menées par les parties à diverses conventions collectives dans des entreprises pertinentes du secteur public ». De plus, [TRADUCTION] « [i]ls ont une bonne connaissance des régimes d’ancienneté, de rémunération et d’évaluation des emplois, des pratiques de maintien des emplois et des autres règles concernant l’exécution du travail. Bref, ils peuvent comprendre facilement l’influence que leurs sentences arbitrales auront sur les réalités du milieu de travail des employés, des syndicats et du patronat. Les parties n’ont pas, au début de chaque arbitrage, à leur “enseigner” les subtilités de leurs milieux de travail particuliers. »

B. *L’historique législatif*

L’historique d’une loi, y compris des extraits du dossier législatif, est admissible en preuve en raison de sa pertinence quant au contexte et à l’objet de cette loi.

Jusqu’en 1965, les employés d’hôpitaux de l’Ontario étaient normalement régis par la *Labour Relations Act*, R.S.O. 1960, ch. 202. Ils avaient le droit de négocier collectivement et, à défaut de parvenir à une entente, de faire la grève. Au début des années 60, le Trenton Memorial Hospital a connu une grève importante qui a duré du 31 octobre 1963 au 5 février 1964. La controverse en ayant résulté, alimentée par une grève antérieure dans un hôpital de Windsor, a entraîné la mise sur pied de la Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees, chargée [TRADUCTION] « [d’]enquêter et [de] faire rapport sur la possibilité et l’opportunité d’assujettir à l’arbitrage obligatoire les différends syndicaux-patronaux qui surviennent en matière de négociation

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agreements affecting hospitals and their employees” (p. 5 of its Report).

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The Commission, consisting of labour and management representatives and chaired by a County Court judge experienced in labour relations, heard submissions from a wide spectrum of opinions in the labour relations community, including reluctant encouragement towards compulsory arbitration from Professors H. W. Arthurs and J. H. G. Crispo, who wrote (at p. 16 of the Report):

At the present time, unless the parties voluntarily agree to arbitrate their differences, a strike or lockout is the only alternative to settlement. However, hostile community opinion added to the normal risks of economic warfare, may force one party to accept an unjust or unrealistic settlement rather than wage war. The party which yields its just or realistic claim in the public interest is thus unfairly disadvantaged. Such settlements are bound to sow resentment which will yield a rich crop of future antagonisms. In this particular context, compulsory arbitration may actually strengthen collective bargaining.

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With similar reluctance, a majority of the Commissioners (the labour designate dissenting) recommended compulsory arbitration “when patient care is adversely affected” (p. 50) or either party had been convicted of bad faith bargaining. The reluctance was made explicit in their report (at pp. 43-44):

The members of this Commission have had experience sitting as arbitrators in negotiations disputes where their decisions were binding upon the parties We think it [is] undisputable . . . from our experience that the parties themselves are in a much better position to arrive at a proper and reasonable decision in these contract disputes than a board of arbitration no matter how much evidence the board hears or how carefully it considers the problems with which it is confronted.

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Concluding, however, that hospitals were in a “special category” like police and firefighters, a majority of the Commissioners recommended the creation of a tripartite board, with representatives

et d’établissement des conditions des conventions collectives touchant les hôpitaux et leurs employés » (p. 5 de son rapport).

La Commission, composée de représentants syndicaux et patronaux et présidée par un juge de comté expérimenté en relations du travail, a entendu des arguments reflétant un large éventail d’opinions répandues dans le milieu des relations du travail, y compris l’appui peu enthousiaste donné à l’arbitrage obligatoire par les professeurs H. W. Arthurs et J. H. G. Crispo, qui ont écrit (à la p. 16 du rapport) :

[TRADUCTION] À l’heure actuelle, à moins que les parties ne conviennent de soumettre leurs différends à l’arbitrage, la grève ou le lock-out constituent la seule possibilité qui s’offre à défaut d’un règlement. L’opinion hostile de la collectivité, conjuguée aux risques normaux d’une lutte économique, peut toutefois forcer une partie à accepter un règlement injuste ou irréaliste au lieu de déclencher une bataille salariale. La partie qui, dans l’intérêt public, abandonne une demande juste et réaliste se trouve donc injustement désavantagée. Ces règlements sèment inévitablement un ressentiment propice au déclenchement de nombreux autres affrontements. Dans ce contexte particulier, l’arbitrage obligatoire peut, en fait, renforcer la négociation collective.

Les commissaires majoritaires (le membre désigné par la partie syndicale étant dissident) ont manifesté la même réticence en recommandant l’arbitrage obligatoire [TRADUCTION] « lorsque les soins apportés aux malades s’en ressentent » (p. 50) ou que l’une ou l’autre partie a été reconnue coupable d’avoir négocié de mauvaise foi. Cette réticence est explicite dans leur rapport (aux p. 43 et 44) :

[TRADUCTION] Les membres de la Commission ont déjà arbitré des différends en matière de négociation où leur décision liaient les parties [. . .] D’après notre expérience, nous croyons qu’il est [. . .] incontestable que les parties elles-mêmes sont beaucoup mieux en mesure qu’un conseil d’arbitrage de régler de manière convenable et raisonnable ces différends en matière de convention collective, et ce, peu importe le nombre de témoignages que le conseil entend ou le soin avec lequel il examine les problèmes qui se posent.

Concluant toutefois que les hôpitaux, comme la police et les pompiers, tombent dans une [TRADUCTION] « catégorie spéciale », les commissaires majoritaires ont recommandé la création d’un

of labour and management, as well as an independent chair, based on the *explicit* assumption that “the nominees of labour and management, presumably knowledgeable in hospital affairs, would be a safeguard against unreasonable awards. Only chairmen experienced in hospital affairs would be appointed” (Report, at p. 51 (emphasis added)).

The Commissioners’ emphasis on industry expertise was echoed in their recommendation to strengthen conciliation services with experienced people (at p. 55):

The conciliation officer and the chairman of the conciliation board should be carefully selected from those qualified and experienced in hospital affairs. This policy, we believe, has been followed by the Department of Labour. [Emphasis added.]

The dissenting member of the Commission stated, somewhat prophetically (at p. 58):

. . . there is considerable evidence that compulsory arbitration simply cannot be made to work if the parties are not willing that it should.

The government of the day concluded that *any* strike at a hospital (defined to include nursing homes) must inevitably affect patient care (the “paramount” consideration) and proposed that the *HLDA* extend compulsory arbitration to prohibit *all* hospital strikes or lockouts, i.e., well beyond the more limited role foreseen in the Commissioners’ recommendations.

In the debate on the bill, the Minister of Labour told the legislature that “[s]ound labour relations are the product of mutual agreement” (*Legislature of Ontario Debates*, No. 35, 3rd Sess., 27th Leg., March 3, 1965, at p. 935). He brushed aside opposition concerns about the possibility a Minister could “pack” an arbitration board, given the

conseil tripartite comprenant un représentant pour chacune des parties syndicale et patronale ainsi qu’un président indépendant, en tenant *explicitement* pour acquis que [TRADUCTION] « les personnes désignées par les parties syndicale et patronale, qui ont vraisemblablement une bonne connaissance du secteur hospitalier, constitueraient un rempart contre les sentences arbitrales déraisonnables. Seules seraient désignées à la présidence des personnes ayant de l’expérience en matière hospitalière » (rapport, p. 51 (je souligne)).

L’insistance des commissaires sur l’expertise en matière hospitalière se retrouve dans leur recommandation de renforcer les services de conciliation en recourant à des personnes expérimentées (à la p. 55) :

[TRADUCTION] Le conciliateur et le président de la commission de conciliation doivent être soigneusement choisis parmi les personnes compétentes qui ont de l’expérience en matière hospitalière. Cette politique a été, croyons-nous, suivie par le ministère du Travail. [Je souligne.]

Le membre dissident de la Commission a affirmé, d’une manière quelque peu prophétique, ce qui suit (à la p. 58) :

[TRADUCTION] . . . une preuve abondante indique que l’arbitrage obligatoire ne peut tout simplement pas fonctionner contre le gré des parties.

Le gouvernement de l’époque a conclu que *toute* grève dans un hôpital (dont la définition inclut les maisons de soins infirmiers) compromet forcément les soins apportés aux malades (l’élément « primordial » devant être pris en considération) et a proposé que la *LACTH* étende l’arbitrage obligatoire de manière à interdire *toute* grève ou *tout* lock-out dans les hôpitaux, c’est-à-dire bien au-delà du rôle plus limité que lui réservaient les commissaires dans leur recommandation.

Au cours du débat sur le projet de loi, le ministre du Travail a déclaré à l’Assemblée législative que [TRADUCTION] « [l’]établissement de saines relations du travail repose sur commun accord » (*Legislature of Ontario Debates*, n° 35, 3^e sess., 27^e lég., 3 mars 1965, p. 935). Il a écarté du revers de la main les craintes de l’opposition qu’un ministre

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government was a “vitaly interested party financially in labour disputes in hospitals” (*Legislature of Ontario Debates*, No. 53, 3rd Sess., 27th Leg., March 22, 1965, at p. 1497), emphasizing the government’s intention was to protect patients, not employers, and thereby to supplement, not hinder, free collective bargaining. The *HLDAA* became law on April 14, 1965.

C. *The 1972 Amendment*

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Despite the prohibition on strikes and lockouts, problems persisted in the hospital sector. There were threats of strikes and several short walk-outs. A report prepared for the Minister of Labour in 1970 noted that “[t]hese are part of a continuing protest by union members generated by concern over their ability to achieve their bargaining goals while operating under the Act. All unions in the hospital industry are either demanding changes in or abolition of [the *HLDAA*]”: K. McLeod, “The Impact of the Ontario Hospital Labour Disputes Arbitration Act, 1965: A Statistical Analysis”, Ontario Department of Labour, Research Branch, November 1970, at p. 1.

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Delays in making collective agreements were endemic. The Minister proposed a series of amendments to make compulsory arbitration speedier and more effective. Amongst other things, he assured the Legislature that *HLDAA* arbitrators would have relevant expertise as well as impartiality, stating “the bill provides for the [arbitration] commission to maintain a list of qualified arbitrators willing to act in hospital cases. This bill will improve the quality of decision-making in these cases by providing a roster of knowledgeable arbitrators experienced in the hospital sector” (*Legislature of Ontario Debates*, No. 134, 2nd Sess., 29th Leg., December 14, 1972, at p. 5760 (emphasis added)). Although s. 6(5) as originally enacted in 1972 included reference to a “register of arbitrators”, the reference was deleted from the *HLDAA* in 1980.

puisse « noyauter » un conseil d’arbitrage étant donné que le gouvernement était [TRADUCTION] « une partie ayant un intérêt financier très important dans les conflits de travail en milieu hospitalier » (*Legislature of Ontario Debates*, n° 53, 3^e sess., 27^e lég., 22 mars 1965, p. 1497), soulignant que l’intention du gouvernement était de protéger les malades et non les employeurs, et ainsi, de compléter et non d’entraver la libre négociation collective. La *LACTH* a été adoptée le 14 avril 1965.

C. *La modification de 1972*

Malgré l’interdiction des grèves et des lock-out, les problèmes ont persisté dans le secteur hospitalier. Il y eut des menaces de grève et plusieurs débrayages de courte durée. Un rapport préparé, en 1970, pour le ministre du Travail indique que [TRADUCTION] « [c]es tactiques s’inscrivent dans un mouvement continu de protestation des syndiqués, qui découle de leur crainte d’être incapables d’atteindre leurs objectifs de négociation en respectant la Loi. Tous les syndicats du secteur hospitalier demandent de modifier ou d’abolir la [*LACTH*] » (K. McLeod, « The Impact of the Ontario Hospital Labour Disputes Arbitration Act, 1965 : A Statistical Analysis », ministère du Travail de l’Ontario, Direction de la recherche, novembre 1970, p. 1).

Les retards dans la conclusion des conventions collectives étaient endémiques. Le ministre a proposé une série de modifications destinées à accélérer l’arbitrage obligatoire et à en accroître l’efficacité. Il a notamment assuré à l’Assemblée législative que les arbitres désignés en vertu de la *LACTH* seraient impartiaux et auraient l’expertise voulue, déclarant que [TRADUCTION] « le projet de loi prévoit que le conseil [d’arbitrage] dressera une liste d’arbitres compétents disposés à agir dans les affaires mettant en cause des hôpitaux. Ce projet de loi améliorera la qualité du processus décisionnel dans ces cas en prévoyant l’établissement d’une liste d’arbitres compétents qui ont de l’expérience dans le secteur hospitalier » (*Legislature of Ontario Debates*, n° 134, 2^e sess., 29^e lég., 14 décembre 1972, p. 5760 (je souligne)). Bien que, dans sa version originale de 1972, le par. 6(5) ait mentionné notamment un « *register of arbitrators* » (registre des arbitres), cette mention a été retirée de la *LACTH* en 1980.

D. 1979 — *The Roster of Arbitrators*

In 1979, the *Labour Relations Act*, R.S.O. 1970, c. 232, was amended to facilitate the approval of qualified arbitrators under what is now s. 49 of the *Labour Relations Act, 1995* which largely concerns itself with grievance arbitrations, and provides in subs. (10) as follows:

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines. [Emphasis added.]

The Labour Management Advisory Committee (“LMAC”) was duly formed. The Court of Appeal found that, since its inception, LMAC “has ensured that all persons on the list have expertise in the area of labour adjudication and are acceptable to both management and union. In addition to evaluating everyone seeking to be added to the list of arbitrators, LMAC plans and monitors an Arbitrator Development Program. Many persons are required to successfully complete this program before becoming eligible to be placed on the list. LMAC also conducts ongoing reviews of all the arbitrators on the list to ensure their continued acceptability. Its recommendations regarding additions to and removals from the list are invariably accepted by the Minister” (para. 12).

A contentious factual issue is the extent to which successive Ministers of Labour limited their appointments under s. 6(5) of the *HLDA* to the s. 49(10) roster. There is nothing in the legislative history to suggest that the s. 49(10) list under the *Labour Relations Act* was intended by the legislature to substitute for the “register of arbitrators” dropped from the *HLDA* in 1980. However, the unions contend that the third member of “interest” arbitration boards under the *HLDA* ordinarily came from this list, even though the main focus of the roster was

D. 1979 — *La liste d’arbitres*

En 1979, la *Labour Relations Act*, R.S.O. 1970, ch. 232, a été modifiée de manière à faciliter l’agrément d’arbitres compétents au sens de la disposition devenue l’art. 49 de la *Loi de 1995 sur les relations de travail*, qui traite surtout de l’arbitrage de griefs et prévoit ce qui suit, au par. (10) :

(10) Le ministre peut dresser une liste d’arbitres agréés. Dans le but de le conseiller sur les personnes ayant les qualités requises pour remplir les fonctions d’arbitre et sur les questions relatives à l’arbitrage, il peut constituer un comité consultatif syndical-patronal, composé d’un président désigné par le ministre et de six membres dont trois représentent des employeurs et trois représentent des syndicats. Le lieutenant-gouverneur en conseil fixe la rémunération et les indemnités des membres du comité. [Je souligne.]

Le comité consultatif syndical-patronal (« CCSP ») a été dûment constitué. La Cour d’appel a conclu que, depuis sa création, le CCSP [TRADUCTION] « a veillé à ce que toutes les personnes inscrites sur la liste aient une expertise en matière d’arbitrage de conflits de travail et soient acceptables à la fois par le patronat et les syndicats. En plus d’évaluer chaque personne qui demande à être ajoutée à la liste d’arbitres, le CCSP planifie et supervise un programme de formation des arbitres, que de nombreux candidats doivent suivre et réussir pour pouvoir être inscrits sur la liste. Le CCSP procède également à l’évaluation continue de tous les arbitres inscrits sur la liste afin de s’assurer qu’ils sont toujours acceptables. Ses recommandations concernant des ajouts à la liste ou des retraits de celle-ci sont toujours entérinées par le ministre » (par. 12).

Sur le plan des faits, on ne s’entend pas sur la mesure dans laquelle les ministres du Travail qui se sont succédé ont limité leurs désignations fondées sur le par. 6(5) *LACTH* aux personnes inscrites sur la liste dressée en vertu du par. 49(10). Rien dans l’historique législatif n’indique que le législateur a voulu substituer la liste prévue au par. 49(10) de la *Loi sur les relations de travail* au « registre des arbitres » retiré de la *LACTH* en 1980. Les syndicats soutiennent cependant que le troisième membre des conseils d’arbitrage de « différends »

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grievance (not interest) arbitrations. The Minister asserts that the roster was only one of many sources from which “interest” arbitrators were appointed. When the text of s. 6(5) was modified in the 1980 consolidation of Ontario statutes, there was no incorporation by reference to s. 49(10). The Court of Appeal, after reviewing the extensive evidentiary record, concluded that: “First, the main purpose of the machinery set up in 1979 was to produce persons qualified to do rights or grievance arbitrations who would be acceptable to both sides. Second, some of the persons so qualified are also skilled in interest arbitration. [Third,] for some years the vast majority of interest arbitrators has been appointed by the Minister or his or her delegate from amongst this second group. [Fourth], those appointed to chair interest arbitrations who were not from the group or roster were persons who were skilled and experienced in interest arbitration and were quite acceptable to the unions involved. They included such persons as Paul Weiler, Ray Illing, former Justice George Adams and [former] Chief Justice Alan Gold” (para. 16).

68 The evidence showed that in the normal course of government operations, senior officials, acting under delegated authority from the Ministers, would generally identify an appropriate arbitrator. This had the effect of distancing the Minister somewhat from the actual selection process.

E. *The 1997 Legislation*

69 Following the election of a new Progressive Conservative government in Ontario in 1995, a massive reorganization of municipalities, school boards, police stations, fire halls and other public sector institutions was undertaken. About 450,000 public sector employees were affected. As then Minister of

constitués en vertu de la *LACTH* était habituellement choisi à partir de cette liste, même si celle-ci était destinée principalement aux arbitrages de griefs (et non de différends). Le ministre affirme que la liste n’était qu’un des nombreux moyens utilisés pour désigner les arbitres de « différends ». Lorsque le libellé du par. 6(5) a été modifié dans le cadre de la refonte des lois de l’Ontario en 1980, il n’y a pas eu d’incorporation par renvoi au par. 49(10). Après avoir examiné la preuve abondante versée au dossier, la Cour d’appel a tiré les conclusions suivantes : [TRADUCTION] « Premièrement, le but principal du mécanisme établi en 1979 était de former des personnes compétentes — et acceptables par les deux parties — pour procéder aux arbitrages de droits ou de griefs. Deuxièmement, parmi ces personnes compétentes, il s’en trouve qui sont également qualifiées pour procéder à l’arbitrage de différends. [Troisièmement,] depuis un certain nombre d’années, la grande majorité des arbitres de différends désignés par le ministre ou son délégué provient de ce second groupe de personnes. [Quatrièmement], les personnes désignées pour présider des arbitrages de différends, qui n’appartenaient pas à ce groupe ou qui n’étaient pas inscrites sur la liste, étaient qualifiées et expérimentées en la matière et étaient tout à fait acceptables par les syndicats en cause. Parmi ces personnes, on compte notamment Paul Weiler, Ray Illing, l’ancien juge George Adams et [l’ancien] juge en chef Alan Gold » (par. 16).

La preuve a démontré que, dans le cours normal des activités gouvernementales, les hauts fonctionnaires, qui exercent les pouvoirs qui leur sont délégués par les ministres, désignent généralement un arbitre compétent. Cela permet d’établir une certaine distance entre le ministre et le processus de sélection proprement dit.

E. *La loi de 1997*

L’élection, en 1995, d’un nouveau gouvernement progressiste-conservateur en Ontario, a marqué le début d’une réorganisation majeure des municipalités, des conseils scolaires, des postes de police, des casernes de pompiers et d’autres institutions du secteur public. Environ 450 000 employés du secteur

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Labour, Elizabeth Witmer, explained on second reading of Bill 136 on August 25, 1997:

More than 3,300 collective agreements could be part of the transition as municipalities, school boards and health care facilities merge, amalgamate or reorganize. School boards alone will decrease from 129 to just 72 at the beginning of the year. By January 1, Ontario will have reduced its number of municipalities from 815 to about 650, and in Toronto alone the Health Services Restructuring Commission has recommended that the 39 hospitals currently operating in 46 separate facilities be reduced to 24 organizations operating 31 inpatient sites and four outpatient sites.

As you can appreciate, special processes are needed to ensure that these employees, whether they are unionized or not, are treated as fairly as possible as the changes unfold.

(Legislative Assembly of Ontario, *Official Report of Debates*, No. 218, August 25, 1997, at p. 11462)

As part of Bill 136, the government proposed the *Public Sector Dispute Resolution Act, 1997* to cover the fire, police and hospital/nursing home sectors. The centrepiece was to be a Dispute Resolution Commission, which the Minister was reported as saying would require members “with expertise in labor relations” (*The Record*, Kitchener-Waterloo, June 5, 1997, at p. B5) including academics and possibly judges. Quite apart from managing the effects of massive restructuring, the Commission was expected to address the problem of delay. The Minister claimed that

[o]n average, arbitrated police agreements are concluded approximately 13 months after the expiry of the previous agreement. In the fire sector the figure is even longer, 20 months, and in the hospital sector agreements are finalized nearly two years after the expiry of a contract. This stands in stark contrast to the private sector where, as I indicated, it is all concluded within four months on average. This means that in some cases

public étaient touchés. Comme l’expliquait la ministre du Travail de l’époque, Elizabeth Witmer, lors de la deuxième lecture du projet de loi 136, le 25 août 1997 :

[TRADUCTION] Plus de 3 300 conventions collectives pourraient être touchées au cours du processus de regroupement, de fusion ou de réorganisation des municipalités, des conseils scolaires et des établissements de santé. Au début de l’année, à eux seuls les conseils scolaires verront leur nombre passer de 129 à 72 seulement. Dès le 1^{er} janvier, l’Ontario aura fait passer de 815 à environ 650 le nombre de ses municipalités, et pour la seule ville de Toronto, la Commission de restructuration des services de santé a recommandé que les 39 hôpitaux qui, à l’heure actuelle, sont exploités dans 46 établissements distincts soient ramenés à 24 organisations exploitant 31 centres pour malades hospitalisés et 4 cliniques de consultation externes.

Comme vous pouvez le constater, des mécanismes spéciaux seront nécessaires pour assurer que ces employés, syndiqués ou non, seront traités aussi équitablement que possible au cours de ces changements.

(Assemblée législative de l’Ontario, *Journal des débats*, n° 218, 25 août 1997, p. 11462)

Dans le cadre du projet de loi 136, le gouvernement a proposé la *Loi de 1997 sur le règlement des différends dans le secteur public* destinée à régir les secteurs des incendies et de la police, ainsi que celui des hôpitaux et des maisons de soins infirmiers. L’élément essentiel de cette loi serait la création d’une commission de règlement des différends qui, d’après ce qu’aurait déclaré la ministre, devrait être composée de membres [TRADUCTION] « ayant une expertise en matière de relations du travail » (*The Record*, Kitchener-Waterloo, 5 juin 1997, p. B5), y compris des professeurs d’université et éventuellement des juges. En plus de gérer les effets d’une restructuration majeure, la commission était censée aborder le problème des délais. La ministre a fait valoir que

[TRADUCTION] [e]n moyenne, la conclusion par voie d’arbitrage des conventions des policiers a lieu environ 13 mois après l’expiration de la convention précédente. En ce qui concerne les pompiers, le délai est même plus long, à savoir 20 mois, et dans le secteur hospitalier, les conventions sont conclues près de deux ans après l’expiration de la convention collective précédente. Cette situation contraste nettement avec celle du secteur privé où,

the employers and unions are learning the final result of an arbitration after the term of the arbitrated contract is over.

(Legislative Assembly of Ontario, *Official Report of Debates*, No. 218, August 25, 1997, at p. 11464)

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Organized labour strongly opposed many aspects of Bill 136 and the respondents in particular dismissed the proposed Dispute Resolution Commission as a move to replace experienced and mutually acceptable interest arbitrators with government-appointed commissioners who lacked independence and impartiality. Union leaders were quoted in the press as saying that a “government-appointed dispute resolution commission would be management-oriented and likely to gut existing contracts” (Canadian Press, September 18, 1997). Massive strike action was threatened. Following negotiations between the government and the unions, the government dropped its proposed Dispute Resolution Commission. On September 23, 1997, during the hearings before the Standing Committee on Resources Development, the Minister announced “a return to the sector-based system of appointing arbitrators” (Legislative Assembly of Ontario, *Official Report of Debates*, No. R-69, Standing Committee on Resources Development, September 23, 1997, at p. R-2577). The unions took such assurances to mean that the government was going to return to what they claimed to be the *status quo ante*. Thus, in a letter dated January 7, 1998, the President of the Canadian Union of Public Employees (“CUPE”) wrote to the Minister to “confirm” that the unions were to be consulted about the appointments and to request assurances that the government would only choose arbitrators from the s. 49(10) roster. He received no response.

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On February 2, 1998, the Minister of Labour, now James Flaherty, wrote to the Ontario

comme je l’ai indiqué, tout se règle en moyenne en l’espace de quatre mois. Cela signifie que, dans certains cas, les employeurs et les syndicats prennent connaissance du résultat final d’un arbitrage après l’expiration de la convention collective conclue par voie d’arbitrage.

(Assemblée législative de l’Ontario, *Journal des débats*, n° 218, 25 août 1997, p. 11464)

Le mouvement syndical s’est fortement opposé à maints éléments du projet de loi 136 et les intimés ont notamment rejeté le projet de création d’une commission de règlement des différends qu’ils percevaient comme une mesure destinée à remplacer des arbitres de différends expérimentés et acceptables par les parties par des commissaires désignés par le gouvernement et dépourvus d’indépendance et d’impartialité. La presse a rapporté les propos de chefs syndicaux selon lesquels [TRADUCTION] « une commission de règlement des différends dont les membres seraient désignés par le gouvernement privilégierait la partie patronale et serait portée à annuler les conventions collectives existantes » (Presse canadienne, 18 septembre 1997). Une menace de grève généralisée planait. À la suite de négociations avec les syndicats, le gouvernement abandonne son projet de création d’une commission de règlement des différends. Le 23 septembre 1997, pendant les audiences du Comité permanent du développement des ressources, le ministre a annoncé [TRADUCTION] « un retour au système sectoriel de désignation des arbitres » (Assemblée législative de l’Ontario, *Journal des débats*, n° R-69, Comité permanent du développement des ressources, 23 septembre 1997, p. R-2577). Pour les syndicats, cette promesse signifiait que le gouvernement reviendrait à ce qu’ils considéraient comme le statu quo. C’est ainsi que, dans une lettre datée du 7 janvier 1998, le président du Syndicat canadien de la fonction publique (« SCFP ») a « confirmé » au ministre que les syndicats devraient être consultés au sujet des désignations et a sollicité une promesse que le gouvernement ne choisirait les arbitres qu’à partir de la liste dressée en vertu du par. 49(10). Sa lettre est restée sans réponse.

Le 2 février 1998, le ministre du Travail de l’époque, James Flaherty, écrivait à l’Ontario

Labour-Management Arbitrators' Association to outline the purpose of the changes to Bill 136:

The Act reforms compulsory interest arbitration processes to stress negotiated solutions instead of arbitrated contracts, provide for expedited time lines and alternate dispute resolution mechanisms, and require arbitrators to consider criteria such as the employer's ability to pay, the economic situation in the municipality and province, and the extent to which services may have to be reduced if current funding and taxation levels remain unchanged.

Although the Minister speaks here of “reforms”, the legislature did not, in the end, amend the provisions of the *HLDA* at issue in this case.

F. *The Contested Appointments*

Early in 1998, the Minister decided to make his s. 6(5) appointments from amongst retired judges, a possibility earlier signalled to the parties by his predecessor, Elizabeth Witmer, in her June 5, 1997 press interview about the proposed Dispute Resolution Commission. One of the Minister's senior officials testified that he was instructed “to identify retired members of the judiciary who might be available to serve in the capacity of interest arbitrators”.

On February 20, 1998, Labour Minister Flaherty appointed four retired judges — the Honourable Mr. Charles Dubin, the Honourable Mr. Lloyd Houlden, the Honourable Mr. Robert Reid and the Honourable Mr. McLeod Craig — to chair boards of interest arbitration to resolve a number of outstanding labour disputes at Ontario hospitals. The judges were not on the s. 49(10) roster, nor were the unions consulted about the appointments. A background statement was issued by the Ministry of Labour on the same day entitled “Interest Arbitration in the Hospital Sector”, which noted:

Labour-Management Arbitrators' Association pour lui exposer le but des amendements apportés au projet de loi 136 :

[TRADUCTION] La Loi réforme le processus d'arbitrage obligatoire des différends de manière à privilégier les solutions négociées plutôt que les conventions collectives conclues par voie d'arbitrage, à raccourcir les délais et à établir d'autres mécanismes de règlement des différends, en plus d'obliger les arbitres à tenir compte de critères tels que la capacité de payer de l'employeur, la situation économique de la municipalité et de la province ainsi que la mesure dans laquelle les services peuvent devoir être réduits si les niveaux actuels de financement et de taxation sont maintenus.

Même si le ministre parle ici de « réforme », l'Assemblée législative n'a pas, en fin de compte, modifié les dispositions de la *LACTH* qui sont en cause en l'espèce.

F. *Les désignations contestées*

Au début de 1998, le ministre a décidé de faire ses désignations fondées sur le par. 6(5) parmi des juges retraités, une possibilité que celle qui l'avait précédé, Elizabeth Witmer, avait déjà laissé entrevoir aux parties lors d'une entrevue accordée à la presse, le 5 juin 1997, au sujet du projet de création d'une commission de règlement des différends. Un des hauts fonctionnaires du ministre a témoigné qu'on lui avait demandé [TRADUCTION] « de trouver des membres retraités de la magistrature qui pourraient être disposés à agir en qualité d'arbitres de différends ».

Le 20 février 1998, le ministre du Travail Flaherty a désigné à la présidence de conseils d'arbitrage de différends quatre juges retraités — les honorables Charles Dubin, Lloyd Houlden, Robert Reid et McLeod Craig — qui seraient chargés de résoudre un certain nombre de conflits de travail touchant des hôpitaux ontariens. Ces juges n'étaient pas inscrits sur la liste dressée en vertu du par. 49(10) et les syndicats n'avaient pas été consultés au sujet de ces désignations. Un énoncé de données de base, publié le même jour par le ministère du Travail et intitulé « Arbitrage de différends dans le secteur hospitalier », précisait ce qui suit :

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During this period of significant restructuring in the broader public sector . . . it is essential that parties to an arbitration have complete confidence in the objectivity and neutrality of arbitrators appointed by the Minister.

On March 10, 1998, the President of the Ontario Federation of Labour (“OFL”) wrote to the Minister alleging that the appointments breached the “understanding” about a return to the *status quo* “without even the pretence of consultation”. Professor Joseph Weiler testified about the negative union reaction to the appointments of retired judges “as a class or group”:

This reaction is not due to the merits of any individual former judge but rather to retired judges as a class or group, given the view and experience of unions concerning the role of the judiciary in labour relations. These retired judges do not have tenure as arbitrators and therefore do not have the kind of independence from government that they previously enjoyed when they served on the bench. They also have no expertise in industrial relations. Certainly they lack the deep and wide experience possessed by arbitrators familiar with the industrial relations community of Ontario.

76 The four judges initially appointed declined to act. The Honourable Charles Dubin, for example, who had for many years acted as counsel to the Ontario Labour Relations Board, wrote to the parties to explain that, while he could not act because his firm had a conflict in the particular case, it was nevertheless his practice not to act as arbitrator unless he could assure himself that “[his] appointment was satisfactory to all parties”. However, a number of other retired judges felt it appropriate to accept the appointments.

77 The unions further complained of a breach of procedural fairness. The Minister, they say, should not have abandoned a practice of delegating the task of the appointments to senior officials without, at least, full consultation.

Au cours de cette importante période de restructuration dans le secteur parapublic [. . .] il est primordial que les parties à l’arbitrage soient entièrement assurées que les arbitres désignés par le ministre agiront de façon objective et impartiale.

Le 10 mars 1998, le président de la Fédération du travail de l’Ontario (« FTO ») a écrit au ministre que ces désignations violaient [TRADUCTION] « [l’]entente » concernant un retour au statu quo « sans qu’on ait même feint de procéder à des consultations ». Le professeur Joseph Weiler a témoigné au sujet de la réaction syndicale négative aux désignations de juges retraités « en tant que catégorie ou groupe » :

[TRADUCTION] Cette réaction est attribuable non pas aux qualités d’un ancien juge en particulier, mais plutôt au fait qu’il s’agit de désignations de juges retraités en tant que catégorie ou groupe, compte tenu de l’opinion et de l’expérience des syndicats concernant le rôle du pouvoir judiciaire dans le domaine des relations du travail. En leur qualité d’arbitres, ces juges retraités ne sont pas inamovibles et ne sont donc pas aussi indépendants du gouvernement qu’ils étaient lorsqu’ils siégeaient comme juges. Ils n’ont également aucune expertise en matière de relations du travail. Ils n’ont sûrement pas la longue et vaste expérience que possèdent les arbitres qui connaissent bien le milieu des relations du travail en Ontario.

Les quatre juges désignés initialement ont refusé d’agir en qualité d’arbitres. Par exemple, l’honorable Charles Dubin qui, pendant de nombreuses années, avait agi comme avocat-conseil auprès de la Commission des relations de travail de l’Ontario a écrit aux parties pour leur expliquer que, même s’il ne pouvait pas agir parce que son cabinet était en conflit dans l’affaire en cause, il avait néanmoins coutume de ne pas agir en qualité d’arbitre à moins de pouvoir s’assurer que [TRADUCTION] « [s]a désignation convenait à toutes les parties ». Un certain nombre d’autres juges retraités ont cependant jugé bon d’accepter les désignations.

Les syndicats se sont en outre plaints d’un manquement à l’équité procédurale. Selon eux, le ministre n’aurait pas dû abandonner la pratique consistant à déléguer à des hauts fonctionnaires la tâche de faire des désignations, sans avoir au moins procédé à des consultations complètes.

Although the Minister took the view that his new practice of appointing retired judges to chair *HLDA* arbitral boards was entirely neutral, it was apparently welcomed by hospital employers. The Court of Appeal found that “in every arbitration involving CUPE in which a chair had been appointed, the employer requested a new appointment. In all cases, the new appointment was a retired judge. Further, since the Minister began appointing retired judges, employers have advised CUPE that they are not prepared to accept anyone on the roster and have refused to propose names of potential chairs. Consequently, there have been no consensual appointments of chairs in CUPE cases since at least February 1998” (para. 33). This finding laid the basis for the Court of Appeal’s conclusion, as mentioned, that the appointment of retired judges “must reasonably be seen as an attempt to seize control of the [collective] bargaining process” (para. 101).

G. *The Proceedings*

If the unions had sought judicial review of the specific appointments, it would have enabled the courts to deal with the legal issues raised by their challenge (including the independence and impartiality of particular appointees) on a case-by-case basis. Instead, the unions sought general relief by way of the series of general declarations already mentioned. The Minister was agreeable to this somewhat difficult procedure because, as his counsel explained, he did not want to be regarded as throwing technical roadblocks in the path of judicial review of his decisions. He did not, at least in this Court, seek to have the proceedings stopped on the basis of the privative clause in s. 7 of the *HLDA*, perhaps because the challenge related broadly to the appointments process rather than to the composition of particular boards. As counsel for the unions put it in the oral hearing in this Court:

Bien que le ministre ait jugé tout à fait neutre sa nouvelle pratique consistant à désigner des juges retraités à la présidence des conseils d’arbitrage formés en vertu de la *LACTH*, cette pratique a apparemment été bien accueillie par les hôpitaux employeurs. La Cour d’appel a conclu que [TRADUCTION] « dans tout arbitrage mettant en cause le SCFP, où un président avait été désigné, l’employeur avait sollicité une nouvelle désignation. Dans tous les cas, la nouvelle désignation était celle d’un juge retraité. En outre, depuis que le ministre a commencé à désigner des juges retraités, les employeurs ont informé le SCFP qu’ils ne sont pas disposés à accepter quiconque est inscrit sur la liste et ont refusé de proposer des noms de candidats potentiels à la présidence. En conséquence, depuis au moins février 1998, il n’y a eu aucune désignation consensuelle de présidents dans les affaires mettant en cause le SCFP » (par. 33). La Cour d’appel s’est fondée sur cette conclusion pour statuer, comme nous l’avons vu, que la désignation de juges retraités [TRADUCTION] « doit raisonnablement être perçue comme une tentative de contrôler le processus de négociation [collective] » (par. 101).

G. *Les procédures*

Si les syndicats avaient demandé le contrôle judiciaire des désignations en cause, les tribunaux judiciaires auraient pu aborder, au cas par cas, les questions de droit soulevées par leur contestation (dont celles de l’indépendance et de l’impartialité de certaines personnes désignées). Les syndicats ont plutôt sollicité une réparation globale au moyen de la série de déclarations générales mentionnées précédemment. Le ministre était favorable à cette procédure quelque peu complexe parce que, comme l’a expliqué son avocat, il ne souhaitait pas être perçu comme érigeant des obstacles procéduraux destinés à empêcher le contrôle judiciaire de ses décisions. Il n’a pas, du moins devant notre Cour, invoqué la clause privative de l’art. 7 *LACTH* pour demander l’arrêt des procédures, peut-être parce que la contestation portait sur le processus de désignation en général plutôt que sur la composition de certains conseils. Comme l’a affirmé l’avocat des syndicats lors de l’audience devant la Cour :

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... it's not that retired judges were appointed. It is that the process by which individuals, who had been identified as mutually acceptable and credible, were, in one fell swoop, removed from participation in the arbitration process, and replaced by an entirely different group of individuals for whom, as the record subsequently established, experience in interest arbitration, experience in labour relations and experience in hospital funding was not a factor, in terms of their appointment.

80 The way these proceedings were formulated creates certain difficulties in the matter of remedy, as discussed below.

H. *The Subsequent Legislation*

81 The parties to the appeal in this Court drew our attention to the *Back to School Act (Toronto and Windsor) 2001*, S.O. 2001, c. 1, apparently enacted in response to the decision of the Ontario Court of Appeal in this case, which provides in s. 11(4) and (5):

11. . . .

(4) In appointing a replacement arbitrator, the Minister may appoint a person who,

- (a) has no previous experience as an arbitrator;
- (b) has not previously been or is not recognized as a person mutually acceptable to both trade unions and employers;
- (c) is not a member of a class of persons which has been or is recognized as comprising individuals who are mutually acceptable to both trade unions and employers.

(5) In appointing a replacement arbitrator, the Minister may depart from any past practice concerning the appointment of arbitrators or chairs of arbitration boards, whether established before or after this Act comes into force, without notice to or consultation with any employers or trade unions.

82 The Minister says the subsequent legislation is irrelevant. The unions say only that this subsequent legislation manifests an explicit legislative intent to exclude the otherwise crucially relevant criteria of expertise and general acceptability. In their view, the new legislation shows the *HLDA* as the Minister would like it to be, but is not. They say the new

[TRANSLATION] ... ce n'est pas le fait d'avoir désigné des juges retraités. C'est la méthode utilisée pour empêcher des personnes reconnues de part et d'autre comme étant acceptables et crédibles de participer au processus d'arbitrage et les remplacer d'un seul coup par un groupe totalement différent de personnes à l'égard desquelles, comme l'a démontré subséquemment le dossier, ni l'expérience en arbitrage de différends ni l'expérience en matière de relations du travail et de financement hospitalier ne comptaient pour qu'elles puissent être désignées.

Comme nous le verrons plus loin, la façon dont ces procédures ont été formulées pose certaines difficultés sur le plan de la réparation.

H. *La mesure législative subséquente*

Les parties au pourvoi devant notre Cour ont attiré notre attention sur la *Loi de 2001 sur le retour à l'école (Toronto et Windsor)*, L.O. 2001, ch. 1, apparemment adoptée à la suite de la décision rendue en l'espèce par la Cour d'appel de l'Ontario. Cette loi prévoit ceci, aux par. 11(4) et (5) :

11. . . .

(4) Lorsqu'il nomme un nouvel arbitre, le ministre peut nommer une personne :

- a) qui n'a pas d'expérience comme arbitre;
- b) qui n'a jamais été reconnue comme une personne acceptable à la fois par les syndicats et les employeurs ou qui n'est pas reconnue comme telle;
- c) qui n'appartient pas à une catégorie de personnes qui a été ou qui est reconnue comme étant composée de particuliers qui sont acceptables à la fois par les syndicats et les employeurs.

(5) Lorsqu'il nomme un nouvel arbitre, le ministre peut s'écarter de tout précédent concernant la nomination d'arbitres ou de présidents de conseil d'arbitrage, que ce précédent ait été établi avant ou après l'entrée en vigueur de la présente loi, sans préavis et sans consultation de tout employeur ou syndicat.

Le ministre affirme que la mesure législative subséquente n'est pas pertinente. Les syndicats prétendent simplement que cette mesure législative traduit l'intention explicite du législateur d'exclure les critères d'expertise et d'acceptabilité générale qui ont par ailleurs une pertinence cruciale. À leur avis, la nouvelle mesure législative présente la *LACTH*

Act is a clear and unmistakable departure from the *HLDA* statutory scheme at issue in this appeal.

II. Relevant Statutory Provisions

Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14

6. . . .

(5) Where the two members appointed by or on behalf of the parties fail within ten days after the appointment of the second of them to agree upon the third member, notice of such failure shall be given forthwith to the Minister by the parties, the two members or either of them and the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act.

7. Where a person has been appointed as a single arbitrator or the three members have been appointed to a board of arbitration, it shall be presumed conclusively that the board has been established in accordance with this Act and no application shall be made, taken or heard for judicial review or to question the establishment of the board or the appointment of the member or members, or to review, prohibit or restrain any of its proceedings.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

49. . . .

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines.

III. Judgments

A. *Ontario Divisional Court* (1999), 117 O.A.C. 340

Southey J. noted that the respondents' claims were based on the Minister's abandonment of the roster, the Minister's personal appointments of chairs of

comme le ministre voudrait qu'elle soit, mais elle n'est pas ainsi. Ils affirment que la nouvelle loi marque une rupture claire et manifeste avec le régime de la *LACTH* qui est en cause dans le présent pourvoi.

II. Les dispositions législatives pertinentes

Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14

6. . . .

(5) Si les deux membres du conseil désignés par les parties ou en leur nom, dans les dix jours de la désignation du deuxième d'entre eux, ne s'entendent pas sur la désignation d'un troisième, les parties, les deux membres du conseil ou l'un d'eux en avisent sans délai le ministre. Le ministre désigne comme troisième membre une personne qui, à son avis, est compétente pour agir en cette qualité.

7 Si une personne a été désignée arbitre unique ou que les trois membres ont été désignés à un conseil d'arbitrage, la création du conseil est présumée, de façon irréfragable, s'être effectuée conformément à la présente loi. Est irrecevable une requête en révision judiciaire ou une requête en contestation de la création du conseil ou de la désignation de son ou ses membres, ou une requête visant à faire réviser, interdire ou restreindre ses travaux.

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A

49. . . .

(10) Le ministre peut dresser une liste d'arbitres agréés. Dans le but de le conseiller sur les personnes ayant les qualités requises pour remplir les fonctions d'arbitre et sur les questions relatives à l'arbitrage, il peut constituer un comité consultatif syndical-patronal, composé d'un président désigné par le ministre et de six membres dont trois représentent des employeurs et trois représentent des syndicats. Le lieutenant-gouverneur en conseil fixe la rémunération et les indemnités des membres du comité.

III. Les jugements

A. *Cour divisionnaire de l'Ontario* (1999), 117 O.A.C. 340

Le juge Southey fait observer que les demandes des intimés s'appuyaient sur le fait que le ministre avait abandonné la liste, qu'il avait personnellement

boards, and the Minister's failure to comply with an understanding respecting the appointment process allegedly reached by the parties while amendments to Bill 136 were being discussed. As the respondents had not claimed any breach of *Canadian Charter of Rights and Freedoms* rights, he concluded that "actions of the Minister, if authorized by statute, cannot be successfully attacked as being a denial of natural justice or lacking in institutional independence or impartiality" (para. 16). In his view, the actions of the Minister in appointing retired judges to chair arbitration boards fell squarely within the authority given to him by statute.

B. *Ontario Court of Appeal* (2000), 51 O.R. (3d) 417

85 Writing for a unanimous Court of Appeal, Austin J.A. for the court stated, at para. 2:

The central issue in this appeal is whether the Minister, in changing the process [i.e., from making appointments from the s. 49 roster], violated the principles of natural justice by interfering with the impartiality and independence of the arbitrators and raising a reasonable apprehension of bias, and/or interfering with the legitimate expectations of the appellants.

86 In answering this question in the affirmative, Austin J.A. observed that the content of collective agreements between union and hospital does not involve "interpretation but rather fundamental matters determining the working conditions of union members. As such they are of vital concern to those members. Such matters are not essentially legal but practical and require the familiarity and expertise of a labour arbitrator rather than the skills of a lawyer or a judge" (para. 75).

87 Austin J.A. further noted that the government of Ontario has a substantial financial interest in the outcome of the arbitrations. The pre-existing system

désigné les présidents des conseils et qu'il n'avait pas respecté une entente concernant le processus de désignation à laquelle les parties seraient parvenues lors des discussions portant sur les amendements apportés au projet de loi 136. Vu que les intimés n'avaient invoqué aucune violation des droits garantis par la *Charte canadienne des droits et libertés*, il a conclu que [TRADUCTION] « dans la mesure où le ministre a agi conformément à la loi, ses actes ne peuvent pas être contestés avec succès pour cause de déni de justice naturelle ou d'absence d'indépendance ou d'impartialité institutionnelle » (par. 16). À son avis, en désignant des juges retraités à la présidence des conseils d'arbitrage, le ministre a clairement agi conformément au pouvoir que lui confère la loi.

B. *Cour d'appel de l'Ontario* (2000), 51 O.R. (3d) 417

Dans l'arrêt unanime qu'il a rédigé au nom de la Cour d'appel, le juge Austin affirme ce qui suit, au par. 2 :

[TRADUCTION] La principale question qui se pose en l'espèce est de savoir si, en modifiant le processus [c'est-à-dire en abandonnant la désignation à partir de la liste dressée en vertu de l'art. 49], le ministre a violé les principes de justice naturelle en compromettant l'impartialité et l'indépendance des arbitres et en suscitant une crainte raisonnable de partialité, ou encore en frustrant les attentes légitimes des appelants.

En répondant par l'affirmative à cette question, le juge Austin a fait remarquer que le contenu d'une convention collective devant être conclue par un syndicat et un hôpital fait non pas intervenir un processus [TRADUCTION] « d'interprétation, mais plutôt des questions fondamentales déterminantes sur le plan des conditions de travail des syndiqués. À ce titre, elles revêtent une importance capitale pour ces syndiqués. De telles questions sont pratiques et non pas essentiellement juridiques, et requièrent les connaissances et l'expertise d'un arbitre en droit du travail plutôt que les compétences d'un avocat ou d'un juge » (par. 75).

Le juge Austin a ajouté que le gouvernement de l'Ontario a un intérêt financier important dans l'issue des arbitrages. Le système précédent semblait

appeared to have worked reasonably well and must be regarded as having been successful.

In his view, retired judges generally lack the expertise of the prior arbitrators, are not independent, have no security, have no assurance that they will be appointed to future arbitrations, and must decide questions in which the person who appointed them has a substantial financial interest. He held that abandoning the established practice gave rise to a reasonable apprehension of bias and an appearance of interference with the institutional independence and the institutional impartiality of the boards.

Accordingly, the appeal was allowed.

IV. Analysis

The Minister argues that the wording of his power of appointment makes it clear that he and not the courts was intended to have the last word on appointments to chair compulsory arbitration boards in hospital and nursing home disputes. He says that the *HLDA* does not condition his power on following any particular process, and it was open to him, in furtherance of government policy, to proceed as he did. Thus viewed, the central issue in this case is statutory interpretation. The *HLDA* enacts quite a complex scheme that covers 11 pages of the statute book. The s. 6(5) power of appointment is an important element of the scheme, but it is only an element, and the *HLDA*, as any statute, must be read as a whole to ascertain the true legislative intent.

The Minister does not claim an absolute and untrammelled discretion. He recognizes, as Rand J. stated more than 40 years ago in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, that “there is always a perspective within which a statute is intended to operate”.

avoir fonctionné raisonnablement bien et devait être considéré comme ayant donné de bons résultats.

À son avis, les juges retraités n’ont généralement pas l’expertise des anciens arbitres, ne sont pas indépendants, n’ont aucune sécurité ni aucune garantie qu’ils seront désignés pour d’autres arbitrages, et doivent trancher des questions dans lesquelles la personne qui les a désignés a un intérêt financier important. Il a conclu que l’abandon de la pratique établie a suscité une crainte raisonnable de partialité et engendré une apparence d’atteinte à l’indépendance et à l’impartialité institutionnelles des conseils.

En conséquence, l’appel a été accueilli.

IV. Analyse

Le ministre fait valoir que la manière dont est libellé son pouvoir de désignation indique clairement que, dans le cas des différends qui surviennent dans les hôpitaux et les maisons de soins infirmiers, c’est lui, et non les tribunaux judiciaires, qui est censé avoir le dernier mot en ce qui concerne les désignations à la présidence des conseils d’arbitrage obligatoire. Selon lui, la *LACTH* ne l’oblige pas à suivre un processus particulier dans l’exercice de son pouvoir, et il pouvait agir comme il l’a fait en appliquant la politique du gouvernement. Vue sous cet angle, la principale question qui se pose en l’espèce est une question d’interprétation législative. La *LACTH* établit un régime assez complexe qui occupe 11 pages du recueil de lois. Le pouvoir de désignation prévu au par. 6(5) est un élément important de ce régime, mais n’est qu’un élément et, comme cela doit être fait pour toute loi, il faut interpréter la *LACTH* dans son ensemble pour déterminer l’intention véritable du législateur.

Le ministre ne prétend pas avoir un pouvoir discrétionnaire absolu et sans entraves. Il reconnaît, comme l’a fait le juge Rand, il y a plus de 40 ans, dans l’arrêt *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140, qu’[TRADUCTION] « [u]ne loi est toujours censée s’appliquer dans une certaine optique ».

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The decision in *Roncarelli*, despite the many factual differences, foreshadows, in part, the legal controversy in this case. There, as here, the governing statute conferred a broad discretion which the decision maker was accused of exercising to achieve an improper purpose. In that case, the improper purpose was to injure financially (by the cancellation of a liquor licence) a Montreal restaurateur whose activities in support of the Jehovah's Witnesses were regarded by the provincial government as troublesome. Here, the allegations of improper purpose behind the unions' challenge are that the Minister used his power of appointment to influence outcomes rather than process, to protect employers rather than patients, and, as stated by the Court of Appeal, to change the appointments process in a way "reasonably" seen by the unions as "an attempt to seize control of the bargaining process" (para. 101). Still, the Minister points to a number of reasons for his conduct which, unlike the situation in *Roncarelli*, were closely associated with the purpose of the statute, including, in particular, the chronic delay and cost associated with *HLDAA* arbitrations. He was looking for "[p]eople who had spent their professional lives as neutrals".

Malgré les nombreuses différences qu'il présente sur le plan des faits, l'arrêt *Roncarelli* laisse présager en partie la controverse juridique en l'espèce. Là comme ici, la loi applicable accordait au décideur un large pouvoir discrétionnaire qu'il était accusé d'avoir exercé dans le but de réaliser un objectif illégitime. Dans cette affaire, l'objectif illégitime était de nuire financièrement (par l'annulation d'un permis d'alcool) à un restaurateur montréalais dont l'appui donné aux Témoins de Jéhovah était mal vu par le gouvernement provincial. En l'espèce, les allégations d'objectif illégitime qui sous-tendent la contestation des syndicats veulent que le ministre se soit servi de son pouvoir de désignation pour influencer les résultats plutôt que le processus, pour protéger les employeurs au lieu des malades et, comme l'a dit la Cour d'appel, pour modifier le processus de désignation d'une façon [TRADUCTION] « raisonnablement » perçue par les syndicats comme étant « une tentative de contrôler le processus de négociation » (par. 101). Le ministre justifie pourtant sa conduite par un certain nombre de raisons qui, contrairement à la situation dans l'affaire *Roncarelli*, avaient un lien étroit avec l'objet de la Loi, dont les délais chroniques et le coût des arbitrages fondés sur la *LACTH*. Il cherchait [TRADUCTION] « [d]es personnes qui avaient été neutres pendant toute leur vie professionnelle ».

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The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).

L'exercice d'un pouvoir discrétionnaire, de faire remarquer le juge Rand dans l'arrêt *Roncarelli*, [TRADUCTION] « doit se fonder sur l'examen des considérations reliées à l'objet de [l']administration [de la loi en cause] » (p. 140). En l'espèce, comme dans cette affaire, on allègue que le décideur a pris en considération des éléments non pertinents (par exemple, l'appartenance à la « catégorie » des juges retraités) et qu'il n'a pas tenu compte d'éléments pertinents (tels que l'expertise de la personne proposée à la présidence, et son acceptabilité générale dans le milieu des relations du travail).

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In this case, the "perspective within which a statute is intended to operate" is that of a legislative measure that seeks to achieve industrial peace by substituting compulsory arbitration for the right to strike or lockout. The "perspective" is another way of describing the policy and objects of the statute.

En l'espèce, l'optique dans laquelle la loi est censée s'appliquer est celle d'une mesure législative destinée à maintenir la paix industrielle en substituant l'arbitrage obligatoire au droit de grève ou de lock-out. L'« optique » est une autre façon de décrire la politique générale et les objets de la loi.

In the language of Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030:

. . . if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. [Emphasis added.]

Lord Reid added that “the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court” (p. 1030). See also: *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 264; D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 13:1221.

This appeal thus brings to the fore the importance of the scheme and purpose of an Act in construing the particular words used by the legislature to disclose its true intent. It also requires us to consider whether the legislative intent disclosed in this case is sufficient to override the principles of natural justice that would otherwise be implied by the courts to limit the discretion of the statutory decision maker, and, if so, in what respect.

A. *Some Preliminary Observations*

Given the range and variety of the unions’ objections, it might be useful to do a little organization at the outset.

Although the net result of a s. 6(5) appointment is the naming of a particular individual as a chairperson, the appointment is inevitably the product of a number of issues or determinations, some of them

Lord Reid s’est exprimé en ces termes dans l’arrêt *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), p. 1030 :

[TRADUCTION] . . . si, parce qu’il a mal interprété la Loi ou pour toute autre raison, le ministre exerce son pouvoir discrétionnaire de façon à contrecarrer la politique générale ou les objets de la Loi ou à aller à l’encontre de ceux-ci, alors notre droit accusera une grave lacune si les personnes qui en subissent des préjudices n’ont pas droit à la protection de la cour. [Je souligne.]

Lord Reid a ajouté que [TRADUCTION] « pour déterminer la politique générale et les objets de la Loi, il faut interpréter la Loi dans son ensemble et l’interprétation est toujours une question de droit qui relève de la cour » (p. 1030). Voir aussi : *Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539; *Baker c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1999] 2 R.C.S. 817, par. 56; *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41; G. Pépin et Y. Ouellette, *Principes de contentieux administratif* (2^e éd. 1982), p. 264; D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), par. 13:1221.

Le présent pourvoi fait donc ressortir l’importance de l’économie et de l’objet de la loi lorsqu’il s’agit d’interpréter les termes particuliers que le législateur a utilisés pour exprimer son intention véritable. Il nous oblige également à nous demander si — et le cas échéant, à quel égard — l’intention du législateur exprimée en l’espèce suffit pour l’emporter sur les principes de justice naturelle qui, pour les tribunaux judiciaires, seraient par ailleurs censés limiter le pouvoir discrétionnaire du décideur légal.

A. *Quelques observations préliminaires*

Compte tenu du nombre et de la diversité des objections formulées par les syndicats, il pourrait être utile, au départ, de mettre un peu d’ordre dans tout cela.

Bien qu’elle aboutisse à la nomination d’un président ou d’une présidente, la désignation fondée sur le par. 6(5) est inévitablement le fruit d’un certain nombre de questions ou de décisions, dont

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having to do with procedural fairness (e.g., do I first have to consult with the parties?), some of them legal (e.g., to what extent is my choice constrained by the *HLDA*?), some of them factual (e.g., what qualifications am I looking for?), and others of mixed fact and law (e.g., is this individual “qualified” within the range of choice permitted to me by the *HLDA*?). The court’s task on judicial review is not to isolate these issues and subject each of them to differing standards of review. The unions’ attack is properly aimed at the ultimate s. 6(5) appointments themselves. Nevertheless, as a practical matter (and practicality is a welcome virtue in this area of the law), it is convenient to group these issues in order to facilitate the judicial review of the s. 6(5) decision.

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The first order of business is to examine the legislative scheme of the *HLDA* in general and s. 6(5) in particular. As Beetz J. pointed out, “[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation”: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087 (emphasis deleted), quoting S. A. de Smith, H. Street and R. Brazier, *Constitutional and Administrative Law* (4th ed. 1981), at p. 558. The court’s mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended.

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In performing that mandate, of course, administrative law supplies certain inferences and presumptions. For example, as this Court recently affirmed in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, at para. 21, “courts generally infer that Parliament or the legislature intended the tribunal’s process to comport with principles of natural justice”. More broadly, it is presumed that the legislature intended the statutory decision maker to function within the established principles and constraints of administrative law.

certaines ont trait à l’équité procédurale (par exemple, dois-je d’abord consulter les parties?), au droit (par exemple, dans quelle mesure la *LACTH* limite-t-elle le choix que je peux faire?) et aux faits (par exemple, quelle sont les qualifications que je recherche?), alors que d’autres ont un caractère mixte de droit et de fait (par exemple, le candidat en question est-il une personne « compétente » que la *LACTH* m’autorise à choisir?). Dans le cadre d’un contrôle judiciaire, il n’appartient pas à la cour d’isoler ces questions et d’appliquer à chacune de celles-ci des normes de contrôle différentes. Ce à quoi s’en prennent à juste titre les syndicats, ce sont les désignations mêmes qui, en définitive, sont faites en vertu du par. 6(5). En pratique (le sens pratique étant une vertu appréciée dans ce domaine du droit), il convient néanmoins de regrouper ces questions pour faciliter le contrôle judiciaire de la décision fondée sur le par. 6(5).

La première étape consiste à étudier le régime général établi par la *LACTH* et, plus particulièrement, le par. 6(5) de cette loi. Comme l’a fait observer le juge Beetz dans *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1087, en citant l’ouvrage de S. A. de Smith, H. Street et R. Brazier, intitulé *Constitutional and Administrative Law* (4^e éd. 1981), p. 558, [TRADUCTION] « [d]ans une large mesure, l’examen judiciaire d’un acte administratif est une division spécialisée de l’interprétation des lois » (soulignement omis). Le mandat de la cour en matière de contrôle judiciaire consiste à veiller à ce que le décideur légal respecte les limites prévues par le législateur.

Il va sans dire que le droit administratif fournit certaines inférences et présomptions utiles pour exécuter ce mandat. Ainsi, comme la Cour l’affirmait récemment dans l’arrêt *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 R.C.S. 781, 2001 CSC 52, par. 21, « les tribunaux judiciaires infèrent généralement que le Parlement ou la législature voulait que les procédures du tribunal administratif soient conformes aux principes de justice naturelle ». De manière plus générale, on présume que l’intention du législateur était que le décideur légal respecte les principes et les contraintes du droit administratif.

The second order of business is to isolate the Minister's acts or omissions relevant to procedural fairness, a broad category which extends to, and to some extent overlaps, the traditional principles of natural justice: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, *per* Laskin C.J., at p. 325. The unions, for example, question whether the Minister was right to refuse to consult with them before making the appointments. These questions go to the procedural framework within which the Minister made the s. 6(5) appointments, but are distinct from the s. 6(5) appointments themselves. It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions. It is only the ultimate exercise of the Minister's discretionary s. 6(5) power of appointment itself that is subject to the "pragmatic and functional" analysis, intended to assess the degree of deference intended by the legislature to be paid by the courts to the statutory decision maker, which is what we call the "standard of review".

The third order of business, accordingly, is to determine the degree of judicial deference which, having regard to the *HLDAA* and all the relevant circumstances, the Minister is entitled to receive in the exercise of his discretionary s. 6(5) power. In assessing the Minister's appointments, the court may need to take into consideration some of the determinations made by the Minister as input into the exercise of his discretion. For example, if, as I believe, the Minister is entitled to make any appointment that is not patently unreasonable, his interpretation of the scope of his power of appointment under s. 6(5) will affect the reasonableness of his ultimate appointment: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 49.

The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

La deuxième étape consiste à isoler les actes ou omissions du ministre qui touchent à l'équité procédurale, une catégorie générale qui comprend et, dans une certaine mesure, chevauche les principes traditionnels de la justice naturelle : *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, p. 325, le juge en chef Laskin. Par exemple, les syndicats se demandent si le ministre a eu raison de refuser de les consulter avant de faire les désignations. Ces questions concernent le cadre procédural à l'intérieur duquel le ministre a fait les désignations fondées sur le par. 6(5), sans toutefois porter sur les désignations mêmes qui ont été faites en vertu de ce paragraphe. Il appartient aux tribunaux judiciaires et non au ministre de donner une réponse juridique aux questions d'équité procédurale. Seul l'exercice en dernière analyse du pouvoir discrétionnaire de désignation conféré au ministre par le par. 6(5) est assujéti à l'analyse « pragmatique et fonctionnelle » qui vise à déterminer le degré de déférence dont le législateur a voulu que les tribunaux judiciaires fassent montre à l'égard du décideur légal, lequel degré constitue ce qu'on appelle la « norme de contrôle ».

La troisième étape consiste donc à déterminer le degré de déférence judiciaire auquel, compte tenu de la *LACTH* et de toutes les circonstances pertinentes, le ministre a droit dans l'exercice du pouvoir discrétionnaire qui lui est conféré par le par. 6(5). Lorsqu'elle apprécie les désignations ministérielles, la cour peut devoir tenir compte de certaines décisions que le ministre a prises en exerçant son pouvoir discrétionnaire. Par exemple, si, comme je le crois, le ministre a le droit de faire toute désignation qui n'est pas manifestement déraisonnable, son interprétation de l'étendue du pouvoir de désignation que lui confère le par. 6(5) influera sur le caractère raisonnable de la désignation qu'il fera en définitive : *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 49.

L'équité procédurale concerne la manière dont le ministre est parvenu à sa décision, tandis que la norme de contrôle s'applique au résultat de ses délibérations.

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On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same “factors” that are looked at in determining the requirements of procedural fairness are also looked at in considering the “standard of review” of the discretionary decision itself. Thus in *Baker, supra*, a case involving the judicial review of a Minister’s rejection of an application for permanent residence in Canada on human and compassionate grounds, the Court looked at “all the circumstances” on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, at para. 23; standard of review, at para. 61); the statutory scheme (procedural fairness, at para. 24; standard of review, at para. 60); and the expertise of the decision maker (procedural fairness, at para. 27; standard of review, at para. 59). Other factors, of course, did not overlap. In procedural fairness, for example, the Court was concerned with “the importance of the decision to the individual or individuals affected” (para. 25), whereas determining the standard of review included such factors as the existence of a privative clause (para. 58). The point is that, while there are some common “factors”, the object of the court’s inquiry in each case is different.

B. *Issues*

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With these preliminary observations, I turn to the issues that arise for determination in the resolution of this appeal:

- (1) the statutory interpretation of s. 6(5) of the *HLDA*;
- (2) procedural fairness issues:
 - (a) the Minister’s alleged lack of impartiality;
 - (b) the Minister’s alleged failure to consult with the unions about the change in the process of appointments;
 - (c) the alleged violation of the doctrine of legitimate expectation in refusing to

La tentative de maintenir séparés ces différents genres de questions peut parfois engendrer une certaine confusion. Force est de constater que certains « facteurs » utilisés pour déterminer les exigences de l’équité procédurale servent également à déterminer la « norme de contrôle » applicable à la décision discrétionnaire elle-même. Ainsi, dans l’affaire *Baker*, précitée, qui portait sur le contrôle judiciaire du rejet par le ministre d’une demande de résidence permanente au Canada fondée sur des raisons d’ordre humanitaire, la Cour a examiné « toutes les circonstances » à ces deux égards, mais il y avait chevauchement de certains facteurs, dont la nature de la décision rendue (équité procédurale, par. 23; norme de contrôle, par. 61), le régime législatif (équité procédurale, par. 24; norme de contrôle, par. 60), et l’expertise du décideur (équité procédurale, par. 27; norme de contrôle, par. 59). Il est évident que d’autres facteurs ne se recoupaient pas. En ce qui concerne l’équité procédurale notamment, la Cour s’est intéressée à « l’importance de la décision pour les personnes visées » (par. 25), tandis que, pour déterminer la norme de contrôle applicable, elle a pris en considération des facteurs comme l’existence d’une clause privative (par. 58). Il reste que, même s’il existe certains « facteurs » communs, l’objet de l’examen du tribunal judiciaire diffère d’un cas à l’autre.

B. *Les questions en litige*

Ces observations préliminaires étant faites, j’aborde maintenant les questions qui doivent être tranchées en l’espèce :

- (1) l’interprétation du par. 6(5) *LACTH*;
- (2) les questions d’équité procédurale :
 - a) l’allégation de partialité de la part du ministre;
 - b) l’allégation voulant que le ministre n’ait pas consulté les syndicats au sujet de la modification du processus de désignation;
 - c) l’allégation de violation de la règle de l’expectative légitime en raison du refus

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| <p>nominate only arbitrators who had been mutually agreed upon;</p> <p>(3) an assessment of the standard of review of the Minister's appointments;</p> <p>(4) when does a decision rise to the level of <i>patent</i> unreasonableness?</p> <p>(5) whether the applicable standard of review was violated by the Minister's rejection of</p> <p style="padding-left: 2em;">(a) the s. 49(10) list as a requisite of appointment, or</p> <p style="padding-left: 2em;">(b) expertise and "broad acceptability within the labour relations community" as criteria for the selection of chairpersons;</p> <p>(6) whether the Court of Appeal erred in finding that the arbitration boards, by reason of the impugned ministerial approach to s. 6(5) appointments, lacked the requisite institutional independence and impartiality;</p> <p>(7) the appropriateness of the remedy granted by the Court of Appeal.</p> | <p>de désigner uniquement des arbitres sur lesquels les parties s'étaient entendues;</p> <p>(3) l'appréciation de la norme de contrôle applicable aux désignations ministérielles;</p> <p>(4) quand une décision devient-elle <i>manifestement</i> déraisonnable?</p> <p>(5) la question de savoir si la norme de contrôle applicable a été violée en raison du rejet par le ministre :</p> <p style="padding-left: 2em;">a) de la liste dressée en vertu du par. 49(10), qui doit être utilisée pour faire des désignations; ou</p> <p style="padding-left: 2em;">b) de l'expertise et de « l'acceptabilité générale dans le milieu des relations du travail » comme critères de sélection du président ou de la présidente;</p> <p>(6) la question de savoir si la Cour d'appel a commis une erreur en concluant qu'en raison de l'approche contestée que le ministre a adoptée en matière de désignations fondées sur le par. 6(5), les conseils d'arbitrage étaient dépourvus de l'indépendance et de l'impartialité institutionnelles requises;</p> <p>(7) le caractère convenable de la réparation accordée par la Cour d'appel.</p> |
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I will deal with each of these issues in turn.

Je vais examiner successivement chacune de ces questions. 105

(1) The Statutory Interpretation of Section 6(5) of the *HLDA*

(1) L'interprétation du par. 6(5) *LACTH*

The appropriate approach to statutory interpretation is that "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" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, frequently cited with approval in this Court, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33). This contextual approach accords with the previously

En matière d'interprétation législative, il convient d'adopter l'approche suivante : [TRADUCTION] « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87. La Cour a souvent cité et approuvé ce passage, notamment dans les arrêts *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21 et 23, et *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33). Cette 106

mentioned *dictum* of Rand J. in *Roncarelli, supra*, that “there is always a perspective within which a statute is intended [by the legislature] to operate” (p. 140), and Lord Reid’s caution in *Padfield, supra*, that the particular wording of a ministerial power is to be read in light of “the policy and objects of the Act” (p. 1030).

- 107 The *HLDDA* contemplates the appointment of “a person who is, in the opinion of the Minister, qualified to act”. The Minister is a senior member of the government with a vital interest in industrial peace in the province. His work in pursuit of that objective in the hospital sector, supported by his officials, should not be micro-managed by the courts. Still, as Rand J. said in *Roncarelli, supra*, at p. 140, the discretionary power is not “absolute and untrammelled”. The discretion is constrained by the scheme and object of the *HLDDA* as a whole, which the legislature intended to serve as a “neutral and credible” substitute for the right to strike and lock-out.

- 108 Compulsory arbitration is a fairly well-understood beast in the jungle of labour relations. Dickson C.J., dissenting on other grounds in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, pointed out, at p. 380:

The purpose of such a mechanism [compulsory arbitration] is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

- 109 Labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. The intervenor, National Academy of Arbitrators (Canadian Region), contended that “[a]rbitration

approche contextuelle concorde avec la remarque susmentionnée du juge Rand dans l’arrêt *Roncarelli*, précité, selon laquelle [TRADUCTION] « [u]ne loi est toujours censée s’appliquer dans une certaine optique [voulue par le législateur] » (p. 140), et avec la mise en garde de lord Reid dans l’arrêt *Padfield*, précité, voulant que le libellé d’un pouvoir ministériel doive être interprété à la lumière de [TRADUCTION] « la politique générale et [d]es objets de la Loi » (p. 1030).

La *LACTH* prévoit la désignation d’« une personne qui, à son avis [c’est-à-dire de l’avis du ministre], est compétente pour agir en cette qualité [d’arbitre] ». Le ministre est un membre supérieur du gouvernement et a un intérêt essentiel dans le maintien de la paix industrielle dans la province. Les tribunaux judiciaires ne devraient pas intervenir à outrance dans les efforts qu’il déploie, avec l’appui de ses fonctionnaires, pour atteindre cet objectif dans le secteur hospitalier. Pourtant, comme l’a affirmé le juge Rand dans l’arrêt *Roncarelli*, précité, p. 140, le pouvoir discrétionnaire n’est pas [TRADUCTION] « absolu et sans entraves ». Ce pouvoir discrétionnaire est limité par l’économie et l’objet de la *LACTH* dans son ensemble, laquelle loi établit un système qui, d’après l’intention du législateur, doit servir de moyen « neutre et crédible » de remplacer le droit de grève et de lock-out.

Dans la jungle des relations du travail, l’arbitrage obligatoire est une bête que l’on comprend assez bien. Le juge en chef Dickson, dissident pour d’autres motifs dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, a fait remarquer, à la p. 380 :

Le but d’un tel mécanisme [l’arbitrage obligatoire] est d’assurer que la perte du pouvoir de négociation par suite de l’interdiction législative des grèves est compensée par l’accès à un système qui permet de résoudre équitablement, efficacement et promptement les différends mettant aux prises employés et employeurs.

L’arbitrage en matière de relations du travail en tant que mécanisme de règlement des différends repose traditionnellement et fonctionnellement sur le consentement, l’arbitre étant choisi par les parties ou étant acceptable par chacune d’elles. L’intervenante, la National Academy of Arbitrators

which is, or is seen to be, political rather than rigorously quasi-judicial is no longer arbitration”. Moreover, the intervener contends:

If arbitrators are, or are perceived to be, a surrogate of either party or of government, or appointed to serve the interests of either party or of government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability. . . . A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.

As the Ontario legislature has considered the *HLDA* over the years, it has demonstrated an awareness of the fact that workers who feel unfairly treated can manifest their grievances with slowdowns or other job actions, including illegal walk-outs. Ministers emphasized that the purpose of the *HLDA* was to protect patients, not to tilt the balance between employers and employees one way or the other. The “background and purpose” of the *HLDA* includes the 1964 Report of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees, which led to the *HLDA*, and recommended that “[o]nly chairmen experienced in hospital affairs would be appointed” (Report, at p. 51). The Minister proposing the 1972 amendment told the Ontario Legislature that the “quality of decision-making” would be improved by “knowledgeable arbitrators experienced in the hospital sector” (*Legislature of Ontario Debates*, December 14, 1972, at p. 5760). The 1979 amendment to the *Labour Relations Act* established what is now renumbered as the s. 49(10) roster of arbitrators who were considered to be impartial and knowledgeable in labour arbitrations (not necessarily hospital matters). Interest arbitrators were frequently, though by no means always, drawn from this roster between the early 1980s and 1997. The anchors that were seen to justify the parties’ confidence in *HLDA* arbitrations were impartiality, independence, expertise and general acceptability in the labour relations community. An individual who combines relevant expertise with independence

(Canadian Region), a fait valoir que [TRADUCTION] « [l]’arbitrage qui est ou qui est perçu comme étant politique plutôt que rigoureusement quasi judiciaire n’est plus un arbitrage ». L’intervenante ajoute ceci :

[TRADUCTION] Si l’arbitre est l’agent de l’une ou l’autre partie ou du gouvernement ou s’il est perçu comme tel, ou encore s’il est désigné pour servir les intérêts de l’une ou l’autre partie ou du gouvernement, le système s’aliène la confiance des parties qui est essentielle à la paix et à la stabilité des relations du travail [. . .] L’absence de confiance dans l’arbitrage entraînerait des conflits de travail et l’interruption des services, lesquels représentent le problème même que l’arbitrage impartial des différends vise à prévenir.

Au fil des ans, l’Assemblée législative de l’Ontario a étudié la *LACTH* et a démontré qu’elle était consciente du fait que des travailleurs qui se sentent injustement traités peuvent exprimer leur mécontentement par des ralentissements de travail ou par d’autres moyens de pression, y compris les débrayages illégaux. Les ministres ont souligné que la *LACTH* avait pour objet de protéger les malades et non de faire pencher la balance en faveur des employeurs ou des employés. Au chapitre « du contexte et de l’objet » de la *LACTH*, il y a le rapport déposé en 1964 par la Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and their Employees qui a abouti à la *LACTH* et qui recommandait, à la p. 51, que [TRADUCTION] « [s]eules [soient] désignées à la présidence des personnes ayant de l’expérience en matière hospitalière ». En proposant la modification de 1972, le ministre a affirmé devant l’Assemblée législative de l’Ontario que la désignation [TRADUCTION] « d’arbitres compétents qui ont de l’expérience dans le secteur hospitalier » contribuerait à améliorer la « qualité du processus décisionnel » (*Legislature of Ontario Debates*, 14 décembre 1972, p. 5760). La modification apportée en 1979 à la *Labour Relations Act* a établi la liste — maintenant prévue au par. 49(10) — d’arbitres jugés impartiaux et compétents en matière d’arbitrage de conflits de travail (mais pas nécessairement en matière hospitalière). Depuis le début des années 1980 jusqu’en 1997, les arbitres de différends étaient souvent — quoique pas toujours — choisis à partir de

and impartiality can reasonably be expected to be experienced in the field, thus known to and broadly acceptable to both unions and management.

111 I conclude, therefore, that, although the s. 6(5) power is expressed in broad terms, the legislature intended the Minister, in making his selection, to have regard to relevant labour relations expertise as well as independence, impartiality and general acceptability within the labour relations community. By “general acceptability”, I do not mean that a particular candidate must be acceptable to all parties all the time, or to the parties to a *particular* *HLDA* dispute. I mean only that the candidate has a track record in labour relations and is generally seen in the labour relations community as widely acceptable to both unions and management by reason of his or her independence, neutrality and proven expertise.

112 I do not consider these criteria to be vague or uncertain. The practice of labour relations in this country has developed into a highly sophisticated business. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill these criteria. Some of them not only enjoy national reputations for their skills in resolving industrial conflicts but are retired judges. From the Minister’s perspective, there exists not only a large pool of recognized candidates, but the *HLDA* allows generous latitude to his selection (i.e., a candidate “who is, in the opinion of the Minister, qualified”). The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDA*’s object and purposes.

cette liste. Les qualités qui semblaient justifier la confiance des parties dans l’arbitrage fondé sur la *LACTH* étaient l’impartialité, l’indépendance, l’expertise et l’acceptabilité générale dans le milieu des relations du travail. On peut raisonnablement s’attendre à ce qu’une personne qui cumule expertise pertinente, indépendance et impartialité ait de l’expérience dans le domaine concerné et qu’elle soit ainsi connue et généralement acceptable tant par les syndicats que par le patronat.

Je conclus donc que, même si le pouvoir conféré au par. 6(5) est énoncé en termes généraux, le législateur a voulu qu’en faisant son choix le ministre prenne en considération l’expertise pertinente en matière de relations du travail ainsi que l’indépendance, l’impartialité et l’acceptabilité générale dans le milieu des relations du travail. Lorsque je parle d’« acceptabilité générale », je ne veux pas dire que les candidats doivent toujours être acceptables par toutes les parties ou encore par les parties à un différend *particulier* visé par la *LACTH*. J’entends seulement par là que les candidats ont de l’expérience en matière de relations du travail et sont généralement perçus dans le milieu des relations du travail comme jouissant d’une grande acceptabilité auprès des syndicats et du patronat en raison de leur indépendance, de leur neutralité et de leur expertise confirmée.

Je ne considère pas que ces critères sont vagues ou incertains. Les relations du travail au pays sont devenues un domaine très spécialisé. Un grand nombre d’arbitres professionnels en droit du travail dépendent, pour leur subsistance, de leur capacité reconnue de satisfaire à ces critères. En plus d’être réputés à l’échelle nationale pour leur aptitude à résoudre des conflits de travail, certains d’entre eux sont des juges retraités. Du point de vue du ministre, non seulement y a-t-il une réserve importante de candidats reconnus, mais encore la *LACTH* lui accorde une grande latitude pour faire son choix (c’est-à-dire pour choisir le candidat « qui, à son avis, est compéten[t] »). Il en résulte un cadre tout à fait acceptable à l’intérieur duquel le législateur a voulu accorder au ministre une liberté d’action considérable, mais non illimitée, pour faire des désignations conformes aux fins et aux objets de la *LACTH*.

(2) Procedural Fairness

Under this heading, I group the challenges to the Minister's impartiality, the allegation that he violated procedural fairness by allegedly changing the "system" of appointments without prior consultation, and his alleged violation of the doctrine of legitimate expectation.

(a) *Was the Minister Impartial in the Exercise of the Power of Appointment?*

The unions say the Minister could not, as a member of a cost-cutting government, make the appointments impartially. He was therefore disqualified and ought to have delegated the appointments to senior officials.

The Minister says that he is not responsible for health costs or hospital administration. He is, however, a member of Cabinet and committed to government policy which, in 1997, included public sector "rationalization" and pay restraint. He was elected on a platform called "the Common Sense Revolution" and people would reasonably think he was committed to carrying it out.

The Ontario Court of Appeal concluded that the Minister had a "significant and direct interest" in the outcome of the arbitral awards (para. 21). As Austin J.A. pointed out, "[a]pproximately 75 per cent to 80 per cent of hospital budgets relate to labour costs and the government's primary method for controlling expenditures is wage control. Although nursing homes have sources of income that are not available to hospitals, they too are substantially dependent upon the government for funding" (para. 21). The Minister's response is that here, unlike in cases such as *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.), at pp. 869-71 and 884, neither he nor his government was a party to hospital sector arbitral proceedings. In the *MacBain* case, the Canadian Human Rights Commission appointed the members of the *ad hoc* tribunal to adjudicate the very dispute between the Commission and the person complained about. The Minister argues that his interest in hospital finance

(2) L'équité procédurale

Je regroupe sous cette rubrique les allégations de partialité de la part du ministre, l'allégation voulant qu'il ait manqué à l'équité procédurale en modifiant le « système » de désignation sans consultation préalable, et l'allégation voulant qu'il ait violé la règle de l'expectative légitime.

a) *Le ministre a-t-il été impartial dans l'exercice de son pouvoir de désignation?*

Les syndicats soutiennent que, à titre de membre d'un gouvernement prônant la réduction des dépenses, le ministre n'était pas en mesure de faire les désignations de manière impartiale. Il était donc inhabile à faire les désignations et il aurait dû confier à des hauts fonctionnaires le soin de le faire à sa place.

Le ministre affirme qu'il n'est responsable ni des coûts en matière de santé ni de l'administration des hôpitaux. Il fait néanmoins partie du Cabinet et est un défenseur de la politique du gouvernement qui, en 1997, consistait notamment à « rationaliser » le secteur public et à contrôler les salaires. Il a été élu en raison de la « Révolution du Bon Sens » qu'il promettait et la population pouvait raisonnablement penser qu'il était résolu à tenir cette promesse.

La Cour d'appel de l'Ontario a conclu que le ministre avait un [TRADUCTION] « intérêt important et direct » dans l'issue des arbitrages (par. 21). Comme l'a fait remarquer le juge Austin, [TRADUCTION] « [e]nviron 75 à 80 pour 100 du budget des hôpitaux est consacré à la masse salariale et le contrôle des salaires représente le principal moyen dont le gouvernement dispose pour contrôler les dépenses. Même si les maisons de soins infirmiers ont des sources de revenus dont ne disposent pas les hôpitaux, elles dépendent largement elles aussi du financement gouvernemental » (par. 21). Le ministre répond qu'en l'espèce, contrairement à des affaires comme *MacBain c. Lederman*, [1985] 1 C.F. 856 (C.A.), p. 869-871 et 884, ni lui ni son gouvernement n'ont participé aux procédures d'arbitrage dans le secteur hospitalier. Dans l'affaire *MacBain*, la Commission canadienne des droits de la personne avait désigné les membres du tribunal

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is not “directly at stake” (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 100) and “too attenuated and remote to give rise to a reasonable apprehension of bias” (*Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 891). The local hospital boards could absorb higher unit labour costs by reducing services, thus keeping public funding requirements more or less constant. This approach, I think, is unrealistic. It underestimates the Minister’s collective responsibility with his colleagues at a time of pitched confrontation with the unions over reductions in public sector staffing and financing. At the very least, there was an appearance that he had a significant interest in outcomes as well as process.

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The legal answer to this branch of the unions’ argument, however, is that the legislature specifically conferred the power of appointment on the Minister. Absent a constitutional challenge, a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice, as recently affirmed by this Court in *Ocean Port Hotel*, *supra*. In that case, the members of the provincial liquor licensing appeal board, who were empowered to impose penalties on liquor licences for non-compliance with the Act, were appointed to serve “at the pleasure” of the executive. Some licencees successfully argued before the British Columbia Court of Appeal that “at pleasure” appointees lacked the security of tenure necessary to ensure their independence. The Board’s decisions were therefore set aside. On further appeal to this Court, however, it was held, *per* McLachlin C.J., that “like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication” (para. 22 (emphasis added)). Affirming the rule of interpretation that “courts generally infer that Parliament or the legislature intended the tribunal’s process to comport with principles of natural justice” (para. 21), the Court never-

ad hoc chargé de se prononcer sur le conflit même qui opposait la Commission à la personne visée par la plainte en question. Le ministre soutient que son intérêt en matière de financement hospitalier n’est pas « directement en jeu » (*Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 100) et qu’il est « trop minime et trop éloigné pour donner lieu à une crainte raisonnable de partialité » (*Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, p. 891). Les conseils d’hôpitaux locaux pourraient éponger une hausse des coûts unitaires de main-d’œuvre en réduisant les services, et ainsi stabiliser plus ou moins les besoins de financement public. J’estime que cette approche n’est pas réaliste. Elle sous-estime la solidarité du ministre avec ses collègues à une époque d’affrontements intenses avec les syndicats au sujet des réductions de personnel et de financement dans le secteur public. Le ministre paraissait tout au moins avoir un intérêt important autant dans le processus que dans l’issue du processus.

Cependant, la réponse juridique à ce volet de l’argumentation des syndicats est que le législateur a expressément conféré le pouvoir de désignation au ministre. En l’absence de contestation constitutionnelle, un régime législatif qui porte sur ce sujet précis et qui est énoncé en des termes clairs et non équivoques prime sur les principes de justice naturelle de la common law, comme l’a récemment affirmé notre Cour dans l’arrêt *Ocean Port Hotel*, précité. Dans cette affaire, les membres de la commission d’appel des permis d’alcool provinciale, habilités à infliger des peines aux titulaires de permis d’alcool qui ne se conformaient pas à la Loi, étaient nommés « à titre amovible » par l’exécutif. Certains titulaires de permis ont fait valoir avec succès devant la Cour d’appel de la Colombie-Britannique que les personnes désignées « à titre amovible » étaient privées de l’inamovibilité nécessaire pour garantir leur indépendance. Les décisions de la commission ont donc été annulées. Cependant, à la suite du pourvoi formé devant notre Cour, il a été décidé, sous la plume de la juge en chef McLachlin, que « comme pour tous les principes de justice naturelle, le degré d’indépendance requis des membres du tribunal administratif peut être écarté par les termes exprès de la loi ou par déduction nécessaire » (par. 22 (je

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theless concluded that “[i]t is not open to a court to apply a common law rule in the face of clear statutory direction” (para. 22 (emphasis added)). Further, “[w]here the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence” (para. 27 (emphasis added)).

The courts will equally give effect in a proper case to exclusion by necessary implication. In *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, for example, the legislature had clearly and unequivocally conferred both investigatory and adjudicative functions on members of the Alberta Securities Commission. In the absence of any constitutional challenge, the Court affirmed that the overlap of functions was permissible, provided the official in question did not go beyond “fulfilling his statutory duties” (p. 315).

Ocean Port Hotel, supra, involved adjudication of licensing violations in the context of government liquor policy. As was stated at para. 33, “[The Board] is first and foremost a licensing body. The suspension complained of was an incident of the Board’s licensing function. . . . The exercise of power here at issue falls squarely within the executive power of the provincial government.”

Here, the context is quite different. The government has the power to legislate workers back to work but the *HLDA* holds out the promise of a “neutral and credible” process to reconcile the interests of the employer and employees. As arbitrator O. B. Shime observed in *McMaster University and McMaster University Faculty Assn., Re* (1990), 13 L.A.C. (4th) 199, at p. 204:

souligne)). Confirmant la règle d’interprétation selon laquelle « les tribunaux judiciaires infèrent généralement que le Parlement ou la législature voulait que les procédures du tribunal administratif soient conformes aux principes de justice naturelle » (par. 21), la Cour a néanmoins conclu qu’« [i]l n’est pas loisible à un tribunal judiciaire d’appliquer une règle de common law alors qu’il est en présence d’une directive législative claire » (par. 22 (je souligne)). De plus, « [l]orsque, comme en l’espèce, l’intention du législateur est sans équivoque, il n’y a pas lieu d’importer les théories de common law en matière d’indépendance » (par. 27 (je souligne)).

Lorsque le cas s’y prête, les tribunaux judiciaires appliquent également le principe de l’exclusion par déduction nécessaire. Par exemple, dans l’affaire *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301, le législateur avait confié clairement et sans équivoque des fonctions d’enquête et de décision aux membres de l’Alberta Securities Commission. En l’absence de contestation constitutionnelle, la Cour a affirmé que le cumul de fonctions était acceptable pourvu que le fonctionnaire en cause ait seulement « exercé les fonctions que lui impose la loi » (p. 315).

L’arrêt *Ocean Port Hotel*, précité, concernait une décision relative à des violations de permis rendue conformément à une politique gouvernementale en matière d’alcool. Comme le précise le par. 33, « [la] fonction première [de la commission] est l’octroi de permis. La suspension qui a fait l’objet de la plainte se rattachait à l’exercice de cette fonction. [. . .] L’exercice du pouvoir en cause procède carrément du pouvoir exécutif du gouvernement provincial. »

Le contexte en l’espèce est totalement différent. Le gouvernement peut légiférer pour forcer le retour au travail, mais la *LACTH* promet un processus « neutre et crédible » permettant de concilier les intérêts de l’employeur et ceux des employés. Comme l’a fait remarquer l’arbitre O. B. Shime, à la p. 204 de la décision *McMaster University and McMaster University Faculty Assn., Re* (1990), 13 L.A.C. (4th) 199 :

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Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy.

121 In the case of tribunals established, as here, to adjudicate “interest” disputes between parties, it is particularly important to insist on clear and unequivocal legislative language before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication.

122 In this case, however, the legislature’s choice of the Minister as the proper authority to exercise the power of appointment is clear and unequivocal.

123 The unions contend that the Minister could have avoided the appearance of a conflict of interest. Over the years, the direct involvement of Ministers in s. 6(5) appointments was somewhat diminished by delegation of the selection of the third arbitrator to a senior public servant, whose recommendation was then, in most cases, accepted by the Minister. An express power of delegation is found in s. 9.2(1), but it is expressed as permissive, not mandatory. The practice of delegation, where followed, may have had as much to do with departmental efficiency as with sensitivity over the Minister’s direct involvement. It was not a requirement.

124 In some provinces, the selection of a chairperson in public sector labour disputes is distanced from the Minister by being conferred on a Chief Justice or other disinterested authority. See, e.g., *Universities Act*, R.S.A. 2000, c. U-3, s. 32(e); *Teachers’ Collective Bargaining Act*, R.S.N. 1990, c. T-3, ss. 17(2) and 22(2); and *Teachers’ Collective Bargaining Act*, R.S.N.S. 1989, c. 460, s. 26(2). This was clearly not an option that recommended itself to the Ontario legislature in the case of the *HLDA*.

[TRADUCTION] Les arbitres et les arbitres des dernières offres ont toujours conservé leur indépendance par rapport aux politiques gouvernementales en matière de détermination de la rémunération dans le secteur public, et n’ont jamais adopté un point de vue qui en feraient des mandataires du gouvernement chargés d’appliquer une politique gouvernementale.

Dans les cas semblables à la présente affaire où des tribunaux administratifs sont constitués pour régler des « différends » entre des parties, il est particulièrement important d’exiger un langage législatif clair et non équivoque pour conclure que le législateur a voulu écarter, soit expressément, soit par déduction nécessaire, l’exigence d’impartialité.

En l’espèce, cependant, le choix par le législateur du ministre comme étant la personne compétente pour exercer le pouvoir de désignation est clair et non équivoque.

Les syndicats prétendent que le ministre aurait pu éviter l’apparence de conflit d’intérêts. Au fil des ans, la délégation du pouvoir de choisir le troisième arbitre à un haut fonctionnaire dont la recommandation était, dans la plupart des cas, entérinée par le ministre a contribué à diminuer quelque peu la participation directe des ministres aux désignations fondées sur le par. 6(5). Le paragraphe 9.2(1) accorde expressément un pouvoir de délégation, mais celui-ci est énoncé de manière facultative et non impérative. Dans les cas où elle a été suivie, la pratique consistant à déléguer le pouvoir de désignation peut avoir répondu autant à un souci d’efficacité ministérielle qu’à un souci d’éviter la participation directe du ministre. Ce n’était pas une exigence.

Dans certaines provinces, on dissocie le ministre du choix d’une personne à la présidence d’un conseil d’arbitrage de conflit de travail dans le secteur public en confiant à un juge en chef ou à une autre personne compétente neutre le soin de l’effectuer. Voir, par exemple, *Universities Act*, R.S.A. 2000, ch. U-3, al. 32e), *Teachers’ Collective Bargaining Act*, R.S.N. 1990, ch. T-3, par. 17(2) et 22(2), et *Teachers’ Collective Bargaining Act*, R.S.N.S. 1989, ch. 460, par. 26(2). Le législateur de l’Ontario n’a manifestement pas jugé cette option acceptable dans le cas de la *LACTH*.

Even in 1965, when the *HLDA* was enacted, provincial funding of health care was such that it was anticipated by opposition members of the legislature that Ministers of Labour would be interested (or would at least have the appearance of an interest) in outcomes as well as process. The legislature nevertheless proceeded to confer the power, perhaps to keep the Minister politically accountable for its exercise. For the court to require the Minister to delegate the choice to an official in his Ministry in the face of the text of s. 6(5) would amount, I think, to a judicial amendment of the legislation.

I therefore conclude that the Minister's perceived interest in the outcome of s. 6(5) arbitrations does not bar him from exercising a statutory power of appointment conferred on him in clear and unequivocal language.

(b) *The Minister's Alleged Failure to Consult with the Unions About the Change in the Process of Appointments*

The unions claim that they were the beneficiaries of a long-standing appointments process that was regarded by the parties as entrenched and was unfairly changed "in one fell swoop" to the unions' detriment without notice or consultation. If established, such circumstance might well give rise to a claim of breach of procedural fairness. As stated by Le Dain J. in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653:

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

The issue here is consultation. The unions say that when the Minister changed an entrenched appointments process, his decision was of an administrative nature and affected the vital interest of union members, namely the earning of their livelihood. Their interest was not remote, but directly engaged by the selection of those to be put in power

Même en 1965, au moment de l'adoption de la *LACTH*, le financement provincial des soins de santé était tel que les membres de l'opposition à l'Assemblée législative prévoient que les ministres du Travail auraient un intérêt (ou du moins l'apparence d'un intérêt) autant dans l'issue du processus que dans le processus même. Le législateur a néanmoins conféré le pouvoir en question, peut-être pour que le ministre demeure politiquement responsable de son exercice. J'estime que, compte tenu du libellé du par. 6(5), il y aurait modification judiciaire de la Loi si un tribunal judiciaire obligeait le ministre à déléguer son pouvoir de désignation à un fonctionnaire de son ministère.

Je conclus donc que la perception selon laquelle le ministre a un intérêt dans l'issue des arbitrages fondés sur le par. 6(5) ne l'empêche pas d'exercer le pouvoir de désignation que la Loi lui confère de manière claire et non équivoque.

b) *L'allégation voulant que le ministre n'ait pas consulté les syndicats au sujet de la modification du processus de désignation*

Les syndicats font valoir qu'ils bénéficiaient depuis longtemps d'un processus de désignation que les parties considéraient comme bien enraciné, et que ce processus a été « d'un seul coup » injustement modifié à leur détriment, sans préavis ni consultation. S'il est établi, ce fait pourrait donner lieu à un recours pour manquement à l'équité procédurale. Comme l'a affirmé le juge Le Dain dans l'arrêt *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653 :

Cette Cour a confirmé que, à titre de principe général de *common law*, une obligation de respecter l'équité dans la procédure incombe à tout organisme public qui rend des décisions administratives qui ne sont pas de nature législative et qui touchent les droits, privilèges ou biens d'une personne . . .

C'est la question de la consultation qui est en litige dans la présente affaire. Les syndicats prétendent que, lorsque le ministre a modifié un processus de désignation bien enraciné, sa décision était de nature administrative et touchait l'intérêt essentiel que leurs membres ont à gagner leur vie. Loin d'être éloigné, cet intérêt qu'ils avaient était

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over the terms of their collective agreement. They consider the situation to be comparable to the facts in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.).

129 Assuming the existence of a duty to consult in these circumstances, I think it was satisfied. All parties agree that there were extensive meetings at the time of Bill 136. Discussions were intense, sometimes strident, and at the highest levels. Both the Minister of Labour and the Deputy Minister signalled that the appointments process was subject to “reform” and that retired judges were potential candidates for s. 6(5) appointments. The unions made clear their opposition to anything short of a system based on mutual agreement. There was thus some notice of the proposed change and an opportunity to comment. I do not think, as a matter of general legal principle, that s. 6(5) imposed on the Minister a procedural requirement to consult with the parties to each arbitration from and after the general consultations in the fall of 1997. There was no history of such consultation in the past. As CUPE’s witness Julie Davis testified:

Q. And I take it there that it was understood that it would not be necessary to consult first before appointing someone like Adams or Gold who was not on the list, so long as they had this expertise and wide acceptability?

A. That they could be appointed, yes. We didn’t dispute people of that calibre; that’s true.

130 It is evident from the cross-examinations filed in this case that the choice of hospital arbitrators was one of the flashpoints of the confrontation from June 1997 to February 1998 and continued to be so after the initial set of appointments of retired judges. The unions did not achieve their objective but they had no difficulty in making themselves heard. There was, with respect

directement touché par le choix des personnes qui exerceraient un pouvoir sur la détermination des conditions de leur convention collective. Ils jugent cette situation comparable aux faits de l’arrêt *Council of Civil Service Unions c. Minister for the Civil Service*, [1985] A.C. 374 (H.L.).

En supposant qu’une obligation de consulter existe dans ces cas, je crois que l’on s’en est acquitté. Toutes les parties reconnaissent que de nombreuses rencontres ont eu lieu à l’époque du projet de loi 136. Les discussions étaient animées, parfois mouvementées, et ont été tenues aux niveaux les plus élevés. Le ministre du Travail et le sous-ministre ont tous deux indiqué que le processus de désignation faisait l’objet d’une « réforme » et que les juges retraités étaient des candidats potentiels pour les désignations fondées sur le par. 6(5). Les syndicats se sont clairement opposés à tout système qui ne serait pas le fruit d’un commun accord. On a donc donné un avis du projet de modification ainsi que l’occasion de le commenter. Je ne pense pas que, depuis les consultations générales de l’automne 1997, le par. 6(5) impose au ministre l’obligation procédurale de consulter les parties à chaque arbitrage, et ce, à titre de principe juridique général. Aucune consultation semblable n’avait eu lieu dans le passé. Comme l’a affirmé le témoin du SCFP, Julie Davis :

[TRADUCTION]

Q. Et là j’imagine qu’il était entendu qu’il ne serait pas nécessaire de consulter avant de désigner une personne comme M. Adams ou M. Gold, qui n’était pas inscrite sur la liste, pourvu qu’elle ait cette expertise et qu’elle jouisse d’une grande acceptabilité?

R. Qu’ils pourraient être désignés, oui. Il est vrai qu’on ne contestait pas la désignation de personnes de ce calibre.

Il ressort clairement des contre-interrogatoires déposés en l’espèce que le choix des arbitres dans le secteur hospitalier a été l’un des éléments déclencheurs de l’affrontement qui a duré de juin 1997 à février 1998, et qu’il a continué d’en être ainsi après la première série de désignations de juges retraités. Les syndicats n’ont pas atteint leur objectif, mais ils n’ont eu aucune difficulté à se faire entendre. Il n’y

to the “changed process”, no refusal of consultation.

- (c) *The Alleged Violation of the Doctrine of Legitimate Expectation in Refusing to Nominate Only Arbitrators Who Had Been Mutually Agreed Upon*

The doctrine of legitimate expectation is “an extension of the rules of natural justice and procedural fairness”: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be “legitimate”, such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker, supra*; *Mount Sinai, supra*, at para. 29; *Brown and Evans, supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the “legitimate” expectation.

The Court of Appeal concluded, at para. 105, that “the Minister interfered with the legitimate expectations of the appellants and other affected unions, contrary to the principles and requirements of fairness and natural justice” and ordered the Minister to restrict his appointments to the s. 49(10) roster.

In my view, with respect, the conditions precedent to the application of the doctrine are not established in this case. The evidence of past practice is equivocal, and as a result the evidence of a promise to “return to” past practice is also equivocal. What Minister Elizabeth Witmer meant by “a return to the sector-based system of appointing arbitrators” (*Standing Committee on Resources Development, supra*, at p. R-2577), and what she was understood by the unions to mean, depends on what they now

a eu, au sujet du « processus modifié », aucun refus de procéder à des consultations.

- c) *L’allégation de violation de la règle de l’expectative légitime en raison du refus de désigner uniquement des arbitres sur lesquels les parties s’étaient entendues*

La règle de l’expectative légitime est « le prolongement des règles de justice naturelle et de l’équité procédurale » : *Renvoi relatif au Régime d’assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, p. 557. Elle s’attache à la conduite d’un ministre ou d’une autre autorité publique dans l’exercice d’un pouvoir discrétionnaire — y compris les pratiques établies, la conduite ou les affirmations qui peuvent être qualifiées de claires, nettes et explicites — qui a fait naître chez les plaignants (en l’espèce, les syndicats) l’expectative raisonnable qu’ils conserveront un avantage ou qu’ils seront consultés avant que soit rendue une décision contraire. Pour être « légitime », une telle expectative ne doit pas être incompatible avec une obligation imposée par la loi. Voir : *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Baker*, précité; *Mont-Sinaï*, précité, par. 29; *Brown et Evans, op. cit.*, par. 7:2431. Lorsque les conditions d’application de la règle sont remplies, la cour peut accorder une réparation procédurale convenable pour répondre à l’expectative « légitime ».

La Cour d’appel a conclu, au par. 105, que [TRADUCTION] « le ministre a contrecarré les attentes légitimes des appelants et des autres syndicats touchés, contrairement aux principes et aux exigences de l’équité et de la justice naturelle », et lui a ordonné de ne désigner que des personnes inscrites sur la liste dressée en vertu du par. 49(10).

J’estime, en toute déférence, que l’existence des conditions préalables à l’application de cette règle n’est pas établie en l’espèce. La preuve de la pratique suivie antérieurement est équivoque et, partant, la preuve d’une promesse de « retour » à l’ancien système est, elle aussi, équivoque. Ce que la ministre Elizabeth Witmer entendait par [TRADUCTION] « retour au système sectoriel de désignation des arbitres » (*Comité permanent du développement des ressources, op. cit.*, p. R-2577), et ce que les

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say were their respective prior understandings of “the system”. The Minister says the “sector-based system” was the *HLDA*, including the broad latitude afforded to him by s. 6(5). The unions say the “sector-based system” was the s. 49(10) roster.

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The evidence shows, I think, that the “system” varied, both from Minister to Minister, and during the tenure of particular Ministers. Between 1982 and 1997 (considered by both parties to be the relevant period), the appointments of *HLDA* chairpersons from the s. 49(10) list dropped from 100 percent in 1982/83 to a low of 66 percent in 1985/86 (and 66 percent again in 1986/87). The Deputy Minister testified that “in [1986/87], there were 58 ministerial appointments and of those 19 of the appointees were not on the list and in [1987/88], there were 80 ministerial appointments and 26 were not on the list” (emphasis added). The use of the s. 49(10) roster rose to 98 percent in 1996/97 before dropping back to 90 percent in 1997/98. CUPE witness Julie Davis testified that her union gladly accepted chairpersons such as Harry Waisglass and Ray Illing who were not on the s. 49(10) list:

So we wouldn’t have even questioned their appointment, whether they were on the list or not on the list, because we know them to be, as I said, well-respected people who understand workplace issues and labour relations — in a labour relations context and had high credibility in terms of being able to work with workplace parties.

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As previously noted, there is no mention in the *HLDA* of s. 49(10) even though numerous other sections of the *Labour Relations Act, 1995* are explicitly referenced. Whether or not successive Ministers or their delegates limited themselves to the list seems to have been a matter of policy and individual preference. I agree that the evidence

syndicats ont compris, dépend de la compréhension qu’ils affirment maintenant avoir respectivement eue du « système » dans le passé. Le ministre prétend que le « système sectoriel » était celui de la *LACTH* — avec la grande latitude que lui accorde le par. 6(5). Les syndicats rétorquent que le « système sectoriel » était celui de la liste dressée en vertu du par. 49(10).

À mon avis, la preuve démontre que le « système » a changé d’un ministre à l’autre, et pendant le mandat de certains ministres. Entre 1982 et 1997 (période que les deux parties jugent pertinente), le pourcentage des personnes inscrites sur la liste dressée en vertu du par. 49(10) qui ont été désignées à la présidence de conseils d’arbitrage constitués en application de la *LACTH*, qui était de 100 pour 100 en 1982-1983, est tombé à 66 pour 100 en 1985-1986 (demeurant à 66 pour 100 en 1986-1987). Le sous-ministre a témoigné que, [TRADUCTION] « [en 1986-1987], le ministre a désigné 58 personnes dont 19 n’étaient pas inscrites sur la liste, et [qu’en 1987-1988], il en a désigné 80 dont 26 n’étaient pas inscrites sur la liste » (je souligne). Le pourcentage de cas où la liste dressée en vertu du par. 49(10) a été utilisée a atteint 98 pour 100 en 1996-1997, pour ensuite tomber à 90 pour 100 en 1997-1998. Le témoin du SCFP, Julie Davis, a déclaré que son syndicat avait bien accueilli des présidents comme Harry Waisglass et Ray Illing, qui n’étaient pas inscrits sur la liste dressée en vertu du par. 49(10) :

[TRADUCTION] Ainsi, nous n’aurions même pas contesté leur désignation, qu’ils aient ou non figuré sur la liste, parce que nous savons que ce sont, comme je l’ai dit, des personnes très respectées qui comprennent les enjeux du milieu de travail et des relations du travail — dans un contexte de relations du travail, et qui jouissaient d’une grande crédibilité sur le plan de leur capacité de travailler avec les parties en cause.

Comme nous l’avons vu, il n’y a aucune mention du par. 49(10) dans la *LACTH* même si on y trouve des renvois explicites à de nombreux autres articles de la *Loi de 1995 sur les relations de travail*. Le fait que les ministres qui se sont succédé ou leurs délégués s’en soient tenus ou ne s’en soient pas tenus à la liste semble avoir été une question de politi-

shows frequent resort of successive Ministers to the s. 49(10) list, but it equally shows considerable variation, which suggests that successive Ministers did not consider such resort to be obligatory. Moreover, as stated, not everyone on the s. 49(10) list, which was addressed primarily to “grievance” arbitrators, was thought by the parties to be suitable for “interest arbitrations”. CUPE’s witness, Julie Davis, in her reply affidavit, affirmed that “we were concerned that the Ministry might appoint arbitrators from the roster who have little or no experience in mediation”. There thus appears to be no compelling basis in the evidence to restrict the *HLDA* to the roster of candidates compiled under s. 49(10) of the *Labour Relations Act, 1995*.

The evidentiary basis of the unions’ contention that chairpersons were to be selected on the basis of mutual agreement is their contention that the Minister made routine resort to the s. 49(10) roster in which the unions had a voice through LMAC. If, as I have concluded, the s. 49(10) argument does not succeed on the facts, the unions’ related argument that appointments were subject to mutual acceptability falls with it. For reasons already discussed, I believe that s. 6(5) contemplates the appointment of chairpersons broadly acceptable to labour and management, but that is different from the veto claimed by the unions on a case-by-case basis.

The evidence of an alleged promise to return to the *status quo* was equivocal. In her press release dated September 18, 1997, announcing the government’s retreat on Bill 136, the Minister stated:

The union movement has requested a return to the current legislative provision governing the appointment of arbitrators. Our amendments would do that. [Emphasis added.]

que générale et de préférence individuelle. Certes, la preuve démontre que les ministres qui se sont succédé ont souvent eu recours à la liste dressée en vertu du par. 49(10), mais elle témoigne également d’une grande fluctuation qui indique que les ministres ne se considéraient pas tenus d’y recourir. De plus, je le répète, les parties ne considéraient pas que les personnes inscrites sur la liste dressée en vertu du par. 49(10) — qui était destinée surtout à l’arbitrage de « griefs » — étaient toutes aptes à faire des « arbitrages de différends ». Le témoin du SCFP, Julie Davis, a confirmé dans sa réponse sous forme d’affidavit que [TRADUCTION] « nous étions préoccupés par la possibilité que le ministre désigne éventuellement des arbitres inscrits sur la liste qui avaient peu ou pas d’expérience en matière de médiation ». Rien dans la preuve ne semble donc commander de limiter l’application de la *LACTH* à la liste de candidats dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*.

Les syndicats font valoir, à l’appui de leur affirmation selon laquelle les présidents et présidentes devaient être choisis d’un commun accord, que le ministre avait coutume de recourir à la liste dressée en vertu du par. 49(10), au sujet de laquelle ils pouvaient se faire entendre par l’intermédiaire du CCSP. Si, comme je l’ai conclu, l’argument fondé sur le par. 49(10) doit être rejeté à la lumière des faits, l’argument connexe des syndicats selon lequel les désignations devaient être acceptables par les parties échouera également. Pour les motifs déjà exposés, je crois que le par. 6(5) prévoit la désignation de présidents généralement acceptables par les syndicats et le patronat, ce qui est toutefois différent du veto dont les syndicats veulent se prévaloir dans chaque cas.

La preuve qu’il y aurait eu promesse de retour au statu quo était équivoque. Dans le communiqué de presse daté du 18 septembre 1997, où elle annonçait le retrait du projet de loi 136 par le gouvernement, la ministre déclarait :

[TRADUCTION] Le mouvement syndical a demandé le retour à la disposition législative actuelle qui régit la désignation des arbitres. C’est ce que feraient nos modifications. [Je souligne.]

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138 On September 23, 1997, the Minister told the legislative Standing Committee:

After a very productive and lengthy consultation, the government has decided it will not proceed with establishing a dispute resolution commission to conduct interest arbitration in the police, fire and hospital sectors. Instead, the government is proposing a return to the sector-based system of appointing arbitrators to resolve disputes in these three particular areas and reforming the existing arbitration systems as they are set out in the Fire Protection and Prevention Act, the Police Services Act and the Hospital Labour Disputes Arbitration Act. [Emphasis added.]

(Standing Committee on Resources Development, *supra*, at p. R-2577)

At least to some extent, the Minister gave with one hand (a “return” to the “sector-based system” instead of a Dispute Resolution Commission) what she took away with the other (the existing system would be “reformed”).

139 With respect to meetings between the unions and government representatives at the time of Bill 136, the Deputy Minister of Labour testified:

Union representatives expressed concern at the lack of any assurances about how the appointments would be made. A lengthy and heated discussion took place about this issue. I recall the following exchange between Howard Goldblatt (speaking for the union representatives) and John Lewis and me (speaking for government representatives):

Q: Will you seek our agreement before adding anyone to the pool?

A: No.

Q: Will you consult with us before adding someone to the pool?

A: No.

Q: Let’s determine the list of arbitrators right now.

A: No.

140 In her June 5, 1997 press interview, then Minister Witmer had indicated that academics and judges

Le 23 septembre 1997, la ministre déclarait devant le Comité législatif permanent :

[TRADUCTION] Après avoir procédé à une longue et très fructueuse consultation, le gouvernement a décidé de ne pas créer une commission de règlement des différends qui serait chargée d’arbitrer les différends dans les secteurs de la police, des pompiers et des hôpitaux. Le gouvernement propose plutôt un retour au système sectoriel de désignation des arbitres pour régler les différends dans ces trois secteurs particuliers et une réforme des systèmes d’arbitrage existants énoncés dans la Loi sur la prévention et la protection contre l’incendie, la Loi sur les services policiers et la Loi sur l’arbitrage des conflits de travail dans les hôpitaux. [Je souligne.]

(Comité permanent du développement des ressources, *op. cit.*, p. R-2577)

La ministre a, dans une certaine mesure du moins, donné d’une main (le « retour » au « système sectoriel » au lieu d’une commission de règlement des différends) ce qu’elle a repris de l’autre (la « réforme » du système existant).

Au sujet des rencontres ayant eu lieu entre les syndicats et les représentants du gouvernement à l’époque du projet de loi 136, le sous-ministre du Travail a fait le témoignage suivant :

[TRADUCTION] Les représentants syndicaux se sont dits préoccupés par l’absence de promesse concernant le mode de désignation. Une discussion longue et animée a eu lieu à ce sujet. Je me souviens de l’échange suivant entre Howard Goldblatt (au nom des représentants syndicaux) et John Lewis et moi (au nom des représentants du gouvernement) :

Q. Nous demanderez-vous notre accord avant d’ajouter un nom à la réserve de candidats?

R. Non.

Q. Nous consulterez-vous avant d’ajouter une personne à la réserve de candidats?

R. Non.

Q. Dressons immédiatement la liste d’arbitres.

R. Non.

Dans l’entrevue qu’elle accordait à la presse le 5 juin 1997, la ministre Witmer avait indiqué que

might be used to staff the dispute resolution commission (*The Record*, Kitchener-Waterloo, June 5, 1997, p. B5).

The Deputy Minister further testified that in his meetings with union representatives on September 20, 1997, he

expressly stated that union representatives would see some new faces whom they had not seen before. I indicated that my personal best guess was that there would not be many such people, but that union representatives should expect such appointments.

Two possible “new faces” expressly mentioned were George Adams and Alan Gold, both of whom are retired judges.

The unions rely on an alleged “understanding” which was described in a letter to the Minister dated March 10, 1998 from Wayne Samuelson, President of the OFL:

The understanding between labour and government [in the discussions about Bill 136] was that the government would not add to the existing roster of accepted and experienced labour arbitrators without consultation, and would appoint interest arbitrators only from those on the list of arbitrators who had conducted interest arbitrations in the past, unless the appointment was of an individual who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community. [Emphasis added.]

Apart from whether or not there was such a roster, the importance of this statement by the unions, speaking through the OFL, is that it would be quite acceptable to appoint “an individual who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community” apparently regardless of whether such an individual was on the s. 49(10) list or any other “list”.

On April 6, 1998, Mr. Samuelson of the OFL again wrote to the Minister basing his complaint on the Minister’s statement that:

des professeurs d’université et des juges pourraient éventuellement siéger à la commission de règlement des différends (*The Record*, Kitchener-Waterloo, 5 juin 1997, p. B5).

Le sous-ministre a ajouté qu’au moment où il avait rencontré les représentants syndicaux le 20 septembre 1997, il avait

[TRADUCTION] précisé que les représentants syndicaux verraient de nouveaux visages qu’ils n’avaient jamais vus auparavant. J’ai indiqué que, d’après moi, il n’y en aurait pas beaucoup, mais que les représentants syndicaux devraient s’attendre à ce genre de désignations.

Les deux « nouveaux visages » possibles, mentionnés expressément, étaient George Adams et Alan Gold, tous deux juges retraités.

Les syndicats s’appuient sur une « entente » qui serait intervenue et que le président de la FTO, Wayne Samuelson, décrit dans une lettre adressée au ministre le 10 mars 1998 :

[TRADUCTION] L’entente intervenue entre les syndicats et le gouvernement (lors des discussions portant sur le projet de loi 136), prévoyait que le gouvernement n’ajouterait aucun nom, sans consulter, à la liste existante d’arbitres en droit du travail acceptés et expérimentés, et qu’il désignerait les arbitres de différends uniquement parmi les personnes — inscrites sur cette liste — qui avaient déjà effectué des arbitrages de différends, sauf si la personne désignée possédait une vaste expérience comme arbitre de différends et si elle jouissait d’une grande acceptabilité dans le milieu des relations du travail. [Je souligne.]

Outre la question de savoir si une telle liste existait, l’importance de cette assertion des syndicats faite par l’entremise de la FTO réside dans le fait qu’il serait tout à fait acceptable de désigner « la personne [...] posséda[nt] une vaste expérience comme arbitre de différends et [...] jouissa[nt] d’une grande acceptabilité dans le milieu des relations du travail », peu importe, semble-t-il, que cette personne soit ou non inscrite sur la liste dressée en vertu du par. 49(10) ou sur toute autre « liste ».

Le 6 avril 1998, M. Samuelson de la FTO a de nouveau écrit au ministre en appuyant sa plainte sur la déclaration du ministre selon laquelle

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The police and hospital sectors will continue under existing systems for appointment of arbitrators.

According to Mr. Samuelson:

This is as explicit and precise a statement as anyone could have hoped for. Indeed, this is precisely the point raised at our meeting with you at the OFL offices on March 10, 1998, and repeated in my letter to you of the same date, namely, that the understanding between labour and government was that the government would appoint interest arbitrators only from those on the list of arbitrators who had conducted interest arbitrations in the past.

This resurrects the s. 49(10) roster argument. Mr. Samuelson continued:

We further understood that should the government find it necessary to add further names to the existing roster of accepted and experienced labour arbitrators, it would only appoint persons with broad experience as an arbitrator. Should this latter case be necessary, it was agreed that the government would engage in genuine consultations on the matter.

145 Mr. Samuelson undoubtedly felt betrayed by the turn of events and attempted to make the best of a difficult situation. The evidence in support of the various agreements and “understandings” he alleges is not clear and it is certainly not unqualified or unambiguous. To bind the exercise of the Minister’s discretion the evidence of the promise or undertaking by the Minister or on his behalf must generally be such as, in a private law context, would be sufficiently certain and precise as to give rise to a claim for breach of contract or estoppel by representation: *In re Preston*, [1985] A.C. 835 (H.L.), at p. 866, *per* Lord Templeman.

146 In my view, the evidence does not establish a firm “practice” in the past of appointing from a *HLDA* list, or from the s. 49(10) list, or proceeding by way of “mutual agreement”. A general promise “to continue under the existing system” where the reference to the system itself is ambiguous, and in any event

[TRANSLATION] [L]es secteurs de la police et des hôpitaux continueront d’être régis par le système existant de désignation des arbitres.

Selon M. Samuelson,

[TRANSLATION] [c]’est la déclaration la plus précise et la plus explicite que l’on pouvait espérer. En effet, il s’agit exactement de la question soulevée lors de notre rencontre du 10 mars 1998 dans les bureaux de la FTO, et réitérée dans la lettre que je vous adressais le même jour, à savoir que l’entente intervenue entre les syndicats et le gouvernement prévoyait que ce dernier désignerait les arbitres de différends uniquement parmi les personnes — inscrites sur la liste — qui avaient déjà effectué des arbitrages de différends.

Cela a pour effet de raviver l’argument fondé sur la liste dressée en vertu du par. 49(10). Monsieur Samuelson a ajouté :

[TRANSLATION] Nous avons en outre compris que, si le gouvernement jugeait nécessaire d’ajouter d’autres noms à la liste existante d’arbitres en droit du travail acceptés et expérimentés, il ne désignerait que les personnes possédant une vaste expérience comme arbitre. Il était entendu que, si cela s’avérait nécessaire, le gouvernement procéderait à de véritables consultations à ce sujet.

Monsieur Samuelson s’est sans doute senti trahi par la tournure des événements et a tenté de tirer le meilleur parti possible de cette situation délicate. La preuve présentée à l’appui des divers accords et « ententes » dont il allègue l’existence n’est pas claire et n’est sûrement pas nette ou explicite non plus. Pour obliger le ministre à exercer son pouvoir discrétionnaire, la preuve d’un engagement ou d’une promesse de sa part ou de la part d’une autre personne agissant en son nom doit généralement être telle que, dans un contexte de droit privé, elle serait assez indiscutable et précise pour donner lieu à une action pour inexécution de contrat ou à la préclusion résultant d’une affirmation : *In re Preston*, [1985] A.C. 835 (H.L.), p. 866, lord Templeman.

À mon avis, la preuve n’établit pas l’existence, dans le passé, d’une « pratique » bien établie consistant à faire les désignations à partir d’une liste dressée en vertu de la *LACTH* ou de celle dressée en vertu du par. 49(10), ou encore à les faire « d’un commun accord ». Une promesse générale de « maintenir le

was stated by the Minister to be subject to reform, cannot bind the Minister's exercise of his or her s. 6(5) discretion as urged by the unions under the doctrine of legitimate expectation.

I therefore turn to the attack on the appointments as such and, as a necessary preliminary step, the determination of the appropriate standard of review.

(3) The Standard of Review of the Minister's Appointments

The Court's response to the unions' challenge to the Minister's appointments will be conditioned in part on the answer to the *Bibeault* question:

Did the legislator intend [*these* appointments] to be within the jurisdiction conferred on the [Minister]?

(*Bibeault*, *supra*, at p. 1087; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 16.)

To put the *Bibeault* question in its proper perspective, the courts have enlarged the inquiry beyond the specific formula of words conferring the statutory power. This "pragmatic and functional" approach to ascertain the legislative intent requires an assessment and balancing of relevant factors, including (1) whether the legislation that confers the power contains a privative clause; (2) the relative expertise as between the court and the statutory decision maker; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the question before the decision maker: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; and *Law Society of New Brunswick v.*

système existant » — alors que la mention du système lui-même est ambiguë et que le système était, en tout état de cause, sujet à une réforme, selon le ministre — ne saurait obliger le ministre à exercer le pouvoir discrétionnaire que lui confère le par. 6(5), comme le font valoir les syndicats, qui invoquent la règle de l'expectative légitime.

J'aborde donc la contestation des désignations proprement dites et, à titre d'étape préliminaire nécessaire, la détermination de la norme de contrôle applicable.

(3) La norme de contrôle applicable aux désignations ministérielles

La réponse que la Cour donnera à la contestation par les syndicats des désignations ministérielles dépendra en partie de celle donnée à la question posée dans l'arrêt *Bibeault* :

Le législateur a-t-il voulu [que *ces* désignations] relève[nt] de la compétence conférée au [ministre]?

(*Bibeault*, précité, p. 1087; voir également *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890, par. 16.)

Afin de replacer la question de l'arrêt *Bibeault* dans son contexte, les tribunaux judiciaires ont poussé leur examen au-delà de la formulation utilisée pour conférer le pouvoir légal. Cette méthode « pragmatique et fonctionnelle » qui sert à déterminer l'intention du législateur exige l'appréciation et la conciliation de facteurs pertinents, notamment : (1) la présence ou l'absence d'une clause privative dans la loi conférant le pouvoir; (2) l'expertise du tribunal judiciaire relativement à celle du décideur légal; (3) l'objet de la disposition en cause et de la loi dans son ensemble; (4) la nature de la question soumise au décideur : voir *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 30; *Dr. Q c. College of Physicians and Surgeons of British Columbia*,

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Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 27. The examination of these four factors, and the “weighing up” of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.

150 The Court has also affirmed that the “pragmatic and functional approach” applies to the judicial review not only of administrative tribunals but of decisions of Ministers: *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 54; *Dr. Q*, *supra*, at para. 21; *Ryan*, *supra*, at para. 21.

151 I would affirm at the outset that the precise wording of the power of appointment of “a person who is, in the opinion of the Minister, qualified to act” (s. 6(5)) is a strong legislative signal, coupled with the privative clause (s. 7), that the Minister is to be afforded a broad latitude in making his selection.

152 The Minister, with the assistance of his officials, knows more about labour relations and its practitioners (including potential arbitrators) than do the courts. The question before him was one of selection amongst candidates he regarded as qualified. These factors call for considerable deference. The Minister says his appointments should be upheld unless they can be shown to be patently unreasonable. As was said in *Mount Sinai*, *supra*, in the concurring reasons, at para. 58:

Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services “in the public interest”. This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers.

[2003] 1 R.C.S. 226, 2003 CSC 19, par. 26; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 27. L’examen de ces quatre facteurs, comme l’« évaluation » des éléments contextuels effectuée pour déterminer la norme de contrôle applicable, n’a rien de machinal. Compte tenu de la vaste gamme de décideurs discrectionnaires et d’organismes administratifs, le critère est forcément souple et fait appel à une analyse fondée sur des principes — plutôt qu’à des catégories — pour déterminer l’intention du législateur, qui doit nous guider.

La Cour a également confirmé que « la méthode pragmatique et fonctionnelle » s’applique au contrôle judiciaire des décisions non seulement des tribunaux administratifs mais aussi des ministres : *Baker*, précité; *Mont-Sinaï*, précité, par. 54; *Dr Q*, précité, par. 21; *Ryan*, précité, par. 21.

Je confirme, au départ, que la formulation utilisée pour conférer le pouvoir du ministre de désigner « une personne qui, à son avis, est compétente pour agir en cette qualité [d’arbitre] » (par. 6(5)), combinée à la clause privative (art. 7), est une solide indication du législateur que le ministre doit jouir d’une grande latitude dans l’exercice de son choix.

Le ministre, aidé de ses fonctionnaires, a une meilleure connaissance du domaine des relations du travail et de ses praticiens (y compris les arbitres potentiels) que les tribunaux judiciaires. Il s’agissait pour lui d’exercer un choix parmi les candidats qu’il considérait compétents. Ces facteurs commandent une grande déférence. Le ministre soutient que ses désignations devraient être maintenues à moins qu’on puisse démontrer qu’elles sont manifestement déraisonnables. Comme l’indiquent les motifs concordants de l’arrêt *Mont-Sinaï*, précité, par. 58 :

La norme de retenue la plus élevée, celle du caractère manifestement déraisonnable, doit généralement être appliquée aux décisions que prennent des ministres en exerçant des pouvoirs discrectionnaires en contexte administratif. La présente affaire montre pourquoi il doit en être ainsi. Le permis délivré par le ministre a pour objet général de régir la prestation de services de santé conformément à « l’intérêt public ». Cela favorise l’adoption d’une norme de retenue élevée, tout comme le fait l’expertise du ministre et de ses conseillers, sans compter la

The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense.

Against the strong pull of these factors towards the highest degree of deference, the unions stake their case on the purpose of s. 6(5) and the *HLDA* as a whole. In the weighing-up exercise, they say, the clearest guidance in this case to legislative intent is to focus on the job s. 6(5) was designed to do. The legal context is different from *Mount Sinai*. The Minister is not promulgating broad policy. He is asked to make an appointment which the parties, had they been able to agree, could have made for themselves. The specialized purpose of the *HLDA* — to provide an adequate substitution for strikes and lockouts, and thereby to achieve industrial peace — provides a relatively narrow context, say the unions, within which the words of s. 6(5) must be understood. In this respect, they point to the standard of reasonableness *simpliciter* adopted in *Baker, supra*, at para. 62.

I accept the unions' distinction between this case and *Mount Sinai*, but a ministerial discretion need not be wide open to attract the protection of the patent unreasonableness standard. On the other hand, *Baker* was an unusual case because the decision was effectively delegated to lower ranking officials whose discretion was itself circumscribed in some detail by ministerial guidelines (paras. 13-17); see *Suresh, supra*, at paras. 36-37. It thus provides little authority for withholding the highest standard of deference from appointments that were clearly and unequivocally made by the Minister of Labour himself.

Nor is the Court's recent decision in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, of particular assistance to the unions. In that case, this Court, *per* Arbour J., reviewed "the interpretation given by the [Judicial

position élevée que ce dernier occupe dans la hiérarchie des décideurs qui exercent une prérogative ou un pouvoir conféré par la loi. L'exercice du pouvoir dépend de ce que le ministre considère être dans l'intérêt public, ce qui est un excellent exemple de mesure touchant l'intérêt public.

À l'argument voulant que ces facteurs commandent fortement le plus haut degré de déférence, les syndicats opposent l'objet du par. 6(5) et de la *LACTH* dans son ensemble. Ils prétendent qu'en procédant à l'évaluation le meilleur moyen de déterminer l'intention du législateur en l'espèce est de se concentrer sur ce que le par. 6(5) avait pour but de réaliser. Le contexte juridique est différent de celui de l'affaire *Mont-Sinaï*. Le ministre n'édicte pas une politique générale. On lui demande de faire une désignation que les parties, si elles avaient pu s'entendre, auraient pu faire elles-mêmes. L'objet spécial de la *LACTH* — qui est de prévoir un moyen adéquat de remplacer la grève et le lock-out et de maintenir ainsi la paix industrielle — crée, au dire des syndicats, un contexte relativement étroit dans lequel les termes du par. 6(5) doivent être interprétés. À cet égard, ils attirent l'attention sur la norme de la décision raisonnable *simpliciter* adoptée dans l'arrêt *Baker*, précité, par. 62.

J'accepte la distinction que les syndicats établissent entre la présente affaire et l'affaire *Mont-Sinaï*, mais un pouvoir ministériel discrétionnaire n'a pas à être très large pour que la protection de la norme du caractère manifestement déraisonnable s'applique. Par ailleurs, l'affaire *Baker* était inhabituelle du fait que le soin de prendre une décision était délégué, en réalité, à des fonctionnaires subalternes dont le pouvoir discrétionnaire était lui-même assez circonscrit par des lignes directrices du ministère (par. 13-17); voir *Suresh*, précité, par. 36-37. Ainsi, l'arrêt *Mont-Sinaï* ne justifie guère le refus d'appliquer la norme de retenue la plus élevée aux désignations faites clairement et sans équivoque par le ministre du Travail lui-même.

L'arrêt récent de notre Cour *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11, n'est pas non plus d'un grand secours aux syndicats. Dans cette affaire, la Cour, sous la plume de la juge Arbour, a

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Council to the scope of its mandate based on its interpretation of s. 6.11(4) of its enabling statute” according to the reasonableness *simpliciter* standard of review (para. 67). That having been done, however, Arbour J. moved to the “ultimate decision of the Council to recommend the removal”, which she characterized as a question of mixed law and fact, and determined that the appropriate standard of review in *that* respect was patent unreasonableness (paras. 68-69). In that case, the decision maker’s interpretation of its enabling statute had emerged as a distinct issue before all levels of court, and it was convenient to deal with the legal determination and the ultimate decision separately. Here, these issues are bundled.

156 This does not mean, however, that the limited nature of the Minister’s mandate under s. 6(5) will be overlooked in the application of a patent unreasonableness standard. It must be an important factor, in this context, in assessing the reasonableness of his s. 6(5) appointments. As was pointed out in *Canadian Broadcasting Corp.*, *supra*, per Iacobucci J., at para. 49:

While the Board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole.

In that case a CBC journalist, who was also president of the union representing CBC writers and performers, wrote an anti-free trade article in the union newspaper during the 1988 federal “free trade” election campaign. The CBC claimed that this publication was an act of partisan politics which compromised CBC journalistic ethics. The CBC forced him to choose between on-air journalism and the

examiné, en fonction de la norme de contrôle de la décision raisonnable *simpliciter*, « la façon dont le Conseil [de la magistrature] a conçu la portée de son mandat selon son interprétation du par. 6.11(4) de sa loi habilitante » (par. 67). Toutefois, la juge Arbour s’est ensuite penchée sur la « décision finale du Conseil de recommander la révocation », qu’elle a qualifiée de question mixte de droit et de fait, et a décidé que la norme de contrôle applicable à *cet* égard était celle du caractère manifestement déraisonnable (par. 68-69). Dans cette affaire, l’interprétation que le décideur avait donnée de sa loi habilitante avait été une question distincte devant toutes les instances, et il convenait de traiter séparément la décision portant sur une question de droit et celle qui a été prise en définitive. En l’espèce, ces questions sont groupées.

Toutefois, cela ne signifie pas que, dans l’application de la norme du caractère manifestement déraisonnable, il ne sera pas tenu compte du caractère limité du mandat que le par. 6(5) confie au ministre. Dans ce contexte, il faut accorder de l’importance à ce facteur en appréciant le caractère raisonnable de ses désignations fondées sur le par. 6(5). Comme le juge Iacobucci l’a souligné dans l’arrêt *Société Radio-Canada*, précité, par. 49 :

Bien que le Conseil puisse être soumis à la norme du caractère correct dans l’interprétation isolée d’une loi autre que sa loi constitutive, la norme de contrôle applicable à l’ensemble de la décision, à supposer que celle-ci soit par ailleurs conforme à la compétence du Conseil, sera celle du caractère manifestement déraisonnable. Évidemment, la justesse de l’interprétation de la loi non constitutive pourra influencer sur le caractère raisonnable global de la décision, mais cela tiendra à l’effet de la disposition législative en question sur la décision dans son ensemble.

Dans cette affaire, un journaliste de la SRC, également président du syndicat représentant les auteurs et les artistes, était l’auteur d’un article contre le libre-échange paru dans le bulletin du syndicat, au cours de la campagne électorale fédérale de 1988 qui avait été axée notamment sur le libre-échange. La SRC a prétendu que cette publication constituait un acte de politique partisane

presidency of the union. He chose journalism. The union complained about the CBC's conduct to the Canada Labour Relations Board. In assessing the union's complaint, the Board was required to consider the CBC's mandate set out in the *Broadcasting Act* (an "external" statute). On an application for judicial review to the Federal Court of Appeal, the Board's interpretation of the *Broadcasting Act* was an issue bound up with its determination of an unfair labour practice under s. 94(1)(a) of the *Canada Labour Code* (the Board's "enabling" statute). The Court treated the first issue as input to the second issue, which was in fact the decision sought to be judicially reviewed.

I conclude, therefore, that the answer to the *Bibeault* question in this case is that the legislature intended the Minister's s. 6(5) appointments to prevail unless his selection is shown to be patently unreasonable.

(4) When Does a Decision Rise to the Level of Patent Unreasonableness?

On what basis can the Minister's appointments be said not only to depart from a reasonableness standard, but to fail even the most deferential standard of *patent* unreasonableness?

In *Southam, supra*, Iacobucci J. described, at para. 57, how reasonableness *simpliciter* differs from patent unreasonableness:

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is

qui allait à l'encontre de son code de déontologie journalistique. Forcée par la SRC à choisir entre son poste de journaliste à la radio et la présidence du syndicat, la personne en question a opté pour le journalisme. Le syndicat s'est plaint de la conduite de la SRC auprès du Conseil canadien des relations du travail. En examinant la plainte du syndicat, le Conseil devait tenir compte du mandat de la SRC énoncé dans la *Loi sur la radiodiffusion* (une loi « non constitutive »). Lors d'une demande de contrôle judiciaire adressée à la Cour d'appel fédérale, la question de l'interprétation que le Conseil avait donnée de la *Loi sur la radiodiffusion* était liée à sa décision — fondée sur l'al. 94(1)a) du *Code canadien du travail* (la loi « habilitante » du Conseil) — qu'il y avait eu pratique déloyale. La cour a considéré que la première question était utile pour trancher la seconde question qui était, en réalité, la décision visée par la demande de contrôle judiciaire.

Je conclus donc que la réponse qui doit être donnée, en l'espèce, à la question de l'arrêt *Bibeault* est que le législateur a voulu que les désignations ministérielles fondées sur le par. 6(5) soient maintenues, sauf s'il est démontré que le ministre a fait un choix manifestement déraisonnable.

(4) Quand une décision devient-elle manifestement déraisonnable?

Comment peut-on dire que les désignations ministérielles s'écartent non seulement de la norme de la décision raisonnable, mais encore qu'elles ne satisfont même pas à la norme du caractère *manifestement* déraisonnable qui commande la plus grande déférence?

Dans l'arrêt *Southam*, précité, par. 57, le juge Iacobucci a décrit ainsi la différence entre la décision raisonnable *simpliciter* et la décision manifestement déraisonnable :

La différence entre « déraisonnable » et « manifestement déraisonnable » réside dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour

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unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, “[i]n the Shorter Oxford English Dictionary ‘patently’, an adverb, is defined as ‘openly, evidently, clearly’”. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. . . . But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

160 The Court recently returned to the distinction between reasonableness *simpliciter* and patent unreasonableness in *Ryan*, at para. 52:

In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted “in the immediacy or obviousness of the defect”. Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

161 The term “patent unreasonableness” predates *Bibeault* (1988), and the birth of the pragmatic and functional approach: see *Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. It was intended to identify a highly deferential standard of review to protect administrative decision makers from excessive judicial intervention. In that sense, it was incorporated as the most deferential standard in the subsequent case law: see, e.g., *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Baker, supra*, at para. 56, and *Suresh, supra*, at para. 29. Patent unreasonableness simply

décélérer le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable. Comme l’a fait observer le juge Cory dans *Canada (Procureur général) c. Alliance de la fonction publique du Canada*, [1993] 1 R.C.S. 941, à la p. 963, « [d]ans le Grand Larousse de la langue française, l’adjectif manifeste est ainsi défini: “Se dit d’une chose que l’on ne peut contester, qui est tout à fait évidente” ». Cela ne veut pas dire, évidemment, que les juges qui contrôlent une décision en regard de la norme du caractère manifestement déraisonnable ne peuvent pas examiner le dossier. Si la décision contrôlée par un juge est assez complexe, il est possible qu’il lui faille faire beaucoup de lecture et de réflexion avant d’être en mesure de saisir toutes les dimensions du problème. [. . .] Mais une fois que les contours du problème sont devenus apparents, si la décision est manifestement déraisonnable, son caractère déraisonnable ressortira.

La Cour est revenue récemment, dans l’arrêt *Ryan*, précité, par. 52, sur la distinction entre la décision raisonnable *simpliciter* et la décision manifestement déraisonnable :

Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu’un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. [. . .] Une décision qui est manifestement déraisonnable est à ce point viciée qu’aucun degré de déférence judiciaire ne peut justifier de la maintenir.

L’expression « décision (ou caractère) manifestement déraisonnable » est plus ancienne que l’arrêt *Bibeault* (1988) et l’analyse pragmatique et fonctionnelle : voir *Union internationale des employés des services, local n° 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382, et *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227. Elle devait servir à décrire une norme de contrôle commandant une très grande déférence qui permettrait de soustraire les instances décisionnelles administratives à l’intervention excessive des tribunaux judiciaires. C’est dans ce sens que la jurisprudence subséquente en a fait la norme commandant la plus grande déférence : voir, par exemple,

identifies the point where, as stated in *Ryan, supra*, “no amount of curial deference can justify letting [the decision] stand” (para. 52).

When reviewing a decision on the less deferential reasonableness *simpliciter* standard, judges may obviously have to let stand what they perceive to be an incorrect decision.

If we could conclude on this record that different Ministers of Labour, acting reasonably, could have come to different conclusions about the need for expertise and general acceptability in the labour relations community to chair *HLDA* boards, and that this Minister’s approach was within such a range of reasonable opinions, we would be guided by the legislative intent, as assessed under the pragmatic and functional test, to defer to his choices.

However, applying the more deferential patent unreasonableness standard, a judge should intervene if persuaded that there is no room for reasonable disagreement as to the decision maker’s failure to comply with the legislative intent. In a sense, like the correctness standard, the patently unreasonable standard admits only one answer. A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

A patently unreasonable appointment, then, is one whose defect is “immedia[te] or obviou[s]” (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no

National Corn Growers Assn. c. Canada (Tribunal des importations), [1990] 2 R.C.S. 1324; *Baker*, précité, par. 56; *Suresh*, précité, par. 29. Le caractère manifestement déraisonnable décrit simplement le point où, comme le précise l’arrêt *Ryan*, précité, « aucun degré de déférence judiciaire ne peut justifier de [. . .] maintenir [la décision] » (par. 52).

Lorsqu’ils contrôlent une décision selon la norme de la décision raisonnable *simpliciter* qui commande moins de déférence, les juges peuvent évidemment devoir maintenir une décision qu’ils considèrent incorrecte.

Si, à la lecture du dossier, nous pouvions conclure, d’une part, que différents ministres du Travail, agissant raisonnablement, auraient pu arriver à différentes conclusions sur la nécessité de satisfaire à des critères d’expertise et d’acceptabilité générale dans le milieu des relations du travail pour pouvoir présider un conseil établi en vertu de la *LACTH*, et d’autre part, que l’approche adoptée, en l’espèce, par le ministre se situait dans cette fourchette d’opinions raisonnables, alors le recours à la méthode pragmatique et fonctionnelle pour déterminer l’intention du législateur nous amènerait à nous en remettre aux choix qu’il a faits.

Cependant, lorsqu’il applique la norme du caractère manifestement déraisonnable qui commande plus de déférence, le juge doit intervenir s’il est convaincu qu’il n’y a pas de place pour un désaccord raisonnable concernant l’omission du décideur de respecter l’intention du législateur. Dans un sens, une seule réponse est possible tant selon la norme de la décision correcte que selon celle du caractère manifestement déraisonnable. La méthode de la décision correcte signifie qu’il n’y a qu’une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

Une désignation manifestement déraisonnable est donc celle qui comporte un défaut « flagrant ou évident » (*Southam*, précité, par. 57) et qui est à ce point viciée, pour ce qui est de mettre à exécution

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amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52).

(5) Were the Minister's Appointments Challenged in This Case Patently Unreasonable?

166 Under this heading, I group the unions' two-pronged attack on the substance of the Minister's appointments, namely (a) that he did not restrict himself to the list of arbitrators established under s. 49(10) of the *Labour Relations Act, 1995*, and (b) that he rejected labour relations expertise and broad acceptability within the labour relations community as criteria for selection of chairpersons.

(a) *The Minister Did Not Restrict His Selections to the Section 49(10) List*

167 The Court of Appeal prohibited the Minister making s. 6(5) appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" (para. 105). It seems the court was referring to the s. 49(10) list.

168 In a preceding discussion, I concluded that the Minister was not required, by reason of the doctrine of legitimate expectation, to limit his appointments to the s. 49(10) list, but the question at this later stage is whether it was patently unreasonable of him, as a matter of law, not to do so.

169 The principal CUPE witness, Julie Davis, in cross-examination, conceded that some of the arbitrators who are in fact on the s. 49(10) list were unacceptable to her union. The witness for the respondent Service Employees International Union, Marcelle Goldenberg, went even further in her affidavit:

It is my understanding that a significant number of all arbitrators on the [s. 49(10)] roster (including both those who were required to complete the Arbitrator Development Program and those who were placed

l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier logiquement de la maintenir (*Ryan*, précité, par. 52).

(5) Les désignations ministérielles contestées en l'espèce étaient-elles manifestement déraisonnables?

Sous cette rubrique, je vais examiner les deux arguments de fond que les syndicats ont invoqués à l'encontre des désignations ministérielles, à savoir a) que le ministre ne s'en est pas tenu à la liste d'arbitres dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*, et b) qu'il a rejeté l'expertise en matière de relations du travail et l'acceptabilité générale dans le milieu des relations du travail comme critères de sélection des présidents ou présidentes.

a) *Le ministre ne s'en est pas tenu à la liste dressée en vertu du par. 49(10) pour faire ses choix*

La Cour d'appel a interdit au ministre de faire des désignations fondées sur le par. 6(5) [TRADUCTION] « à moins que ces désignations ne soient faites à partir de la liste traditionnelle d'arbitres expérimentés en relations du travail » (par. 105). La cour semblait alors parler de la liste dressée en vertu du par. 49(10).

J'ai conclu précédemment que la règle de l'expectative légitime, n'obligeait pas le ministre à s'en tenir à la liste dressée en vertu du par. 49(10) pour faire ses désignations, mais la question à cette étape-ci est de savoir si, en droit, il était manifestement déraisonnable qu'il ne le fasse pas.

Le principal témoin du SCFP, Julie Davis, a reconnu en contre-interrogatoire que certains arbitres effectivement inscrits sur la liste dressée en vertu du par. 49(10) étaient inacceptables par son syndicat. Marcelle Goldenberg, témoin de l'intimé l'Union internationale des employés des services, est même allée plus loin dans son affidavit :

[TRADUCTION] Si je comprends bien, un nombre important d'arbitres inscrits sur la liste [dressée en vertu du par. 49(10)] (y compris ceux qui ont dû suivre et réussir le programme de formation des arbitres et ceux qui ont

directly on the roster) fail to meet the criteria of acceptability at their first review [four years after appointment] and are purged from the list.

Just as being on the s. 49(10) list is no guarantee of acceptability, so the unions' acceptance of non-s. 49(10) candidates, including Professor Weiler and Ray Illing, confirm the reasonableness of the Minister's view that candidates can qualify for s. 6(5) appointments without being on the s. 49(10) list.

The unions, speaking through the OFL, said that they would be satisfied with any individual "who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community" (see para. 142 above). It would not be at all unreasonable for the Minister to adopt the same position. The Minister, accordingly, cannot be faulted for refusing to limit his selection to the s. 49(10) roster.

(b) *Rejecting the Criteria of "Labour Relations Expertise and Broad Acceptability Within the Labour Relations Community"*

Earlier in these reasons, I referred to Justice Rand's *dictum* in *Roncarelli* that the exercise of a discretion "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). I propose briefly to supplement that *dictum* by reference to our more recent case law, then consider it in relation to the test for "patent unreasonableness" on the facts of this case.

(i) Exclusion from Consideration of Relevant Criteria

The principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration

été inscrits directement sur la liste) ne satisfont pas aux critères d'acceptabilité au moment de leur première évaluation [quatre ans après leur désignation] et sont rayés de la liste.

Tout comme le seul fait d'être inscrit sur la liste dressée en vertu du par. 49(10) n'est pas une garantie d'acceptabilité, l'acceptation par les syndicats de candidats non inscrits sur cette liste, dont le professeur Weiler et Ray Illing, confirme le caractère raisonnable de l'opinion du ministre selon laquelle des candidats non inscrits sur la liste dressée en vertu du par. 49(10) peuvent tout de même remplir les conditions requises pour être désignés en vertu du par. 6(5).

Les syndicats, par l'intermédiaire de la FTO, ont déclaré que toute personne [TRADUCTION] « posséda[nt] une vaste expérience comme arbitre de différends et [. . .] jouissa[nt] d'une grande acceptabilité dans le milieu des relations du travail » leur conviendrait (voir par. 142 ci-dessus). Il ne serait nullement déraisonnable que le ministre soit du même avis. En conséquence, on ne saurait reprocher au ministre d'avoir refusé de s'en tenir à la liste dressée en vertu du par. 49(10) pour faire ses choix.

b) *Le rejet des critères « d'expertise en matière de relations du travail et d'acceptabilité générale dans le milieu des relations du travail »*

Plus tôt dans les présents motifs, j'ai mentionné la remarque du juge Rand dans l'arrêt *Roncarelli*, selon laquelle l'exercice d'un pouvoir discrétionnaire [TRADUCTION] « doit se fonder sur l'examen des considérations reliées à l'objet de [l']administration [de la loi en cause] » (p. 140). Je me propose de compléter brièvement cette remarque par un renvoi à notre jurisprudence plus récente, pour ensuite l'examiner en fonction du critère du « caractère manifestement déraisonnable » et à la lumière des faits de la présente affaire.

(i) L'exclusion de critères pertinents comme facteurs à prendre en considération

Le principe voulant que le décideur légal soit tenu de prendre en considération les critères pertinents, tout comme il se doit d'exclure ceux qui ne

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irrelevant criteria, has been reaffirmed on numerous occasions. In *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, the issue was whether a municipal Council erred in refusing to consider an application for the subdivision of some land prone to flooding. Although the Council had considered that fact, it failed to consider the severity of those floods and excluded consideration of any possible solutions to the problem. Wilson J. stated, at pp. 174-75:

More specifically, was [the Council] entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative decision must “be based upon a weighing of considerations pertinent to the object of the administration”. For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. . . . The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

173 Again, in *Reference re Bill 30, an Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1191, Wilson J. noted:

It is, however, well established today that a statutory power to make regulations is not unfettered. It is constrained by the policies and objectives inherent in the enabling statute. A power to regulate is not a power to prohibit. It cannot be used to frustrate the very legislative scheme under which the power is conferred.

174 In my view, as will be seen, the appointment of retired judges as a class to chair *HLDA* arbitration boards had the effect of frustrating “the very

le sont pas, a été réitéré à maintes reprises. Dans l’arrêt *Oakwood Development Ltd. c. Municipalité rurale de St. François Xavier*, [1985] 2 R.C.S. 164, il s’agissait de déterminer si un conseil municipal avait commis une erreur en refusant d’étudier une demande de lotissement de terres inondables. Bien que le conseil ait tenu compte de ce fait, il n’avait pas considéré la gravité des inondations et avait exclu toute solution possible au problème comme facteur à prendre en considération. La juge Wilson a affirmé, aux p. 174-175 :

Plus précisément, le conseil était-il autorisé à tenir compte de la possibilité d’inondations et à fonder sur cette possibilité sa décision de rejeter la demande d’autorisation de lotissement? Comme le fait remarquer le juge Rand dans l’arrêt *Roncarelli v. Duplessis*, [1959] R.C.S. 121, à la p. 140, toute décision administrative résultant de l’exercice d’un pouvoir discrétionnaire doit [TRADUCTION] « se fonder sur l’examen des considérations reliées à l’objet de cette administration ». Pour les motifs que j’ai déjà exposés, j’estime que le conseil avait le droit de tenir compte du problème posé par la possibilité d’inondations. Cela ne règle toutefois pas le litige. Comme lord Denning l’a affirmé dans l’arrêt *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, à la p. 693, l’omission d’un organe de décision administrative de tenir compte d’un élément très important constitue une erreur au même titre que la prise en considération inappropriée d’un facteur étranger à l’affaire. [. . .] Il faut donc non seulement que la municipalité intimée ait tenu compte uniquement de facteurs qui relèvent de la compétence que lui a conférée la loi, mais aussi qu’elle ait pris en considération tous les facteurs dont elle doit tenir compte pour bien remplir la fonction de prise de décisions qu’elle a aux termes de la loi.

Puis, dans le *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148, la juge Wilson a fait observer, à la p. 1191 :

Toutefois, il est bien établi de nos jours qu’un pouvoir légal de réglementation n’est pas illimité. Il est limité par les politiques et les objectifs inhérents à la loi habilitante. Un pouvoir de réglementation n’est pas un pouvoir d’interdiction. Il ne saurait être utilisé pour contrecarrer l’économie même de la loi qui le confère.

J’estime, comme nous le verrons, que la désignation de juges retraités, en tant que catégorie, à la présidence de conseils d’arbitrage établis en vertu de la

legislative scheme under which the power is conferred”. See also *Baker, supra*, at para. 73.

More recently, in *Suresh*, at paras. 37-38, the Court restated this basic principle of administrative law:

Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors. . . .

. . . The court’s task, if called upon to review the Minister’s decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament’s legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion. [Emphasis added.]

In applying the *patent* unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the *HLDA* legislative scheme.

(ii) Application of These Principles to the Facts of This Case

The task before the arbitration boards was not to apply existing collective agreements to a fact situation (as in a grievance arbitration) but to write the essential and most controversial terms of the collective agreement itself. The need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour to the Ontario legislature since the *HLDA* was

LACTH a eu pour effet de contrecarrer « l’économie même de la loi qui [. . .] confère le [pouvoir] ». Voir également l’arrêt *Baker*, précité, par. 73.

Plus récemment, dans l’arrêt *Suresh*, précité, par. 37-38, notre Cour a réitéré ce principe fondamental du droit administratif :

[L’arrêt *Baker*] n’a pas pour effet d’autoriser les tribunaux siégeant en révision de décisions de nature discrétionnaire à utiliser un nouveau processus d’évaluation, mais il repose plutôt sur une jurisprudence établie concernant l’omission d’un délégué du ministre de prendre en considération et d’évaluer des restrictions tacites ou des facteurs manifestement pertinents . . .

. . . Enfin, le rôle du tribunal appelé à contrôler la décision du ministre consiste à déterminer si celui-ci a exercé son pouvoir discrétionnaire conformément aux limites imposées par les lois du Parlement et la Constitution. Si le ministre a tenu compte des facteurs pertinents et respecté ces limites, le tribunal doit confirmer sa décision. Il ne peut l’annuler, même s’il aurait évalué les facteurs différemment et serait arrivé à une autre conclusion. [Je souligne.]

En appliquant le critère du caractère *manifestement* déraisonnable, nous ne devons pas réévaluer les facteurs en cause. Nous avons cependant le droit de tenir compte de l’importance des facteurs qui ont été totalement soustraits à la prise en considération. Selon la norme du caractère manifestement déraisonnable, les facteurs pertinents que le ministre n’a pas voulu prendre en considération n’ont pas tous un effet irrémédiable. Comme nous l’avons vu, le problème qui se pose en l’espèce est que le ministre a expressément exclu des facteurs qui étaient non seulement pertinents, mais qui allaient directement au cœur du régime de la *LACTH*.

(ii) Application de ces principes aux faits de la présente affaire

Les conseils d’arbitrage devaient non pas appliquer des conventions collectives existantes à une situation de fait (comme dans le cas de l’arbitrage de griefs), mais plutôt rédiger les conditions essentielles les plus controversées de la convention collective elle-même. Depuis l’adoption de la *LACTH* en 1965 et de ses diverses modifications subséquentes, les ministres du Travail qui se sont succédé à l’Assemblée législative de l’Ontario ont

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introduced in 1965, and its various amendments thereafter.

178 I do not impute to the Minister a knowledge of the *HLDA*'s legislative history. He himself aptly summarized the legislative intent when he wrote on February 2, 1998 that "the parties must perceive the [*HLDA*] system as neutral and credible" (emphasis added).

179 His reading of the legislative intent is reinforced by the evidence of practice and experience in the labour relations field. I accept, as did the Court of Appeal, the testimony in this respect of Professor Joseph Weiler, whose affidavit was filed on behalf of the unions (at para. 36):

The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security, but by training, experience and mutual acceptability. [Emphasis added.]

180 I agree too with the observation of the Ontario Court of Appeal in this case that the matters before a *HLDA* "interest" arbitration were "not essentially legal but practical and require the familiarity and expertise of a labour arbitrator rather than the skills of a lawyer or a judge" (para. 75).

181 Given the role and function of the *HLDA*, as confirmed by its legislative history, we look in vain for some indication in the record that the Minister was alive to these labour relations requirements.

182 Instead, there is an active disclaimer of any such requirement, by the Minister's senior advisor charged with the search for retired judges, who made clear in his cross-examination the Minister's rejection of both expertise and broad acceptability as qualifications:

Q. And you didn't ask about any experience in the health care field?

constamment réitéré le besoin d'expertise en relations du travail, d'indépendance et d'impartialité, que traduit la notion d'acceptabilité générale.

Je ne suppose pas que le ministre avait une connaissance de l'historique de la *LACTH*. Il a lui-même bien résumé l'intention du législateur lorsqu'il a écrit, le 2 février 1998, que [TRADUCTION] « les parties doivent percevoir le système [établi par la *LACTH*] comme étant neutre et crédible » (je souligne).

Son interprétation de l'intention du législateur est renforcée par la preuve de la pratique et de l'expérience dans le domaine des relations du travail. À l'instar de la Cour d'appel, j'accepte le témoignage fait à cet égard par le professeur Joseph Weiler, qui a déposé son affidavit au nom des syndicats (au par. 36) :

[TRADUCTION] L'indépendance et l'impartialité des arbitres ne sont garanties ni par le fait qu'ils ne sont pas touchés par le différend soumis à leur arbitrage, ni par leur inamovibilité et leur sécurité financière ou administrative, mais plutôt par leur formation, leur expérience et leur acceptabilité par les parties. [Je souligne.]

Je souscris également à l'observation de la Cour d'appel de l'Ontario, en l'espèce, voulant que les questions soumises à un conseil d'arbitrage de « différends » soient [TRADUCTION] « pratiques et non pas essentiellement juridiques, et requièrent les connaissances et l'expertise d'un arbitre en droit du travail plutôt que les compétences d'un avocat ou d'un juge » (par. 75).

Compte tenu du rôle et de la fonction de la *LACTH*, que confirme son historique législatif, rien dans le dossier n'indique d'une manière ou d'une autre que le ministre était au fait de ces exigences en matière de relations du travail.

Au contraire, le conseiller principal du ministre, chargé de trouver des juges retraités, a nié énergiquement l'existence de telles exigences et a clairement affirmé, en contre-interrogatoire, que le ministre rejetait l'expertise et l'acceptabilité générale comme qualifications requises :

[TRADUCTION]

Q. Et vous n'avez pas posé de questions au sujet d'une expérience dans le domaine des soins de santé?

A. No. This was not about finding people who had any past experience, relationships or — we weren't trying to come through to find people who would understand —

Q. Anything to do with the health field?

A. The health field or the labour field through some past involvement.

We were looking for neutral decision makers to provide mediation and arbitration.

I accept as correct the Minister's February 2, 1998 statement that the *HLDA* process must be "perceive[d] . . . as neutral and credible". I also accept that neutrality, and the perception of neutrality, is bound up with an arbitrator's "training, experience and mutual acceptability" (as Professor Weiler testified). I conclude as well that the Minister's approach was antithetical to credibility because he excluded key criteria (labour relations expertise and broad acceptability) and substituted another criterion (prior judicial experience) which, while relevant, was not sufficient to comply with his legislative mandate even as he, in his February 2, 1998 letter, defined his mandate.

Speaking broadly, "the perspective" within which the *HLDA* was intended by the legislature to operate (*Roncarelli*, at p. 140) is to secure industrial peace in hospitals and nursing homes. The *HLDA* imposes a compulsory yet mutually tolerable procedure (if properly administered) to resolve the differences between employers and employees without disrupting patient care. In that context, appointment of an inexperienced and inexperienced chairperson who is not seen as broadly acceptable in the labour relations community is a defect in approach that is both immediate and obvious. In my view, with respect, having regard to what I believe to be the legislative intent manifested in the *HLDA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable.

R. Non. Il ne s'agissait pas de trouver des gens qui avaient de l'expérience, des relations ou — nous ne tentions pas de trouver des gens qui comprendraient —

Q. Quelque chose à voir avec le domaine de la santé?

R. Le domaine de la santé ou le domaine des relations du travail en raison d'une participation antérieure.

Nous cherchions des décideurs neutres qui feraient de la médiation et de l'arbitrage.

Je considère juste l'affirmation du ministre datée du 2 février 1998, selon laquelle le processus établi par la *LACTH* doit être [TRADUCTION] « per[çu] [. . .] comme étant neutre et crédible ». Je conviens également que la neutralité — et la perception de neutralité — dépend [TRADUCTION] « [de la] formation, [de l']expérience et [de l']acceptabilité [d'un arbitre] par les parties » (comme l'a témoigné le professeur Weiler). Je conclus aussi que l'approche adoptée par le ministre était l'antithèse de la crédibilité du fait qu'il a exclu des critères clés (expertise en matière de relations du travail et acceptabilité générale) et leur a substitué un autre critère (expérience judiciaire antérieure) qui, bien que pertinent, ne permettait pas au ministre de se conformer à son mandat législatif, même selon la définition qu'il en donne dans sa lettre du 2 février 1998.

De manière générale, [TRADUCTION] « l'optique » dans laquelle le législateur a voulu que la *LACTH* s'applique (*Roncarelli*, précité, p. 140) est de maintenir la paix industrielle dans les hôpitaux et les maisons de soins infirmiers. La *LACTH* prescrit une procédure — obligatoire mais néanmoins tolérable par les parties (si elle est bien suivie) — de règlement des différends entre les employeurs et les employés, sans qu'il y ait interruption des soins aux malades. Dans ce contexte, la désignation au poste de président d'une personne inexperte ou inexpérimentée qui n'est pas perçue comme étant généralement acceptable dans le milieu des relations du travail comporte un défaut à la fois flagrant et évident. J'estime, en toute déférence, que, compte tenu de ce que je crois être l'intention du législateur qui ressort de la *LACTH*, l'approche que le ministre a adoptée en matière de désignations fondées sur le par. 6(5) était manifestement déraisonnable.

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This is not to say that specific s. 6(5) appointees of the Minister do not also possess labour relations expertise and broad acceptability, coincidentally as it were, despite the Minister's documented lack of interest in these qualifications. We would properly exercise our discretion to decline to interfere, as did the Court of Appeal, with such (coincidentally) appropriate appointments. Thus the qualifications of specific s. 6(5) appointees will, if challenged, have to be assessed on a case-by-case basis. I will discuss this point further when I come to the issue of remedy.

- (6) Did the Court of Appeal Err in Finding that the Arbitration Boards, By Reason of the Impugned Ministerial Approach to Section 6(5) Appointments, Lacked the Requisite Institutional Independence and Impartiality?

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Having determined that the Minister's approach to the s. 6(5) appointments was patently unreasonable on other grounds, it is not, strictly speaking, necessary to address this further ground of appeal. I do so, however, for two reasons. Firstly, it is on this ground that the Court of Appeal granted the following declaration:

1. THIS COURT DECLARES that the Minister created a reasonable apprehension of bias and interfered with the independence and impartiality of boards of arbitration established under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("HLDA"), contrary to the principles and requirement of fairness and natural justice.

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Secondly, as will be seen when I address the issue of remedy, I propose to leave open (as did the Court of Appeal) the possibility of specific challenges by the parties to particular s. 6(5) appointments on a case-by-case basis. I would not want our Court's silence on this ground of attack, in light of its acceptance by the Court of Appeal, to encourage (or prolong) further litigation on this point. The parties have fought the issue of the independence

Malgré le manque d'intérêt attesté du ministre pour ces qualifications, cela ne veut pas dire que les personnes désignées par le ministre en application du par. 6(5) n'ont pas non plus une expertise en matière de relations du travail et ne jouissent pas d'une acceptabilité générale, car il s'en trouve parmi elles qui remplissent ces conditions. Dans l'exercice de notre pouvoir discrétionnaire, nous pourrions légitimement refuser, comme l'a fait la Cour d'appel, d'intervenir à l'égard de ces désignations (par hasard) appropriées. Par conséquent, si elles sont contestées, les qualifications de certaines personnes désignées en vertu du par. 6(5) devront être évaluées cas par cas. Je m'attarderai davantage sur ce point au moment d'examiner la question de la réparation.

- (6) La Cour d'appel a-t-elle commis une erreur en concluant qu'en raison de l'approche contestée que le ministre a adoptée en matière de désignations fondées sur le par. 6(5), les conseils d'arbitrage étaient dépourvus de l'indépendance et de l'impartialité institutionnelles requises?

Après avoir décidé que l'approche que le ministre a adoptée en matière de désignations fondées sur le par. 6(5) était manifestement déraisonnable pour d'autres motifs, il n'est pas nécessaire, à vrai dire, d'examiner cet autre moyen d'appel. Je le fais toutefois pour deux raisons. En premier lieu, c'est pour ce motif que la Cour d'appel a rendu le jugement déclaratoire suivant :

[TRADUCTION] 1. LA COUR DÉCLARE que le ministre a suscité une crainte raisonnable de partialité et compromis l'indépendance et l'impartialité des conseils d'arbitrage établis en vertu de la *Loi sur l'arbitrage des conflits de travail dans les hôpitaux*, L.R.O. 1990, ch. H.14 (« LACTH »), contrairement aux principes et à l'obligation d'équité et de justice naturelle.

En second lieu, comme nous le verrons lorsque j'examinerai la question de la réparation, je propose (comme l'a fait la Cour d'appel) de laisser aux parties la possibilité de contester expressément, cas par cas, certaines désignations fondées sur le par. 6(5). Cependant, je ne voudrais pas que, compte tenu de l'acceptation par la Cour d'appel de ce moyen de contestation, le fait que notre Cour ne se prononce sur ce moyen contribue à encourager (ou à

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and impartiality of the resulting arbitration boards, which is an objection generic to all of the impugned s. 6(5) appointments, for almost four years. Now that the issue has arrived at this Court, where it was fully argued, we should, I think, provide as much help as we can to assist the parties to resolve their outstanding differences without prolonging the delay and expense.

The unions contend that the appointment of retired judges created arbitration boards that were neither impartial nor independent of the Minister, and that s. 6(5) did not authorize appointments that resulted in a tribunal that failed to meet the minimum standards of natural justice.

It is now clear that the independence as well as the impartiality of the decision maker is a component of natural justice: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at p. 332, *per* Gonthier J.; *Matsqui Indian Band*, *supra*, at para. 79, *per* Lamer C.J.; and *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 283-84. As the purpose of the independence requirement is to establish a protected platform for impartial decision making, I will deal first with this objection.

(a) *Institutional Independence*

The *HLDA* commands the use of *ad hoc* arbitration boards. The unions argue that such boards, in the context of “interest arbitrators”, are flawed because they lack the usual indices of institutional independence such as security of tenure, financial security and administrative independence that rest on “objective conditions or guarantees”: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 115. However, as explained above, the Court cannot substitute a different tribunal for the one designed by the legislature. An *ad hoc* tribunal is by definition constituted on a case-by-case

prolonger) un autre litige à cet égard. Les parties se livrent bataille, depuis presque quatre ans, sur la question de l’indépendance et de l’impartialité des conseils d’arbitrage constitués de la manière reprochée, cette question constituant l’objection commune à toutes les désignations contestées qui ont été faites en vertu du par. 6(5). Maintenant que cette question a été soumise à notre Cour, où elle a été débattue à fond, j’estime que nous devrions aider, autant que possible, les parties à résoudre leurs divergences d’opinions sans prolonger les délais ni poursuivre les dépenses.

Les syndicats soutiennent que la désignation de juges retraités a engendré des conseils d’arbitrage qui n’étaient ni impartiaux ni indépendants du ministre, et que le par. 6(5) n’autorisait pas les désignations menant à la constitution d’un tribunal administratif ne respectant pas les normes minimales de justice naturelle.

Il est maintenant évident que l’indépendance et l’impartialité du décideur sont des composantes de la justice naturelle : *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, p. 332, le juge Gonthier; *Bande indienne de Matsqui*, précité, par. 79, le juge en chef Lamer; *R. c. Généreux*, [1992] 1 R.C.S. 259, p. 283-284. Je vais d’abord examiner l’objection fondée sur l’exigence d’indépendance, étant donné que cette exigence vise à établir un écran de protection favorisant la prise de décisions impartiales.

a) *L’indépendance institutionnelle*

La *LACTH* commande le recours à des conseils d’arbitrage *ad hoc*. Les syndicats soutiennent que, dans le cas des « arbitres de différends », de tels conseils sont viciés parce qu’ils sont dépourvus des signes habituels d’indépendance institutionnelle comme l’inamovibilité, la sécurité financière et l’indépendance administrative qui reposent sur des « conditions ou garanties objectives » : *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 689, et *Renvoi relatif à la rémunération des juges de la Cour provinciale de l’Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 115. Cependant, comme je l’expliquais plus haut, la Cour ne peut pas substituer un autre tribunal administratif à celui conçu par le législateur. Par

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basis. Security of tenure does not survive the termination of the arbitration, and financial security is similarly circumscribed. Administrative independence has little formal protection. Professional labour arbitrators (including those on the s. 49(10) list) function successfully in such a structure even though there may be no guarantee of continuing work from any particular employer or union.

191 In addition to the *HLDA*'s statutory command, the Court's assessment of structural independence should take into account the success with which *ad hoc* tribunals have long operated in labour relations in general and under the *HLDA*'s scheme of compulsory arbitrations (prior to the appointments in question) in particular: *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, at para. 1. In this regard, as mentioned, Professor Joseph Weiler testified that: "The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security but by training, experience and mutual acceptability".

192 Accepting Professor Weiler's evidence on this point, it follows that if, as I have concluded, s. 6(5) requires the appointment of individuals as chairpersons who are qualified by training, experience and mutual acceptability, the proper exercise of the appointment power would lead to a tribunal which, in the context of labour relations, would satisfy reasonable concerns about institutional independence.

193 Accordingly, having regard both to general labour relations experience, as well as the explicit legislative provisions in the *HLDA*, I would not give effect to the unions' generic objection directed to the issue of institutional independence. If additional facts are raised on a case-by-case challenge, they will have to be addressed at that time.

définition, un tribunal *ad hoc* est constitué cas par cas. L'inamovibilité ne subsiste pas à la fin de l'arbitrage et la sécurité financière est limitée de façon similaire. L'indépendance administrative bénéficie de peu de protection formelle. Les arbitres professionnels en droit du travail (y compris ceux inscrits sur la liste dressée en vertu du par. 49(10)) réussissent à fonctionner dans une telle structure même s'ils n'ont peut-être aucune garantie de travail permanent de la part d'un employeur ou d'un syndicat particulier.

En plus de l'exigence imposée par la *LACTH*, la Cour devrait, pour apprécier l'indépendance structurelle, tenir compte du succès que les tribunaux *ad hoc* connaissent depuis longtemps dans le domaine des relations du travail en général, et qu'ils connaissent aussi depuis longtemps (avant les désignations contestées) dans le domaine des arbitrages obligatoires fondés sur la *LACTH* en particulier : *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405, par. 1. À ce propos, comme nous l'avons vu, le professeur Joseph Weiler a témoigné que [TRADUCTION] « [l']indépendance et l'impartialité des arbitres ne sont garanties ni par le fait qu'ils ne sont pas touchés par le différend soumis à leur arbitrage, ni par leur inamovibilité et leur sécurité financière ou administrative, mais plutôt par leur formation, leur expérience et leur acceptabilité par les parties ».

Si l'on retient le témoignage du professeur Weiler à ce propos, il s'ensuit que, si, comme je l'ai conclu, le par. 6(5) exige la désignation de présidents compétents en raison de leur formation, de leur expérience et de leur acceptabilité par les parties, l'exercice approprié du pouvoir de désignation permettra de constituer un tribunal administratif qui, dans le contexte des relations du travail, répondra aux préoccupations raisonnables concernant l'indépendance institutionnelle.

En conséquence, compte tenu à la fois du critère de l'expérience générale en matière de relations du travail et des dispositions explicites de la *LACTH*, je suis d'avis de ne pas retenir l'objection commune formulée par les syndicats au sujet de l'indépendance institutionnelle. Si des faits additionnels sont soulevés dans le cadre d'une contestation sur une base individuelle, il faudra les examiner à ce moment là.

(b) *Impartiality*

Impartiality, on the other hand, raises different considerations. The *HLDA* did not command the appointment of retired judges. Nor does the *HLDA* contemplate biased arbitrators.

The test for institutional impartiality is whether a well-informed person, viewing the matter realistically and practically and having thought the matter through, could form a reasonable apprehension of bias in a substantial number of cases (2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 44; *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, and *Matsqui Indian Band, supra*, at para. 67).

The Minister does not contest the requirement that his s. 6(5) appointees be impartial. He was, as stated, looking for “[p]eople who had spent their professional lives as neutrals”.

Allegations of individual bias must necessarily be dealt with on a case-by-case basis. I am dealing here only with the general proposition that the Minister’s appointment of retired judges to chair *HLDA* boards did, by the fact of their appointment alone, doom the impartiality of the resulting boards.

To be sure, the unions now say that their challenge is not directed so much to the appointment of retired judges as to the sudden change of appointments process without prior consultation. Nevertheless, they still rely on the evidence of Professor Joseph Weiler who says that judges as a class have historically not been seen to be sympathetic or particularly fair to the cause of labour.

“Impartiality” is a state of mind. Some of the cases draw a distinction between an allegation of bias (or prejudice), i.e., that the s. 6(5) appointees come to their task with something less than an open mind, a predisposition for or against one of the parties, or a leaning towards a particular outcome, and an allegation of partiality. The allegation of

b) *L'impartialité*

Par contre, l’impartialité fait intervenir des considérations différentes. La *LACTH* n’exigeait pas la désignation de juges retraités. Et elle ne prévoit pas non plus la désignation d’arbitres partiaux.

Le critère de l’impartialité institutionnelle consiste à se demander si une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique pourrait éprouver une crainte raisonnable de partialité dans un grand nombre de cas (2747-3174 *Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919, par. 44; *R. c. Lippé*, [1991] 2 R.C.S. 114, p. 143; *Bande indienne de Matsqui*, précité, par. 67).

Le ministre ne conteste pas que les personnes qu’il désigne en vertu du par. 6(5) doivent être impartiales. Comme nous l’avons vu, il cherchait [TRADUCTION] « [d]es personnes qui avaient été neutres pendant toute leur vie professionnelle ».

Les allégations de partialité de la part d’une personne doivent nécessairement être examinées cas par cas. Je ne parle ici que de la proposition générale selon laquelle la désignation par le ministre de juges retraités à la présidence des conseils établis en vertu de la *LACTH* compromettrait, à elle seule, l’impartialité des conseils qui en résulteraient.

Certes, les syndicats affirment maintenant que leur contestation ne vise pas tant la désignation de juges retraités que le changement soudain, sans consultation préalable, du processus de désignation. Ils s’appuient néanmoins encore sur le témoignage du professeur Joseph Weiler, selon lequel les juges, en tant que catégorie, ne sont pas traditionnellement perçus comme étant favorables à la cause des travailleurs et des travailleuses ou comme étant particulièrement équitables à leur sujet.

L’« impartialité » est un état d’esprit. Certains arrêts établissent une distinction entre, d’une part, une allégation de préjugés consistant à reprocher aux personnes désignées en vertu du par. 6(5) de ne pas avoir l’esprit ouvert et d’avoir des opinions favorables ou défavorables à l’une des parties ou encore une préférence pour un résultat particulier,

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partiality, according to these cases, takes the attack a significant step further by suggesting that the appointees are not only biased but will allow, either consciously or unconsciously, their biases to influence the decision they will be called on to make: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 105 *et seq.*, *per* Cory J.; *R. v. Williams*, [1998] 1 S.C.R. 1128, at paras. 9-10; *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 336, leave to appeal refused, [1994] 1 S.C.R. x. The Court of Appeal did not suggest that the retired judges were in fact prejudiced or partial but concluded that they might reasonably be seen to be “inimical to the interests of labour, at least in the eyes of the appellants” (para. 101). I agree with the Minister that the proper test is not so narrowly focussed. The test is not directed to the subjective perspective of one of the parties but to the reasonable detached and informed observer, i.e., “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude”: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394.

200 The unions contend that this Court should defer to the Court of Appeal’s findings of fact. Reliance is placed on the observation of Gonthier J. that “[t]he principle of non-intervention on questions of fact is also applicable to a second appellate court such as this Court *vis-à-vis* a first appellate court” (*St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at para. 37). However, we are not thusly inhibited if the Court of Appeal applied the wrong test. The correct viewpoint is that of an informed observer who is detached from a personal interest in the controversy.

201 The fact is that retired judges as a class have no interest in the outcome of hospital collective bargaining disputes beyond that of other citizens. They pay provincial taxes at the same rates and aspire to a reasonable level of health care. They have personal experience of public sector pay restraint. They

et d’autre part, une allégation de partialité. D’après ces arrêts, l’allégation de partialité va beaucoup plus loin en laissant entendre que les personnes désignées ont non seulement des idées préconçues, mais que, consciemment ou inconsciemment, elles laisseront ces idées préconçues influencer la décision qu’elles seront appelées à rendre : *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484, par. 105 et suiv., le juge Cory; *R. c. Williams*, [1998] 1 R.C.S. 1128, par. 9-10; *R. c. Parks* (1993), 15 O.R. (3d) 324 (C.A.), p. 336, autorisation d’appel refusée [1994] 1 R.C.S. x. La Cour d’appel n’a pas indiqué que les juges retraités avaient, en fait, des préjugés ou un parti pris, mais elle a conclu qu’ils pourraient raisonnablement être perçus comme étant [TRADUCTION] « hostiles aux intérêts des travailleurs et des travailleuses, du moins aux yeux des appelants » (par. 101). Je partage l’avis du ministre selon lequel le critère applicable n’a pas une portée aussi étroite. Ce critère est axé non pas sur le point de vue subjectif de l’une des parties, mais sur celui de l’observateur raisonnable, neutre et renseigné, c’est-à-dire qu’il s’agit de se demander « à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique » (*Committee for Justice and Liberty c. Office nationale de l’énergie*, [1978] 1 R.C.S. 369, p. 394).

Les syndicats soutiennent que la Cour devrait s’en remettre aux conclusions de fait de la Cour d’appel. Ils s’appuient sur l’observation du juge Gonthier voulant que « [l]e principe de non-intervention dans les questions de fait s’applique aussi à un second niveau d’appel, comme notre Cour par rapport à une première cour d’appel » (*St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 37). Cependant, nous ne sommes pas liés par ce principe de non-intervention lorsque la Cour d’appel a appliqué le mauvais critère. Le bon point de vue est celui de l’observateur renseigné qui n’a aucun intérêt personnel dans la controverse.

Force est de constater que, en tant que catégorie, les juges retraités n’ont pas plus d’intérêt que les autres citoyens dans l’issue des différends concernant les négociations collectives en milieu hospitalier. Ils sont assujettis aux mêmes taux d’impôt provincial que les autres citoyens et, comme eux, ils

probably harbour as many different views of public sector wage policy as there are retired judges.

There are no “substantial grounds” (*Committee for Justice and Liberty, supra*, at p. 395) to think that retired superior court judges, who enjoy a federal pension, would do the bidding of the provincial Minister, or make decisions to please the employers so as to improve the prospect of future appointments. Undoubtedly, there have been some judges predisposed toward management in the past, as well as some judges predisposed toward labour, but I do not think the fully informed, reasonable person would tar the entire class of presently retired judges with the stigma of an anti-labour bias.

The unions refute any “class” objection by their ready acceptance of retired judges Alan Gold and George Adams as chairpersons of “interest” arbitrations. The potential problem with some retired judges is not partiality but expertise.

While I would therefore reject this branch of the unions’ challenge, I accept, of course, that a challenge might be made to the impartiality of a particular retired judge to a particular *ad hoc* tribunal, as indeed the impartiality of any other appointee could be questioned on a case-by-case basis.

(7) The Proper Remedy

The remedy of the Court of Appeal was predicated on its conclusion that the Minister created a reasonable apprehension of bias and interfered with the independence and impartiality of the *HLDAA* boards of arbitration, as well as the legitimate expectation of the unions contrary to the requirements of natural justice.

aspirent à des soins de santé raisonnables. Ils ont personnellement vécu le contrôle des salaires dans le secteur public. Le nombre d’opinions différentes qu’ils ont au sujet de la politique salariale dans le secteur public est probablement aussi élevé que celui des juges retraités.

Il n’y a aucun « motif sérieux » (*Committee for Justice and Liberty*, précité, p. 395) de penser que des juges de cour supérieure retraités, qui bénéficient d’une pension du gouvernement fédéral, se plieraient à la volonté du ministre provincial ou rendraient des décisions destinées à plaire aux employeurs afin d’améliorer leurs chances de désignation future. Il est indubitable que, dans le passé, il y eu des juges enclins à privilégier les employeurs et aussi des juges enclins à privilégier les travailleurs et travailleuses, mais je ne crois pas qu’une personne raisonnable et bien renseignée reprocherait à toute la catégorie des juges présentement retraités d’avoir un parti pris contre les travailleurs et les travailleuses.

Les syndicats réfutent toute objection fondée sur une « catégorie » du fait qu’ils acceptent volontiers que les juges retraités Alan Gold et George Adams président des arbitrages de « différends ». Le problème que peut poser le recours à certains juges retraités n’est pas tant un problème de partialité qu’un problème d’expertise.

Bien que je sois, par conséquent, d’avis de rejeter cet aspect de la contestation des syndicats, il va sans dire que je reconnais qu’il serait possible de contester l’impartialité d’un juge retraité nommé à un tribunal *ad hoc* particulier, tout comme il serait sûrement possible de contester, cas par cas, l’impartialité de toute autre personne désignée.

(7) La réparation convenable

La réparation accordée par la Cour d’appel reposait sur sa conclusion que le ministre avait suscité une crainte raisonnable de partialité et porté atteinte à l’indépendance et à l’impartialité des conseils d’arbitrage établis en vertu de la *LACTH*, ainsi qu’à l’expectative légitime des syndicats, contrairement aux exigences de la justice naturelle.

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I have indicated my reasons for respectful disagreement with the scope of that decision, while agreeing with the Court of Appeal's fundamental concern about the Minister's non-compliance with the legislative intent reflected in the *HLDAA* to appoint persons who were not only impartial and independent but possessed expertise and who were generally seen as acceptable to both labour and management in the labour relations community. I also share the Court of Appeal's reluctance, in a judicial review which did not focus on the circumstances of individual appointments, to give effect to the unions' request to set aside the Minister's appointments.

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It is common ground that some retired judges *do* have the necessary labour relations background (e.g., former judges Gold and Adams) and, of course, the fact they also happen to be members of the "class" of retired judges would not, in their case, be a ground of disqualification.

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In accordance with these reasons, the appeal should therefore be dismissed, but paragraphs 1, 2 and 3 of the order of the Court of Appeal should be varied to read:

1. The Court declares that the Minister is required, in the exercise of his power of appointment under s. 6(5) of the *HLDAA*, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour relations community as generally acceptable to both management and labour.

2. This order speaks from the date hereof and does not invalidate completed arbitration awards.

3. Any challenges to continuing arbitrations, including those chaired by retired judges appointed by the Minister under s. 6(5) of the *HLDAA*, are subject to judicial review on a case-by-case basis.

J'ai indiqué les motifs de mon désaccord avec la portée de cette décision, tout en partageant la préoccupation fondamentale de la Cour d'appel concernant le non-respect, par le ministre, de l'intention du législateur — qui ressort de la *LACTH* — de désigner des personnes qui sont non seulement impartiales et indépendantes, mais qui ont une expertise et qui sont généralement perçues, dans le milieu des relations du travail, comme étant acceptables à la fois par les syndicats et par le patronat. À l'instar de la Cour d'appel, j'hésite à accéder à la demande des syndicats d'annuler les désignations ministérielles dans le cadre d'un contrôle judiciaire non axé sur les circonstances de chacune des désignations.

Nul ne conteste que certains juges retraités possèdent *effectivement* les antécédents requis en matière de relations du travail (par exemple, les anciens juges Gold et Adams), et il est évident que, dans leur cas, le fait d'appartenir également à la « catégorie » des juges retraités ne serait pas un motif d'incapacité.

Conformément à ces motifs, il y a lieu de rejeter le pourvoi, mais également de modifier de la façon suivante les paragraphes 1, 2 et 3 de l'ordonnance de la Cour d'appel :

1. La Cour déclare que, dans l'exercice de son pouvoir de désignation conféré par le par. 6(5) *LACTH*, le ministre doit être convaincu que les candidats à la présidence sont non seulement indépendants et impartiaux, mais également qu'ils ont une expertise appropriée en matière de relations du travail et sont reconnus, dans le milieu des relations du travail, comme étant généralement acceptables à la fois par le patronat et par les syndicats.

2. La présente ordonnance prend effet à compter de la date des présentes et n'invalide pas les sentences arbitrales déjà rendues.

3. Toute contestation des arbitrages en cours, y compris ceux présidés par des juges retraités désignés par le ministre conformément au par. 6(5) *LACTH*, pourra faire l'objet d'un contrôle judiciaire sur une base individuelle.

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V. Conclusion

Except as aforesaid, the appeal is dismissed with costs.

Appeal dismissed with costs, MCLACHLIN C.J. and MAJOR and BASTARACHE JJ. dissenting.

Solicitor for the appellant: The Attorney General of Ontario, Toronto.

Solicitors for the respondents: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Bar Association: Koskie Minsky, Toronto.

Solicitor for the intervener the National Academy of Arbitrators (Canadian Region): Michel G. Picher, Toronto.

V. Conclusion

Sous réserve de ce qui précède, le pourvoi est rejeté avec dépens. 209

Pourvoi rejeté avec dépens, la juge en chef MCLACHLIN et les juges MAJOR et BASTARACHE sont dissidents.

Procureur de l'appelant : Le procureur général de l'Ontario, Toronto.

Procureurs des intimés : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Koskie Minsky, Toronto.

Procureur de l'intervenante National Academy of Arbitrators (Canadian Region) : Michel G. Picher, Toronto.

2003 SCC 21 (CanLII)