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BY EMAIL and RESS

June 2, 2014
Our File: EB20140155

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

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

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

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: KWHI and Intervenors (by email)

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EB-2014-0155

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

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

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

REPLY SUBMISSIONS OF THE SCHOOL ENERGY COALITION

1. Pursuant to the Ontario Energy Board's (the "Board") *Notice of Motion to Vary and Procedural Order No. 1*, these are the reply submissions of the School Energy Coalition ("SEC") on its Motion to Review and Vary the Decision and Order in EB-2013-0147, dated March 20th 2014 (the "Decision").

A. Threshold Test

2. ***Error of Law is a Proper Ground For Review.*** KWHI argues that the threshold test has not been met as an error of law is not a ground for a motion to review. SEC disagrees. As Board Staff also stated in its submissions, an error of law is a proper ground for a motion to review.[1]

3. KWHI has mischaracterized the Divisional Court's decision in *Corporation of Municipality of Grey Highlands v. Plateau Wind Inc*, ("*Grey Highlands*").[2] The threshold test screens out motions for review that do not contain any identifiable errors, do not go to the correctness of the decision, or are just a re-argument of the case.[3] *Grey Highlands* was about whether the Board, on review, was required to allow a legal issue to be re-argued. It was not about whether an error of law is a proper ground for a motion to review.

[1] Board Staff Submission at p.3
[2] KWHI Submissions at para 22
[3] *Motion to Review the Natural Gas Electricity Interface Review Decision* (EB-2006/0322/0338/0340), dated May 22 2007 at p.18 (See (KWHI Brief, Tab 6)

4. In *Grey Highlands*, the Appellant appealed the Board's decision to deny a motion to review at the threshold stage. The Board's denial was made on the basis that the legal issues raised "were simply a re-argument of those raised in the original hearing."[4] The Appellant argued before the Divisional Court that the Board was required to reconsider that legal question in its motion to review. The Court disagreed with the argument that the "word 'may' in Rule 44.01 requires the Board to consider errors of law [emphasis added]."[5] The Divisional Court never stated, nor was it an issue in the Board's decision on the motion to review, that Rule 44.01 (now Rule 42.01) does not include errors of law as a proper ground for review.

5. KWHI's argument is also inconsistent with other Board decisions decided after the *Grey Highlands* decision. The Board has never rejected motions to review on the basis that an error of law is an improper ground.[6]

6. KWHI also argues that allowing a motion to review on a question of law is inconsistent with section 33 of the *Ontario Energy Board Act, 1998*, which provides a right of appeal to the Divisional Court on a question of law or jurisdiction.[7] The Supreme Court recently rejected a very similar argument in *Canadian National Railway Company v. Canada (Attorney General)*. In that case, the Appellant argued that a review of a Canadian Transportation Agency decision by the Governor in Council could not encompass errors of law, since there was a parallel avenue of appeal to the Federal Court of Appeal on questions of law and jurisdiction. The Supreme Court disagreed. Instead, it determined that while parties may prefer to bring an appeal to the Federal Court of Appeal for practical or strategic considerations, that "does not restrict the Governor in Council from determining a question of law".[8]

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[4] *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc*., 2012 ONSC 1001 (See KWHI Brief, Tab 5) at para 7. Also see *Decision and Order on Motion to Review* (EB-2011-0053), dated April 21, 2011 at p.5-6 (See Appendix A)

[5] *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc*., 2012 ONSC 1001 at para 8 (See KWHI Brief, Tab 5)

[6] See for example: *Decision on Motion to Review Decision and Order (*EB-2013-0331), dated January 16, 2014 at p.3. The Board rejected Nishnawbe Aski Nation's motion on the basis that "[t]he Board concludes that the statement that it is bound by the Regulation, as set out in the Decision, is not an **error in fact or in law** [emphasis added]." (See Appendix B)

Oral Decision in EB-2014-0163, dated May 2, 2014 at Transcript at p.73. The Board granted the motion to review, in part, on the basis that "the doctrine of issue estoppel does apply and as that agreement was afforded confidential status in the CANDAS case, the Board should not revisit that determination". Failure to apply the doctrine of issue estoppel correctly is an error of law. A motion for review on that basis is a motion on the grounds of an error in law. (See Appendix C)

[7] KWHI Submissions at para 26

[8] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para 38 (See Appendix D)

7. The plain meaning of rule 42.01(a) is clear. The grounds listed are not exhaustive. An error of law is a proper ground for review.

8. ***Standard is not onerous.*** Insofar as Board Staff raises a separate issue: whether there is enough substance to the issue raised by SEC for the purpose of the threshold test, SEC submits that the burden of the moving party is not onerous and has been met. [9] As the Board stated in EB-2011-0090, "[i]f it is a *reasonable argument* that the original panel erred, and the error is of sufficient materiality to result in a reversal, variance, or suspension of the decision, the threshold is met [emphasis added]."[10]

B. <u>Board Fettered Its Discretion</u>

9. ***Evidence is clear***. Board Staff argues that SEC has failed to put forward any evidence that suggests the Board failed to keep an open mind when hearing arguments of all parties, and that "nowhere does the Board state that it is bound by the 13% set out in the Filing Requirements."[11]

10. With respect, Board Staff's argument misses the point. SEC agrees that the Board never stated explicitly it was "bound" by the 13% default value. What it said was that it did not have to consider the evidence cited and the arguments made by the intervenors, with respect to a value other than the default value. The Board was on that point very clear. It said that it "does not find it <u>necessary to consider</u> whether any WCA other than the default 13% used by KWHI is more appropriate in this application" [emphasis added].[12] In doing so, it treated the Filing Requirements as binding and thus fettered its discretion.

11. While the Board may have not intended to treat the Filing Requirements as a mandatory instrument, the Decision makes clear that is the *effect* of its analysis. In doing so, it erred. Once the Board determined that KWHI was not required to file a lead-lag study, it decided that it did not need to go any further. It simply applied the 13% default value for distributors who do not file lead-lag studies as set out in the Filing Requirements. It decided it did not need to actually assess, based on the evidence before it, the appropriate WCA percentage for KWHI.

12. The Decision itself is at odds with Board Staff's submission that the Board "clearly was aware of and gave due consideration to arguments put forward about the appropriate working capital". While the

[9] Board Staff Submissions at p.3
[10] *Decision and Order on Motion* (EB-2011-0090), dated June 23 2011 at p.6 (See Appendix E)
[11] Board Staff Submissions at p. 6
[12] *Decision and* Order (EB-2013-0147), dated March 20, 2014 ["*Decision*"] at p.9

Board may have been aware of the parties' arguments, the Board's findings clearly stated that it did not believe it had to consider those arguments. This is where the Board erred by fettering its discretion. It was required to consider other WCA percentages, if there was evidence and argument before the Board with respect to those other percentages. The Board has the authority to reject that evidence and those arguments, but it does not have the authority to ignore them. While the Board may ultimately disagree with intervenors on the appropriate WCA percentage, it must address any relevant and material issue if there is evidence and argument on it. It cannot simply rely on a policy guideline when asked to deviate from it.

13. Board Staff points to summaries in the Decision of certain intervenor arguments, as evidence that the Board did consider arguments of intervenors on why the default WCA percentage was in inappropriate.[13] Those arguments referenced are about the issue of whether KWHI should have filed a lead-lag study for the purposes of Issue 1.1.[14] There were also detailed arguments about the appropriate WCA percentage for KWHI based on the evidence in this specific case. The Board did not refer to those arguments at all.

14. ***Guidelines can influence decision-maker but cannot fetter discretion.*** SEC agrees with Board Staff and KWHI that guidelines such as the Filing Requirements are an important and desirable regulatory tool, and they may influence a decision-maker's conduct. There is nothing wrong with that, but the law imposes a limit on that influence. When the Board treats those guidelines as binding, it has fettered its discretion.[15] The Board must consider the particular facts and arguments raised in each specific case to determine if applying a guideline is appropriate in that specific case.[16]

15. The issue is not whether the Filing Requirements can be a factor, or even the determining factor, in the Board's decision, but whether the Board treated the default value as binding or conclusive without the need to consider any other factors or evidence relating to the circumstances of the specific case.[17] SEC and other intervenors challenged the assumptions underlying the default value in the Filing Requirements and that value's appropriateness for a utility such as KWHI moving to monthly billing. The intervenors

[13] Board Staff Submissions at p.6
[14] Issue 1.1: Has KWHI responded appropriately to all relevant Board directions from previous proceedings?
[15] "Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered" [*Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198 at para 66 (See Written Submissions of the School Energy Coalition at Appendix E)]
[16] *Jackson v. Ontario (Minister of Natural Resources),* 2009 ONCA 846 at para 51. *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198 at para 68 (See Written Submissions of the School Energy Coalition at Appendices D-E)
[17] Brown & Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf at p.12-42 (See Appendix F)

argued in these specific circumstances that the Board should not apply the policy (the Filing Requirements), and provided detailed reasons, based on the evidence, for a more appropriate WCA percentage.[18] The Board did not have to agree with those reasons. It did have to consider them. It was incorrect for the Board to approach the issue on "a hierarchical basis", in which it decided that since KWHI was not required to file a lead-lag study then the Board did not need to consider if any other number besides the 13% default WCA percentage was appropriate.[19]

16. Board Staff also relies on the April 12, 2012 Letter[20] as evidence that the Board did not fetter its discretion.[21] SEC does not understand this argument. The Letter can be no more binding than the Filing Requirements. In this proceeding, parties challenged the applicability of the Filing Requirements, which incorporated the Letter. Further, the reference to the Letter in the Decision is with respect to the issue of KWHI responding to previous Board directions.[22] SEC does not challenge that aspect of the Decision.

17. ***Reasonableness of the decision based on the record not relevant.*** KWHI argues the Decision must be read in conjunction with the record before the Board, and in doing so it is clear that a) the Board had SEC's submissions, b) no lead-lag study had been performed by KWHI and, c) the Board knew that KWHI had not yet moved to monthly billing.

18. This argument misses the point of SEC's motion. The underlying proposition (and the cases KWHI relies on) that the Board must look at the record as a whole to determine if the "outcome is reasonable" relates to situations in which the adequacy of reasons is being challenged.[23] SEC's motion to review is not about the adequacy of reasons at all. In some instances where reasons are inadequate on their face, this principle of looking at the whole record may be appropriate.[24] It can also apply where a reviewing court must determine the reasonableness of a decision in which there is no requirement for

[18] Final Argument of the School Energy Coalition at paras 2.2.6-2.2.17. Energy Probe Research Foundation Argument at p.4-10, Final Argument of the Vulnerable Energy Consumers Coalition at paras 4-10 (See Written Submissions of the School Energy Coalition at Appendices A-C)
[19] *Decision* at p.2, Ontario Energy Board, *Filing Requirements For Electricity Distribution Rate Applications, dated July 17 2013*, at 2.5.1.3
[20] Letter of Ontario Energy Board, *Re: Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications – Allowance for Working Capital*, dated April 12 2012 (K1.2 at p.7-9)
[21] Board Staff Submissions at p.7
[22] *Decision* at p.9
[23] KWHI Submissions at p.9
[24] See *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. (see KWHI Submissions at footnote 17)

reasons.[25] In this case, the reasons in the Decision are clear. There is no ambiguity. The Board failed to take a particular step in its analysis because it incorrectly instructed itself that it was not required to do so. It is precisely the clear wording of the Decision that is the basis of this motion.

19. KWHI makes a number of references to the record in support of its argument on this point. Those references are, in each case, either irrelevant to the issue raised in this motion, or misleading.

20. As discussed above, no party disagrees that the Board had the submissions of SEC (and other intervenors) on the WCA issues. Having the submissions, and considering them, are not the same thing.

21. It is also not disputed that KWHI failed to conduct a lead-lag study, and the Board accepted their explanation for their failure to do so. That aspect of the Decision is accepted by SEC, and is not the subject of this motion. That explanation and determination did not, however, in any way extinguish the onus of KWHI to justify, and the Board to consider, the appropriateness of the default 13% WCA percentage in the particular circumstances of KWHI for the test period. Intervenors' arguments showed with great specificity how a more appropriate WCA percentage, determined based on the change in service lag, was more appropriate for a KWHI who was moving to monthly billing.[26] The Board had evidence and arguments on both sides of the issue. It elected to consider only one side and not the other. In doing so, the Board treated the Filing Requirement as more than just a guideline but a binding instrument.

22. It is misleading for KWHI to now argue that since the Board knew that it had not yet moved to monthly billing, that this was a justification for not considering any WCA percentage other than 13%.[27] KWHI appears to be alleging that the Board considered and rejected the intervenor arguments as to the appropriate WCA percentage. This is wrong on two counts. First, the Board stated that it was not going to consider those intervenor arguments at all. It did not say that those arguments were incorrect. It said it did not have to consider them. KWHI's argument on this point is directly contrary to the clear words of the Decision. Second, while there was no firm date for the move to monthly billing, the evidence on the record was that KWHI was going to make the move in the test year, which is consistent with the Board's

[25] See *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* , 2011 SCC 61 (see KWHI Submissions at footnote 18)
[26] Final Argument of the School Energy Coalition at paras 2.2.6-2.2.17. Energy Probe Research Foundation Argument at p.4-10, Final Argument of the Vulnerable Energy Consumers Coalition at paras 4-10 (See Written Submissions of the School Energy Coalition at Appendices A-C)
[27] KWHI Submissions at para 34

explicit findings accepting the OM&A cost consequences of that move.[28] KWHI cannot have it both ways.

23. ***Recent decisions considered other WCA percentages.*** KWHI argues that if there is a lacuna in the Decision, the Board should look at previous or similar decisions to.[29] SEC notes that case relied upon by KWHI provides guidance for a reviewing courts to determine the reasonableness of a decision by an administrative decision-maker where there are no reasons to review.[30] In this case, the Board did provide reasons, and this motion to review is about the correctness not reasonableness of that decision.

24. Moreover, the Board decisions cited by KWHI, where the Board accepted the 13% WCA default value, only reinforce the conclusion that in this proceeding, the Board did fetter its discretion. In each of those decisions the Board, while ultimately accepting the applied for 13% default WCA percentage, explicitly considered arguments raised by other parties and provided reasons for rejecting them. None of those decisions stated that the Board did not need to *consider* any amount other than the 13% default value where no utility specific lead-lag study had been filed.

25. In Centre Wellington (EB-2012-0113), the Board stated that it "accepts CWH's proposal to use 13% and it's consistent with the Board policy and there is no compelling reason to depart from that policy" and then set out the reasons why it did not agree with VECC's proposal of 12%.[31] Similarly, in both Co-operative Hydro Embrun (EB-2013-0122) and Hydro Hawkesbury (EB-2013-0139), before setting out its specific reasons for rejecting VECC's argument of 12%, the Board stated that "[t]he Board finds no compelling reason to depart from the policy at this time."[32] In this proceeding, the Decision is clear that the Board did not consider the detailed and utility specific evidence that SEC and other intervenors argued made the 13% default value inappropriate in this proceeding. As Energy Probe alluded to in their submissions, the intervenors learned from previous Board decisions and devoted a significant

[28] "The total cost estimate for moving to monthly billing now stands at approximately $500K ($401,500 for monthly billing plus $98k for additional postage). KWHI is not seeking an increase in its OM&A expenses or revenue requirement to cover the additional postage cost.
The Board is of the view that there is sufficient potential for cost offsets associated with the monthly billing to warrant their inclusion in the calculation of the revenue requirement associated with the move to monthly billing." (*Decision* at p.5)
[29] KWHI Submission at para 35
[30] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (see KWHI Submissions at footnote 18)
[31] *Decision and* Order (EB-2012-0113), dated May 23 2013 at p.3 (See KWHI Brief, Tab 3)
[32] *Decision and Order* (EB-2013-0122), dated December 23 2013 at p.4 (See KWHI Brief, Tab 2), and *Decision and Order* (EB-2013-0139), dated January 30, 2014 at p.10 (See KWHI Brief, Tab 4)

portion of cross-examination and subsequent argument to providing a robust basis to show how the 13% default value was not appropriate for KWHI.[33]

C. Remedy

26. KWHI states that, based on the existing record, the Decison is reasonable and should not be varied.[34] If Board accept SEC's submissions that the Board fettered its discretion, the proper approach is not to determine if regardless of the error, the Decision is reasonable. It is a two-staged process. The first stage is to determine on review if an error of law took place. If it did, the second stage is to correct the error of law. The review panel can itself review the existing record to determine the correct WCA percentage based on all the relevant evidence and arguments of intervenors, Staff and KWHI. In the alternative, the review panel can remit the second stage back to the original panel to do the same thing. A motion to review is not the same thing as an appellate review, where the approach KWHI advocates may be appropriate. The Board panel reviewing the Decision is tasked with determining the correctness, not the reasonableness, of the decision.[35]

27. SEC submits the Board should grant this motion to review, set aside the Board's finding that it does not need to consider any WCA percentage other than the 13% set out in the Filing Requirements, and make a new finding on the WCA percentage based on the existing record in EB-2013-0147. In the alternative, the Board should remit the matter back to the original panel to do the same.

D. Costs

28. SEC submits that it has acted responsibly in this proceeding and by bringing this motion, and should be reimbursed its reasonably incurred costs in so doing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Original signed by

Mark Rubenstein
Counsel to the School Energy Coalition

[33] Energy Probe Submissions at p.4
[34] KWHI Submissions at para 37
[35] Rule 42.01(a) provides that a motion to review may be made if it raises a question about the "**correctness** of the order or decision**"** [emphasis added]. This would suggest that once the moving party has satisfied the threshold test the standard of review is correctness not reasonableness. This would also be consistent with purpose of a judicial reasonableness review, which is give deference to the administrative decision-maker who has the necessary expertise unlike a court. In this case another panel of the Board has the same expertise as the original panel.

Appendices

A *Decision and Order on Motion to Review* (EB-2011-0053), dated April 21, 2011

B *Decision on Motion to Review Decision and Order (*EB-2013-0331), dated January 16, 2014

C *Oral Decision* (EB-2014-0163), dated May 2, 2014

D *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40

E *Decision and Order on Motion* (EB-2011-0090), dated June 23 2011

F Brown & Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (excerpt)

A

Ontario Energy Board

Commission de l'Énergie de l'Ontario

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 4.0.1of 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 4.0.1of 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.

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[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 indentified 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

B

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0331

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

AND IN THE MATTER OF an Order by the Ontario Energy Board dated August 28, 2013 which approved rates and other charges to be charged by Hydro One Remote Communities Inc. for electricity (EB-2012-0137)

AND IN THE MATTER OF Rules 8.02, 42, 43, 44, and 45 of the Ontario Energy Board's *Rules of Practice and Procedure*.

BEFORE: Christine Long
Presiding Member

Paula Conboy
Member

Emad Elsayed
Member

DECISION ON MOTION TO REVIEW DECISION AND ORDER

On September 11, 2013, the Nishnawbe Aski Nation ("NAN") filed a Motion to Review and Vary (the "Motion") the Board's Decision in Hydro One Remote Communities Inc. ("Remotes") application for changes to the rates that Remotes charges for electricity, to be effective May 1, 2013 (EB-2012-0137). In the Decision, the Board approved a 3.45% rate increase, based on the average of approved rates for Ontario distributors from 2010 to 2011, in accordance with Regulation 442/01.

The Threshold Question

Under Rule 45.01 of the *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. The Board issued Procedural Order No. 1 on October 11, 2013, making provision for submissions on the threshold question. Submissions were received from NAN, Remotes, and Board staff, together with a reply submission from NAN.

In its submission, Board staff noted that the threshold question was first articulated in the Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Decision", EB-2006-0322, -0338, -0340, May 22, 2007). In the NGEIR Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by a moving party raised a question as to the 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. The Board indicated that "the review is not an opportunity for a party to reargue the case", and that “it is not enough to argue that conflicting evidence should have been interpreted differently”[1].

Board staff submitted that, in accordance with the NGEIR Decision, the threshold question requires a motion to review to meet the following tests:

- 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 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;

[1] *Natural Gas Electricity Interface Review Decision* (the "NGEIR Decision"), EB-2006-0322, -0338, -0340, May 22, 2007) at page 18.

> and the alleged error must be 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.[2]

Board staff submitted that NAN 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.[3] Board staff submitted, therefore, that the threshold tests have not been met.

NAN submitted that its Motion does not amount to rearguing the case. According to NAN, the Motion does not rely principally on an error in fact, rather on the reasons given by the Board which could not have been anticipated by the parties and therefore could not be addressed adequately in argument. NAN submitted that the alleged error relates to the Board's statement in the Decision that it is bound by Regulation 442/01 (the "Regulation"). NAN submitted that the Board has broad discretion to accept or not accept the amount of rate increase as prescribed in the Regulation. It submitted that the Board erred in concluding that, because of the Regulation, it does not have discretion to consider factors other than the level of increase of other distributors.

In NAN's submission, the Board has to consider additional factors, in particular the ability of Remotes' customers to pay higher electricity rates when setting just and reasonable rates. NAN submitted that the Board erred in concluding that the ability of Remotes' customers to pay for electricity had been taken into account in the Regulation.

Board Findings

The Board finds that NAN's Motion does not pass the threshold test, and shall, therefore, not conduct a review on the merits of the Motion.

The Board's reasons are as follows.

The Board concludes that the statement that it is bound by the Regulation, as set out in the Decision, is not an error in fact or in law. The Board is required to follow the Regulation. However, the Regulation affords discretion in that the language provides

[2] *Motions to Review, Natural gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007* (EB-2006-0322, EB-2006-0338, EB-2006-0340)
[3] P.6

that the amount of rate "shall be adjusted in line with the average…" [4], and while the Decision does not specifically state whether the Board exercised its discretion in approving the 3.45% rate increase there is no requirement to do so. Furthermore, the Board notes that there was no evidence provided during the original proceeding to substantiate a different outcome such as the 2% proposed by NAN. The fact that the 3.45% increase is equal to the average of the increases approved for the other Ontario distributors does not establish that the Board understood this to be its only option under the Regulation.

Further, the Board is of the view that the "ability to pay" argument raised by NAN was a consideration in the Decision. This issue was raised and canvassed in the original proceeding before the Board. NAN did not present any new facts regarding this issue in its Motion from those raised in the original proceeding. The Motion does not constitute an opportunity to re-argue the same facts.

In conclusion, NAN has not established that the Board erred in its interpretation of the Regulation or of the Act or made any other error that raises a question as to the correctness of the Decision outcome.

THE BOARD ORDERS THAT:

The Motion to Review is hereby dismissed.

[4] Regulation 442.01:

(3.1) For each year, in respect of the rates for a distributor serving consumers described in paragraph 5 of section 2, the Board shall calculate the amount by which the distributor's forecasted revenue requirement for the year, as approved by the Board, exceeds the distributor's forecasted consumer revenues for the year, as approved by the Board. O. Reg. 335/07, s. 1 (2).

(3.2) For the purpose of subsection (3.1), the distributor's forecasted consumer revenues for a year shall be based on the rate classes and on the rates set out for those classes in the most recent rate order made by the Board and shall be adjusted in line with the average, as calculated by the Board, of any adjustment to rates approved by the Board for other distributors for the same rate year. O. Reg. 335/07, s. 1 (2).

DATED at Toronto, January 16, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

C

other contexts and other sections should be disclosed.

I say, with respect, the considerations of the integrity of the Board's decision-making process militate in favour of keeping this information confidential.

Those are my reply submissions.

MS. HARE: Thank you. We have no questions.

We're hoping that we can make a decision today, but that may or may not happen. So what we would like to do is take a two-hour break until 2:00 o'clock. If it looks like we will not be able to make a decision, we, through counsel, will let you know so that we're not keeping you here all afternoon. Okay? Thank you

--- Luncheon recess taken at 11:52 a.m.

--- On resuming at 2:10 p.m.

DECISION:

MS. HARE: Please be seated.

The Board has made a decision. Toronto Hydro-Electric System limited has argued that the decision on confidentiality dated April 8th, 2014 did not have appropriate regard to the factual and legal context of a section 29 application.

Toronto Hydro-Electric System Limited seeks an order that the decision be reviewed and varied so that certain interrogatory responses be kept confidential. The information sought through the interrogatories falls into three general categories:

1), historical and current costs for wireless attachments;

2), historical and current revenues for wireless attachments;

3), terms of an agreement between Toronto Hydro-Electric System Limited and a customer.

This panel does not agree that adequate consideration was not given by the original panel to the unique issues associated with a section 29 application. In fact, it is clear that the decision did consider this issue but did not agree with Toronto Hydro-Electric System Limited.

> The decision specifically states, and I quote: "THESL argues that the Board should approach the issue of confidentiality differently in this case because the application is being made under section 29. The Board does not agree."

End quote from that decision.

What we have heard this morning was, for the most part, a re-argument of issues raised previously which were not accepted by the original panel. The decision on confidentiality determined that the potential competitive harm to Toronto Hydro-Electric System Limited, a regulated company, did not outweigh the need for transparency and openness.

It was not that the previous panel did not consider these issues or that there was an error in fact or law, but rather the panel decided in a way that was contrary to the position of THESL.

The Board must continue to be cautious in not

overturning decisions simply because a party does not like the outcome of the original decision.

With respect to the first two general categories of information, this panel finds that the information being sought deals with current and past costs and revenues incurred by the regulated distributor while offering a service that is currently regulated.

Should Toronto Hydro-Electric System Limited be successful in its section 29 application, it will be a competitive service provider with respect to wireless attachments. The Board will no longer regulate the terms, conditions, and rates for wireless attachments. At that time, the treatment of its costs and revenues will be a different matter.

This was clearly recognized by the original panel, as it did not require that information relating to Toronto Hydro Energy Service, an unregulated entity, to be disclosed publicly. However, the information sought through these interrogatories relates to a period during which Toronto Hydro-Electric System is offering these services as a regulated business.

Ratepayers have a right to know what the past and existing costs and revenues are. The fact that this information has not previously been sought or publicly disclosed by Toronto Hydro-Electric System does not mean that it should not be now.

There is one exception that this panel is making to the original panel's findings. This panel finds that

copies of the agreement between Toronto Hydro-Electric System Limited and a wireless-attachment customer requested in Board Staff IR No. 22 will remain confidential.

This Panel finds that in this case the doctrine of issue estoppel does apply, and as that agreement was afforded confidential status in the CANDAS case, the Board should not revisit that determination. The original panel's decision is varied accordingly.

Are there any questions?

MR. WARREN: No.

MS. HARE: Thank you very much.

--- Whereupon the hearing adjourned at 2:17 p.m.

D

SUPREME COURT OF CANADA

CITATION: Canadian National Railway Co. *v*. Canada (Attorney General), 2014 SCC 40

DATE: 20140523
DOCKET: 35145

BETWEEN:

Canadian National Railway Company
Appellant
and
Attorney General of Canada,
Peace River Coal Inc. and
Canadian Industrial Transportation Association
Respondents

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 69)
Rothstein J. (McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Canadian National Railway Company *Appellant*

v.

Attorney General of Canada,
Peace River Coal Inc. and
Canadian Industrial Transportation Association *Respondents*

Indexed as: Canadian National Railway Co. *v.* Canada (Attorney General)

2014 SCC 40

File No.: 35145.

2014: January 14; 2014: May 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Transportation law — Boards and tribunals — Judicial review — Standard of review — Governor in Council rescinding decision of Canadian Transportation Agency — Whether Governor in Council empowered to vary or rescind decision of Agency — Whether applicable standard of review is

correctness or reasonableness — Canadian Transportation Act, S.C. 1996, c. 10, ss. 40, 41, 120.1.

The confidential contract between PRC and CN for shipping coal specified that a fuel surcharge set out in Tariff 7402 would be applied when the monthly average price of highway diesel fuel equalled or exceeded the "strike price". Tariff 7402 set the strike price at US$1.25 per gallon. CN could make unilateral changes to Tariff 7402, and the contract provided no mechanism for PRC to challenge any such change.

Shortly after the confidential contract took effect, CN introduced Tariff 7403, which provided for a higher strike price. Tariff 7402 and its lower strike price would remain in effect until the expiration of those contracts to which it applied. CN refused to apply the higher strike price to PRC's traffic, and the Canadian Transportation Agency ("Agency") dismissed PRC's application under s. 120.1 of the *Canada Transportation Act* ("*CTA*") for an order that the strike price in Tariff 7402 be varied to reflect the higher strike price in Tariff 7403. The Canadian Industrial Transportation Association then filed a petition under s. 40 of the *CTA* requesting that the Governor in Council vary the Agency's decision and direct the Agency that the confidential contract does not preclude the Agency from assessing the reasonableness of the fuel surcharge in Tariff 7402. The Governor in Council rescinded the Agency's decision. On judicial review, the Federal Court found that the issue before the Governor in Council was one of pure jurisdiction, applied the correctness standard

and set aside the Order of the Governor in Council, and restored the Agency's decision. The Federal Court of Appeal, applying a reasonableness standard, set aside the judgment of the Federal Court and dismissed CN's application for judicial review of the Governor in Council's decision.

Held: The appeal should be dismissed.

Section 40 of the *CTA* confers broad authority on the Governor in Council to address any orders or decisions of the Agency, including those involving questions of law. Where Parliament intends to limit the Governor in Council's authority, it does so expressly, but the only inherent limitation on the authority conferred by s. 40 is that the Governor in Council's authority is limited to matters already dealt with by the Commission. Limitations like those placed on the right to appeal a decision of the Agency to the Federal Court of Appeal or on the Governor in Council's authority under other legislation are not found in s. 40.

The *Dunsmuir* framework, which applies to administrative decision-makers generally and not just to administrative tribunals, applies to adjudicative decisions of the Governor in Council made under s. 40, and the applicable standard of review is reasonableness. It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Parliament has recognized that the Governor in Council has particular familiarity in the area of economic regulation and transportation law and policy is closely connected to the Governor in

Council's review function. The presumption of deference applies and is not rebutted. Whether a party to a confidential contract can bring a complaint under s. 120.1 is a question of law which does not fall within one of the established categories of questions to which correctness review applies. There is no issue of constitutionality or competing jurisdiction between tribunals. The question at issue is not a question of central importance to the legal system as a whole. Finally, it is an issue of statutory interpretation and could not be a true question of jurisdiction or *vires* of the Governor in Council.

The Governor in Council's conclusion that a party to a confidential contract is able to bring a complaint under s. 120.1 in certain circumstances was reasonable. It is supported by the facts and the wording of s. 120.1(1). The conclusion that the existence of a confidential contract did not bar a shipper from applying for a reasonableness assessment under s. 120.1(1), is consistent with the terms of the *CTA*, which do not preclude the Agency from reviewing the reasonableness of a charge contained in a tariff applicable to more than one shipper, whether or not it is incorporated by reference into a confidential contract. In addition, it was open to the Governor in Council to conclude that Parliament's intent in enacting s. 120.1 was to provide a measure of protection for shippers. Accordingly, without deciding whether in any particular case a confidential contract would preclude a shipper from relief under s. 120.1, leaving access to the s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be

consistent with that intention. The Governor in Council's interpretation of s. 120.1 was reasonable.

Cases Cited

Referred to: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194, [2011] 3 F.C.R. 344; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

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Canada Marine Act, S.C. 1998, c. 10, ss. 52(2), 94(3).

Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 51.

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Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Federal Court of Appeal (Dawson, Gauthier and Stratas JJ.A.), 2012 FCA 278, 440 N.R. 217, [2012] F.C.J. No. 1438 (QL), 2012 CarswellNat 4527, setting aside a decision of Hughes J., 2011 FC 1201, 398 F.T.R. 218, [2011] F.C.J. No. 1469 (QL), 2011 CarswellNat 4297. Appeal dismissed.

Guy J. Pratte, *Nadia Effendi* and *Éric Harvey*, for the appellant.

Peter Southey and *Sean Gaudet*, for the respondent the Attorney General of Canada.

Forrest C. Hume and *Cynthia A. Millar*, for the respondents Peace River Coal Inc. and the Canadian Industrial Transportation Association.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Overview

[1] In *The Railway Act, 1868*, S.C. 1868, c. 68, the Governor in Council was given the power to approve railway freight rates in Canada. In 1903, the regulation of freight rates devolved to the Board of Railway Commissioners and the role of the Governor in Council changed to that of a reviewing body with the power to vary or rescind decisions of the Board of Railway Commissioners. Section 40 of the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), continues this role for the Governor in Council to vary or rescind any decision or order of the Canadian Transportation Agency ("Agency").

[2] The questions at issue in this appeal centre on whether the Governor in Council was empowered to vary or rescind a decision of the Agency on a point of law. In my respectful opinion, the Governor in Council has such authority.

II. Facts

[3] This appeal concerns a confidential contract between the Canadian National Railway Company ("CN") and Peace River Coal Inc. ("PRC"). PRC operates a coal loading facility at Trend, British Columbia. The confidential contract, effective for the period from January 1, 2008 to June 30, 2010, was for shipping coal from Trend to Ridley Terminals in Prince Rupert, British Columbia.

[4] The confidential contract incorporated by reference all applicable tariffs, rules and regulations. In particular, it incorporated "Fuel Surcharge Tariff CN 7402 series, supplements thereto or reissues thereof", which provided for the addition of a

mileage-based fuel surcharge to the base rate CN charged for carriage of freight. The surcharge would be applied when the monthly average price of highway diesel fuel equalled or exceeded a set price called the "strike price". Tariff 7402 set the strike price at US$1.25 per gallon. CN and PRC both understood that, during the lifetime of the contract, CN could unilaterally make changes to Tariff 7402. The contract did not provide a mechanism for PRC to challenge any change to the Tariff unilaterally made by CN.

[5] On February 21, 2008, CN advised its customers that, effective April 1, 2008, it would be introducing Tariff 7403, which provided for a strike price of US$2.30 per gallon. However, Tariff 7402 would remain in effect until the expiration of those contracts to which Tariff 7402 applied.

[6] PRC asked CN to apply Tariff 7403 to PRC's traffic as of April 1, 2008. CN declined this request.

[7] On April 22, 2008, PRC applied to the Agency under s. 120.1 of the *CTA* for an order establishing a reasonable fuel surcharge to apply to PRC's traffic. PRC requested that the Agency require CN to vary its charges in Tariff 7402 to reflect the charges in Tariff 7403; that is, that its rates for the movement of its coal from Trend to Ridley Terminals in its confidential contract could not be increased by a fuel surcharge until the strike price of US$2.30 per gallon was equalled or exceeded.

[8] On motion by CN, the Agency dismissed PRC's application on the ground that PRC was asking the Agency to amend its confidential contract, which the Agency said it did not have the jurisdiction to do. PRC did not seek leave to appeal to the Federal Court of Appeal, despite having the option to do so pursuant to s. 41 of the Act, which provides for a right of appeal, on leave being obtained, on a matter of law or jurisdiction brought within one month of the Agency's decision.

[9] Six months after the Agency's decision, the Canadian Industrial Transportation Association ("CITA"), a trade association representing the interests of shippers, filed a petition with the Governor in Council requesting a variance of the Agency's decision pursuant to s. 40 of the *CTA*. PRC is a member of CITA. CITA asked the Governor in Council to direct the Agency that the confidential contract between PRC and CN does not preclude the Agency from assessing the reasonableness of the fuel surcharge in Tariff 7402. On June 10, 2010, the Governor in Council rescinded the Agency's decision.

III. Relevant Statutory Provisions

[10] The relevant statutory provisions are contained in the Appendix. The statutory provisions most directly at issue in this appeal are ss. 40, 41 and 120.1 of the *CTA*.

IV. Administrative Decisions

A. *The Decision of the Agency*

[11] CN brought a preliminary motion before the Agency, seeking to dismiss PRC's application on two grounds: (1) the Agency did not have jurisdiction to amend the terms of a confidential contract under s. 120.1 of the *CTA* and (2) the fuel surcharge was part of the rate for the movement of traffic such that s. 120.1(7) would preclude review of the surcharge under s. 120.1 of the *CTA*.

[12] The Agency found that PRC was seeking to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge.

[13] Citing certainty and predictability of contract, the Agency found that the parties were bound by the contract and that it had no jurisdiction to change the terms of a contract under s. 120.1. The Agency did not find it necessary to go on to consider whether the fuel surcharge forms part of the rate for the movement of traffic within the meaning of s. 120.1(7). The Agency dismissed PRC's application.

B. *The Decision of the Governor in Council*

[14] The Governor in Council rescinded the Agency's decision. The Order in Council, P.C. 2010-749, stated that s. 120.1 of the *CTA* is a complaint-based regulatory remedy against unreasonable charges for the movement of traffic imposed by a railway company. Section 120.1 is aimed at benefiting all shippers subject to the charges in the challenged tariff rather than only benefiting the complainant. The

complaint filed by PRC was for the benefit of all shippers subject to the charge contained in Tariff 7402, which applies to more than one shipper.

[15] The Order in Council stated that the Governor in Council was of the opinion that, while the existence and terms and conditions of a confidential contract are relevant to whether PRC will benefit from an order made by the Agency under s. 120.1, the confidential contract had no bearing on the reasonableness of a charge in a tariff that applies to more than one shipper and is not a tariff referred to in s. 165(3) of the *CTA*.

V. Judicial History

A. *Federal Court of Canada, 2011 FC 1201, 398 F.T.R. 218*

[16] CN sought judicial review of the Governor in Council's decision. Hughes J. set aside the Order of the Governor in Council and restored the Agency's decision. Hughes J. characterized the issue before the Governor in Council as one of "pure jurisdiction" as it centred on the Agency's jurisdiction over PRC's application and determined that the applicable standard of review was correctness (para. 68).

[17] Hughes J. found that PRC was seeking to have the fuel surcharge in the contract changed to reflect a different fuel surcharge. He also held that Tariff 7402 was part of the "rate" for the movement of traffic and was therefore exempt from review by the Agency on the basis of s. 120.1(7). The Agency had no power to vary

a contract entered into by the parties and did not have jurisdiction to review rates which are covered by the s. 120.1(7) exemption. Although the Governor in Council has the authority to determine questions of law and jurisdiction, the decision of the Governor in Council to rescind the Agency's decision was incorrect.

B. *Federal Court of Appeal, 2012 FCA 278, 440 N.R. 217*

[18] The Federal Court of Appeal set aside the judgment of the Federal Court and dismissed CN's application for judicial review of the Governor in Council's decision.

[19] Applying a reasonableness standard, Dawson J.A. held that the decision of the Governor in Council was reasonable. She determined that "the effect of the Governor in Council's decision was to impugn the Agency's factual determination that [PRC's] application sought an order requiring new fuel surcharge rates to apply to the contract" (para. 43). The Governor in Council substituted its own view, which was that PRC's application was for the benefit of all shippers. Dawson J.A. held that the characterization by the Governor in Council of the nature of PRC's application to the Agency was a question of fact that carried a policy component. Accordingly, it was not necessary for the Federal Court of Appeal to consider whether the Governor in Council is a proper forum for determining questions of law and jurisdiction.

[20] Dawson J.A. concluded that the specific remedy sought, together with the fact that s. 120.1 is "aimed at benefiting all shippers subject to the challenged tariff,

provided a basis upon which the Governor in Council could reasonably conclude that PRC's application was for the benefit of all shippers subject to the alleged charge" (para. 50). She held that the Governor in Council's decision was supported by the evidence and fell within a range of outcomes defensible in respect of the facts and law. The decision was therefore reasonable. In addition, as the Agency declined to decide whether the fuel surcharge was part of the rate for the movement of traffic within the meaning of s. 120.1(7), the Federal Court judge sitting on judicial review erred by determining this issue, which remained a live issue before the Agency. The s. 120.1(7) issue was not a proper basis for setting aside the decision of the Governor in Council. Making the judgment that the Federal Court ought to have pronounced, the Federal Court of Appeal dismissed CN's application for judicial review.

VI. Issues

[21] This appeal raises four issues:

(1) What was the nature of the question answered by the Governor in Council in this case?

(2) What is the scope of the Governor in Council's authority under s. 40 of the *CTA*?

(3) What is the applicable standard of review?

(4) Does the Governor in Council's decision withstand judicial review?

VII. Background to the Regulatory Scheme

A. *Section 120.1 of the CTA*

[22] Section 120.1 was added to the legislation following a 2001 statutory review of the Act and as part of amendments aimed at updating the legislative framework (Parliamentary Information and Research Service, Legislative Summary LS-569E "Bill C-8: An Act to Amend the Canada Transportation Act (Railway Transportation)", revised June 27, 2008, at p. 1). Shippers had expressed concerns about incidental or ancillary charges, applied over and above freight rates for the movement of traffic. Examples of such charges include those imposed for cleaning cars, storing cars, weighing product and demurrage, a charge imposed for taking longer than the permitted free time to load or unload a car. Unlike rates for the movement of traffic from origin to destination, which may be challenged through final offer arbitration, shippers had limited recourse to challenge incidental or ancillary charges established unilaterally by the railway companies (Standing Committee on Transport, Infrastructure and Communities, Evidence, No. 2, 2nd Sess., 39th Parl., November 22, 2007, at p. 2).

[23] The amendments came as part of a move towards partial re-regulation in the rail sector after two decades of deregulation. Beginning with legislative reform in 1987 and continuing with further amendments in 1996, the goals of deregulation were to increase efficiency and improve service in the rail industry in Canada (Standing Committee on Transport, Infrastructure and Communities, Evidence, No. 3, 2nd Sess., 39th Parl., November 27, 2007, at pp. 1-2). Although deregulation was seen to

achieve these aims, rail services were and are not provided in a perfectly competitive marketplace. In certain circumstances, the railway companies were seen to have superior market power to shippers. This superior market power of the railway companies, combined with the complaints of shippers over railway service and rates, led to Parliament's efforts to respond to these concerns (Standing Committee on Transport, Infrastructure and Communities, November 22, 2007, at p. 1). As the Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities explained: "I believe the time has come to rebalance the legislative framework in favour of shippers" (*ibid*., at p. 2).

[24] In the context of this "rebalancing" in favour of shippers, s. 120.1 was introduced to provide a new remedy for shippers who are subject to unreasonable charges or associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper, other than a tariff resulting from a decision of an arbitrator in a final offer arbitration. It provides that, if, on complaint in writing to the Agency, the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may establish new charges or associated terms and conditions. Under s. 120.1(7), this complaint-based remedy does not apply to rates for the movement of traffic from origin to destination.

B. *Confidential Contracts*

[25] Under s. 126 of the *CTA*, carriers and shippers may enter into confidential contracts. A confidential contract may pertain to the rates to be charged by the railway company to the shipper, reductions or allowances pertaining to rates in tariffs, rebates or allowances pertaining to rates in tariffs or confidential contracts, any conditions relating to the traffic to be moved by the railway company and the manner in which the railway company shall fulfill its service obligations.

[26] Confidential contracts were introduced in 1987 amendments to railway legislation (*National Transportation Act, 1987*, S.C. 1987, c. 34, s. 120). Parliament provided for confidential contracts in order to promote flexibility in negotiations between railway companies and shippers for rates and services (*Freedom to Move: The Legislation: Overview of National Transportation Legislation 1986* (1986), at p. 8). Confidential contracts provide an alternative to the historic requirement that a railway company could only charge a rate in respect of the movement of traffic if the rate was set out in a tariff that had been issued and published by the railway company.

[27] Where a rate is not contained in a confidential contract, typically when a confidential contract expires, a shipper dissatisfied with the rate proposed by the railway company may submit the matter to the Agency for final offer arbitration (*CTA*, s. 161). The Agency itself does not conduct the final offer arbitration. Rather, if the parties do not agree upon the arbitrator or if no arbitrator is chosen, the arbitrator will be appointed by the Agency (*CTA*, s. 162(1)(*a*)). However, a party to a

confidential contract cannot submit a matter governed by the confidential contract to the Agency for final offer arbitration unless the parties consent (*CTA*, s. 126(2)).

[28] As the evidence in this case established, it is common railway industry practice to include a term in confidential contracts which incorporates by reference all of the railway's tariffs covering ancillary and incidental charges (CITA petition, at para. 27, cited in Federal Court of Appeal reasons, at para. 38).

VIII. Analysis

A. *The Nature of the Question Answered by the Governor in Council*

[29] The Governor in Council rescinded the Agency's decision. PRC argues, and the Federal Court of Appeal found, that the issue before the Governor in Council was predominantly fact-based and, in addition, carried a policy component. PRC submits that the Agency mischaracterized its application as it was not in fact seeking to have the Agency amend the terms of its confidential contract. Rather, PRC alleges that a finding by the Agency that the fuel surcharge in Tariff 7402 is unreasonable could result in an order from the Agency requiring CN to vary the fuel surcharge, such that a higher strike price would apply to shippers subject to Tariff 7402, including PRC. As I understand it, PRC's position is that, because the confidential contract states that fuel surcharges would be subject to supplements or reissuances of Tariff 7402, any variance of the fuel surcharge would be incorporated by reference into the confidential contract by reason of the issuance of a supplement to or

reissuance of Tariff 7402, without constituting an amendment to the contract. Accordingly, the Agency mischaracterized PRC's application and the Governor in Council simply disagreed with the Agency in this regard — a question of fact that it says carried a policy component in light of the purpose of s. 120.1.

[30] The Order in Council contained two key findings. First, the Governor in Council found that PRC's complaint was for the benefit of all shippers subject to the fuel surcharge contained in Tariff 7402. Tariff 7402 applied to more than one shipper and was not a tariff referred to in s. 165(3) of the *CTA* (a tariff resulting from a decision of a final offer arbitrator). As these are the statutory conditions for bringing a complaint, PRC's application met the requirements of s. 120.1 of the *CTA*.

[31] Second, the Governor in Council stated that while the existence of a confidential contract between a railway company and a complainant and the terms and conditions of such contract are relevant to the question of whether the complainant will benefit from any order made by the Agency under that section, a confidential contract has no bearing on the reasonableness of the charge that is found in a tariff that applies to more than one shipper.

[32] Having regard to these two findings, the Governor in Council determined that the Agency can hear a complaint brought by a party to a confidential contract under s. 120.1. The necessary implication of the Governor in Council's key findings is that, where an applicant meets the statutory requirements of s. 120.1(1), the Agency must consider the reasonableness of the charge, notwithstanding the existence of a

confidential contract. The decision therefore held that a confidential contract is not an impediment to a shipper's ability to bring a complaint under s. 120.1 about charges in a tariff that applies to more than one shipper. This decision was a matter of statutory interpretation.

[33] An issue of statutory interpretation is a question of law. In the present case, policy considerations that are at the heart of the complaint mechanism underlie the question of whether a party to a confidential contract can bring a complaint under s. 120.1. These policy considerations include the market power of a railway company in some circumstances and the relatively weaker position of shippers in those circumstances. These policy considerations may be at the root of the Governor in Council's interest in the statutory interpretation issue. However, although there may be policy considerations underlying the question at issue, that does not transform the nature of the question to one of policy or fact. The question of whether a party to a confidential contract can bring a complaint under s. 120.1 is one of law.

B. *The Scope of the Governor in Council's Authority Under Section 40 of the CTA*

[34] That the Governor in Council answered a question of law in this case raises the issue of whether the Governor in Council has the authority to do so. CN argues that s. 40 of the *CTA* does not confer authority on the Governor in Council to determine matters of law or jurisdiction. Rather, questions of law or jurisdiction must be appealed to the Federal Court of Appeal pursuant to s. 41 of the *CTA*. The

Governor in Council only has authority to determine questions of fact and policy. With respect, I cannot agree.

[35] For ease of reference, I produce the text of ss. 40 and 41(1) here:

> **40.** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.
>
> **41.** (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

[36] The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at p. 67).

[37] Section 40 does not contain any express limitations on the Governor in Council's authority. Unlike s. 41, which places a number of restrictions on the right of appeal to the Federal Court of Appeal, s. 40 states that the Governor in Council

may at any time vary or rescind *any* decision, order, rule or regulation of the Agency on petition of a party or an interested person, or even on the Governor in Council's own motion. There is no language in the provision that suggests the Governor in Council's authority is in any way circumscribed, nor is the Governor in Council's authority restricted to answering issues of fact or policy.

[38] In *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, this Court described s. 64 of the *National Transportation Act*, the predecessor provision to the current s. 40, as providing for an "unlimited or unconditional" right to petition the Governor in Council, a "quite different" avenue of review from the right of appeal on questions of law or jurisdiction to the Federal Court of Appeal (p. 745). Section 64 was substantially the same as the current s. 40.

[39] As Estey J. explained, "[t]here can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1)" (p. 745) (Although Estey J.'s conclusion, at p. 759, that the trappings of procedural fairness could not be implied into the provision may not represent the current view of how natural justice operates in an administrative context, the issue of procedural fairness owed by the Governor in Council is not before this Court.) Of course, the Governor in Council is "constrained by statute" and cannot, in the course of exercising its authority under s. 40, enact or change a law of Parliament (*Public Mobile Inc. v.*

Canada (Attorney General), 2011 FCA 194, [2011] 3 F.C.R. 344, at para. 29; see *Inuit Tapirisat*, at p. 752).

[40] For the purposes of this appeal, it remains the case that the only inherent limitation is that the Governor in Council is not empowered to address issues arising under the *CTA ab initio*: "Cabinet's authority is restricted to matters already dealt with by the Commission, and such matters must be orders, decisions, rules or regulations . . ." (*British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at p. 119, citing B. S. Romaniuk and H. N. Janisch, "*Competition in Telecommunications: Who Polices the Transition?* (1986) 18 *Ottawa L. Rev*. 561, at p. 628). In this sense, the Governor in Council does not have any substantive law-making capacity by virtue of s. 40; however, this restriction does not mean that questions of law are excluded from the scope of the Governor in Council's authority on review of Agency decisions.

[41] By contrast, where Parliament intended to circumscribe an avenue of review, it did so expressly. Section 41, for example, places a number of restrictions on the right to appeal a decision of the Agency to the Federal Court of Appeal: appeals under s. 41 are limited to questions of law or jurisdiction, leave to appeal must be obtained and the application for leave must be made within one month of the date of the decision, order, rule or regulation being appealed from, unless there are special circumstances which justify extending the time limit. The limitations contained in s. 41 provide strong indication that Parliament directed its attention to

the issue of restrictions on the avenues of review and included intended limitations expressly.

[42] Unlike s. 40 of the *CTA*, Parliament has expressly limited the scope of the Governor in Council's authority under other legislation. The *Broadcasting Act*, S.C. 1991, c. 11, empowers the Governor in Council to set aside or refer back decisions made by the Canadian Radio-television and Telecommunications Commission only if the Governor in Council is "satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1)" of the legislation (s. 28(1)). This kind of limitation is not found in s. 40 of the *CTA*. The indication is that where Parliament has intended to limit the Governor in Council's authority, it has done so expressly.

[43] CN argues that s. 40 should be read as limiting the Governor in Council's authority to questions of fact or policy on the basis of the legislative history of ss. 40 and 41. CN maintains that Parliament's intention was to leave questions of law to the courts.

[44] However, the legislative history is ambiguous. Although some of the Hansard references to which reference was made seem to indicate that Parliament's intention was for the Governor in Council to review questions of fact and policy (*Debates of the House of Commons of the Dominion of Canada*, vol. LVIII, 3rd Sess. 9th Parl. ("*1903 Debates*"), March 20, 1903, at p. 248, per Hon. A.G. Blair, and vol. XI, 1st Sess., 27th Parl. ("*1967 Debates*"), January 10, 1967, at p. 11630, per

Hon. J. W. Pickersgill), the Hansard also contains ministerial statements suggesting that the Governor in Council's power was intended to be untrammelled (*1903 Debates*, March 20, 1903, at p. 259, per Hon. A. G. Blair).

[45] The *1967 Debates* include a statement by the Minister of Transport that the legislation provided for "an appeal on questions of fact to the governor in council" (January 10, 1967, at p. 11630). Although this correctly states the Governor in Council's legislative authority to determine questions of fact, this statement does not provide evidence of Parliament's intention to limit the Governor in Council's authority to reviewing questions of fact alone. In addition, although he was Minister of Transport at the time of the 1967 enactment of the *National Transportation Act*, S.C. 1966-67, c. 69, Mr. Pickersgill's interpretation of earlier enactments by other parliaments do not provide evidence of the intent of the legislature at the time of the earlier enactments. As such, the Hansard evidence does not establish an unambiguous parliamentary intention to limit the authority of the Governor in Council.

[46] In my view, the Hansard evidence does confirm that Parliament intended to prevent questions of fact from being appealed to the Federal Court of Appeal. This does not, without more, demonstrate that the Governor in Council's role was intended to be limited to review of questions of fact or policy alone.

[47] This Court has observed that, while Hansard evidence is admitted as relevant to the background and purpose of the legislation, courts must remain mindful of the limited reliability and weight of such evidence (*Rizzo & Rizzo Shoes Ltd. (Re)*,

[1998] 1 S.C.R. 27, at para. 35; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484; Sullivan, *supra*, at pp. 608-14). Hansard references may be relied on as evidence of the background and purpose of the legislation or, in some cases, as direct evidence of purpose (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 44, per LeBel and Cromwell JJ.). Here, Hansard is advanced as evidence of legislative intent. However, such references will not be helpful in interpreting the words of a legislative provision where the references are themselves ambiguous (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 39, per LeBel J.). Accordingly, the evidence relied on by CN in this case does not support the argument that an implied restriction to questions of fact and policy should be read into the otherwise broad and unrestricted language in s. 40.

[48] CN submits that it is rare for the Governor in Council to vary or rescind an administrative decision on a question of law. I accept that it is unusual for the Governor in Council to determine a question of law and agree that the Governor in Council is generally concerned with issues of policy and fact. Although it is rare for the Governor in Council to determine a question of law, this does not mean that the Governor in Council has no authority under the statute to do so. Indeed, parties may prefer to comply with the requirements of s. 41 and seek leave to appeal to the Federal Court of Appeal, where a traditional full hearing on the matter will be carried out. Although these may be practical or strategic considerations, they do not alter the

fact that the legislation does not restrict the Governor in Council from determining a question of law.

[49] Accordingly, petitions to the Governor in Council are not restricted to issues of fact or policy. The Governor in Council has the authority to answer legal questions. This authority is properly supervised by the courts in the course of judicial review.

C. *Standard of Review*

[50] Determining the appropriate standard of review in this case involves consideration of two issues. First, does the standard of review analysis set out by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, apply to decisions of the Governor in Council? Second, what is the applicable standard of review in this case?

(1) The Dunsmuir Framework Applies to Decisions of the Governor in Council

[51] This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with

a decision or order of the Agency. The issue is the review framework that should apply to such a determination by the Governor in Council. I am of the view that the *Dunsmuir* framework is the appropriate mechanism for the court's judicial review of a s. 40 adjudicative decision of the Governor in Council.

[52] When the Governor in Council exercises its statutory authority under s. 40 of the *CTA*, it engages in its own substantive adjudication of the issue brought before it. The decision of the Governor in Council is then subject to judicial review by the Federal Court (*Public Mobile*, at para. 26). In this way, the court exercises a supervisory function over the Governor in Council, a public authority exercising the statutory powers delegated to it under s. 40 of the *CTA*.

[53] *Dunsmuir* is not limited to judicial review of tribunal decisions (paras. 27-28; *Public Mobile*, at para. 30). Rather, in *Dunsmuir*, the standard of review analysis was discussed in the context of "various administrative bodies", "all exercises of public authority", "those who exercise statutory powers", and "administrative decision makers" (paras. 27, 28 and 49).

[54] This Court has applied the *Dunsmuir* framework to a variety of administrative bodies (see, for example, *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 13 and 35, per McLachlin C.J.). The precedents instruct that the *Dunsmuir* framework applies to administrative decision-makers generally and not just to administrative tribunals. The *Dunsmuir* framework thus is applicable to adjudicative decisions of the Governor in Council.

(2) The Applicable Standard of Review

[55] It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). In such cases, there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction (*Dunsmuir*, at paras. 58-61, and *Alberta Teachers' Association*, at para. 30, citing *Canada (Canadian Human Rights Commission)*, at para. 18, and *Dunsmuir*, at paras. 58-61).

[56] Economic regulation is an area with which the Governor in Council has particular familiarity. Authority similar to that conferred in s. 40 of the *CTA* — that is authority to vary or rescind decisions of other administrative bodies — is found in a variety of federal economic regulatory legislation (*Telecommunications Act*, S.C. 1993, c. 38, s. 12; *Broadcasting Act*, at s. 28; *Canada Marine Act*, s.c. 1998, c. 10, ss. 52(2) and 94(3); *Pilotage Act*, R.S.C. 1985, c. P-14, s. 35(7); *Canada Oil and Gas*

Operations Act, R.S.C. 1985, c. O-7, s. 51). The issues arising under these statutes are linked by the shared economic regulatory purpose of the legislation. The cluster of economic regulatory statutes in respect of which the Governor in Council is given authority to vary or rescind decisions of the tribunals administering the legislation is an indication of a parliamentary intention to recognize that the Governor in Council has particular familiarity with such matters. The presumption of reasonableness review therefore applies to adjudicative decisions of the Governor in Council under s. 40.

[57] Although this indication of parliamentary intent is sufficient to justify a reasonableness review of the decision of the Governor in Council in this case, further support is found in the history of the Governor in Council's involvement in the regulation of railways in Canada. The Governor in Council has always been closely connected to the regulation of railways in Canada. In the first session of the first Parliament of the Dominion, *The Railway Act, 1868*, was passed. This legislation, the first incarnation of the present Act, provided that "[t]he Governor General may, from time to time, appoint such Members of the Privy Council, to the number of four at least, as he may see fit, to constitute the Railway Committee of the Privy Council" (s. 23). In amendments to the Act in 1888, the jurisdiction of the Railway Committee of the Privy Council was extended beyond regulatory powers to include the power to hear and determine any application respecting "[a]ny manner, act or thing which by this . . . is sanctioned, required to be done, or prohibited" (*The Railway Act*, S.C.

1888, c. 29, s. 11(*r*); see also H. E. B. Coyne, *The Railway Law of Canada* (1947), at p. vi).

[58] Although primary administrative jurisdiction over *The Railway Act* was later delegated to the Board of Railway Commissioners (the body that later became the Agency) in order to further efficiency in addressing issues arising under *The Railway Act*, the Governor in Council maintained an oversight role (*The Railway Act, 1903*, S.C. 1903, c. 58; Coyne, at pp. vi-vii). The long history of the Governor in Council's involvement in transportation law and policy indicates that this is an area closely connected to the Governor in Council's review function. Parliament has maintained a robust role for the Governor in Council in this area through s. 40, which confers broad authority on the Governor in Council to address any orders or decisions of the Agency, including those involving questions of law. When reviewing orders or decisions of the Agency in its s. 40 role, the Governor in Council acts in an adjudicative capacity and determines *de novo* substantive issues that were before the Agency. In this way, Parliament has recognized the Governor in Council's longstanding involvement in this area. As such, the principle that deference will usually result where a tribunal is interpreting statutes closely connected to its function, with which it will have particular familiarity, can be said to apply in this case.

[59] The presumption of deference is not rebutted here. The question at issue does not fall within one of the established categories of questions to which

correctness review applies. In the present case, there is no issue of constitutionality or competing jurisdiction between tribunals.

[60] This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the *CTA*. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the *CTA* and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme.

[61] To the extent that questions of true jurisdiction or *vires* have any currency, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or *vires* of the Governor in Council — the decision maker under review in this case.

[62] In this case, the Governor in Council was interpreting the *CTA*, legislation closely related to its economic regulation review function. This issue of

statutory interpretation does not fall within any of the categories of questions to which a correctness review applies. As such, the applicable standard of review is reasonableness.

D. *Application of the Reasonableness Standard in This Case*

[63] In the present case, the Governor in Council concluded that a party to a confidential contract is able to bring a complaint under s. 120.1 of the *CTA* in certain circumstances. In my view, this decision was reasonable.

[64] The wording of s. 120.1 provides the basis for the Governor in Council's decision. Section 120.1(1) sets out the circumstances under which the Agency can inquire into the reasonableness of a charge imposed by a railway company: the shipper bringing the complaint must be subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services; the charges must be found in a tariff; the tariff must apply to more than one shipper; and the tariff must not be one referred to in s. 165(3) (a tariff resulting from a decision of a final offer arbitrator). As noted by the Governor in Council, PRC met all of these conditions. As such, the only reason to preclude PRC from bringing a complaint under s. 120.1 is the existence of the confidential contract between PRC and CN.

[65] The Governor in Council concluded that, while the terms of a confidential contract are relevant to whether PRC may benefit from any order made

by the Agency, the existence of a confidential contract does not bar a shipper from applying for a reasonableness assessment under s. 120.1(1). This conclusion is consistent with the terms of the *CTA*, which do not preclude the Agency from reviewing the reasonableness of a charge contained in a tariff applicable to more than one shipper, whether or not it is incorporated by reference into a confidential contract. There was also no evidence in this case that the parties attempted to contract out of the availability of the s. 120.1 remedy, nor is it necessary in this case to decide whether a shipper could contract out of the recourse provided by s. 120.1. The Governor in Council also did not resolve the question of whether PRC could benefit from any change to the tariff and this remains an open question.

[66] The Governor in Council's interpretation of s. 120.1(1) is also supported by a reasonable view of the provision's purpose. It was open to the Governor in Council to conclude that Parliament's intention in including this complaint-based mechanism in the Act was to rebalance the legislative framework in favour of shippers in an industry where there are circumstances of railway market power. We are not deciding in this case whether the confidential contract between PRC and CN would preclude PRC from any relief ordered by the Agency under s. 120.1 or whether a mileage-based fuel surcharge tariff is a rate for the movement of traffic under s. 120.1(7). However, there was evidence before the Governor in Council that confidential contracts are standard in the industry (CITA petition to the Governor in Council, at para. 27, found in the Federal Court of Appeal reasons, at para. 38). Accordingly, without deciding whether in any particular case a confidential contract

would preclude a shipper from relief under s. 120.1, the Governor in Council's interpretation of s. 120.1 was reasonable. Leaving access to the s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be consistent with Parliament's intention to provide a measure of protection for shippers.

[67] The Governor in Council's decision is supported by the facts and the wording of s. 120.1(1), and it is consistent with Parliament's intention. The Governor in Council's decision was reasonable.

E. *Rate for the Movement of Traffic*

[68] I agree with the Federal Court of Appeal that, as the Agency did not consider the question of whether fuel surcharges are a component of the "rates for the movement of traffic" within the meaning of s. 120.1(7) and the Governor in Council did not make any finding in this regard, this question remains a live issue before the Agency (Federal Court of Appeal reasons, at paras. 52-56). It is within the Agency's jurisdiction to determine this question and it remains open for the Agency to do so.

IX. Conclusion

[69] I would dismiss the appeal with costs to the Attorney General of Canada and one set of costs to PRC and CITA.

APPENDIX

Canada Transportation Act, S.C. 1996, c. 10

40. The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

. . .

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or

associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

(2) An order made under subsection (1) remains in effect for the period, not exceeding one year, specified in the order.

(3) In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:

(*a*) the objective of the charges or associated terms and conditions;

(*b*) the industry practice in setting the charges or associated terms and conditions;

(*c*) in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and

(*d*) any other factor that the Agency considers relevant.

(4) Any charges or associated terms and conditions established by the Agency shall be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them.

(5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

(6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

(7) For greater certainty, this section does not apply to rates for the movement of traffic.

. . .

126. (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting

(*a*) the rates to be charged by the company to the shipper;

(*b*) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;

(*c*) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;

(*d*) any conditions relating to the traffic to be moved by the company; and

(*e)* the manner in which the company shall fulfill its service obligations under section 113.

(1.1) If a shipper wishes to enter into a contract under subsection (1) with a railway company respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may request that the railway company make it an offer to enter into such a contract.

(1.2) The request must describe the traffic to which it relates, the services requested by the shipper with respect to the traffic and any undertaking that the shipper is prepared to give to the railway company with respect to the traffic or services.

(1.3) The railway company must make its offer within 30 days after the day on which it receives the request.

(1.4) Subject to subsection (1.5), the railway company is not required to include in its offer terms with respect to a matter that

(*a*) is governed by a written agreement to which the shipper and the railway company are parties;

(*b*) is the subject of an order, other than an interim order, made under subsection 116(4);

(*c*) is set out in a tariff referred to in subsection 136(4) or 165(3); or

(*d*) is the subject of an arbitration decision made under section 169.37.

(1.5) The railway company must include in its offer terms with respect to a matter that is governed by an agreement, the subject of an order or decision or set out in a tariff, referred to in subsection (1.4) if the agreement, order, decision or tariff expires within two months after the day on which the railway company receives the request referred to in subsection (1.1). The terms must apply to a period that begins after the agreement, order, decision or tariff expires.

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

. . .

161. (1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

. . .

162. (1) Notwithstanding any application filed with the Agency by a carrier in respect of a matter, within five days after final offers are received under subsection 161.1(1), the Agency shall refer the matter for arbitration

(*a*) if the parties did not agree that the arbitration should be conducted by a panel of three arbitrators, to the arbitrator, if any, named under paragraph 161(2)(*e*) or, if that arbitrator is not, in the opinion of the Agency, available to conduct the arbitration or no arbitrator is named, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration; and

(*b*) if the parties agreed that the arbitration should be conducted by a panel of three arbitrators,

(i) to the arbitrators named by the parties under paragraph 161(2)(*e*) and to any arbitrator who those arbitrators have, within 10 days after the submission was served under subsection 161(2), notified the Agency that they have agreed on, or if those arbitrators did not so notify the Agency, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration, or

(ii) if an arbitrator referred to in subparagraph (i) is not, in the opinion of the Agency, available to conduct the arbitration, to the arbitrators named in that subparagraph who are available and to an arbitrator chosen by the Agency from the list of arbitrators referred to in section 169 who the Agency

determines is appropriate and available to conduct the arbitration.

. . .

165. (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier.

. . .

(3) The carrier shall, without delay after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.

Appeal dismissed with costs.

Solicitors for the appellant: Borden Ladner Gervais, Ottawa; Canadian National Railway Company, Montréal.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the respondents Peace River Coal Inc. and the Canadian Industrial Transportation Association: Davis, Vancouver.

E

Ontario Energy Board

Commission de l'énergie de l'Ontario

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 table[1] 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 case[2] 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 Factum[3] 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-2009-0038[5], 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 performance[9] 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 stated[12]:

> 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

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Publisher's Note

December 2013 Update
Previous update was May 2013

Brown

Judicial Review of Administrative Action in Canada

Latest Developments in Judicial Review

Supreme Court of Canada

In the first six months of the year, the Supreme Court of Canada did some "fine-tuning" to two areas of administrative law: issue estoppel and the standard of review applicable to human rights tribunals.

Doctrine of Issue Estoppel

In *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, the Supreme Court emphasized the discretionary and flexible nature of the doctrine of issue estoppel, holding that the application of the doctrine to police disciplinary hearings should not be precluded by a rule of public policy based on judicial oversight of police accountability. But, in the particular circumstances of this case, the Court applied its earlier analytical framework from *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, and held that, while the procedure followed in the police disciplinary proceedings was fair, it would be fundamentally unfair to apply the doctrine of issue estoppel and conclude that the acquittal of the officers precluded a civil claim for damages.

invalidate a revocation of a licence that the same agency lawyer in the same matter *might* have advised the agency on possible enforcement measures and might have acted as counsel to the agency in its adjudicative capacity.[195] On the other hand, counsel to a commission of inquiry will not be precluded from assisting in the preparation of a report by virtue of having examined witnesses and drafted notices.[196]

12:4400 Fettering of Judgment

12:4410 *Overview*

An allegation that a tribunal has "fettered its judgment" is similar to a charge of "prejudgment," in that the complaint is that the decision-maker has decided the matter without regard to the particular circumstances,[197] and accordingly it is reviewable for correctness.[198] In particular, an agency may not fetter the exercise of its statutory discretion, or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that it had previously formulated, other than where it is properly enacted pursuant to a statutory power to make subordinate legislation. "Fettering" can also occur if, without exercising any independent judgment in a matter, a decision-maker makes a decision in accordance with the views of another,[199] or where a contract or some other undertaking is regarded as

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[195] ***2747-3174 Quebec Inc. v. Québec (Régie des permis d'alcool)***, [1996] 3 S.C.R. 919.

[196] ***Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)***, [1997] 2 F.C. 36 (FCA), aff'd (1997), 151 D.L.R. (4th) 1 (SCC).

[197] As to "prejudgment," see topic 11:4510, *ante*, and for review of discretion generally, see topics 14:5400, 15:2000, *post.*

[198] *Okomaniuk v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 473 at para. 20 ref'g to ***Thamotharem v Canada (Minister of Citizenship & Immigration)***, 2007 FCA 198 at para. 33. **See further** *Qin v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at para. 23, ref'g to *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 23 questioning whether "fettering" can be an independent ground of review in light of the Supreme Court's decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, which requires the decision on the merits typically be assessed for "reasonableness".

[199] E.g. *Heilman v. Saskatchewan (Workers' Compensation Board)*, 2012 SKQB 361 at para. 39; *Stafford v. Newfoundland (Milk Marketing Board)* (1987), 67 Nfld. & P.E.I.R. 198 (Nfld. S.C.) (appeal tribunal deferred to decision of Milk Marketing Board); *Amerato v. Ontario (Registrar Motor Vehicle Dealers Act)* (2005), 257 D.L.R. (4th) 146 (Ont. C.A.) (by allowing Registrar to automatically revoke licence for any breach of order, tribunal fettered its discretion); *Labiyi v. Canada (Solicitor General)* (2004), 261 F.T.R. 149 (FC)

determinative of the exercise of a statutory power.[200]

On the other hand, it is not unlawful for a decision-maker to take into account informal rules or guidelines, previous decisions, contractual commitments or the views of others. Indeed, formulating guidelines and written reasons for decision can enhance the quality of decision-making and administrative justice by increasing certainty, reducing inconsistencies and raising the level of accountability to the public. Thus, apart from whether the guideline itself has correctly applied the law,[201] where fettering of judgement is alleged, the issue is not whether the rule, guideline, precedent, policy, or contract was a factor, or even the determining factor, in the making of a decision, but whether the decision-maker treated it as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case. In the result, in each instance a tension will exist between the desirability of consistency on the one hand, and encouraging administrative decision-makers to be mindful of the particular circumstances of individual cases on the other. As one judge has observed: "The principle [that decision-makers must not fetter their judgment] is easy enough to state. But, in truth, it is a principle [that is] vague in its limits with a good deal of the chancellor's foot in its application."[202]

12:4420 *Policies, Rules and Guidelines*

12:4421 *Generally*

A decision-maker will fetter his or her discretion by *automatically* following policies, rules, guidelines, or precedent, notwithstanding that their existence is proper. In other words, although courts have often acknowledged that policies and guidelines may be desirable as tools of

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(officer wrongly concluded decision had been made by her Director and that she was bound by it).

[200] To refuse to exercise discretion based on an error of law, while it may be described as "fettering," e.g. *Electrical Power Construction Systems Association v. Ontario Allied Construction Trades* (1993), 12 OR. (3d) 768 (Ont. Div. Ct.), is more properly viewed as an instance of legal error which may or may not result in judicial intervention.

[201] E.g. *Moya v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 971 at para. 10. **And see** topic 15:3160, *post.*

[202] *Saunders Farms Ltd. v. British Columbia (Liquor Control & Licensing Board)* (1995), 32 Admin. L.R. (2d) 145 at p. 147, *per* Southin J.A. (BCCA) .