K1.2

ONTARIO ENERGY BOARD

EB-2014-0375

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 Union Gas Limited for an order or orders approving a one-time exemption Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations;

AND IN THE MATTER OF a Motion initiated by Natural Resource Gas Limited pursuant to the Board's Rules of Practice and Procedure requesting that the Board review its Decision and Order dated October 9, 2014 in EB-2014-0154.

BRIEF OF DOCUMENTS

in Support of

OPENING STATEMENT OF NATURAL RESOURCE GAS LIMITED ("NRG")

Preliminary NRG Motion to Review and Vary Board Decision January 27, 2015

I N D E X

Tab 6: *Re Union Gas Ltd.*, 2012 LNONOEB 363, No. EB-2012-0360.

Tab 7: *Grey Highlands (Municipality) v. Plateau Wind Inc.*, 2012 ONSC 1001.

Tab 8: *Rules of Civil Procedure*, RRO 1990, Reg. 194, r. 59.06.

Tab 9: *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848.

Tab 10: *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67 (Div. Ct.).

Tab 11: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983.

Tab 12: *Windsor-Essex Children's Aid Society v. T.R.*, 2014 ONCJ 563.

NAVIGANT

Winter 2013/14 Natural Gas Price Review

Prepared for:

Ontario Energy Board

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November 25, 2014

NAVIGANT

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NAVIGANT

Winter 2013/14 Natural Gas Price Review

Glossary

Checkpoint balancing	A balancing requirement on Union Gas' direct purchase customers requiring a particular minimum balance to be in a customer's Banked Gas Account as of the Winter Checkpoint Date of February 28.
Dawn, Ontario	The major gas market and storage center serving southwestern Ontario
Eastern Canada	A division used to account for storage locations in Canada, including the areas east of the Saskatchewan-Manitoba border
Eastern U.S.	A division used to account for storage locations in the U.S., including the states of the U.S. east of the Mississippi River, but including IA, MO, and NE and excluding AL and MS
Empress	The point at the Alberta-Saskatchewan border where the TCPL Mainline begins
Enbridge	Enbridge Gas Distribution, the gas distribution utility serving much of Toronto and environs
FT	Firm Transportation of natural gas under utility tariff from a receipt point to a delivery point for a specified maximum capacity for a term over one year
HDD	Heating Degree Days, a measure equal to the number of degrees that a day's average temperature is below 18 degrees Celsius
IT	Interruptible Transportation of natural gas under utility tariff providing for curtailment for capacity and/or supply reasons, at the utility's option
LDC	Local Distribution Company, a retail gas distribution utility
QRAM	The Quarterly Rate Adjustment Mechanism that allows Ontario's gas distribution utilities to recover their gas supply costs via customer rates
STFT	Short-Term Firm Transportation for a term between 7 days up to one year, with less flexible terms than FT
STS	Storage Transportation Service allows for injections and withdrawals at storage locations, held in conjunction with an FT contract
TCPL	TransCanada Pipeline, which includes the Mainline
U.S. Region-East North Central	The U.S. states MI, OH, IN, IL, WI
U.S. Region-East South Central	The U.S. states KY, TN, AL, MS
U.S. Region-Middle Atlantic	The U.S. states NY, NJ , PA
U.S. Region-Mountain	The U.S. states MT, ID, WY, CO, UT, NV, AZ, NM
U.S. Region-New England	The U.S. states ME, VT, NH, MA, CT, RI
U.S. Region-Northeast	The U.S. states in the Middle Atlantic and New England
U.S. Region-Pacific	The U.S. states WA, OR, CA

U.S. Region-South Atlantic	The U.S. states WV, MD, DE, VA, NC, SC, GA FL
UDC	Unabsorbed Demand Charges, reflecting a utility's costs for unutilized firm transport capacity
Union Gas	Union Gas, Ltd., the gas distribution utility serving northern Ontario and parts of southwest Ontario

1. Executive Summary

The Ontario Energy Board (Board) engaged Navigant Consulting to analyze the gas market events of last winter, focusing on the variables and factors that affected Ontario natural gas supply, demand and prices over the Winter 2013/14 period, and to identify potential prospective issues relative to such factors affecting prices.

Extreme winter conditions associated with last winter's polar vortex[1] events elevated natural gas demand throughout the U.S. and Ontario to record levels. As a result of dramatically elevated natural gas demand levels that occurred over an extended period of time and over a widespread geographic area, spot natural gas prices were elevated across most market points of North America for at least some period of the winter. Prices at the Dawn market hub were elevated mostly during February, with a few spikes in January and some residual price elevation in early March. These market conditions also set the stage for additional factors that further exacerbated Ontario gas prices

There were many events unfolding in real time last winter as market participants made decisions on planning and acquiring supply. The most important event was the cold weather, which was widespread, persistent, and extreme. Hindsight allows all the information to be seen at once. Following are the main conclusions about last winter's gas prices and the various events that contributed to them:

- Extreme winter conditions elevated natural gas demand throughout the U.S. and Ontario to record levels, leading to a tight gas market and setting the stage for additional factors that exacerbated the winter's price behavior.
- Strong Midwest demand impacted gas prices at Dawn and incented increased storage withdrawals to meet Ontario demand.
- Large storage withdrawals early necessitated large spot purchases later (which happened to be at high prices) as continued cold conditions led to persistent high demand.
- "Checkpoint" balancing by Union direct purchase customers, although an annual occurrence, coincided last winter with the on-going need to meet persistent high demand, exacerbating prices.
- Increased interruptible transport tolls appear to have limited the competitiveness of Empress as an economic source of supply, leading incremental gas for Ontario to be drawn from the Midwest and Northeast, further exacerbating Dawn prices
- The necessary conditions for last winter's price scenario appear to be the coincidence in both the U.S. and Canada of early, widespread and persistent high demand (resulting from the macro weather conditions).
- It is not clear whether the same weather conditions would have led to the same price impacts had supply plan requirements called for more base storage or increased firm transportation, but more storage and increased firm transportation may have helped.
- Similarly, supply plan requirements leading to more conservative use of storage withdrawals (and thus more supply procurement early in the winter) would likely have helped.

[1] "Polar vortex" refers to a type of event, one of which occurred from December 2013 through April 2014, where there is a southward shift of the North Polar Vortex, which is a cyclonic wind pattern in the upper atmosphere in the North Pole region.

Navigant also reviewed the drivers of the Quarterly Rate Adjustment Mechanism (QRAM), the provinces's mechanism to allow gas distributors to recover their actual gas costs. As the QRAM relates to actual gas supply costs, the drivers of the QRAM are essentially the factors that influence a gas distribution company's actual gas costs. Such factors that could potentially be impacted by operational, managerial and regulatory policies, procedures, directives and decisions of a gas distribution company or its regulator include the following: weather assumption design day criteria, demand forecasts, firm transportation planning criteria, storage level planning, use of peaking supplies, and procurement mechanisms for incremental supply. Choices made with respect to these factors likely involve cost and risk trade-offs dependent on an entity's risk profile and the array of potential risks.

2. Explanation of 2013/2014 Winter Price Levels and Volatility-

a. Introduction

It is important to remember that the Ontario natural gas market is part of the larger, highly-integrated and interconnected North American natural gas market, which is distinct in the world for its efficiency and transparency that allow for a highly competitive market environment. As such, the market will largely drive the particular impacts of events such as a cold winter based on supply and demand. As supply resources and the infrastructure necessary to move new supplies to demand centers continue to develop, we would expect that market responses to cold weather events would evolve, as well.

Extreme winter conditions associated with last winter's polar vortex events elevated natural gas demand throughout the U.S. and Ontario to record levels. As a result of dramatically elevated natural gas demand levels that occurred over an extended period of time and over a widespread geographic area, spot natural gas prices were elevated across most market points of North America for at least some period of the winter. Prices at the Dawn market hub were elevated mostly during February, with a few spikes in January and some residual price elevation in early March. These market conditions also set the stage for additional factors that further exacerbated Ontario gas prices, as explained in Section 2.e.

The key price effect in Ontario was the sustained and increasing price trend that occurred in February. Due to the higher actual prices paid than were forecast, and larger than forecast purchased gas supplies by Ontario's major gas Local Distribution Companies (LDCs), Union Gas and Enbridge, substantial dollars were reflected in the LDC's Quarterly Rate Adjustment Mechanism (QRAM) filings for Q2 of 2014. The QRAM is a mechanism to allow for cost recovery of actual gas supply costs through the combination of a forecast-based rate and a true-up component to account for past variances between actual costs and recovered costs at then-existing forecast-based rates.

- Union's filings indicate a total of C$134 million in costs above existing rates during the November-March period last winter, due to C$76 million in higher prices on Union's planned purchases plus $58 million in higher prices on spot purchases to meet increased demand.[2]

- Enbridge's filings indicate a total of C$643 million in costs above existing rates during the November-March period last winter, due to higher prices on planned purchases and incremental spot purchases.[3]

b. Weather

Ontario

Last winter's weather was characterized by extreme, persistent, and widespread cold. Union Gas reported that its franchise area was the coldest since its records began in 1969, with weather that was 15.5%, 16.5% and 18.4% colder than normal in November, December and January, respectively.[4] FIGURE 1 shows heating degree day (HDD)[5] data for three large cities covering the range of Ontario's more populous areas that were colder than any of the prior 10 years, as follows:

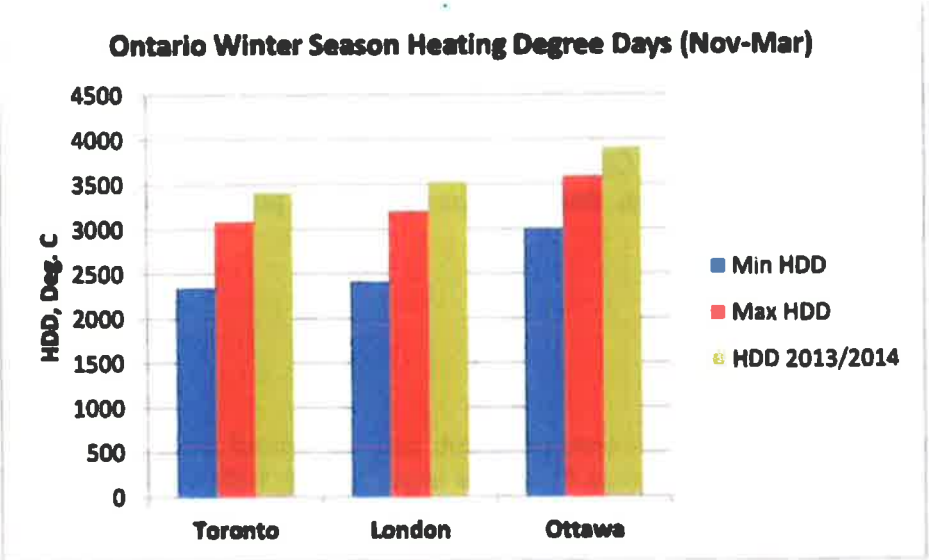
- Toronto: 11% colder than 2010/11 (coldest there in prior 10 years),
- London: 10% colder than 2010/11 (coldest there in prior 10 years), and
- Ottawa: 9% colder than 2010/11 (coldest there in prior 10 years).

[2] See Union Gas Limited, April 1, 2014 QRAM Application (EB-2014-0050), Pre-Filed Evidence of Chris Shorts, Director, Gas Supply and Mary Evers, Manager, Gas Supply, (Tab 1, p.1), April 6, 2014.

[3] See Enbridge Gas Distribution Inc., Q2 2014 QRAM Application (EB-2014-0039), Gas Acquisition Costs Component of the Purchased Gas Variance Account, Ex. Q2-3, Tab 1, Schedule 2, p. 1 of 7), col. 6, items 8-12.

[4] Union QRAM filing, Tab 1, p. 15.

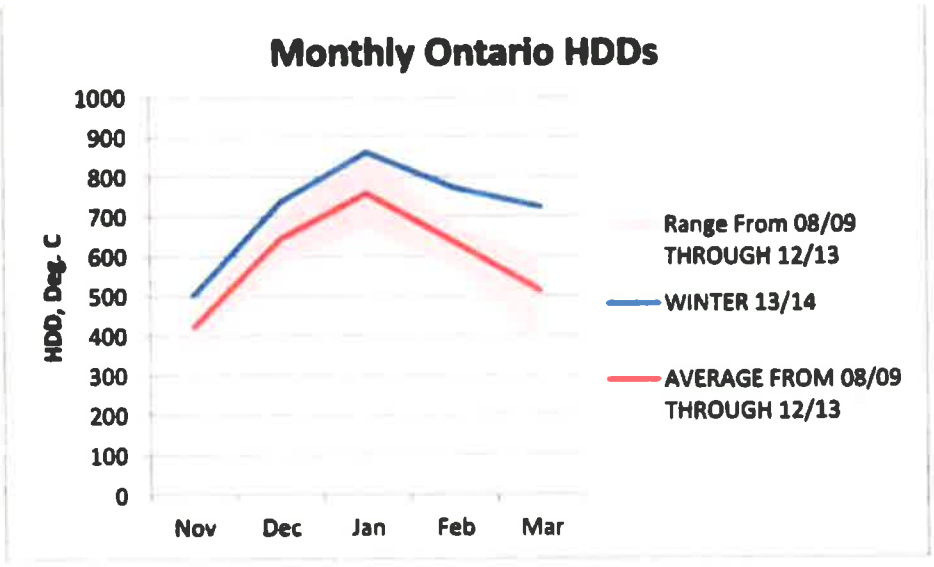
[5] Heating Degree Days is defined as the number of degrees by which a day's mean temperature was below 65 degrees Fahrenheit, or below 18.3 degrees Celsius. HDD's for a period of time is the sum of the HDD value for each day in the time period.



Source: Navigant/Aegent/Environment Canada

FIGURE 1: ONTARIO WINTER SEASON HEATING DEGREE DAYS

Confirming that last winter was persistently colder than normal in Ontario, FIGURE 2 shows that HDDs exceeded the prior 5-year maximum for virtually all of winter, with pronounced cold in February and early March. HDDs were 21.0% above average for the winter, starting the season at 19.2% above average during November and ending at 41.4% above average during March.



Source: Navigant/Aegent/Environment Canada

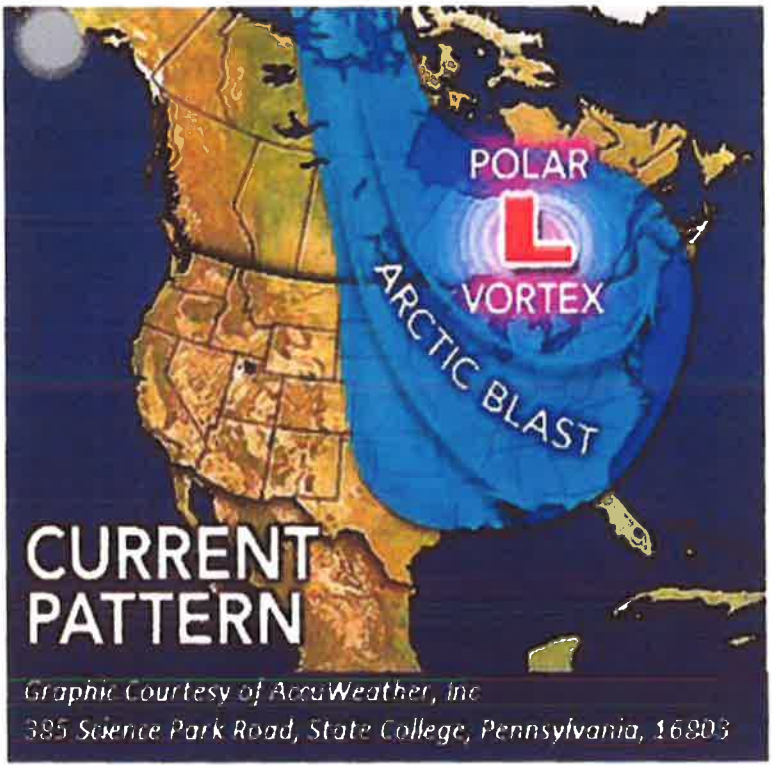
FIGURE 2: ONTARIO MONTHLY HEATING DEGREE DAYS

An Exceptional Winter

Serving the Needs of Ontario's Natural Gas Customers

Winter 2013-14

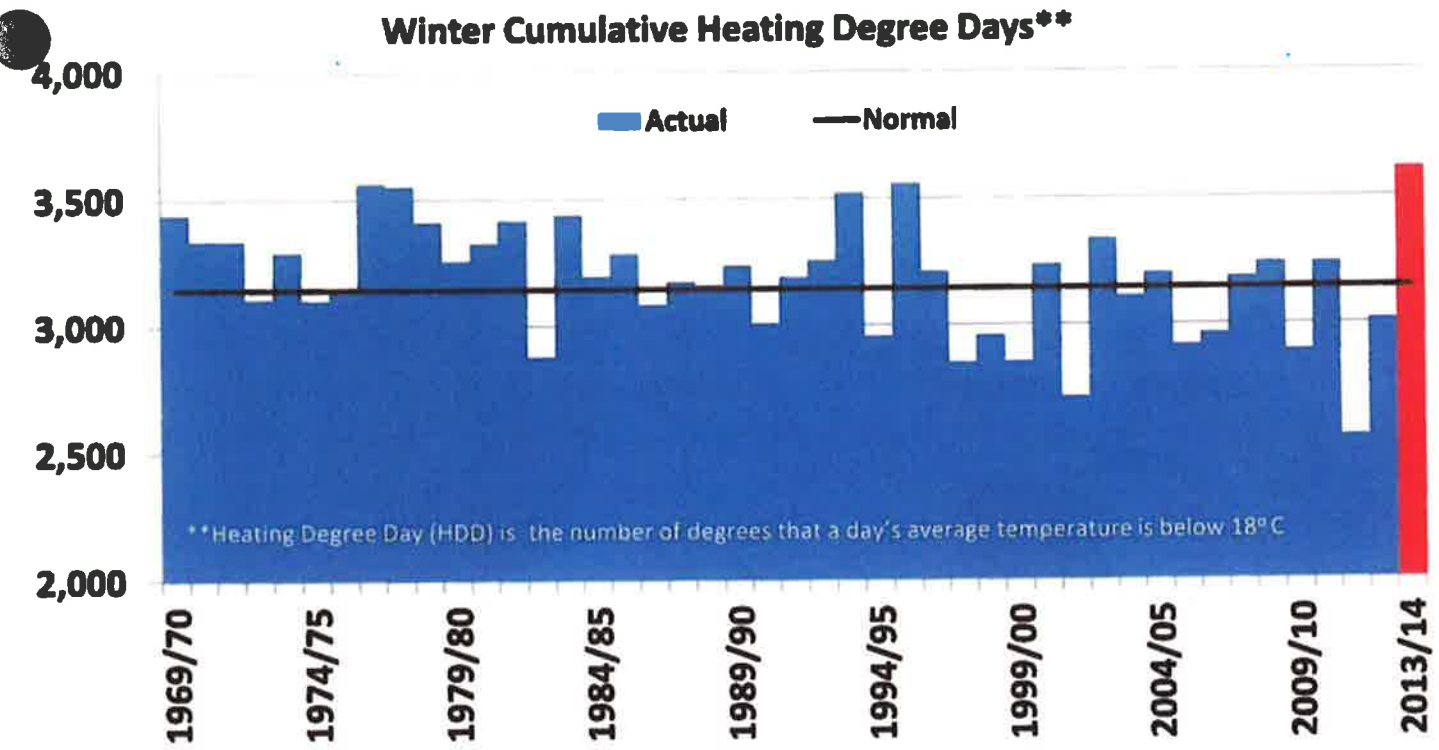
An Exceptional Winter



1. **Coldest on record:**
   - Moved from west to east and settled in the eastern half of North America
   - Drove incremental demand
2. **Gas supply contracted to Ontario:**
   - Some gas found lucrative markets upstream (Dawn (i.e. Chicago) reducing supply delivered to Ontario
3. **Incremental Ontario/Quebec dema served by:**
   - Dawn storage withdrawals
   - TransCanada Interruptible and Short Term Fi Services from Alberta on Mainline
4. **Prices:**
   - Remained relatively stable for customers buying for future month delivery
   - Were subject to volatility for customers buyi on a daily basis

Sustained record cold weather impacted natural gas demand, flows and pricing across North America

Coldest Winter on Record*
Union Franchise Area

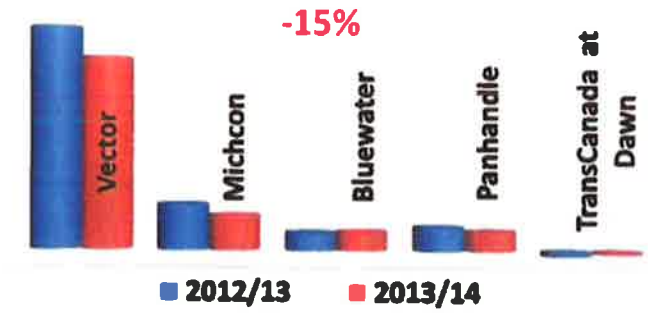


** Union Gas temperatures back to 1969*

Sustained cold not experienced in at least 45 years

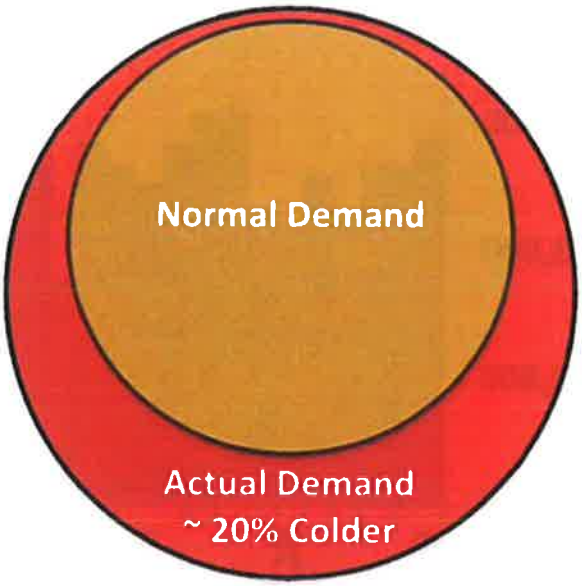
Serving Ontario Demand this Winter

Pipeline Flows into Dawn Decreased



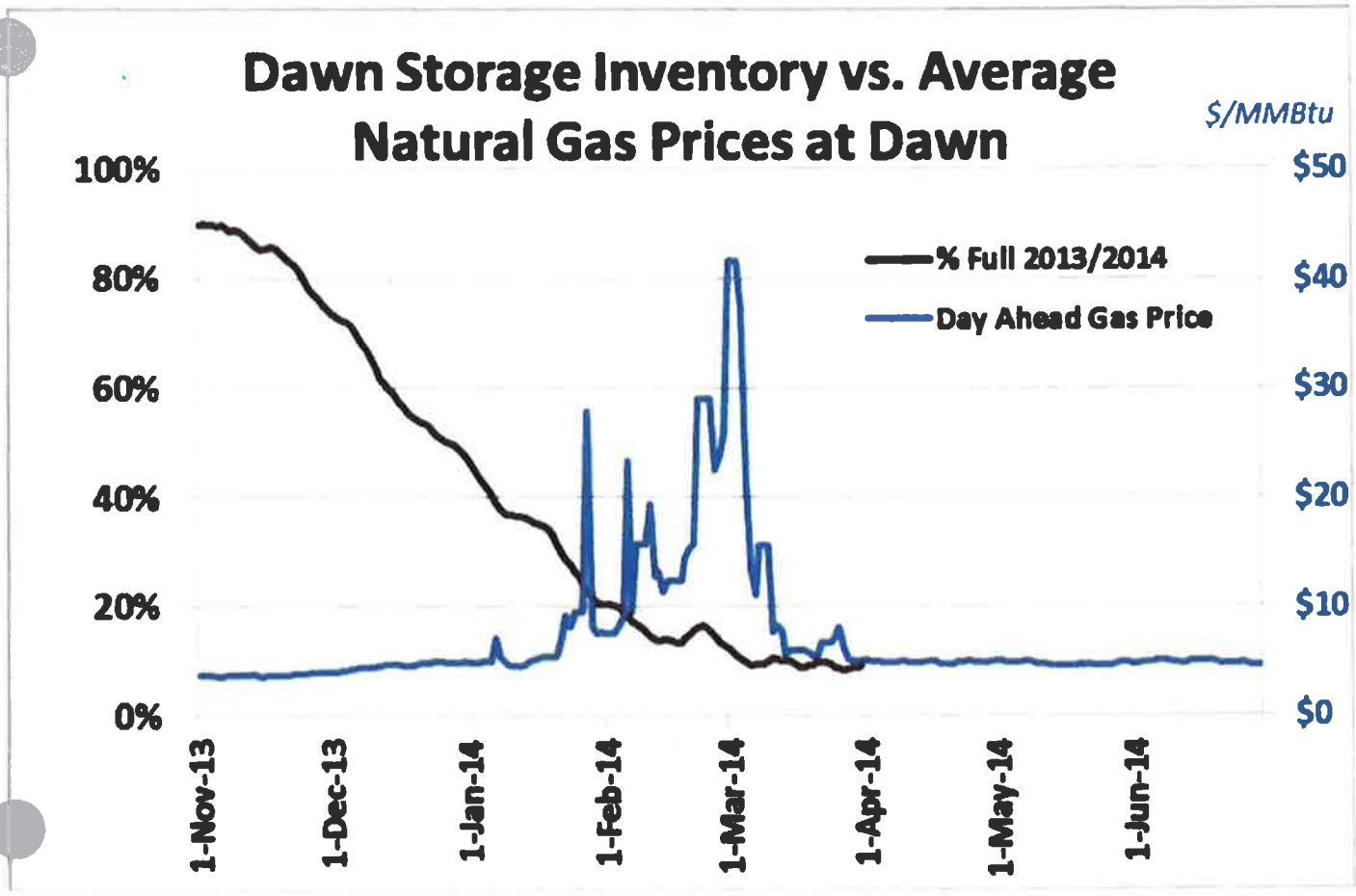
Dawn Storage Made Up the Difference

Ontario Gas Demand

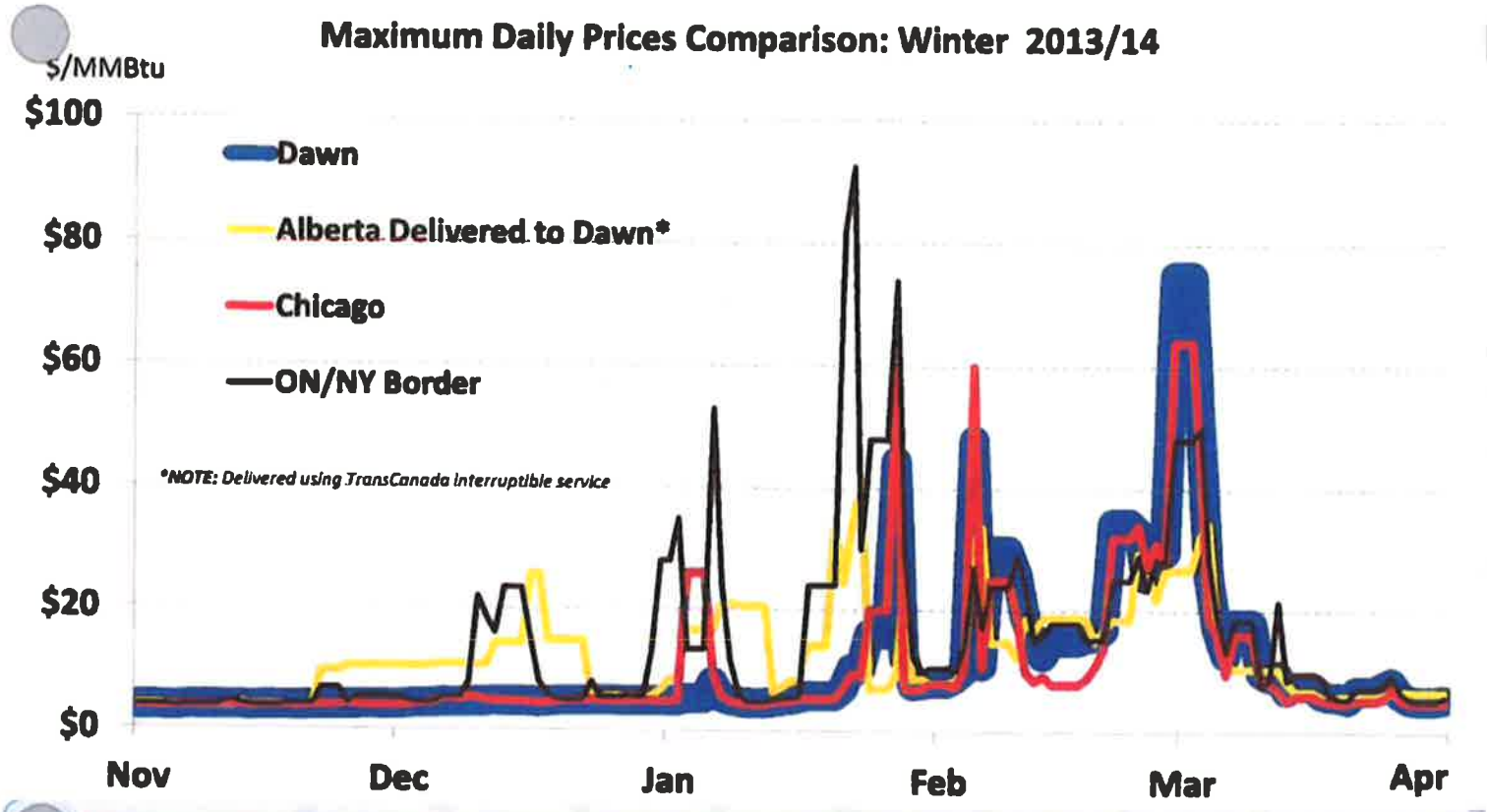


Dawn storage was Ontario's workhorse this winter

Dawn Storage Availability Offset Price Spikes

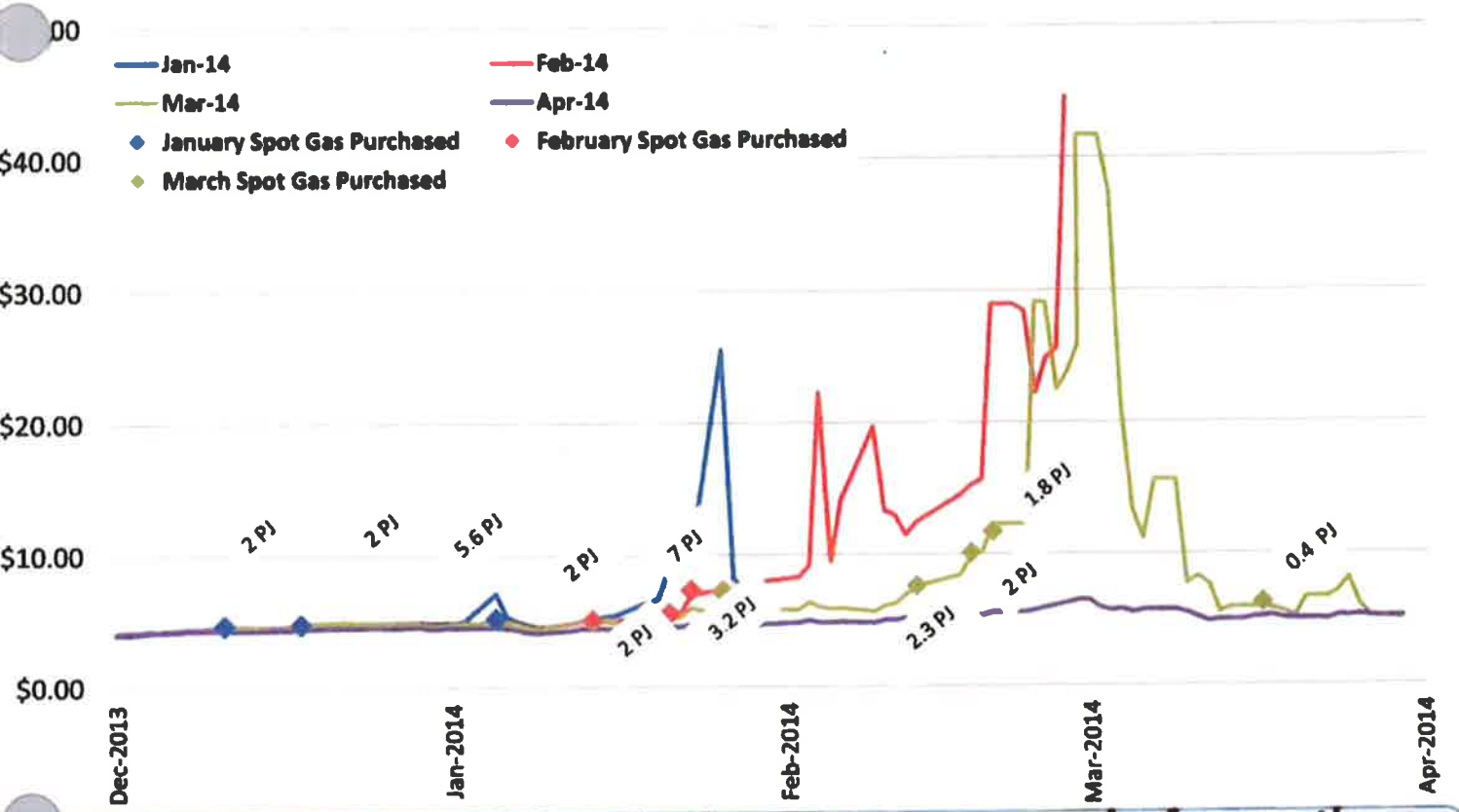


Maximum Daily Prices Winter 2013/2014



Dawn traded lower than Chicago and ON/NY border during the coldest days

Additional Gas Purchased for Customers Supplied by Union



Union Gas managed the price impact to customers by frequently monitoring markets and prices, adjusting purchasing strategy to account for forecast weather impacts and continuing to not rely on the day market

The Cost of Winter – Regulatory Outcomes

- **April QRAM**
  - Prices increased due to:
    - Forward NYMEX 12 month strip (Apr '14 to Mar '15) impact on Reference Price
      - »April 1 ($4.87/GJ to $6.17/GJ)
    - Increased costs of planned January through March purchases (higher than forecast in Jan QRAM)
    - Unplanned spot gas required to meet incremental weather driven demand
      - Union purchased over 30 PJ of spot gas at an average price of approx. $7.12/GJ
- **October QRAM**
  - Prices retreated as storage refilled back to normal levels
    - Reference price decreased from $6.17/GJ to $5.44/GJ (price retreated approx. 60% of April increase)

The Cost of Winter – Regulatory Outcomes cont'd

- **2013 Deferral Hearing**
  - Costs to balance south bundled direct purchase customers
    - Board ruled that these customers should pay $1.954 million for additional gas Union bought to balance their needs for the period beyond when the Feb 28 checkpoint requirement was calculated
  - Costs of Managing the system including the price variance related to Unaccounted for Gas (UFG)
    - Board ruled all customers who rely on their compressor fuel (bundled Direct Purchase and System supply) from Union should pay a portion of the $4.7 million price variance incurred
- **Winter Penalty Proceeding**
  - The Board approved Union's application, for a one-time exemption from approved tariffs with respect to the penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014
  - A reduction in the charge from approx. $78/GJ to approx. $50/GJ

True Impact to Union Sales Service Customers of Winter 2013/14

unionGas

Estimate based on April QRAM

- **Residential annual bill increase for Union Gas system gas customers:**

Annual average use of 82 GJ (equal to 2,200 m3 of natural gas)

Total estimated increase April 2014 – March 2015:	**$200**
– Due to increased price of planned purchases (Jan-Mar):	**$ 50**
– Due to incremental gas purchases (Jan-Mar):	**$ 40**
– Due to the forward gas price (Apr 2014 to Mar 2015):	**$110**

- **Revised due to price change based on October QRAM**

Total estimated increase April 2014 – March 2015:	**$126**
– Due to increased price of planned purchases (Jan-Mar):	**$ 50**
– Due to incremental gas purchases (Jan-Mar):	**$ 40**
– Due to the forward gas price (Apr 2014 to Mar 2015):	**$ 36**

QRAM Process

- Concerns were raised about QRAM process after last winter
- OEB Initiated a process to review (July QRAM delayed)
  - Many submissions were filed
  - Most concerns centered on communication protocol and early warning of significant changes
  - OEB amended process to communicate early when a significant change in rates is foreseen
- QRAM Process as currently structured is an efficient and effective mechanism
  - Provides customers with market pricing signals, while at the same time, reducing rate volatility
  - Does not require any further changes

Summary Observations
From Coldest Winter on Record

- Customers received the gas needed this winter as Union's integrated system worked very well

2. Less gas delivered to Ontario, combined with the coldest winter on record meant that Dawn storage was critical in meeting incremental winter needs

3. Dawn storage limited gas price volatility until end of January

4. Union's frequent monitoring and proactive purchasing strategies were critical in managing the cost impact to sales service customers

5. The vast majority of Union's Direct Purchase customers complied with their contractual requirements and ultimately paid the appropriate cost over the winter

- Increased access to new supply basins (Marcellus/Utica) is critical to help reduce future price volatility in Ontario

PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, 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.

(b) the notice of any hearing;

(c) any interlocutory orders made by the tribunal;

(d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;

(e) the transcript, if any, of the oral evidence given at the hearing; and

(f) the decision of the tribunal and the reasons therefor, where reasons have been given. R.S.O. 1990, c. S.22, s. 20.

ljournments

21.A hearing may be adjourned from time to time by a tribunal of its own motion or where s shown to the satisfaction of the tribunal that the adjournment is required to permit an equate hearing to be held. R.S.O. 1990, c. S.22, s. 21.

rrection of errors

21.1A tribunal may at any time correct a typographical error, error of calculation or similar or made in its decision or order. 1994, c. 27, s. 56 (36).

wer to review

21.2(1)A tribunal may, if it considers it advisable and if its rules made under section 25.1 al with the matter, review all or part of its own decision or order, and may confirm, vary, spend or cancel the decision or order. 1997, c. 23, s. 13 (20).

me for review

(2)The review shall take place within a reasonable time after the decision or order is made.

nflict

(3)In the event of a conflict between this section and any other Act, the other Act prevails. 94, c. 27, s. 56 (36).

dministration of oaths

22.A member of a tribunal has power to administer oaths and affirmations for the purpose any of its proceedings and the tribunal may require evidence before it to be given under oath affirmation. R.S.O. 1990, c. S.22, s. 22.

wers re control of proceedings

buse of processes

23. (1) A tribunal may make such orders or give such directions in proceedings before it it considers proper to prevent abuse of its processes. R.S.O. 1990, c. S.22, s. 23 (1).

mitation on examination

(2) A tribunal may reasonably limit further examination or cross-examination of a witness here it is satisfied that the examination or cross-examination has been sufficient to disclose lly and fairly all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (37).

xclusion of representatives

(3) A tribunal may exclude from a hearing anyone, other than a person licensed under the *w Society Act*, appearing on behalf of a party or as an adviser to a witness if it finds that such rson is not competent properly to represent or to advise the party or witness, or does not

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

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

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

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

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

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

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

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

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

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

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

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

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

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

TABLE OF CONTENTS

Section A: Introduction

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

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

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

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

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

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

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

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

The NGEIR Decision

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

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

2) Storage regulation.

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

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

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

Kitchener

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

APPrO

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

IGUA/CCC/VECC

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

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

Organization of the Decision

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

The sections of this Decision are:

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

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

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

Section B: Board Jurisdiction to Hear the Motions

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

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

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

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

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

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

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

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

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

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

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

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

(ii) error in fact;

(iii) a change in circumstances;

(iv) new facts that have arisen;

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

- The right to counsel (s 10)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Board's Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

Section D: Board Process

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

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

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

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

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

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

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

Examples of the alleged behaviour objected to by IGUA include:

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

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

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

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

The other parties largely supported the position of Board Staff.

Findings

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

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

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

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

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

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

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

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

Section 21 of the OEB Act provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

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

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

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

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

IGUA also alleged that:

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

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

Findings

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

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

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

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

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

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

> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products "is or will be" subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

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

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

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

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

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

> The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.
>
> Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

The NGEIR panel then proceeds to balance the Board's public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices an the reliability and quality of gas service, to facilitate rational development and safe operation of gas storage) and

conducting an assessment of whether the level of storage competition is sufficient to protect the public interest in light of each of those objectives.

At page 56 of Chapter 5, having determined that part of the storage market is workably competitive and having considered some of the key elements of the public interest, the panel addresses whether and it what circumstances the Board should refrain from setting storage prices and approving storage contracts.

> In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives.

The NGEIR panel then applies its interpretation of the legislative intent of section 29 to the facts before it. That panel's understanding of its mandate under section 29 and its careful application of that mandate are evidenced in its findings at pages 56 and 57 of the decision. The NGEIR panel's application of the requisite elements of section 29 is evident in the balancing between considerations of competition with aspects of public interest.

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with

the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

The submissions of both CCC/VECC and of IGUA are that the Board misinterpreted and misapplied section 29 of the OEB Act. This panel finds that there is no reviewable error

associated with the NGEIR panel's interpretation of section 29. The NGEIR Decision clearly evidences that the NGEIR panel knew and understood that section 29 was not a section that the Board had invoked in any previous decisions or analyses. For that reason, the Decision provides extensive background regarding the section and goes into significant detail regarding the appropriate framework and analysis required to be undertaken. The Decision shows that the NGEIR panel reviewed the elements of section 29 and considered each of those elements in considerable detail. Where moving parties raised specific questions regarding the application of Section 29, for example, with respect to whether the NGEIR panel had sufficient evidence upon which to make a finding that there was competition sufficient to protect the public interest and whether the NGEIR panel erred in setting a cap on the amount of natural gas storage available to in-franchise customers, the Board makes specific findings elsewhere in this Decision.

With respect to the allegation by CCC/VECC and IGUA that the NGEIR panel exceeded its jurisdiction by restructuring the storage businesses of Union and Enbridge, something which they assert should come under section 36 of the legislation, the Board also finds there is no reviewable error.

The NGEIR panel confined its considerations related to the application of the test under Section 29 in determining whether and to what extent there was competition in the natural gas storage market sufficient to protect the public interest. The portions of the decision that go on to discuss the impacts of the Section 29 decision on the structure of the natural gas storage market flow from the determination under Section 29, but the NGEIR panel does not, in its Decision, describe these as arising out of their Section 29 jurisdiction. The NGEIR proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998*. As such, the NGEIR panel acted under the authority of Section 29 and 36 in making the determinations in the NGEIR Decision. The decisions made by the NGEIR panel with respect to the allocation of storage available at cost-based rates and the treatment of the premium on market-based storage transactions were made based on evidence filed by the parties to the proceeding and the NGEIR panel considers this evidence as part of the NGEIR Decision.

The Board finds that the allegations of CCC/VECC and IGUA on this point do not raise a question as to the correctness of the decision. The NGEIR panel clearly confined itself to its legislative mandate as provided in Section 29 in determining whether the natural gas market was subject to competition sufficient to protect the public interest. The NGEIR's findings that flow from the Section 29 determination align with the evidence that was before it, did not fail to address any material issue and did not make any inconsistent findings with respect to the evidence before it, except as otherwise noted in this decision.

Section F: Status Quo

The factums and submission of both CCC/VECC and of IGUA allege that the NGEIR panel erred by failing to consider the option of retaining the current regulatory regime in respect of natural gas storage regulation. CCC/VECC and IGUA articulate this alleged error in a number of different ways in different parts of their factums and submissions.

For example, at paragraph 3 of their joint factum, CCC and VECC take the position that:

> "... the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so." IGUA's factum states that "...reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief."

Findings

The NGEIR Decision provides evidence in various places, of the NGEIR panel's recognition of both the current regulatory status with respect on natural gas storage in Ontario and the dynamic nature of competition generally.

In particular, Chapter 2 is described at page 5 of the decision as "...an overview of gas storage in Ontario today – the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services."

Later in the NGEIR Decision, as part of its findings on the assessment of assessment of storage competition, the Board expressly disagrees with Mr. Stauft's testimony that the regulated cost-base price for storage is a reasonable proxy for the competitive price of

storage. Implicit in this finding is the NGEIR panel's consideration of the current regulatory regime.

At page 46 of the Decision, the NGEIR Panel also considered the current regulatory regime in the context of question of the sharing of the premium which exists between the price of market-based storage and the underlying costs. The Board acknowledged the current state as follows:

> Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities" proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejects these proposals and, as a result, opposed forbearance.

At page 47, the NGEIR panel specifically considered and expressly acknowledged the importance of the change from the status quo, but ultimately rejected these submissions as follows:

> The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

There are a number of other examples throughout the NGEIR Decision that satisfy the Board that the NGEIR panel was conscious of the status quo regulatory regime and bore this in mind throughout its analysis on the narrow issue of competition and the s.

29 analysis as well as in considering the impacts upon both shareholders and ratepayers, of a completely or partial forbearance decision.

The Board also feels that the decision by the NGEIR panel to continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts evidences a clear understanding of the current regulatory framework and under what circumstances, based upon the evidentiary record before the NGEIR panel, it was appropriate to deviate from that current framework.

The Board is not convinced, however, that the analysis mandated by the legislative language of s. 29 requires the Board to consider the status quo in the way that has been suggested by some parties. Although it was important for the NGEIR panel to review the current regulatory framework to set the stage for the analysis, the Board is not convinced by the arguments of CCC/VECC, nor those of IGUA that consideration of the status quo is an integral, or even a necessary part of the s. 29 analysis. The purpose of s. 29 was clearly stated by the NGEIR panel and that is to determine whether there is or will be competition sufficient to protect the public interest. If there is a finding that competition does exist, nothing in the section requires the panel to then consider whether the current regulatory framework is sufficient to accommodate the competitive market. In fact, the section mandates that upon finding competition sufficient to protect the public interest, that "...the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act..." In this case, the Board determined that it would refrain, in part, from regulating the setting of rates and the review of contracts for natural gas storage.

The Board therefore concludes that CCC/VECC and IGUA have not demonstrated that their grounds for review based on the alleged failure of the NGEIR panel to consider retaining the status quo as a viable decision-making option raise an issue that is material and directly relevant to the findings made in the decision. This panel concludes that there is no reviewable error with respect to the NGEIR panel's alleged failure to fairly consider the status quo.

Section G: Onus

At paragraph 84(d) of its factum, IGUA alleges that the Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated. IGUA alleges that the NGEIR panel erred in law in not assigning the onus of proof to the utilities.

Findings

Pages 26 to 27 of the NGEIR Decision deal explicitly with this issue. In that part of the Decision, the panel acknowledges that generally, the onus is on the applicant. The panel also, however, pointed out the unique nature of the NGEIR proceeding and the fact that the proceeding was brought on the Board's own motion.

The Board is satisfied that all parties to the NGEIR Proceeding were given a full and fair opportunity to provide submissions on the question of onus and that, based on the Decision, the NGEIR panel heard and understood those submissions. This panel is not satisfied that the question of onus is an issue that is material and directly relevant to the findings made in the Decision, nor that if a reviewing panel did decide the issue differently, that it would change the outcome of the Decision. For these reasons, the Board finds that there is no reviewable error relating to assignment of or the failure to assign onus in the NGEIR proceeding.

Section H: Competition in the Secondary Market

In the NGEIR Decision, the Board concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania, that the market is competitive and neither Union nor Enbridge have market power. This determination was made by employing the following four step process, based on the Competition Bureau's Merger Enforcement Guidelines (MEGs):

- Identification of the product market.
- Identification of the geographic market.
- Calculation of market share and market concentration measures.
- An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

IGUA alleged that the NGEIR panel made numerous errors in assessing sufficiency of competition in the secondary market. IGUA's allegations of errors can be summarized as follows:

- The NGEIR panel erred in misapprehending and misapplying the analytical tests used for determining market power.
- The NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor their prices, nor whether consumers regarded such services as substitutes for delivery services offered by Union.

- The NGEIR panel failed to recognize that the evidence of Gaz Métropolitain Inc. (GMi) did not establish that Union lacked market power in storage services transacted at Dawn, and indeed this evidence established the opposite.

Findings

IGUA alleges that the Board misapprehended and misapplied the market power analytical frameworks presented in documents from the Competition Bureau, the Federal Energy Regulatory Commission (FERC), and the Canadian Radio-Television and Telecommunications Commission (CRTC). According to IGUA, a 10 step procedure must be followed in order to correctly carry out a market power analysis instead of the four step process used by the NGEIR panel.

The Board notes that, in settling on the four step procedure that should apply to determine whether Union and Enbridge have market power and whether the storage market is competitive, the NGEIR Decision provided substantial review and analysis pertaining to Competition Bureau's Enforcement Guidelines (MEGs) and the FERC's 1996 Policy Statement on Market Power Analysis. It is evidenced in the Decision that this was the result of the review of substantial pre-filed evidence, cross examination and argument on this topic.

In the Board's view, the test to be applied is not whether a review panel of the Board would have adopted a different analytical framework. Rather, it is matter of whether in settling upon a certain analytical process, there was an error of fact or law. In view of the extensive record and the analysis and reasons provided in the NGEIR Decision, the Board finds that IGUA not raised an identifiable error in the NGEIR Decision. Rather the submissions of the moving parties are more in the nature of re-arguing the same points that were made in the original hearing. This evidence was presented and evaluated by the NGEIR panel. As the Board stated in enunciating the threshold test at Section C of this Decision, a motion for review cannot succeed if a party simply argues that the Board should have interpreted conflicting evidence differently. The Board has therefore

determined that there is not enough substance to the issues raised by IGUA such that a review of those issues could result in the Board determining that the NGEIR Decision or Order should be varied, cancelled or suspended. As such, the NGEIR panel's determination on the nature and application of market power analysis to the natural gas storage market in and around Ontario is not reviewable.

IGUA alleges that the NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services were available at Dawn, nor their prices or whether consumers regarded such services as substitutes for delivery services offered by Union.

In the Board's view, this alleged error is essentially an application of the alleged market power analysis framework error discussed above. The NGEIR panel listed several forms of evidence in support of its conclusion that the secondary market in transportation services is unconstrained and therefore serves to enlarge the geographic market from what it would otherwise have been found to be.

The NGEIR panel treated evidence on the operation of primary and secondary markets in transportation as relevant to the determination of the geographic market in a manner consistent with the market power analysis methodology that the NGEIR panel had settled upon. For the reasons stated above, the Board finds that the original NGEIR panel's use of evidence relating to the secondary market in transportation services is not reviewable.

IGUA cites the NGEIR hearing transcript (volume 10, pages 56-120) in support of its allegation that the Board failed to recognize that GMi's evidence actually supported IGUA's view that Union has market power.

The Decision (at page 35, paragraphs 4-5) clearly reflects the statements of GMi witnesses that they regularly contact alternative suppliers for comparisons to Union's services. IGUA has not shown that the NGEIR panel's findings are contrary to the evidence that was before the panel, or that the panel failed to address GMi's evidence

or made inconsistent findings with respect to that evidence. The Board therefore finds that there is no reviewable error with respect to the NGEIR panel's use of the evidence provided by GMi.

Section I: Harm to Ratepayers

IGUA and CCC/VECC alleged that the Board erred when it bifurcated the natural gas storage market between those customers that continue to benefit from storage regulation and those customers who do not. They allege that as a result of this bifurcated market, the Board conferred a windfall benefit on the shareholders of the utilities with no corresponding benefit to ratepayers and that this is unfair.

The parties also alleged that the transitional measures the Board employed to implement the new regime merely serve to underscore the error in the finding that the market should be split. The parties alleged that the market, taken as a whole, was determined not to be workably competitive, and the transitional measures are evidence that a decision to forbear from the regulation of prices was not appropriate.

Finally, CCC and VECC alleged that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by moving assets out of rate base, with no credit to the ratepayer. They argued that the effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. They submitted that doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated.

Findings

The Board finds that the issues raised in this area have not met the threshold test for the matter to be forwarded to a reviewing panel of this Board. The NGEIR panel did not err in failing to consider the facts, the evidence, or in exercising its mandate. There were no facts omitted or misapprehended in the NGEIR panel's analysis nor are the moving parties raising any new facts.

It was entirely within the NGEIR panel's mandate and discretion how to assess the competitive position of segments of the market and how to address the regulatory treatment of customers within those segments. The NGEIR panel clearly decided that ex-franchise customers of both Union and Enbridge had access to a competitive natural gas storage market. Further, the decision goes on to make clear on page 61, that Enbridge as a utility is ex-franchise to Union and therefore should be subject to market prices. The NGEIR Decision differentiates between the competitive position of a utility (e.g. Enbridge) and the competitive position of that utility's in-franchise customers. For example, the Decision is clear that the in-franchise customers of Enbridge will pay cost-based rates which will continue to be regulated by the Board and are based on EGD's costs of storage service owned by the utility and the costs that EGD pays for procuring these services in the competitive market.

A key issue the parties raise is that the bifurcated market brings about unfair and inconsistent treatment, and therefore constitutes a misapplication of the Board's mandate to protect the public interest. However, on this point, the grounds that the moving parties raised to support a review are in fact the very points used by the NGEIR panel to protect consumers as a natural consequence of the decision to refrain from storage regulation of the ex-franchise market. It is clear that the NGEIR panel took into account the protection of the public interest in its decision to provide transition mechanisms to protect consumers.

With respect to the allegation of a windfall benefit for shareholders of the utilities with no corresponding benefit to ratepayers, the Board is of the view that this is related to the question of earnings sharing. This issue is more fully addressed in Section K of this Decision. It is important to note here, however, that the NGEIR panel's decisions with respect to the profit or earnings sharing mechanism were based on the evidence presented by all parties and flowed from the broader decisions with respect to the competitiveness of the gas storage market. Chapter 7 of the NGEIR Decision clearly described the NGEIR panel's considerations with respect to and its reasoning for changing the earnings sharing mechanism. In the Board's view, the changes related to the earnings sharing mechanism necessarily arise from a recognition by the Board of

the implications of its findings under Section 29 that there is a workably competitive market for storage in the ex-franchise market.

Section J: Union's 100 PJ Cap

In their factum, CCC and VECC allege that, on the one hand the Board in its NGEIR Decision said that a substantial portion of the storage market requires regulatory protection because there is insufficient competition to protect the public interest while on the other hand the Board exposed this same group to the effects of competition from the unregulated market.

Kitchener has also specifically sought the Board's review of an aspect of the NGEIR Decision related to the Board's placement of a "cap" on the amount of Union's storage space that is reserved for in-franchise customers at cost-based rates.

The Board determined at page 83 of the NGEIR Decision that Union should reserve 100 PJ of storage space at cost-based rates for its in-franchise customers. The Decision reads as follows (page 83):

> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.
>
> The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the

> cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

The Board acknowledged that the cap might be reached at any time between 2012 and 2024, depending on what growth rate assumptions are used. At the current rate of growth (0.5% each year), the cap would not be met until 2024.

In Kitchener's oral submissions (page 187, Volume 1), Mr. Ryder on behalf of Kitchener makes the following comments:

> And while the cap of 100 pJs allows for some growth so it won't immediately affect the Ontario consumer, the cap will be reached between 2012 and 2024. That's between 5 and 17 years from now.
>
> Now, that's not far off, and if the public interest requires a margin for growth today in 2007, then the public interest will surely require it in five to 17 years from now when the cap is reached.
>
> And when it is reached, it is my submission that the Board will have wished it had reviewed the decision in 2007, because, when the cap is reached, this decision will be responsible for adding significantly to the costs of energy in Ontario, to the detriment of the Ontario consumer.

Page 7 of the CCC/VECC factum states:

> The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by in-franchise customers of Union and EGD, would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that,

at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

Findings

On page 57 of the NGEIR decision, in reference to the in-franchise customers of Union the NGEIR panel makes the following statement:

> The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there reasonable prospect that they will be at some future time.

Later in the decision at page 82, the decision states:

> The Board panel concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.
>
> The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-

> franchise needs when determining the "utility asset" portion of Union's current capacity.
>
> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs."

The NGEIR panel then goes on to provide its decision on the methodology which was used to determine the cap and says at page 83 of the decision:

> The 100 PJ (95 BCF) amount is the capacity that Union must ensure is available to in-franchise customers if they need it.

The NGEIR panel then makes a finding with respect to how the excess capacity should be treated if the in-franchise customers require less than 100 PJ in a given year. The NGEIR panel is silent on the outcome if in-franchise customers require more than 100 PJ of storage per year. Although the NGEIR panel is clear that it does not expect this circumstance to occur for many years, the decision nevertheless appears to raise the possibility that in-franchise customers may, at some point, be subject to unregulated prices.

The Board finds that on this issue the moving parties have raised a question as to the correctness of the order or decision and that a review based on the issue could result in the Board deciding that the decision or order should be varied, cancelled or suspended.

In particular, in this instance, there are unanswered questions that are raised by the NGEIR Decision on the 100 PJ cap issue. Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from the regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent. The Board finds that the following questions should have been addressed by the NGEIR panel:

(a) If the cap of 100 PJ of storage for in-franchise Union customers remain in place in perpetuity, what is the basis for forbearance (under Section 29) of required storage above 100 PJ for in-franchise customers?

(b) If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

(c) If the cap of 100 PJ of storage for in-franchise Union customers is likely to be exceeded, what, if any, remedy is available to in-franchise customers?

The Board therefore finds that the NGEIR panel either failed to address a material issue or made inconsistent findings, that the alleged error is material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected, the reviewing panel could change the outcome of the decision.

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

Certain parties, led by VECC, allege that the NGEIR panel erred because one of the effects of the NGEIR Decision on the in-franchise customers of Union is that these customers will lose the benefit of their share of the premium obtained by Union through the sale of storage to ex-franchise customers. The parties stated that the NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EGD's shareholder. They also indicated that at the same time, there will be no corresponding benefit to the ratepayers of either Union or EGD. In fact the moving parties argued that the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The moving parties maintained that the NGEIR Decision upsets the balance between the interests of ratepayers and shareholders which the regulatory system is supposed to maintain and that the NGEIR Decision is, therefore, contrary to public and regulatory policy.

It was also stated by the moving parties that section 29 of the OEB Act does not permit the Board to re-allocate rate-based storage assets. The effect of the NGEIR Decision was to allocate rate-based storage assets between in-franchise and ex-franchise customers and to allow for a new shareholder business within each utility. The moving parties stated that the Board exceeded its jurisdiction by moving assets out of rate base with no credit to the ratepayer.

It was further asserted that rather than requiring utility shareholders to share the premiums derived from the sale of storage to ex-franchise customers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. The moving parties stated that this will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; a result which they say contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.

Further, the parties allege that the Board erred in concluding that it has the power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a

windfall benefit to utility shareholders and consequential harm to ratepayers. The parties asserted that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

Findings

The Board notes that the NGEIR Decision deals extensively with the issue of the allocation/sharing of margins (also called premiums, revenues or earnings) associated with the sale of natural gas storage on both a short-term (transactional services) and long-term contractual basis. The Decision canvasses both the status quo (prior to the implementation of the changes required by the NGEIR Decision) and provides an explanation of the rationale for changing the earnings sharing structure, the new mechanisms for earnings sharing and the transitional implementation (where applicable) of those mechanisms.

In particular, chapter 2 of the NGEIR Decision provides, among other things, a description of the current types and volumes of sales of natural gas storage by Union to ex-franchise customers and canvasses the current regulatory treatment of ex-franchise sales, including the rate treatment of margins on storage sales. In Chapter 7, the NGEIR panel goes into greater detail regarding the extent of margin sharing and the regulatory history that underlines premium sharing for both short-term (for both Union and Enbridge) and long-term (for Union only) sales of storage.

Chapter 7 goes on to provide the Board's findings on for the sharing of margins for both short-term and long-term transactions and to describe a transition mechanism related to long-term margins.

The record that the NGEIR panel relied upon included extensive evidence and argument of many parties, including the moving parties to this proceeding and the utilities. The NGEIR Decision refers to various parties' submissions on the issue of premium sharing and the Board reiterated some of the historical evidence with respect

to the margin sharing in its Decision. The NGEIR Decision indicates that the NGEIR panel heard and considered the evidence and submissions before it in making its determinations with respect to this issue.

Importantly, the NGEIR panel's findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services. The Board does not accept the suggestion that the Board exceeded its jurisdiction by moving assets (in the case of Union) out of rate-base and by altering the status quo margin sharing mechanism. On the contrary, the NGEIR Decision clearly articulates that the changes to margin sharing flow necessarily and logically from the decision to refrain, in part, from regulated rates for storage services.

The determinations of the NGEIR panel are also consistent with its determination to distinguish between "utility assets" and "non-utility assets". The Decision clearly indicates that the NGEIR panel canvassed past decisions of the Board on this issue and considered the implications of its findings on both the utilities and ratepayers. Part of this consideration is evidenced in the development by the panel of a transition mechanism related to the implementation of the Board's finding that profits from new long-term transactions should accrue entirely to the utility (Union) as opposed to ratepayers. The threshold panel does not accept the argument that this transitional implementation is a form of implicit acknowledgement that the finding is inappropriate. The NGEIR panel exemplified Board precedent for the use of a phase-out mechanism and, in its finding, indicated that it had considered other options for a transitional mechanism.

The Board finds that the NGEIR panel's determinations on the treatment of the premium on market-based storage transactions are not reviewable. The record of the NGEIR proceeding clearly demonstrates that the NGEIR panel considered the evidence, the regulatory history with respect to the issue of premium sharing and parties' submissions and made its determination on the basis of that evidence and those submissions. There is nothing in the moving parties' evidence or arguments that demonstrate to the Board that the NGEIR panel made a reviewable error. For this

eason, the Board has determined that the threshold test has not been met and it will ot order a review of the NGEIR Decision as it pertains to the issue of the division of the tilities assets or the sharing of the margin realized from the sale of natural gas storage o ex-franchise customers.

Section L: Additional Storage for Generators and Enbridge's Rate 316

Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board in the NGEIR proceeding. These settlements deal with storage space parameters, increased deliverability for that space, and access to that enhanced space to balance on an intra-day basis. What remained unresolved was the pricing for the new high deliverability storage services for in-franchise generators.

The utilities had proposed in the NGEIR proceeding to offer these services at market-based rates and proposed that the Board refrain from regulating the rates for these services. The power generators took the position that storage services provided to them should be regulated at cost-based rates.

In the NGEIR Decision, APPrO's position was described as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is more interested in – high deliverability storage – is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

The NGEIR Decision stated:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

the Motions proceeding, APPrO stated that its position was and continues to be narrower than what was described by the NGEIR panel. APPrO was not seeking high deliverability storage. Rather, it was seeking services that would allow generators to manage their gas supply on an intra-day basis. It is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of the storage space with deliverability from a supplier other than Union. Moreover, APPrO asserted that the frequent nominations windows required for such service are only available in Ontario from the utilities. Since this is a monopoly service, then it should be offered at cost.

Union argued that APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. It also stated that APPrO's assertion that high-deliverability storage is only available from the utility is demonstrably wrong and that there was sufficient evidence that high deliverability storage is available from others. Union disagreed with APPrO's position that deliverability could not be separated from storage space. Although this is correct in the physical context, Union submitted that there were substitutes for deliverability and storage space and gas-fired power generators could acquire their intra-day balancing needs from sources other than the utilities. This according to Union was clearly addressed in the original proceeding and considered by the Board in its decision and APPrO was simply seeking to re-argue its position that had already been fully canvassed.

Enbridge pointed out that any de-linking of storage and deliverability that occurred was as a result of the settlement agreed to by APPrO and the power generators with Enbridge. The settlement states that the allocation methodology for gas-fired generators' intra-day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

APPrO has also raised an issue with some aspects of Rate 316 offered by Enbridge. Rate 316 was part of a proposal submitted by Enbridge during the NGEIR proceeding in response to generators' need for high deliverability storage service. As a result of the

Settlement Proposal, Enbridge's Rate 316 provides an allocation of base leve deliverability storage at rolled in cost along with high deliverability storage a incremental cost to in-franchise gas fired generators. Section 1.5 of the Settlemen Proposal indicates that generators are entitled to an allocation of 1.2% deliverabilit storage at rolled-in cost based rates.

Findings

In the Board's view, it is unclear from the NGEIR Decision whether the NGEIR pane took the implications of the Union settlement agreement into consideration. The NGEIR Decision does not provide sufficient clarity regarding the issues raised by APPrO. I appears that there are some practical limitations faced by gas-fired generators in that presently they can only access certain services from the utility. Although Union asserted that it is demonstrably wrong to suggest, as APPrO has, that "high-deliverability storage is only available from the utility" and that "there was sufficient evidence that high deliverability storage is available from others" this was not the finding expressed in the NGEIR Decision. In fact, at page 69 of the NGEIR Decision, the NGEIR Panel acknowledged this by stating that: "These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them." On the other hand, APPrO asserted that only TCPL offers some intra-day services but only in some parts of Ontario through a utility connection or a direct connection with TCPL. To the extent that APPrO's facts may be correct, there is sufficient question whether the NGEIR Decision erred by requiring that monopoly services be priced at market.

For these reasons, and given the potential material impact on power generators, the Board finds that the alleged errors raised by APPrO with respect to Union are material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected this could change the outcome of the decision. The Board will therefore pass this matter to a reviewing panel of the Board to investigate and make findings as it sees fit.

With respect to the Rate 316 issue, on page 70 of the NGEIR Decision, the Board stated:

> The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on cost pass-through basis. The Board expects Enbridge to fulfill this commitment.

The Board further noted:

> The Board will refrain from regulating the rates for new storage services, including Enbridge's high deliverability service from the Tecumseh storage enhancement and Rate 316, and Union's high deliverability storage, F24-S, UPBS and DPBS services.

At the motion hearing, APPrO indicated that it wanted the Board to issue an order requiring Enbridge to do what the Board has asked them to do, that is, to offer Rate 316 on a cost pass-through basis. Enbridge has already committed to offering this service in the Settlement Proposal and the Board has already noted this commitment in this decision. This panel does not see any further value to issuing an order stating the same.

However, there is some ambiguity with respect to Rate 316. The NGEIR decision seems to indicate that the Board will refrain from regulating Rate 316. Even so, the Enbridge NGEIR Rate Order has a tariff sheet for Rate 316 with storage rates for maximum deliverability of 1.2% of contracted storage space. This seems to indicate that Rate 316 is regulated for 1.2% deliverability storage and the Board has refrained from regulating rates for deliverability higher than 1.2%. It is difficult to recognize this distinction from the NGEIR Decision.

For these reasons, the Board finds that APPrO has raised a question as to the correctness of the order or decision in respect of the Rate 316 issue and that a review

panel of the Board could decide that the decision or order should be varied (by way o
clarification or otherwise), cancelled or suspended.

ection M: Aggregate Excess Method of Allocating Storage

n the NGEIR proceeding, Union had proposed the "aggregate excess" method in llocating storage to its customers. The aggregate excess method is the difference etween the amount of gas a customer is expected to use in the 151-day winter period nd the amount that would be consumed in that period based on the customer's verage daily consumption over the entire year. Kitchener had proposed two alternative nethodologies. The NGEIR Decision approved Union's proposal.

Kitchener argued that the NGEIR Decision failed to take into account that the aggregate excess methodology, because it uses normal weather to estimate a customer's storage allocation, unnecessarily increases utility rates and therefore offends the requirement of ust and reasonable rates under sections 2 and 36 of the Act. Kitchener also argued hat there is no evidence to support the Board's conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility.

Union argued that these issues were fully considered by the Board in its NGEIR Decision and that Kitchener has not brought forward any new evidence or any new circumstances; it is simply attempting to reargue its case.

Findings

With respect to Kitchener's allegation that the NGEIR panel did not consider the impact on rates, the Board notes that the record in the NGEIR proceeding indicates that the impact on utility rates was examined extensively. The issue was raised in Kitchener's pre-filed evidence at page 5 and again at page 14. The transcript from the proceeding also indicates that there was extensive discussion on costs (Volume 12, pages 39-133) during cross examination and additional undertakings were filed on the topic. The record also indicates that the previous Panel questioned the witnesses specifically with respect to the costs and a utility's exposure to winter spot purchases (Volume 12, pages 183-184). The issue was again raised by Kitchener in argument (Volume 17, page 153)

and once again questions were posed to Kitchener's counsel by the NGEIR panel (Volume 17, pages 159-164).

The NGEIR Decision (pages 93 to 95) refers to Kitchener's alternatives and arguments and deals with that issue squarely when it finds that:

> The Board does not agree that the allocation of cost based storage should be determined assuming colder than normal weather or that it should be designed to provide protection against a cold snap in April. To do so would result in in-franchise customers as a group being allocated more cost-based storage than they are expected to use in most winters. As noted in 6.2.2, the Board concludes that the objective of the allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. In the Board's view, that supports continuing the assumption of normal weather.

In the Board's view, the record clearly indicates that this issue was thoroughly examined in the NGEIR proceeding. The Board believes that Kitchener's claim that the NGEIR panel failed to account for the fact the aggregate excess methodology increases utility rates is without merit. Kitchener presented no new evidence or new circumstances which would convince the Board that this issue is reviewable.

To support its second claim (i.e. the Board erred because there is no evidence to support the Board's conclusion that the aggregate excess method meets the reasonable load balancing requirements of the Kitchener utility), Kitchener argues that the Board ignored the evidence which suggests that the actual allocation to Kitchener over the past 6 years has been at a contractual level which is 10.6% higher than aggregate excess.

he Board disagrees. Contrary to Kitchener's assertions, the NGEIR Decision clearly onsiders the fact that Kitchener's aggregate excess amount is 10.6% lower than its urrent contracted amount. Specifically, the NGEIR Decision states:

> The current contract expires March 31, 2007 and Kitchener is seeking a long-term storage contract with Union effective April 1, 2007. It is concerned that its allocation of cost-based storage in a new contract will be restricted to the amount calculated under the aggregate excess method. Kitchener's current aggregate excess amount is 3.01 million GJ, 10.6% lower than the amount of cost-based storage in its current contract.

The NGEIR Decision also states:

> The issue is whether Kitchener has made a compelling case that its use of storage is so different from the assumed use underlying the aggregate excess method that Union should be required to develop an allocation method just for Kitchener. The Board finds Kitchener has not successfully made that argument.

n view of the above, the Board is convinced that the NGEIR panel considered the evidence before it. The claim by Kitchener that the Board ignored the evidence in question and based its decision only on the evidence provided by Union is demonstrably incorrect.

Kitchener also claims that the Board committed an error in fact by stating (at page 85 of the NGEIR Decision), that Enbridge uses a methodology similar to that of Union's. In the Boards' view, this reference is simply to provide context and is clearly referring to the mathematical formula used to calculate the storage allocation. It is certainly not a matter capable of altering the decision on this point.

In conclusion, the Board finds that the matters raised by Kitchener are not reviewable.

Section N: Orders

Having made its determinations on the Motions, the Board considers it appropriate to make the following Orders.

The Board Orders That:

The Motions for Review are hereby dismissed without further hearing, with the following exceptions. The Board's findings on Union's 100 PJ cap on cost-based storage for in-franchise customers and the additional storage requirements for in-franchise gas-fired generators are reviewable for the purposes set out in this Decision.

ection O: Cost Awards

he eligible parties shall submit their cost claims by June 5, 2007. A copy of the cost laim must be filed with the Board and one copy is to be served on both Union and nbridge. The cost claims must be done in accordance with section 10 of the Board's ractice Direction on Cost Awards.

nion and Enbridge will have until June 19, 2007 to object to any aspect of the costs laimed. A copy of the objection must be filed with the Board and one copy must be erved on the party against whose claim the objection is being made.

he party whose cost claim was objected to will have until June 26, 2007 to make a eply submission as to why their cost claim should be allowed. Again, a copy of the ubmission must be filed with the Board and one copy is to be served on both Union nd Enbridge.

DATED at Toronto, May 22, 2007

Original signed by

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

Paul Vlahos
Member

Original signed by

Cathy Spoel
Member

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2012-0360

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 Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2011;

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the accuracy of the calculation of margin sharing in the Short-Term Storage Account;

AND IN THE MATTER OF a Motion initiated by Union Gas Limited to review and vary the Ontario Energy Board's Decision and Order dated July 18, 2012 in EB-2012-0206 in which the Ontario Energy Board, proceeding on its own motion, reviewed and varied its EB-2011-0038 Decision and Rate Order (as it related to the issue of calculating the amount of margin sharing in the Short-Term Storage Account).

BEFORE: Marika Hare
Presiding Member

Ken Quesnelle
Member

Jerry Farrell
Member

DECISION AND ORDER
ON MOTION TO REVIEW AND VARY
October 18, 2012

Introduction

Union Gas Limited ("Union") filed a Notice of Motion to Review and Vary (the "Motion") dated August 24, 2012 with the Ontario Energy Board (the "Board") under Rule 42 of the Board's *Rules of Practice and Procedure* (the "Rules") requesting that the Board review and vary its Decision and Order dated July 18, 2012 in the EB-2012-0206 proceeding as it relates to the amount of margin sharing in the Short-Term Storage and Other Balancing Services Deferral Account (the "Short-Term Storage Account"). The Board assigned Board File No. EB-2012-0360 to Union's Motion.

The Board has considered the Motion, and applied the threshold test as contemplated under Rule 45.01 to determine whether the matter should be reviewed on the merits.

The 2010 Earnings Sharing and Deferral Account Disposition Proceeding (EB-2011-0038)

Union filed an application dated April 18, 2011 with the Board under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B, for an order of the Board amending or varying the rate or rates charged to customers as of October 1, 2011 in connection with the sharing of 2010 earnings under the incentive rate mechanism approved by the Board as well as final disposition of 2010 year-end deferral accounts and other balances (the "Application"). The Board assigned file number EB-2011-0038 to the Application.

On September 19th to the 21st 2011, the Board held a hearing on all matters in that proceeding and the Board issued its Decision and Order on January 20, 2012. The Board directed Union to file a Draft Rate Order which reflected the Board's findings in its Decision.

The Board received submissions from parties contesting Union's Draft Rate Order with respect to the Short-Term Storage Account.[1]

[1] The following parties filed submissions contesting the Draft Rate Order with respect to the Short-Term Storage Account: Board staff, Canadian Manufacturers and Exporters ("CME"), London Property Management Association ("LPMA"), Federation of Rental-housing Providers of Ontario ("FRPO"), and the City of Kitchener ("Kitchener").

The Board issued its Decision and Order on the Draft Rate Order on February 29, 2012. In that Decision, the Board made the following findings:

> The Board finds that the ratepayers' share of 2012 net short-term revenues should be $0.831 million. The Board agrees with CME, LPMA, Kitchener, and Board staff that the outcome of the findings in its Decision is the establishment of the ratepayer credit in the Short-term Storage Account of $0.831 million.
>
> The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset. In addition, the Board's findings are informed by Union's ability to track what storage assets are being used for each type of storage transaction and state that the entire amount of utility storage above in-franchise requirements is available for sale as short-term storage services (and all costs of this space is to be paid for by in-franchise customers).
>
> Although the Board was not explicit in its findings that $0.831 million is the amount that should be shared with ratepayers, it is a clear outcome of its findings. The Board's findings in this proceeding result in the sharing with ratepayers of all net revenues (minus a 10% incentive payment as set out in the NGEIR Decision) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.[2]

The Board also directed Union to file a revised Draft Rate Order reflecting the Board's determination on the matter (as discussed above). The Board noted that it would review the revised Draft Rate Order to confirm that all the necessary changes were made and would subsequently issue a Final Rate Order.

Union filed a revised Draft Rate Order on March 2, 2012. The Board issued its Final Rate Order on March 8, 2012 approving Union's Draft Rate Order as filed.

By letter dated March 27, 2012, CME informed the Board that there may have been an error in the calculation of margin sharing in the Short-Term Storage Account in the EB-2011-0038 proceeding. CME asserted that the correct amount to be credited to ratepayers should be $3.824 million (as opposed to the $0.831 million credit approved by the Board in the EB-2011-0038 Final Rate Order). CME requested that the Board address this error by making an adjustment to the margin sharing calculation under Rule 43.02 of the Board's Rules. Union filed a letter responding to CME's letter on April 5, 2012, which attempted to refute CME's assertion that there was an error in the calculation of margin sharing in the Short-Term Storage Account and requested that the

[2] EB-2011-0038, Decision and Order, February 29, 2012 at p. 5.

Board deny the relief requested in CME's letter. CME filed a subsequent letter on April 16, 2012, which reiterated its position that the Board should order Union to increase the credit amount for ratepayers in the Short-Term Storage Account to $3.824 million. Union filed a final letter on April 19, 2012, in which Union again argued against the correction requested by CME in its letters.

The Board's Motion to Review the 2010 Earnings Sharing and Deferral Account Disposition Decision (EB-2012-0206)

On May 2, 2012, the Board issued a Notice of Motion to Review, Notice of Motion Hearing and Procedural Order No.1 ("Procedural Order No. 1"). In Procedural Order No. 1, the Board stated the following:

> The Board determined that the correction requested by CME in regards to the margin sharing calculation in the Short-Term Storage Account would not, if substantiated, be allowable under Rule 43.02 of the Board's *Rules of Practice and Procedure* (the "Rules"). The Board is, however, of the view that issues have been raised with respect to the calculation of short-term storage margin sharing which warrant further review by the Board. The Board has therefore determined that it will commence a review proceeding on its own motion pursuant to Rule 43.01 of the Rules to review its EB-2011-0038 Decision and Rate Order as it relates to the issue of calculating the amount of margin sharing in the Short-Term Storage Account. The Board assigned Board File No. EB-2012-0206 to this proceeding.[3]

The Board also provided all intervenors and Union an opportunity to make additional submissions on the issue of margin sharing in the Short-Term Storage Account.[4]

After the filing of additional submissions[5], the Board issued a Decision and Order on the Board Motion on July 18, 2012. In that Decision, the Board made the following findings:

> The Board finds that the correct amount to be credited to ratepayers related to margin sharing in the Short-Term Storage Account is $3.824 million.
>
> In its February 29, 2012 Decision and Order on Draft Rate Order in the EB-2011-0038 proceeding, the Board stated the following:

[3] EB-2012-0206, Notice of Motion to Review, Notice of Motion Hearing and Procedural Order No.1, May 2, 2012 at p. 2.
[4] *Ibid.* at p. 3.
[5] The following parties made additional submissions on the noted issue: Board staff, CME, LPMA, FRPO, Kitchener, Consumers Council of Canada ("CCC"), and the School Energy Coalition ("SEC").

> The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset. In addition, the Board's findings are informed by Union's ability to track what storage assets are being used for each type of storage transaction and state that the entire amount of utility storage above in-franchise requirements is available for sale as short-term storage services (and all costs of this space is to be paid for by in-franchise customers).
>
> Although the Board was not explicit in its findings that $0.831 million is the amount that should be shared with ratepayers, it is a clear outcome of its findings. The Board's findings in this proceeding result in the sharing with ratepayers of all net revenues (minus a 10% incentive payment as set out in the NGEIR Decision) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.[6]

The Board continued on page 10 of its Decision and Order on Board Motion dated July 18, 2012, noting:

> The Board's intent in its EB-2011-0038 Decision and Order was that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account should accrue the benefit of ratepayers. The Board made an error when it stated that $0.831 million is the amount that should be shared with ratepayers. The Board is of the view that the $0.831 million amount does not flow correctly from the intent of the Board's Decision. The Board calculated the 2010 margin sharing amount for the Short-Term Storage Account on the basis that $15.829 million was the short-term storage margin already embedded in rates. This is an error because in 2008, after the issuance of the NGEIR Decision, the credit amount embedded in rates was changed to $11.254 million which continued to be the amount embedded in rates in 2010. Using $11.254 million as the amount embedded in rates, the correct ratepayer share that flows from the intent of the Board's Decision is $3.824 million. Increasing the ratepayer credit to $3.824 million ensures that ratepayers receive 90% of the net revenues in the Short-Term Storage Account.[7]

The Union Motion

Union specifically requested the following in its Notice of Motion to Review and Vary:

[6] EB-2012-0206, Decision and Order on Board Motion, July 18, 2012 at pp. 9-10.
[7] *Ibid.* at p. 10.

1) An Order exercising the Board's discretion to set aside the timeframe under Rule 42.03 of the Rules for filing a motion for review and variance of an order or decision;

2) An Order that Union satisfies the threshold test in Rule 45.01 of the Rules; and

3) An Order varying the Board's finding at page 10 of the Decision that the 2010 margin sharing amount for the Short-Term Storage Account is the actual adjusted net revenue of $15.078 million less the credit amount embedded in rates (which the Board found was $11.254 million), as this finding:

   a) Is contrary to the methodology ordered by the Board in its Accounting Order for the Short-Term Storage Account (the "Accounting Order"); and

   b) Has the effect of introducing a change to the incentive regulation framework that is adverse to Union in that it will require Union to accrue in 2012 an amount of approximately $9 million to reflect the adjustment for 2010, 2011 and 2012, thereby materially impacting Union's financial position, which is contrary to Union's reasonable expectations in participating in the incentive regulation framework ("IRM Framework") and undermines the integrity of the IRM Framework.

Union noted that its Motion satisfies the threshold test as the error identified by Union in its Motion is contrary to the Accounting Order and raises material questions as to the correctness of the Board's Decision and Order on Board Motion. Union noted that once the error identified is corrected, the Board's ultimate decision will be materially different than the Decision and Order on Board Motion.

Union noted that it was unable to submit its Notice of Motion to Review and Vary within the time prescribed by Rule 42.03 because it had been in the midst of a major rate hearing and engaging in that process had taken up all of Union's regulatory capacity. In response to Union's request, the Board will set aside the timeframe for the filing of a Motion under Rule 42.03 of the Rules. The Board accepts Union's justification for filing its Motion late.

The Threshold Test

Rule 44.01 of the Board's Rules provides that every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

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

Rule 45.01 of the Board's Rules provides that:

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

Board Findings

The application of the threshold test was considered by the Board in the Board's Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision") and most recently in the Divisional Court's decision in the *Grey Highlands v. Plateau* case in which the court dismissed an appeal of the Board's decision in EB-2011-0053.[8]

In the NGEIR Review Decision, the Board stated that the purpose of the threshold test is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is 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 also indicated that in order to meet the threshold test there must be an "identifiable error" in the decision for which

[8] EB-2006-0322/0388/0340, May 22, 2007 ("NGEIR Decision") p. 18; and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012).

review is sought and that "the review is not an opportunity for a party to reargue the case."[9] The Board stated as follows:

> 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.[10]

In the *Grey Highlands v. Plateau* decision the Divisional Court dismissed an appeal of a Board decision where the Board determined that the Motion to Review did not meet the threshold test and the Board did not proceed to review the earlier decision. In upholding the Board's decision, the Divisional Court stated:

> The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.[11]

The Board notes that it initiated its own motion to hear the same issue that is raised in Union's Notice of Motion. Having reviewed Union's Motion material, and for the reasons provided below, the Board finds that there is no argument raised in Union's Motion that leads to the conclusion that the Board erred in its Decision and Order on the Board Motion. Union did not raise any errors in fact; changes in circumstances; new facts; or facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time. Therefore, the Board finds that Union's Motion does not meet the threshold test and therefore denies the Motion at the threshold stage.

The Board notes that Union has argued, in its Motion, that the Board's finding in EB-2012-0206 is contrary to the methodology ordered by the Board in its Accounting Order for the Short-Term Storage Account and that it has the effect of introducing a change to the IRM Framework that is adverse to Union.

[9] EB-2006-0322/0388/0340, May 22, 2007 ("NGEIR Decision") at pp.16 and 18.

[10] *Ibid.* at p. 18.

[11] Grey Highlands (Municipality) v. Plateau Wind Inc., [2012] O.J. No. 847 (Div. Court) ("Grey Highlands v. Plateau") at para. 7.

In regard to the first argument, the Board notes that Union highlighted the alleged disconnect between the Board's Decision and the Accounting Order in its submissions on the Board's Motion. In CME's letter to the Board dated March 27, 2012, CME included an email from Union's counsel to CME's counsel, which stated the following:

> There is no error in Union's calculation of the margin in the short term deferral account. Contrary to your note, the deferral account balance is calculated not based on what is in rates but rather on the Board Approved 2007 forecast margin of $15.289 million. The sharing percentages are applied to the difference between the actual margin and the Board approved forecast. This methodology has been used since 2008, accepted by parties and, through the Rate Order, approved by the Board.[12]

In addition, in Union's May 30, 2012 reply submission, Union stated the following:

> The accounting definition confirms Union's submissions. It provides as follows:
>
> > To record, as a debit (credit) in Deferral Account No. 179-70 the difference between actual net revenues for Short-term Storage and Other Balancing Services including: C1 Off-Peak Storage, Gas Loans, Consumers' LBA, Supplemental Balancing Services, C1 Firm Peak Storage, C1 Firm Short-term deliverability and M12 Interruptible deliverability and the net revenue forecast for these services as approved by the Board for ratemaking purposes.
>
> The accounting definition confirms that the relevant comparator — the one used by Union — is the revenue forecast for short term services approved by the Board for ratemaking purposes.[13]

The Board reiterates that Union's first argument had formed part of the record in the EB-2012-0206 proceeding. As such, the Board finds that it is clearly not a new argument and was part of the record upon which the Board deliberated in the EB-2012-0206 proceeding. In this context, the Board notes that the language in the Accounting Order for the Short-Term Storage Account was developed prior to the Board's Decisions in EB-2011-0038 and EB-2012-0206. These Decisions govern the operation of the account.

[12] EB-2012-0206, CME Letter, March 27, 2012 at Tab 12, p. 3.
[13] EB-2012-0206, Union Reply Submission, May 30, 2012 at p. 2.

With respect to Union's argument that the Board's findings in the EB-2012-0206 proceeding have the effect of introducing a change to the IRM Framework that is adverse to Union, the Board is of the view that this submission could have reasonably been brought forth during the Board's Motion proceeding. Union had ample opportunity to make this submission during that proceeding and it did not.

THE BOARD ORDERS THAT:

1. The Motion is dismissed without a hearing.

ISSUED at Toronto, October 18, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND HARVISON YOUNG JJ.

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

SWINTON J. (ORALLY)

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

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

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

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

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

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

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

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

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

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

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

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

LEDERMAN J.

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

SWINTON J.

LEDERMAN J.

HARVISON YOUNG J.

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

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

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND HARVISON YOUNG JJ.

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF GREY HIGHLANDS

Appellant

– and –

PLATEAU WIND INC. and THE ONTARIO ENERGY BOARD

Respondents

ORAL REASONS FOR JUDGMENT

SWINTON J.

Date of Reasons for Judgment: February 9, 2012

Date of Release: February 23, 2012

MENDING, SETTING ASIDE OR VARYING ORDER

nending

59.06 (1) An order that contains an error arising from an accidental slip or omission or quires amendment in any particular on which the court did not adjudicate may be amended on a tion in the proceeding. R.R.O. 1990, Reg. 194, r. 59.06 (1).

tting Aside or Varying

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

ay make a motion in the proceeding for the relief claimed. R.R.O. 1990, Reg. 194, r. 59.06 (2).

ATISFACTION OF ORDER

59.07 A party may acknowledge satisfaction of an order in a document signed by the party fore a witness, and the document may be filed and entered in the court office where the order as entered. R.R.O. 1990, Reg. 194, r. 59.07.

IMITED SCOPE RETAINER

59.08 (1) Despite subrule 15.01.1 (2), if an order arises from a hearing at which a lawyer ho is not a party's lawyer of record appeared under a limited scope retainer for the party, that wyer shall act in the place of the party for the purposes of this Rule. O. Reg. 231/13, s. 11.

(2) Subrule (1) does not apply if,

(a) the agreement governing the limited scope retainer provides otherwise; and

(b) the lawyer acting under the limited scope retainer provides written notice of the fact to the other parties and to the registrar. O. Reg. 231/13, s. 11.

RULE 60 ENFORCEMENT OF ORDERS

EFINITIONS

60.01 In rules 60.02 to 60.19,

"creditor" means a person who is entitled to enforce an order for the payment or recovery of money; ("créancier")

"debtor" means a person against whom an order for the payment or recovery of money may be enforced. ("débiteur") R.R.O. 1990, Reg. 194, r. 60.01.

NFORCEMENT OF ORDER FOR PAYMENT OR RECOVERY OF MONEY

eneral

Chandler *v.* Alberta Association of Architects, [1989] 2 S.C.R. 848

IN THE MATTER of an application for an order for prohibition;

AND IN THE MATTER of the *Architects Act*, being chapter A-44.1 of the Revised Statutes of Alberta, 1980, as amended;

AND IN THE MATTER of the Practice Review Board of the Alberta Association of Architects;

BETWEEN

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk and Peter J. Dandyk Architect Ltd. *Appellants*

v.

Alberta Association of Architects, the Practice Review Board of the Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh and Mary K. Green
Respondents

indexed as: chandler *v.* alberta association of architects

File No.: 19722.

1989: January 30; 1989: October 12.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for alberta

Administrative law -- Boards and tribunals -- Jurisdiction -- Continuation of original proceedings -- Functus officio -- Inquiry into the practices of a firm of architects -- Board conducting a valid hearing but issuing ultra vires findings and orders -- Board's findings and orders quashed -- Board failing to consider whether it should make recommendations as required by legislation -- Whether Board empowered to continue original proceedings -- Architects Act, R.S.A. 1980, c. A-44.1, s. 39(3) -- Alberta Regulation, 175/83, s. 11(1).

Pursuant to s. 39 of the *Architects Act*, the Practice Review Board of the Alberta Association of Architects conducted a hearing to review the practices of a firm of architects which went bankrupt and issued a report. Although the hearing was intended to be a practice review, the Board, in its report, made 21 findings of unprofessional conduct against the firm and six of the architects, levied fines, imposed suspensions and ordered them to pay the costs of the hearing. The Court of Queen's Bench allowed appellants' application for *certiorari* and quashed the Board's findings and orders. The Court of Appeal upheld the decision holding that the Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Under s. 39(3) of the Act, the Board is simply responsible for reporting to the Council of the Alberta Association of Architects and for making appropriate recommendations.

The Board notified the appellants that it intended to continue the original hearing to consider whether a further report should be prepared for consideration by the Council and whether the

matter should be referred to the Complaint Review Committee. The Court of Queen's Bench allowed appellants' application to prohibit the Board from proceeding further in the matter. The court found that the Board had completed and fulfilled its function and that it was therefore *functus officio*. The Court of Appeal vacated the order of prohibition. It held that s. 39(3) of the Act and s. 11(1) of the Regulations require the Board to consider whether or not to make recommendations to the Council or the Complaint Review Committee. The Board did not do so and therefore did not exhaust its jurisdiction.

Held (La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson and Sopinka JJ.: The Board was not *functus officio*. As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of *functus officio* applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tribunals which are subject to appeal only on a point of law must thus be more flexible and less formalistic.

Here, the Board failed to dispose of the matter before it in a manner permitted by the Act. The Board conducted a hearing into the appellants' practices but issued findings and orders that were *ultra vires*. The Board erroneously thought it had the power of the Complaint Review Committee

and proceeded accordingly. It did not consider making recommendations as required by the Regulations and s. 39(3) of the Act. While the Board intended to make a final disposition of the matter before it, that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the Board, which conducted a valid hearing until it came to dispose of the matter, should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis. On the continuation of the original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulations.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): When an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. In this case, the Board was *functus officio* when it handed down its decision. Its function was completed when it rendered its final report. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio*.

If the Board had discretion to consider making recommendations, and chose not to do so, it should be the end of the matter. There is no authority in the Act that permits the Board to change its mind on its own initiative. Furthermore, once a board acts outside its jurisdiction it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a Board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide

matters. Finally, as a general rule, a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations once it had made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

If the Board had a duty to consider making recommendations which it failed to fulfill, it could, depending on the circumstances of the case, be directed to review the entire matter afresh, and could be required to conduct a new hearing. Any re-examination, however, should not be construed as a "continuation of the Board's original proceedings". It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. It would also erode the protection of fairness and natural justice which is expected of administrative tribunals. In the particular circumstances of this case, a rehearing would not be appropriate.

The Court of Appeal erred in applying the principles of mandamus to the present situation.

Cases Cited

By Sopinka J.

Referred to: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v.*

Toronto Stock Exchange, [1968] S.C.R. 330; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577.

By L'Heureux-Dubé J. (dissenting)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Lodger's International Ltd. v. O'Brien* (1983), 45 N.B.R. (2d) 342; *Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), aff'd [1989] 1 S.C.R. 1038; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577; *Cité de Jonquière v. Munger*, [1964] S.C.R. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Statutes and Regulations Cited

Alberta Regulation, 175/83, s. 11.

Architects Act, R.S.A. 1980, c. A-44.1, ss. 9(1)(j.1) [ad. 1981, c. 5, s. 6], 39 [am. 1981, c. 5, s. 16].

Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4).

National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [formerly *National Transportation Act*], s. 66.

Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42.

Authors Cited

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, "*functus officio*".

Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, "*functus officio*".

Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

APPEAL from a judgment of the Alberta Court of Appeal (1985), 67 A.R. 255, allowing respondents' appeal from a decision of the Court of Queen's Bench[1], granting appellants' application for an order for prohibition against the Practice Review Board. Appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting.

W. E. Code, Q.C., and *B. G. Kapusianyk*, for the appellants.

No one appearing for the respondents.

//Sopinka J.//

The judgment of Dickson C.J. and Wilson and Sopinka JJ. was delivered by

[1]Alta. Q.B., No. 8501-19113, October 8, 1985 (Brennan J.)

SOPINKA J. -- The issue in this appeal is whether the Practice Review Board of the Alberta Association of Architects was *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group. The Alberta Court of Appeal allowed an appeal from the decision of the Alberta Court of Queen's Bench granting the appellants' application for an order prohibiting the Practice Review Board from proceeding on the grounds that the Board no longer had jurisdiction to deal with the matter and was *functus officio*.

Facts

As a result of the Chandler Kennedy Architectural Group filing for voluntary insolvency in June 1984, the Practice Review Board of the Alberta Association of Architects decided on its own initiative pursuant to s. 39(1)(b) of the *Architects Act*, R.S.A. 1980, c. A-44.1, to undertake a review of the practice of the Group and a number of the individual members of the Group. Hearings were commenced on August 14, 1984 and continued for a total of eighteen days. Final submissions were heard on December 17, 1984 and the report of the Board was issued on March 6, 1985.

The 71-page report made 21 specific findings of unprofessional conduct against the firm and several of the partners. Fines totalling $127,500 were imposed upon six members of the firm. The same six partners were also issued suspensions from practicing architecture for periods from six months to two years. As well, the appellants were required to pay the costs of the hearing, approximating $200,000.

Proceedings in the Courts Below

The appellants filed notice of intention to appeal the decision of the Board to the Council of the Alberta Association of Architects pursuant to s. 55 of the *Architects Act*. However, prior to the commencement of the appeal, the appellants brought an application before the Alberta Court of Queen's Bench for an order in the nature of *certiorari* to quash the findings and order of the Practice Review Board. Kryczka J. granted the order requested and held that the failure to inform the appellants that they were facing any charges or allegations of unprofessional conduct offended the principles of natural justice. Kryczka J. held that the comments of the Chairman of the Board clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

This decision was appealed by the Alberta Association of Architects to the Alberta Court of Appeal. In the Court of Appeal (1985), 39 Alta. L.R. (2d) 320, Prowse J.A. speaking for the court, upheld the decision of Kryczka J. but on different grounds. Prowse J.A. held that the Practice Review Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Disciplinary powers were said to be reserved for another body within the Alberta Association of Architects, the Complaint Review Committee. Under s. 39(3) of the *Architects Act* the Board is simply responsible for reporting to the Council and making whatever recommendations it feels are appropriate. Therefore, the Court of Appeal dismissed the appeal on the grounds that the *Architects Act* did not give to the Board the powers it purported to exercise.

A month after the decision of the Court of Appeal, the Practice Review Board gave notice to the appellants that it intended to continue the original hearing in order that consideration could be given to preparing a further report to the Council of the Alberta Association of Architects and consideration could also be given to referring the matter to the Complaint Review Committee.

The appellants then brought an application before the Court of Queen's Bench to prohibit the Board from proceeding further with the continuation of the matter. Brennan J. held that the Board had completed and fulfilled the function for which it was constituted and it was therefore *functus officio* and lacked jurisdiction to continue its hearing. This decision was also appealed to the Alberta Court of Appeal.

The Court of Appeal (1985), 67 A.R. 255 allowed the appeal and vacated the order of prohibition. Kerans J.A. for the court held that s. 39(3) of the *Architects Act* and Regulation 175/83, s. 11(1) impose on the Board the duty to consider whether or not to make a recommendation. Kerans J.A. held that the Board did not consider whether to make a recommendation that the matter be referred to the Complaint Review Committee and therefore it did not exhaust its jurisdiction. *Functus officio* was held not to apply here as there was a failure to consider matters which were part of the Board's statutory duty. It is from this decision that the present appeal arises.

Statutory Powers of the Board

In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals. See *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 11(4); *Ontario Municipal Board Act*, R.S.O. 1980, c. 347, s. 42; and *National Telecommunications Powers and Procedures Act*, R.S.C., 1985, c. N-20, s. 66 (formerly the *National Transportation Act*). It is therefore necessary

to consider (a) whether it had made a final decision, and (b) whether it was, therefore, *functus officio*.

The Board on its own initiative launched an inquiry into the practices of the appellants pursuant to s. 39 of the Act which provides:

39(1) The Board

(a) shall, on its own initiative or at the request of the Council, inquire into and report to and advise the Council in respect of

(i) the assessment of existing and the development of new educational standards and experience requirements that are conditions precedent to obtaining and continuing registration under this Act,

(ii) the evaluation of desirable standards of competence of authorized entities generally,

(iii) any other matter that the Council from time to time considers necessary or appropriate in connection with the exercise of its powers and the performance of its duties in relation to competence in the practice of architecture under this Act and the regulations, and

(iv) the practice of architecture by authorized entities generally,

and

(b) may conduct a review of the practice of an authorized entity in accordance with this Act and the regulations.

(2) A person requested to appear at an inquiry under this section by the Board is entitled to be represented by counsel.

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

(4) If it is in the public interest to do so, the Council may direct that the whole or any portion of any inquiry by the Board under this section shall be held in private.

It is apparent that s. 39 does not deal with discipline but rather with practices in the profession with a view to their improvement. If, however, in the course of the inquiry into practices it appears to the Board that a matter may require investigation by the Complaint Review Committee, provision is made for referral of that matter to that Committee. Section 9(1)(j.1) of the Act empowers the Council to make regulations:

(j.1) respecting the powers, duties and functions of the Practice Review Board including, but not limited to, the referral of matters by that Board to the Council or the Complaint Review Committee and appeals from decisions of that Board;

Section 11 of Regulation 175/83 passed pursuant to s. 9(1)(j.1) provides as follows:

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

(a) make one or more recommendations to the authorized entity or licensed interior designer, the subject of a practice review, respecting desired improvements in the practice reviewed;

(b) direct that a reviewer conduct a follow-up practice review to determine whether or not the Board's recommendations have been adopted and whether they have resulted in the desired improvements being made in the practice of the entity concerned;

(c) if it considers any one or more of the following matters to be of a sufficiently serious nature to require investigation by the Complaint Review Committee, direct that the matter be referred to the Complaint Review Committee for investigation:

(i) the unco-operative manner of an authorized entity or licensed interior designer in the course of a practice review or a follow up review;

(ii) a failure to comply with the Act, Professional Practice Regulation, Code of Ethics, Interior Design Regulation or General By-laws;

(iii) a failure to adopt and implement the recommendations respecting desired improvements in the practice of the entity concerned;

(iv) any apparent fraud, negligence or misrepresentation, or any disregard of the generally accepted standards of the practice of architecture or practice of licensed interior designers;

(d) if the Board determines in the course of its practice review that the conduct of an authorized entity or licensed interior designer constitutes

(i) unskilled practice of architecture or unprofessional conduct or both, or

(ii) unskilled practice of interior design or unprofessional conduct, or both

the Board shall deal with the matter in accordance with sections 50 to 53 of the Act;

(e) indicate that it has no recommendations to make or that the practice reviewed is satisfactory;

(f) comment on a practice maintained at a high standard and with the consent of the authorized entity or licensed interior designer concerned, publicize the high standard and the persons concerned;

(g) take recommendations to the Council with a view to the establishment of new standards related to specific or general areas of the practice of architecture.

(2) The Board shall not impose any sanction under subsection (1)(d) unless the authorized entity or professional interior designer concerned

(a) has made representations to the Board, or

(b) after a notice under section 42 of the Act has been given, fails to attend the hearing or does not make representations.

The Board's inquiry proceeded as an inquiry into practices in accordance with the Act. The following statements made by the Chairman during the course of the inquiry aptly describe the nature of the inquiry:

The first thing that I would like to make very clear and I believe that you alluded to this in the beginning, that this is not a complaint review, this is a practice review, and as a result

> we are not dealing with a specific case of wrongdoing which I think you are alluding to and you are obviously experienced in the court. We are dealing with a review of the practice of the various authorized entities and that means a total review. So, as a result, the entire course of this Hearing has been to review the total practice. It has not been a process of reviewing specific points. The Board has been concerned to develop a full and as broad an understanding of the practice of the various entities as is humanly possible under the circumstances.

> As a result of the review of those authorized entities, it is our responsibility and our duty to make recommendations and to make findings and we of course are going to be doing that following this.

> ...

> Following each and every individual, we have provided an opportunity for questioning. The Board will have to take into consideration all of the evidence that has been put before it and has been spending a great deal of time in making certain it is listening and trying to understand everything that has taken place. But again, as I said to your counsel, a few minutes ago, this is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result of the fullest extent of which has taken place, make findings and recommendations to the profession. [Emphasis added.]

Nevertheless, when it came to issue directions and recommendations, instead of proceeding under s. 39(3) of the Act as amplified by s. 11(1)(a), (b), (c), (e), (f) or (g) of the Regulation, the Board proceeded under s. 11(1)(d) of the Regulation, a provision that the Court of Appeal in the first appeal held to be *ultra vires*. The Court of Appeal held that ss. 50 to 53 deal with disciplinary matters which are beyond the competence of the Board. This decision of the Court of Appeal has not been challenged. Accordingly, the result of the decision of the Court of Appeal is that the Board conducted a valid hearing into the appellants' practice but issued findings and orders that were *ultra vires* and have been quashed.

In view of the fact that the Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly, it did not consider recommendations under s. 39(3) of the Act or under s. 11(1)(a), (b), (c), (e), (f) or (g), and in particular (c), of the Regulation.

Kerans J.A. based his conclusion that the Board was not *functus officio* on the ground that the Board had a duty to consider whether to make a recommendation. He stated, at p. 257:

> While the board has, under s. 39(3) and perhaps also the regulations, a discretion whether to make any recommendation, we think that the section imposes upon the board the duty to consider whether to make a recommendation. The report does not say that the board did so. If the board did not so consider, then, contrary to the finding of the learned Queen's Bench judge, the board has not exhausted its jurisdiction.

In view of the inexplicable use of "may/shall" in Regulation 11(1), it is difficult to determine precisely what the Board was obliged to do. Certainly it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations, either to the parties or to Council, or to consider a referral to the Complaint Review Committee. Therefore, I agree with Kerans J.A. that the Board had the duty to consider making recommendations pursuant to the Regulation and s. 39(3) of the *Architects Act*.

I am, however, of the opinion that the application of the *functus officio* principle is more appropriately dealt with in the context of the following characterization of the current state of the Board's proceedings. The Board held a valid hearing into certain practices of the appellants. At the conclusion of the hearing, in lieu of considering recommendations and directions, it made a

number of *ultra vires* findings and orders which were void and have been quashed. In these circumstances, is the decision of the Board final so as to attract the principle of *functus officio*?

Functus Officio

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1.where there had been a slip in drawing it up, and,

2.where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186.

In *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At p. 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had

> recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra.*

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act.* The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R.

> 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.

In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and should be entitled to do so. The Court of Appeal so held.

On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

In the result, the appeal is dismissed, but without costs. The respondents neither appeared on the argument nor filed a factum.

//L'Heureux-Dubé J.//

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

The issues which arise in this appeal are:

(1)Was the Practice Review Board ("Board") of the Alberta Association of Architects *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group?

(2)If the Board was not *functus officio*, does it have the jurisdiction to continue the original hearing against the appellants to consider making recommendations to the Complaint Review Committee?

(3)Did the Court of Appeal err in its consideration and application of the principles relating to mandamus?

The first two, closely related issues, turn on the construction of s. 39 of the *Architects Act*, R.S.A. 1980, c. A-44.1, and Regulation 175/83 (passed under authority of the Act), which establish the Board and define its powers.

Section 39(3) of the *Architects Act* provides:

> (3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

The disputed text is found in Regulation 175/83, s. 11(1):

> 11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:
>
> . . .
>
> (c) ...direct that the matter be referred to the Complaint Review Committee for investigation: ...

The confusion emanates from the inclusion of both the permissive, discretionary term "may", and the affirmative, mandatory term "shall", without any indication as to which prevails. However, while I shall discuss the implications of both interpretations, in my view the appeal should be allowed on either construction.

(1) *Functus Officio*

When the Board first undertook to reopen the hearing, appellants sought an order for prohibition, which was granted by Brennan J. In granting the order, the chambers judge of the Court of Queen's Bench stated:

> Unfortunately, the Practice Review Board proceeded to set itself up as having disciplinary functions and made findings and assessed penalties. Mr. Justice Kryczka declared these Findings and Orders a nullity, which decision was upheld by the Alberta Court of Appeal.
>
> In my view, the Practice Review Board has completed and fulfilled the function for which it was appointed and therefore it is *functus officio*. Such being the case, it had no jurisdiction to continue with any function. Accordingly, the application is granted for an Order to prohibit the Board from proceeding further against these Applicants, and in particular, the Board is hereby prohibited from proceeding with any further hearings on this matter.

This decision was reversed by the Alberta Court of Appeal: (1985), 67 A.R. 255. According to Kerans J.A., for the court, the Board was not *functus officio,* and should be allowed to "voluntarily...do the right thing" (at p. 257):

> [T]he board, having mistaken[ly] decided that it had itself the power to deal directly and finally with discipline questions, too quickly rejected any consideration of making recommendations to other bodies. We think that the board, persuaded by its mistaken assumption of these other powers, made such an egregious error about the significance of its powers of recommendation that it cannot be said that it has exercised that jurisdiction.

Jowitt's Dictionary of English Law (2nd ed. 1977) defines *functus officio* as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J. in *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), is well summarized in the headnote:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

> This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is *functus officio*, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

Black's Law Dictionary (5th ed. 1979) defines *functus officio* as "a task performed":

> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)) "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter `afresh' is contrary to this doctrine" (appellants' factum, at p. 19).

In *Re Nelsons Laundries Ltd.*, Verchere J. cited *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (B.C.C.A.), at p. 154:

> The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award.

In *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (Nfld. C.A.), Morgan J.A. stated that (at p. 163):

> Whether or not the trial judge was in error in the first instance in declaring the proceedings a nullity, and ordering the Writ of Summons and Statement of Claim to be struck out, is not relevant to the issue now before us. The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it. ... Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the *functus officio* doctrine. Perhaps the most concise statement of the doctrine can be found in Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 221:

> [TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the file is closed and the government body is "functus officio". The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.

In line with that doctrine, if the Board had discretion to consider making recommendations, and chose not to, that should be the end of the matter. The finality of the Board's decision can be ascertained from its own language when it made its orders. The actual report of the Board reveals that the hearings concluded on December 17, 1984. The Board members signed the report under the heading "Conclusions". Furthermore, given that the Council of the Alberta Association of Architects issued a notice of hearing of an appeal from the decision rendered by the Board, it too must have considered the hearing complete. In the actual findings of the Board, they imposed suspensions, effective immediately. The report is entitled "Report of the Practice Review Board", the rendering of which is the function of that tribunal. All these factors indicate that the Board had completed its function and had rendered its final report.

It seems to me that there is a fundamental flaw in the reasoning of the Alberta Court of Appeal. If the Board was not *functus officio* after handing down its decision, at what point does it become so? In this case an appeal was filed, though not heard because the original ruling was quashed. If the Board is not *functus officio* when the decision is handed down, it must certainly be so by the time an appeal is filed. If not, then the logical conclusion would be that the Board could sit again to redetermine a matter even after an appeal had been heard, for there is no principled basis on which to say that at some point after the decision has come down the Board becomes *functus officio*, and there seems no way to rationally define an exception for the rare circumstance where the Board fails to consider the exercise of a discretionary duty. In my view, this point should be fatal to the respondents.

If a tribunal has discretion, i.e. if it may consider making recommendations, and chooses not to, there is no authority in the *Architects Act* that permits it to change its mind on its own initiative. Furthermore, once a board acts *ultra vires*, it should not be allowed to rectify the infirmities of its

disposition according to its own predilections. Standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters.

In most administrative decisions, the tribunal does not address the fact that it has considered all of its discretionary powers but has elected to invoke only a few of those powers. I agree with the holding in *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.), that a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations to Council once it has made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

There are, of course, exceptions to the general rule that an arbitrator who has reached a final decision becomes *functus officio* and cannot afterwards alter his award. For example an adjudicator may correct clerical mistakes or errors arising from an accidental slip or omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 N.B.R. (2d) 342 (N.B.C.A.); *Re Nelsons Laundries Ltd., supra*). However, the Board in the present case is not seeking to correct a slip or clerical error. If it had the option to consider making recommendations, and yet chose not to, that choice does not detract from the finality of the decision.

When a decision is rendered with nothing to be completed, there is no doubt that the adjudicator is *functus officio*: any further action would be entirely without authority (*Slaight Communications*

Inc. v. Davidson, [1985] 1 F.C. 253 (C.A.), affirmed [1989] 1 S.C.R. 1038). Hence, if the Board is seen as having discretion whether or not to consider making recommendations, and the Alberta Court of Appeal decision is left undisturbed, the doctrine of *functus officio* would be rendered nugatory.

In *Lodger's International Ltd.*, *supra*, the New Brunswick Court of Appeal dealt with a series of orders by the New Brunswick Human Rights Commission. The Commission first ordered an employer to compensate two employees. When the employer did not comply, the Commission renewed the order with a time limit for payment. Section 21(2) of the *Human Rights Act* provided that the orders were "final". The court held that the second order was improper and that the Commission was *functus officio* after the first order, because s. 21 did not authorize subsequent orders. La Forest J.A. (now of this Court), writing for the court, addressed the issue of whether the Commission was empowered to make such a series of orders and concluded that (at p. 352):

> It would take strong words indeed to convince me that the legislature ever intended to give this kind of power to an administrative body, however lofty its goals and however liberally we are expected to construe the statute to facilitate the achievement of these goals.

Unlike the enabling statute in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, where the Immigration Appeal Board had statutory jurisdiction to hold a rehearing under s. 15 of the *Immigration Appeal Board Act*, there is no authority in the *Architects Act* for the Board to hold a rehearing. *Cité de Jonquière v. Munger*, [1964] S.C.R. 45, also supported a policy favouring the finality of decisions unless the statute dictates otherwise. Upholding the unanimous decision of the Quebec Court of Appeal, Cartwright J., for the Court, held that (at p. 48):

> I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous.

Furthermore, I agree with the holding in *M. Hodge and Sons Ltd.*, *supra*, that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio* (at p. 163):

> The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it.

(2) The Board's Jurisdiction to Rehear

The Alberta Court of Appeal interpreted the *Architects Act*, and Regulation 175/83, as imposing a duty on the Board to consider whether to make a recommendation to the Governing Council or Complaint Review Committee.

Despite the ambiguous language, my colleague, Sopinka J., concludes that the Act imposes a duty on the basis that "it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations (p. 000)". Given that "the Board conducted a valid hearing until it came to dispose of the matter" (p. 000), my colleague suggested that "[o]n the continuation of the Board's original proceedings . . . either party should be allowed to supplement the evidence and make further representations which are pertinent to the disposition of the matter" (p. 000). Hence, while it would provide for the presentation of

supplementary evidence, the rehearing itself would not be conducted afresh, but rather as a "continuation of the Board's original proceedings".

This analysis does have a certain intuitive appeal: given that a Practice Review Board does exist, and has a certain function to fulfill, it should be allowed, or rather required, to perform that function. However, the issue here is precisely that the Board did exercise that function, albeit illegally.

There is no dispute that when making the final orders it did, the Board clearly exceeded its jurisdiction. The Chairman of the Board himself set out the Board's functions and explicitly recognized that:

> [T]his is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result if the fullest extent of which has taken place, make findings and recommendations to the profession.

Following this introduction, the Board embarked on an adjudicatory path which the courts found to be wholly *ultra vires*. If it had a duty to consider whether to make a recommendation to the Complaint Review Committee, it did not do so.

Even though the Board was wrong in its initial decision, the question is whether that precludes the Board from now attempting to correctly carry out its function. According to my colleague, as the Board's disposition was a nullity, it amounts to no disposition at all in law: "a tribunal which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and

render a valid decision" (p. 000) (emphasis added), relying on *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), where McLachlin J. (now of this Court) wrote, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid. [Emphasis added.]

These precedents distinctly indicate that whenever special circumstances do warrant reconsideration by an administrative tribunal, such is to take place "afresh", not merely as a continuation of the tainted process now sought to be corrected.

Furthermore, *Re Trizec* dealt with a procedural error by the Court of Revision. While acting wholly within the domain of its substantive jurisdiction, the Court of Revision increased an assessment against a taxpayer before allowing the taxpayer to be heard. Two days later, at the request of the taxpayer, the court reconvened and a hearing was conducted. Hence, this case is distinguishable on at least three grounds:

(1) the court in *Re Trizec* was instructed to consider the matter afresh and conduct a proper hearing; the Alberta Court of Appeal in *Chandler* allowed the Board to continue its original proceeding;

(2) the court, acting within its jurisdiction, made a procedural error which it subsequently corrected; the Board in *Chandler* was not empowered at the substantive level to make any of the findings it did; and

(3) the taxpayer itself requested a hearing, whereas the Board in *Chandler* reopened the proceedings on its own initiative.

The issues in *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.), relied upon in *Re Trizec*, were almost identical. A teacher was dismissed on three grounds of misconduct, yet was heard on only two of those grounds. He was then heard on the third ground and the dismissal was upheld.

The suggestion that the Board's original proceedings be <u>continued</u> is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals. The original hearing was conducted under the mistaken belief by the Board that it could make certain orders, despite the Chairman's introductory words. The Chairman's comments, reproduced above, clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

Kryczka J. of the Alberta Court of Queen's Bench held that, given the failure to inform the appellants that they were facing any such discipline charges or allegations, "it is difficult for me to conceive how the eventual result could be characterized as anything other than a travesty of justice". It might be that the appellants would have entered into a different course or line of defense at the hearing had they suspected that they were being investigated with respect to matters entirely outside the scope of the Board's jurisdiction. Unaware and not informed of the discipline charges that were in fact contemplated by the Board, appellants were not legally in a position to prepare a full defense to the allegations and orders ultimately made against them.

Appellants further contend that, if upheld, the decision of the Alberta Court of Appeal must be taken as overturning the judgment of the same court in *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, cited with approval in *Grillas*, *supra*, at pp. 588-89. *Canadian Industries* dealt with a board that held a hearing without giving notice to the appellant who was entitled to such notice as an interested party. The Board then held a rehearing of which proper notice was given, and decided, after hearing submissions, that its previous order should not be changed. Johnson J.A., for the Court of Appeal held that both orders had to be set aside. The first was a nullity as the appellant was not notified. The second was a nullity as well in the absence of clear statutory authority to conduct a rehearing.

As mentioned previously, there is no clear statutory language enabling the Board to conduct a rehearing. If the Board has a duty which it failed to fulfill, it can, depending on the circumstances of the case, be directed to review the entire matter afresh, and can be <u>required</u> to conduct a <u>new</u> hearing. *Re Trizec* and *Lange*, *supra*. However, if it sets out to do one thing and winds up doing something entirely different, any reexamination should not be construed as a "continuation of the Board's original proceedings".

I would like to briefly address the *prima facie* apprehension that a direction to the Board to conduct a new hearing is tantamount to "double adjudication". That would be a valid concern if the Board is seen as having discretion. It would then be making orders subsequent to its being rendered *functus officio*. However, if it has an imposed duty, a rehearing would only be required if the original hearing is determined to be a total nullity, and the case so warrants. In that case, the apprehension of allowing a tribunal to make a series of orders, *Lodger's International Ltd.*, *supra*, would not arise. In the particular circumstances of this case, a rehearing would not be appropriate in my view.

Mandamus

As the Court of Appeal twice referred to the principles of mandamus, I will address them as well. However, I agree with appellants that these principles have nothing to do with this appeal.

Laidlaw J.A. set out the requirements for mandamus in *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (Ont. C.A.), at p. 297:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" . . . ; (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief . . . "; (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"; (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy . . . .

Hence, mandamus appears to be a remedy that would apply against a tribunal or authority, and not one to be invoked by it. If the Board declined to exercise jurisdiction, then mandamus would lie. However, that is not the case here. Quite the contrary; the Board took it upon itself to exercise more jurisdiction than in fact it had. That alone would undermine the Court of Appeal's application of mandamus to this case. Furthermore, if we are to follow the requirements set out above, none appear to be satisfied by the facts here:

(1) There is no clear legal right in issue.

(2) The Board may have had discretion whether or not to make recommendations.

(3) Whether or not the Regulation confers discretion upon the Board is still an open question, and if the Board has a duty to consider making recommendations, it certainly has discretion whether or not to make them, and which ones to make, if any.

(4) There has been no demand by the appellants or refusal by the Board to perform, as is required by mandamus.

Conclusion

On either interpretation of the ambiguous language in the Regulation, I am of the view that the appeal should succeed. If the Board had discretion, and decided to act in a certain manner, it is now *functus officio*. If it had an imposed duty which it did not perform, it cannot continue with a tainted hearing. For the reasons discussed above, mandamus is not a controlling factor in this appeal.

Therefore, I would allow the appeal, vacate the order of the Court of Appeal and restore the judgment of Brennan J. prohibiting the Board from acting any further in this matter, the whole with costs throughout.

Appeal dismissed, LA FOREST *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

Solicitors for the appellants: Code Hunter, Calgary.

Re Grier and Metro International Trucks Limited et al.

[Indexed as: Grier v. Metro International Trucks Ltd.]

28 O.R. (3d) 67
[1996] O.J. No. 538
Court File No. 339/95

Ontario Court (General Division), Divisional Court,
McMurtry C.J.O.C., Feldman and MacPherson JJ.
February 19, 1996

Administrative law -- Functus officio -- Referee under Employment Standards Act basing decision on error in written statement of facts -- Flexible approach to doctrine of functus officio called for in circumstances -- Doctrine of functus officio not preventing referee from reconsidering matter and rendering valid decision.

An order to pay under s. 65 of the Employment Standards Act, R.S.O. 1990, c. E.14, was made in respect of vacation pay owing to former employees of M Ltd. M Ltd. applied for a review of the order to pay by way of an appeal hearing before a referee. The appeal proceeded on the basis of a written statement of facts; there was no oral evidence. The issue before the referee was whether M Ltd. was liable for the vacation pay of certain employees of the previous employer, which had been wound up as of September 19, 1992, when its employees were terminated. M Ltd. purchased certain assets of the previous employer, rehired some of its employees and started business two days later, on September 21, 1992. The agreed statement of facts recorded the date on which M Ltd. commenced operations as September 21, 1993, not 1992. The referee found that the employees' right to accrued vacation pay crystallized when their employment was terminated and did not resume with a new employer within a

reasonable time afterwards. When the error was later brought to the referee's attention, she declined to reopen the matter, holding that she was functus officio. The applicant applied for judicial review of the referee's two decisions.

Held, the application should be allowed.

A flexible approach to the doctrine of functus officio was called for in the circumstances. It was clear that the referee relied on an important fact which was incorrect. Her first decision was a nullity. She intended to make a final disposition but that disposition was fatally tainted by her reliance on a crucial finding which proved to be incorrect. She should be permitted to reconsider the matter afresh and render a valid decision. The parties were entitled to a decision on the merits based on a full and accurate statement of the facts.

Chandler v. Alberta Assn. of Architects, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577, [1989] 6 W.W.R. 521, 99 N.R. 277, 70 Alta. L.R. (2d) 193, apld

Other cases referred to

Canada (Minister of Employment & Immigration) v. Nabiye, [1989] 3 F.C. 424, 102 N.R. 390 (C.A.); Canada (Treasury Board) v. Exley, [1985] F.C.J. No. 331 (C.A.); Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609, 93 C.L.L.C. 14,032, 152 N.R. 1, 13 O.R. (3d) 164n; Kingston (City) v. Ontario (Mining & Lands Commissioner) (1977), 18 O.R. (2d) 166 (Div. Ct.); MTD Products Ltd. v. Tariff Board of Canada, [1987] 2 F.C. 227, 8 F.T.R. 158, 13 C.E.R. 123

Statutes referred to

Employment Standards Act, R.S.O. 1990, c. E.14, ss. 65, 68

APPLICATION for judicial review of decisions of a referee under the Employment Standards Act, R.S.O. 1990, c. E.14.

Murray Klein, for applicant.
Mark Geiger and Bill Anderson, for respondents.

The judgment of the court was delivered by

MACPHERSON J.: --

Introduction

The principle of functus officio holds that a judicial decision-maker, including an administrative tribunal, does not have the authority to reopen a decision once made. This application raises the question of whether rigour or flexibility should control the application of the principle in a situation where a tribunal's decision was based, at least in part, on a misapprehension of an important fact lying at the heart of the litigation.

Factual Background

On May 27, 1993, the applicant Stephen Grier, an employment standards officer ("Grier"), made an order to pay under s. 65 of the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA"), against the respondents Metro International Trucks Limited and Metro Leasing Limited (collectively "Metro"). The order to pay was in the amount of $21,893.65, representing vacation pay owing to former employees of Metro plus administration costs of $2,189.36 for a total of $24,083.01.

Metro applied for a review of the order to pay by way of an appeal hearing before a referee in accordance with s. 68 of the ESA. Referee Shari Novick was appointed to preside at the appeal hearing. There was no oral evidence at the hearing; it proceeded on the basis of a written statement of facts prepared by Metro's solicitors and assented to by the solicitor who represented the Ministry of Labour at the hearing.

The hearing before Referee Novick related to the question of

whether Metro was liable for the vacation pay of certain employees of the previous employer, McCleave Truck Sales Ltd. ("McCleave"). McCleave had been wound up, and its employees were terminated, as of September 19, 1992. Metro purchased certain assets of the insolvent McCleave and commenced business two days later, on September 21, 1992. It rehired some of the McCleave employees, including those who were later the subject of Grier's order.

Unfortunately, the agreed statement of facts recorded the date on which Metro commenced operations as September 21, 1993, not 1992. Thus the situation presented to Referee Novick was that Metro had succeeded McCleave as employer a year and two days, rather than two days, after McCleave had been wound up.

Before Referee Novick, Metro conceded that it was a successor employer for the purposes of the ESA. However, it disagreed with Grier's decision that it owed the employees the vacation pay that had accrued during their employment with McCleave.

Referee Novick released her 12-page decision on August 30, 1994. She reversed Grier's decision. She said, in part, at pp. 9, 10-11 and 12:

> The only issue I must decide is which party should bear the responsibility of paying the amount owing -- the applicants, who have accepted that they are "successor employers" for the purpose of this hearing, or the Ministry, through the Employee Wage Protection Plan.
>
> . . . . .
>
> In my view, the proper way to approach this issue is to determine when the entitlement to the employment standard in question (vacation pay in this case) arose, and identify who the employer was at that moment in time. It follows then that the party employing an employee at the point his or her entitlement crystallized bears the liability for the amounts owing. This approach is not inconsistent with what s. 13(2) provides, and leads to an equitable result. Applying that to the case at hand, the agreed facts submitted to me

established that the claimants' employment was terminated by the bank-appointed receiver in September of 1992, and that they were not hired by the applicants until they presumably began operations, approximately one year later. The right to any accrued vacation pay crystallized when their employment was terminated and did not resume with a new employer within a reasonable time afterwards.

. . . . .

I remain seized of the matter to determine any issues which may arise as a result of any of the above.

(Emphasis added)

Subsequent to the release of Referee Novick's decision, counsel for the Ministry of Labour contacted Metro's counsel and pointed out the error in the agreed statement of facts. Metro's counsel acknowledged that there was a "typo" with respect to the dates, but stated that the error had no effect on the result.

Counsel for the Ministry wrote to Referee Novick and requested that she reconsider her decision. Metro's counsel wrote to referee Novick and opposed this request, in part on the ground that she was functus officio.

On January 19, 1995 Referee Novick rendered a second decision in which she declined to reopen the matter. She agreed with Metro's submissions that she was functus officio. She said, in part, at pp. 2-3:

The Employment Standards Act does not provide a referee hearing an application for review . . . with the power to reconsider his or her decision. In the absence of such a power I am functus officio, or without jurisdiction to revisit the matter for the purpose requested. I do not dispute Ministry counsel's suggestion that the authorities support the notion that adjudicators can retain some post-decision powers even if they are not expressly provided in the enabling statute; however, these are restricted to re-

opening a matter in situations where either clerical or typographical errors have been made, proper notice of hearing has not been given, or for some other reason a party has been unable to exercise their right to be heard. That is not the case here; I am effectively being asked to change my decision because one of the facts presented, upon which I relied in arriving at the decision, was incorrect.

(Emphasis added)

The applicant brings this application for judicial review of Referee Novick's two decisions. It seeks an order quashing those decisions and remitting the matter back to Referee Novick or another referee for determination based upon an agreed statement of facts amended to correct the inadvertent error with respect to the date Metro commenced business as successor to McCleave.

Legal Issues

The legal issue on this application is whether Referee Novick was correct in deciding that she could not reconsider her first decision because of the principle of functus officio.

Analysis

In her decision of January 19, 1995, Referee Novick decided that the principle of functus officio precluded her from reconsidering her August 30, 1994 decision. The parties agree that the January 19, 1995 decision was one relating to the limits of the referee's jurisdiction. Hence the standard of review on this application is correctness: see Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609.

Before turning to the main issue, I will dispose of two preliminary arguments advanced by Metro. Both of these arguments are to the effect that even if the principle of functus officio is not determinative of the application, the matter should nevertheless not be returned to the referee for other reasons. Two such reasons are put forward by Metro.

The first argument is that the matter should not be returned to Referee Novick because her decision would have been the same without the error in the agreed statement of facts. In support of this argument, Metro relies on several passages from Referee Novick's decision of August 30, 1994, all of which can be encapsulated by her statement on p. 10: "The right to any accrued vacation pay crystallized when their employment was terminated". In other words, says Metro, when the employees were terminated on September 19, 1992 their right to vacation pay for their service with McCleave "crystallized" on that date. The fact that Metro purchased the business two days later, or a year and two days later, is irrelevant to Referee Novick's decision.

The short answer to this argument is that it is clear from both of Referee Novick's decisions that the error in date was a relevant and important factor in her decision on the merits of the vacation pay issue. The words quoted above from p. 10 of her first decision are in fact not a full sentence; the rest of the sentence concludes with "and did not resume with a new employer within a reasonable time afterwards". She also refers, again at p. 10, to the fact that the employees were not rehired after they left McCleave until "approximately one year later". Finally, and conclusively in my view, in her second decision Referee Novick says that the incorrect date was a fact "upon which I relied in arriving at the decision". This strikes me as a very clear statement. The word "relied" should be given its ordinary meaning; it indicates that the incorrect fact in issue here influenced her decision. It may not have been determinative of the decision; however, it did influence it.

The second preliminary argument advanced by Metro is a variation of the first. Metro asserts that even if the referee was influenced by the incorrect date, that is inconsequential because, as a matter of law, the only relevant date is the day on which the employees were terminated by McCleave. Since that date is September 19, 1992, it is irrelevant whether Metro stepped into McCleave's shoes on September 21, 1992 or 1993.

The problem with this argument is that it invites this court

to interpret several important provisions of the ESA without the advantage of a decision on the merits by the referee. This court's essential role in the domain of administrative law is to perform the function of judicial review of decisions of various administrative tribunals. An ab initio judicial interpretation of provisions of the ESA, cut adrift from the anchor of a tribunal's interpretation of those provisions, would be antithetical to the rationale underlying the roles of both administrative tribunals and this court. Specialized tribunals interpret and decide; this court reviews on limited grounds. Metro's second argument ignores the two-step process that is the foundation of administrative law process in Ontario and in Canada.

Turning to the main issue, Metro articulates it in this fashion in its factum:

> 48. At the time of the rendering of Referee Novick's decision there was no statutory authority contained in the Employment Standards Act which permitted a Referee to reconsider, vary or amend his or her decision after it had been issued. As such, Referee Novick was functus officio, and her jurisdiction was exhausted.

In support of its argument, Metro cites several decisions of the Federal Court, including Canada (Minister of Employment & Immigration) v. Nabiye, [1989] 3 F.C. 424, 102 N.R. 390 (C.A.); Canada (Treasury Board) v. Exley, [1985] F.C.J. No. 331 (C.A.); and MTD Products Ltd. v. Tariff Board of Canada, [1987] 2 F.C. 227, 8 F.T.R. 158.

In my view, the leading case dealing with the principle of functus officio in the context of administrative tribunals is Chandler v. Alberta Assn. of Architects, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577. In that case the Supreme Court of Canada permitted an Alberta tribunal to continue a hearing after it had made an extensive report in which it made findings of unprofessional conduct against several architects. The court found that the tribunal had not disposed of the matter before it and was not, therefore, functus officio. In particular, the tribunal had not decided whether to make any recommendations

which it was required to do by statute.

In Chandler, there was nothing in the governing statute, purporting to confer on the tribunal the power to rescind, vary, amend or reconsider a final decision that it had made. Nevertheless, the majority of the court held that the tribunal was not functus. Sopinka J. said, at pp. 861-62 S.C.R., p. 596-97 D.L.R.:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. Ross Engineering Corp., supra.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If,

however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute: see Huneault v. Central Mortgage & Housing Corp. (1981), 41 N.R. 214 (F.C.A.).

In this appeal we are concerned with the failure of the board to dispose of the matter before it in a manner permitted by the Architects Act. The board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision.

I believe that the flexibility of which Sopinka J. speaks in this passage is appropriate on the present application. Under the ESA the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties accidentally placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision. Moreover, if there were any doubt about this, Referee Novick expressly confirmed her reliance in her subsequent decision dealing with the request for a rehearing. In these circumstances, I think that a fair conclusion is that her first decision, like the tribunal's decision in Chandler, was a nullity. She intended to make a final disposition; however, that disposition was fatally tainted by her reliance on a crucial fact which both parties agree is incorrect. She should be permitted, as was the tribunal in Chandler, "to reconsider the matter afresh and render a valid decision".

Another analogous case, in my view, is a decision of this court in Kingston (City) v. Ontario (Mining & Lands Commissioner) (1977), 18 O.R. (2d) 166 (Div. Ct.). In that case the court permitted a commissioner to reopen a hearing when it

turned out that he had made an order which inaccurately reflected a settlement made by the parties. Southey J. said, at p. 169:

> Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out that the order, through inadvertence or negligence of one or more of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view, is for the interested party to apply to the tribunal to have its order amended. Such an application was made to the Mining Commissioner in this case by the conservation authority; that application was dismissed in a lengthy and carefully written decision dated February 3, 1977, on the ground that the Commissioner had no authority to make the correcting order. One of the grounds for this decision was that the Commissioner was bound in these circumstances by the doctrine of functus officio and could not reopen his decision in the absence of express statutory authority. With the greatest deference to the view of the Commissioner, the doctrine of functus officio, in our judgment, does not prevent a tribunal from reopening a matter and correcting an order made by it, where a mistake has occurred of the nature alleged in this case.

(Emphasis added)

In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.

In conclusion, the flexibility in the application of the principle of functus officio articulated by Sopinka J. in Chandler permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts.

Accordingly, the two decisions of Referee Novick are quashed.

Normally, the matter would be returned to Referee Novick for the rehearing. However, Metro objects to such an order and requests that the matter be referred to a different referee. This submission is based on the final paragraph of Referee Novick's decision refusing the request for a rehearing:

> Finally, and regrettably, I note that had this matter come to my attention after the proclamation of Bill 175, the omnibus government bill which contains several amendments to the Statutory Powers Procedure Act including the provision of a reconsideration power to tribunals to be used in cases "it considers advisable", I would have been able to reconsider the matter.

Metro contends that the words "and regrettably" might presage that the referee intends to change her view of the merits of the case if it is returned to her with a correct agreed statement of facts. I do not read those words in this fashion; I think that the referee is expressing regret that she cannot rehear the matter in light of her understanding of functus officio. Nevertheless, the applicant does not object to the matter being referred to a different referee. It is so ordered.

The applicant does not seek costs. Accordingly, no order of costs is made.

Application allowed.

MVRT

671122 Ontario Ltd. *v.* Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, 2001 SCC 59

Sagaz Industries Canada Inc., Sagaz Industries Inc. and Joseph Kavana *Appellants*

v.

671122 Ontario Limited, formerly Design Dynamics Limited *Respondent*

Indexed as: 671122 Ontario Ltd. *v.* Sagaz Industries Canada Inc.

Neutral citation: 2001 SCC 59.

File No.: 27820.

2001: June 19; 2001: September 28.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Torts -- Vicarious liability -- Employee versus independent contractor -- Original supplier suffering substantial losses when it was replaced as supplier because of bribery scheme in large commercial transaction -- Whether rival supplier vicariously liable to original supplier for tortious conduct of its consultant.

Trial -- Evidence -- Re-opening of trial to admit fresh evidence -- Trial judge declining to reopen trial to admit fresh evidence on a motion brought after

release of reasons but before formal judgment entered -- Whether Court of Appeal erred in substituting its discretion for that of trial judge in decision to reopen trial.

The respondent ("Design") was Canadian Tire's principal supplier of synthetic sheepskin car seat covers for 30 years. In 1984, Design was advised by S, the head of Canadian Tire's automotive division, that the corporate appellants ("Sagaz") would be replacing Design as Canadian Tire's seat cover supplier. S terminated Canadian Tire's supply relationship with Design in favour of Sagaz because of bribery in the form of a "kickback" scheme. Sagaz retained American Independent Marketing Inc. ("AIM"), which was owned and controlled by L, to assist in marketing Sagaz's seat covers. S was to receive two percent of all sales from L and AIM and incorporated a sham corporation to receive this money. S's wrongdoing was discovered and his employment was terminated. New management at Canadian Tire determined it preferred the seat cover products of Sagaz to those of Design and retained Sagaz as its supplier. Having lost its major customer, Design's manufacturing business went into a steep decline and, in 1989, Design brought an action alleging that AIM, L, Sagaz and K, Sagaz's president, had bribed S and, but for the bribes, Design would have continued as supplier to Canadian Tire. At trial, damages were assessed against L and AIM, jointly and severally, including punitive damages. The action was dismissed as against Sagaz and K. After the trial judge's reasons for judgment were released, but before formal judgement was entered, L, who did not testify at trial, gave Design an affidavit admitting to the conspiracy to bribe S and implicating K in it. On the basis of the affidavit, Design brought a motion to have the trial reopened to hear L's fresh evidence. The trial judge dismissed the motion. The Court of Appeal reversed the decisions of the trial judge, finding that Sagaz was vicariously liable to Design and therefore jointly and severally liable with L and AIM for the damages awarded, with the exception of punitive damages. A

new trial was ordered with respect to the liability of K on the basis that the trial judge should have reopened the trial to hear L's evidence.

Held: The appeal should be allowed and the order of the trial judge restored.

The Court of Appeal erred in holding Sagaz vicariously liable to Design. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee. This is distinguished from the relationship of an employer and independent contractor which, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability. The main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm. Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether

the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. Although the contract designated AIM as an "independent contractor", this classification is not always determinative for the purposes of vicarious liability. Looking at the non-exhaustive list of factors set out in *Market Investigations*, it is clear, based on the total relationship of the parties, that AIM was an independent contractor. On the totality of the evidence, AIM was in business on its own account. Absent exceptional circumstances which are not present in this case, it follows that the relationship between Sagaz and AIM, as employer and independent contractor, is not one which attracts vicarious liability.

The Court of Appeal erred in substituting its discretion for that of the trial judge in deciding to reopen the trial. Absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. Appellate courts should defer to the trial judge, who is in the best position to decide whether fairness dictates that the trial be reopened. The case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result. In this case, the trial judge decided not to exercise his discretion to reopen the trial because neither of the two steps of the test in *Scott* was met to his satisfaction. First, he could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. Second, the trial judge found that L's evidence could have been obtained before trial. L's affidavit evidence contradicts his sworn evidence on discovery, particularly with respect to the existence of the bribery scheme which L avoids acknowledging on discovery.

Evidence which is not presumptively credible may fail to probably change the result under the first branch of the test in *Scott*. This is how the trial judge dealt with the affidavit evidence, and he was correct in so doing.

Cases Cited

Referred to: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Scott v. Cook*, [1970] 2 O.R. 769; *Mayer v. J. Conrad Lavigne Ltd.* (1979), 27 O.R. (2d) 129; *Co-operators Insurance Association v. Kearney*, [1965] S.C.R. 106; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553; *Regina v. Walker* (1858), 27 L.J.M.C. 207; *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605; *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161; *Stevenson Jordan and Harrison, Ltd. v. Macdonald*, [1952] 1 *The Times* L.R. 101; *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732; *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092; *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257; *Ladd v. Marshall*, [1954] 1 W.L.R. 1489.

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APPEAL from a judgment of the Ontario Court of Appeal (2000), 46 O.R. (3d) 760, 183 D.L.R. (4th) 488, 128 O.A.C. 46, 2 B.L.R. (3d) 1, 48 C.C.L.T. (2d) 79, 41 C.P.C. (4th) 107, [2000] O.J. No. 121 (QL), reversing the decisions of the Ontario Court (General Division) (1998), 40 O.R. (3d) 229, 42 C.C.L.T. (2d) 50, [1998] O.J. No. 2194 (QL), and [1998] O.J. No. 4018 (QL). Appeal allowed.

H. Lorne Morphy, Q.C., *John B. Laskin* and *M. Paul Michell*, for the appellants.

Martin Teplitsky, Q.C., and *James M. Wortzman*, for the respondent.

The judgment of the Court was delivered by

1 MAJOR J. – This appeal raises two issues: the application of vicarious liability for a bribery scheme in a large commercial transaction and the appellate court's review of the trial judge's exercise of discretion not to reopen the trial to admit fresh evidence on a motion brought after the release of his reasons but before formal judgment was entered.

2 Vicarious liability describes the event when the law holds one person responsible for the misconduct of another because of their relationship. In this case, the respondent (the original supplier) suffered substantial losses when it was replaced as Canadian Tire's synthetic car seat cover supplier. This happened because a bribe was paid by a rival supplier's consultant to the head of Canadian Tire's automotive division.

3 The first question is whether the appellant Sagaz (the rival automotive supplier) is vicariously liable for the tortious conduct of its consultant who was hired to assist in securing Canadian Tire's business. In my opinion the appellant Sagaz, the competitive supplier, is not vicariously liable for the bribery scheme perpetrated by its consultant. The consultant was not an employee of the supplier but an independent contractor. Based on policy considerations, the relationship between an employer and independent contractor does not typically give rise to a claim in vicarious liability.

4 On the second question, the motion to reopen the trial to adduce fresh evidence, I conclude for the reasons that follow that the Court of Appeal erred in substituting its discretion for that of the trial judge.

I. Facts

5 The respondent, 671122 Ontario Limited, formerly Design Dynamics Limited ("Design"), was Canadian Tire Corporation's principal supplier of synthetic sheepskin car seat covers for 30 years. Canadian Tire was the party in the position of strength in the relationship. This is so as it represented more than 60 percent of the

Canadian seat cover market and, by 1983, was Design's largest customer accounting for over 50 percent of its sales.

6 In June 1984, Design lost Canadian Tire's business. Robert Summers, the head of Canadian Tire's automotive division, advised Design that another company, the appellants Sagaz Industries Canada Inc. and Sagaz Industries Inc. (collectively "Sagaz"), would be replacing Design as Canadian Tire's seat cover supplier. Sagaz is a Florida corporation and the appellant, Joseph Kavana, is its president. Sagaz Industries Inc. continues to supply Canadian Tire and Sagaz Industries Canada Inc. is inactive.

7 Summers terminated Canadian Tire's supply relationship with Design in favour of Sagaz because of bribery in the form of a "kickback" scheme. Sagaz retained American Independent Marketing Inc. ("AIM"), a New York corporation, to assist in marketing Sagaz's seat covers to Canadian Tire. AIM was owned and controlled by Stewart Landow. It was later determined that Summers accepted a bribe from Landow and AIM in relation to the Sagaz seat cover contract. Specifically, Summers incorporated a sham corporation, International Marketing Consultants ("IMC"), to receive the bribery money. Summers employed a surrogate, Anthony Brathwaite, as a token manager of IMC. Brathwaite was the puppet of Summers who received all the profits of IMC. Summers entered into an agreement with Landow whereby Landow (through AIM) would pay Summers (through IMC) two percent of all sales by Sagaz to Canadian Tire of synthetic seat covers in order to ensure the sales occurred. As a result of the bribe, Summers terminated Canadian Tire's relationship with Design.

8 Summers' wrongdoing was discovered in 1985. His employment with Canadian Tire was terminated and he was eventually convicted of corruptly accepting benefits and went to prison. He later went bankrupt. Brathwaite pleaded guilty to similar charges.

9 Summers was replaced by new management at Canadian Tire which re-evaluated its purchase of synthetic seat covers. Management determined that it preferred the seat cover products of Sagaz to those of Design. Accordingly, Canadian Tire retained its relationship with Sagaz as its supplier.

10 Having lost its major customer, Design's manufacturing business went into a steep decline. It sold its assets in 1988. In 1989, Design brought an action against some 13 defendants, including Canadian Tire, Summers, Brathwaite, Landow, AIM, Sagaz and Kavana. At the trial, only AIM, Landow (who did not testify), Sagaz and Kavana remained as defendants. Canadian Tire paid Design $750,000 to settle the action against it. The action against Summers was discontinued when he went bankrupt. Design's action alleged that AIM, Landow, Sagaz and Kavana had bribed Summers and, but for those bribes, Design would have continued as supplier to Canadian Tire.

II. Judicial History

A. *Ontario Court (General Division)* (1998), 40 O.R. (3d) 229

11 The trial judge found that the decision of Canadian Tire management to switch suppliers of seat covers had nothing to do with any belief that the Sagaz

product was superior to the Design product. Design's business was lost solely because of the bribe.

12 The bribery scheme was profitable to Landow as commissions on the sales from Sagaz to Canadian Tire would be paid to his solely-owned corporation, AIM. Landow could not hide behind the corporate veil of AIM in his use of the corporation as his agent in the commission of an intentional tort. The trial judge found that Landow and AIM conspired with Summers and IMC to engage in the unlawful conduct of taking away Design's business from Canadian Tire.

13 While the tort of civil conspiracy was sufficient to establish liability, the trial judge found that liability was more directly addressed through the tort of unlawful interference with economic relations, for which Landow and AIM were liable.

14 There were suspicious business dealings raised at the trial in an attempt to implicate Kavana, President of Sagaz, in the bribery scheme. For instance, commissions that Landow received in respect of the sale of seat covers from Sagaz to Canadian Tire. Before Sagaz secured the seat cover contract with Canadian Tire, it was paying Landow a five percent commission on sales. Sagaz then raised Landow's commission from five to six percent. At the same time, or close to it, Landow entered into the agreement with Summers whereby Landow paid Summers two percent in the form of the kickback scheme. It was Design's theory at trial that Landow's commission was raised from five to six percent to fund the bribe to Summers. That implied that Kavana and Landow agreed to share or split the payment of the two percent bribe. Kavana denied involvement in the bribery scheme. He testified that he was misled by Landow in agreeing to change the

commission from five to six percent because Landow told him that he was required to hire someone to provide in-store service in Canada which would entail additional expense. Another suspicious event was the payment of $15,000 by Kavana to Landow in March 1985 which eventually found its way to Robin Addie, a senior buyer for Canadian Tire. Again, Kavana testified and denied any improper conduct. He claimed that Landow told him that this expenditure was tied to the purchase of a car as part of an intended promotion to display the Canadian Tire seat covers. In fact, a car was never purchased.

15 These suspicious circumstances surrounding Kavana were presented at the trial. The trial judge believed Kavana, found him credible and accepted his evidence that he had trusted Landow and had accepted Landow's explanation about the commission and car purchase. As well Summers did not implicate Kavana in his testimony. The trial judge concluded that Kavana was not involved in the bribery scheme. He pointed out that had Kavana known of the bribe by Landow then Kavana and Sagaz would have been held directly liable and obviously vicarious liability would not have been an issue.

16 The trial judge was brief on the issue of whether Sagaz was vicariously liable to Design for the wrongdoing of Landow and AIM. He held that, on the evidence, AIM was an independent contractor to Sagaz. Citing *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, he held that vicarious liability could not and should not be imposed upon Sagaz for the tortious acts of an independent contractor.

17 Damages were assessed at $1,807,500 against Landow and AIM, jointly and severally, plus $50,000 in punitive damages, and pre-judgment interest. The

action was dismissed as against Sagaz and Kavana. The trial judge refused to award Sagaz and Kavana their costs against Design, but awarded Sagaz and Kavana their costs against Landow and AIM under a "Sanderson order".

B. *Ontario Court (General Division)*, [1998] O.J. No. 4018 (QL)

18 After the trial judge's reasons for judgment were released, but before formal judgment was entered, Landow, who did not testify at the trial, gave Design an affidavit admitting to the conspiracy to bribe Summers and implicating Kavana in it. On the basis of the affidavit, Design brought a motion before the trial judge pursuant to rule 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to have the trial reopened to hear Landow's fresh evidence. Design claimed that the fresh evidence would show that Kavana was involved in and had knowledge of the tortious activity of Landow, and was also liable to Design.

19 The trial judge dismissed the motion. He found that there was no direct evidence at trial that Kavana was a party to the bribe paid to Summers. Summers dealt directly with Landow. Summers did not implicate Kavana in his testimony. Kavana testified and denied involvement in the bribe. He was subjected to a thorough and rigorous cross-examination and was credible in his testimony. Landow did not testify nor attend the trial. He was represented by counsel throughout the trial. In the cross-examination of Landow on his affidavit given in connection with the fresh evidence motion, Landow acknowledged that he was aware of his right to attend the trial and to testify. He received daily reports about the course of the trial over its duration.

20 In dismissing the motion to reopen the trial, the trial judge applied a two-part test from *Scott v. Cook*, [1970] 2 O.R. 769 (H.C.). First, would the evidence, if presented at trial, probably have changed the result? Second, could the evidence have been obtained before trial by the exercise of reasonable diligence?

21 The trial judge found that neither of the two steps was met. He could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. As well, if the trial were reopened, Landow's evidence might well not be believed. His credibility would be very much in issue. On the second part of the test, the trial judge found that Landow's evidence could have been obtained before trial. Design could have compelled Landow to testify under oath at trial, although that evidence may not have been helpful to Design. The trial judge concluded that the court would not allow a party to correct what in hindsight was an unsuccessful strategy at trial.

C. *Ontario Court of Appeal* (2000), 183 D.L.R. (4th) 488

22 The Court of Appeal reversed the decisions of the trial judge. The gist of its view was that Sagaz was vicariously liable to Design. Applying the "organization test" (from *Mayer v. J. Conrad Lavigne Ltd.* (1979), 27 O.R. (2d) 129 (C.A.), as previously approved by this Court in *Co-operators Insurance Association v. Kearney*, [1965] S.C.R. 106), the Court of Appeal found that Landow and AIM did their work as part of the "Sagaz sales team". Sagaz was therefore jointly and severally liable with Landow and AIM for the damages awarded, with the exception of punitive damages. For this reason, the Court of Appeal also allowed Landow's and AIM's cross-appeal on the issue of costs and set aside the costs award to Sagaz and Kavana against Landow and AIM. Design was entitled to costs against Sagaz.

23 A new trial was ordered with respect to the liability of Kavana on the basis that the trial judge should have reopened the trial to hear Landow's evidence. The Court of Appeal found that the evidence, if presented at trial and accepted as credible, would implicate Kavana and Sagaz in the bribery scheme. Also, it held that Landow's evidence was not discoverable by reasonable diligence prior to trial as Design made serious efforts to no avail to persuade Landow to co-operate and to testify against Kavana and Sagaz.

III. Issues

24 1. Did the Court of Appeal err in holding Sagaz vicariously liable to Design?

2. Did the Court of Appeal err by substituting its discretion for that of the trial judge in the decision to reopen the trial?

IV. Analysis

A. *Vicarious Liability*

(1) Policy Rationale Underlying Vicarious Liability

25 Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to

vicarious liability is the relationship between master and servant, now more commonly called employer and employee.

26 In general, tort law attempts to hold persons accountable for their wrongful acts and omissions and the direct harm that flows from those wrongs. Vicarious liability, by contrast, is considered to be a species of strict liability because it requires no proof of personal wrongdoing on the part of the person who is subject to it. As such, it is still relatively uncommon in Canadian tort law. What policy considerations govern its discriminate application?

27 As Fleming stated in an oft-quoted passage:

> [T]he modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations....
>
> (*The Law of Torts* (9th ed. 1998), at p. 410, cited in *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 26, *per* McLachlin J. (as she then was); see also *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, released concurrently, at para. 29, *per* Binnie J.)

However, McLachlin J. noted in *Bazley*, at para. 27 (cited in *Jacobi*, at para. 29) that "[a] focus on policy is not to diminish the importance of legal principle."

28 The most recent discussion by this Court of the policy considerations that justify the imposition of vicarious liability was in *Bazley*, at paras. 26-36, where McLachlin J. succinctly reviewed the relevant jurisprudence. She began with La Forest J.'s opinion (dissenting on the cross-appeal) in *London Drugs*, *supra*, which held that vicarious liability is generally considered to rest on one of two logical bases.

The first, known as the "master's tort theory", posits that the employer is vicariously liable for the acts of his employee because the acts are regarded as being authorized by him so that in law the acts of the employee are the acts of the employer. The second, known as the "servant's tort theory", attributes liability to the employer simply because the employer was the employee's superior and therefore in charge or command of the employee (G. H. L. Fridman, *The Law of Torts in Canada* (1990), vol. 2, at pp. 314-15, and P. S. Atiyah, *Vicarious Liability in the Law of Torts* (1967), at pp. 6-7).

29 However, La Forest J. acknowledged that neither of the logical bases for vicarious liability succeeds completely in explaining the operation of the doctrine, and he found that the vicarious liability regime is a response to a number of policy considerations, including compensation, deterrence and loss internalization (*London Drugs*, *supra*, at p. 336). McLachlin J. noted that Fleming identified similar policies to justify the imposition of vicarious liability, including the provision of a just and practical remedy for the harm and the deterrence of future harm, and held that these two ideas "usefully embrace the main policy considerations that have been advanced" (*Bazley*, *supra*, at para. 29).

30 Identification of the policy considerations underlying the imposition of vicarious liability assists in determining whether the doctrine should be applied in a particular case and it is for that reason that the policy considerations set out by this Court in *Bazley* should be briefly reviewed.

31 First, vicarious liability provides a just and practical remedy to people who suffer harm as a consequence of wrongs perpetrated by an employee. Many commentators are suspicious of vicarious liability in principle because it appears to

hold parties responsible for harm simply because they have "deep pockets" or an ability to bear the loss even though they are not personally at fault. The "deep pockets" justification on its own does not accord with an inherent sense of what is fair (see also R. Flannigan, "Enterprise control: The servant-independent contractor distinction" (1987), 37 *U.T.L.J.* 25, at p. 29). Besides an ability to bear the loss, it must also seem just to place liability for the wrong on the employer. McLachlin J. addresses this concern in *Bazley*, *supra*, at para. 31:

> Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.

Similarly, Fleming stated that "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise" (p. 410). McLachlin J. states that while the fairness of this proposition is capable of standing alone, "it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society" (*Bazley*, at para. 31). Finally on this point, it is noteworthy that vicarious liability does not diminish the personal liability of the direct tortfeasor (Fleming, *supra*, at p. 411; *London Drugs*, *supra*, at p. 460, *per* McLachlin J.).

32 The second policy consideration underlying vicarious liability is deterrence of future harm as employers are often in a position to reduce accidents and

intentional wrongs by efficient organization and supervision. This policy ground is related to the first policy ground of fair compensation, as "[t]he introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it" (*Bazley*, *supra*, at para. 34).

(2) Employee Versus Independent Contractor

33 The most common relationship that attracts vicarious liability is that between employer and employee, formerly master and servant. This is distinguished from the relationship of an employer and independent contractor which, subject to certain limited exceptions (see Atiyah, *supra*, at pp. 327-78), typically does not give rise to a claim for vicarious liability. If a worker is determined to be an employee as opposed to an independent contractor such that vicarious liability can attach to the employer, this is not the end of the analysis. The tortious conduct has to be committed by the employee in the course of employment. For the reasons that follow, this second stage of the analysis is not relevant and need not be analysed in the present appeal.

34 What is the difference between an employee and an independent contractor and why should vicarious liability more likely be imposed in the former case than in the latter? This question has been the subject of much debate. The answer lies with the element of control that the employer has over the direct tortfeasor (the worker). If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied. See Flannigan, *supra*, at pp. 31-32:

> This basis for vicarious liability discloses a precise limitation on the scope of the doctrine. If the employer does not control the activities of the worker it is clear that vicarious liability should not be imposed, for then insulated risk-taking [by the employer] does not occur. Only the worker, authorized to complete a task, could have affected the probability of loss, for he alone had control in any respect. Thus, because there is no mischief where employer control is absent, no remedy is required.

35 Explained another way, the main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm (*Bazley*, *supra*, at para. 29). Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. Each of these policy justifications is relevant to the ability of the employer to control the activities of the employee, justifications which are generally deficient or missing in the case of an independent contractor. As discussed above, the policy justifications for imposing vicarious liability are relevant where the employer is able to control the activities of the employee but may be deficient in the case of an independent contractor over whom the employer has little control. However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. For the reasons discussed below, reliance on control alone can be misleading, and there are other relevant factors which should be considered in making this determination.

36 Various tests have emerged in the case law to help determine if a worker is an employee or an independent contractor. The distinction between an employee and an independent contractor applies not only in vicarious liability, but also to the

application of various forms of employment legislation, the availability of an action for wrongful dismissal, the assessment of business and income taxes, the priority taken upon an employer's insolvency and the application of contractual rights (Flannigan, *supra*, at p. 25). Accordingly, much of the case law on point while not written in the context of vicarious liability is still helpful.

37 The Federal Court of Appeal thoroughly reviewed the relevant case law in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. As MacGuigan J.A. noted, the original criterion of the employment relationship was the control test set out by Baron Bramwell in *Regina v. Walker* (1858), 27 L.J.M.C. 207, and adopted by this Court in *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605. It is expressed as follows: "the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work" (*Hôpital Notre-Dame de l'Espérance*, *supra*, at p. 613).

38 This criterion has been criticized as wearing "an air of deceptive simplicity" (Atiyah, *supra*, at p. 41). The main problems are set out by MacGuigan J.A. in *Wiebe Door*, *supra*, at pp. 558-59:

> A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to

> highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

39 An early attempt to deal with the problems of the control test was the development of a fourfold test known as the "entrepreneur test". It was set out by W. O. Douglas (later Justice) in "Vicarious Liability and Administration of Risk I" (1928-1929), 38 *Yale L.J.* 584, and applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), at p. 169:

> In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.

40 As MacGuigan J.A. notes, a similar general test, known as the "organization test" or "integration test" was used by Denning L.J. (as he then was) in *Stevenson Jordan and Harrison, Ltd. v. Macdonald*, [1952] 1 *The Times* L.R. 101 (C.A.), at p. 111:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract

> for services, his work, although done for the business, is not integrated into it but is only accessory to it.

41 This decision imported the language "contract of service" (employee) and "contract for services" (independent contractor) into the analysis. The organization test was approved by this Court in *Co-operators Insurance*, *supra* (followed in *Mayer*, *supra*), where Spence J. observed that courts had moved away from the control test under the pressure of novel situations, replacing it instead with a type of organization test in which the important question was whether the alleged servant was part of his employer's organization (from Fleming, *supra*, at p. 416).

42 However, as MacGuigan J.A. noted in *Wiebe Door*, the organization test has had "less vogue in other common-law jurisdictions" (p. 561), including England and Australia. For one, it can be a difficult test to apply. If the question is whether the activity or worker is integral to the employer's business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account (see R. Kidner, "Vicarious liability: for whom should the 'employer' be liable?" (1995), 15 *Legal Stud.* 47, at p. 60). As MacGuigan J.A. further noted in *Wiebe Door*, if the main test is to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would always meet the organization test of an employee even though this criterion may not accurately reflect the parties' intrinsic relationship (pp. 562-63).

43 Despite these criticisms, MacGuigan J.A. acknowledges, at p. 563, that the organization test can be of assistance:

> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in *Montreal*] addressed the question "Whose business is it?" [Emphasis added.]

44 According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 737-38 (followed by the Privy Council in *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374, *per* Lord Griffiths, at p. 382):

> The observations of LORD WRIGHT, of DENNING, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always

> have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. [Emphasis added.]

45 Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, *supra*, sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in *London Drugs* where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents."

46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many

variables of ever changing employment relations . . ." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

(3) Application to the Facts

49 According to the agreement between Sagaz and AIM dated January 29, 1985, AIM was hired to "provide assistance to Sagaz in retaining the goodwill of [Canadian Tire]". Although the contract designated AIM as an "independent contractor", this classification is not always determinative for the purposes of vicarious liability. The starting point for this analysis is whether AIM, while engaged to perform such services for Sagaz, was in business on its own account. If so, AIM is an independent contractor as opposed to an employee of Sagaz and vicarious liability likely will not follow. It is helpful to examine the non-exhaustive list of factors from *Montreal* and *Market Investigations* to assist in this determination.

50 There is some evidence to suggest that Landow and AIM were employees of Sagaz. In other words, in response to the query "whose business is it?", there is some suggestion that Landow worked in what was characterized as a "joint effort" with Sagaz sales managers in order to secure Canadian Tire's business. Specifically, although it was Landow's duty under the contract to obtain Canadian Tire's business and maintain its goodwill, the first letter sent to Canadian Tire on behalf of Sagaz was written by Canadian Tire's national sales manager, David English, who gave price quotations. The first meeting was attended by Landow, English and Kavana. Following that meeting, revised price quotations were sent by English. Landow's role was limited to presenting prices that were set and negotiated by Kavana and English and he required instructions with respect to terms and various other aspects of the

business that he was conducting on Sagaz's behalf. Quotations given to Canadian Tire did not disclose Landow as a sales representative. Rather, the space on the invoice for the sales representative was left blank and the account was characterized as a "house account".

51 There was also some issue made about the fact that in a letter dated June 12, 1984, Landow communicated with Canadian Tire directly using Sagaz's letterhead. On cross-examination, Kavana admitted that Landow had been supplied with Sagaz letterhead. The courts below speculated that these factors came about because Canadian Tire preferred to deal with its suppliers, like Sagaz, directly and not through external sales agents.

52 On the other hand, there are some compelling points which indicate that AIM and Sagaz were separate legal entities, some of which are that AIM had its own offices, located in New York, while the Sagaz head offices were located in Florida. According to the agreement between the parties, AIM was to pay all of its own costs of conducting its business, including travel expenses, commissions and other compensation of salespersons employed by it. AIM remained free to carry on other activities and represent other suppliers provided that it did not take on any competing lines of business.

53 With respect to AIM's responsibility for investment and management, Sagaz did not either specify or control how much time AIM was to devote to representing them in maintaining their goodwill with Canadian Tire, or to performing in-store services. Similarly, it was up to AIM and Landow to decide how many, if any, trips Landow would take to Toronto. According to the agreement and Kavana's testimony, AIM had no authority to bind the Sagaz company.

54 In terms of a risk of loss or an opportunity for profit, Landow and AIM worked on commission on sales of Sagaz's products. As such, the risk of loss and the opportunity for profit depended on whether AIM's expenses (such as travel expenses) exceeded its commissions.

55 Central to this inquiry is the extent of control that Sagaz had over AIM. While Sagaz directed the prices, terms and other conditions that AIM was to negotiate on Sagaz's behalf, AIM was ultimately in control of providing assistance to Sagaz in retaining the goodwill of Canadian Tire. Again, AIM decided how much time to devote to Sagaz and how much time to devote to its services for other supply companies. Although Sagaz controlled what was done, AIM controlled how it was done. This indicates that Landow was not controlled by Sagaz.

56 In my opinion, the contravening factors such as the suggestion that the Canadian Tire account was a "house account" and the one letter written by Landow on Sagaz's letterhead, while of interest, are not sufficient to show that AIM was an employee as part of the Sagaz "sales team". I agree with the courts below that these factors likely came about because Canadian Tire preferred to deal with its suppliers, like Sagaz, directly and not through external sales agents. Looking at the non-exhaustive list of factors set out in *Market Investigations*, *supra*, including ownership of tools, hiring its own helpers, the degree of financial risk or opportunity for profit by AIM and the responsibility for investment and management, it is clear to me that, based on the total relationship of the parties, AIM was an independent contractor.

57 On the totality of the evidence, I agree with the trial judge that AIM was in business on its own account. Absent exceptional circumstances which are not present in this case (see Atiyah, *supra*, atpp. 327-49), it follows that the relationship between Sagaz and AIM, as employer and independent contractor, is not one which attracts vicarious liability. In finding that AIM was an independent contractor and not an employee in relation to Sagaz, I need not consider the second stage of the analysis which inquires into whether the tortious conduct of an employee was committed within the scope of employment.

58 Design submitted that if AIM was not an independent contractor, then AIM was an agent of Sagaz and therefore Sagaz was liable for the economic tort committed by AIM in the scope and course of its authority. Absent evidence to the contrary, it cannot be presumed that the scope of AIM's authority in providing "assistance to Sagaz in retaining the goodwill of [Canadian Tire]" was so broad as to include unlawful means such as bribery. This is confirmed by the finding of the trial judge at p. 241 that "Mr. Kavana was not a party to the conspiracy of Messrs. Summers and Landow". As well he also found at p. 245 "that it has not been proven on a balance of probabilities that Mr. Kavana knew of the bribery by Mr. Landow". In the result, the payment of the bribe by AIM to Summers exceeded the actual and apparent authority of AIM as representative of Sagaz.

B. *Motion to Reopen the Trial*

59 After the trial judge's reasons were released, but before the formal judgment was entered, Landow, who did not testify at trial, gave Design an affidavit admitting to the conspiracy to bribe and implicating Kavana in the conspiracy. Design brought a motion to have the trial reopened to hear the fresh evidence. The trial judge applied the two-part test from *Scott*, *supra*, to assist in determining whether

to exercise his discretion to reopen the trial. First, he decided that the evidence, if presented at trial, probably would not have changed the result. Second, he found that the evidence could have been obtained before trial by the exercise of reasonable diligence. The Court of Appeal overturned the trial judge's decision, having found that he erred on both branches of the test and that the trial should have been reopened to hear Landow's evidence. Was the Court of Appeal in error to reverse the trial judge's exercise of discretion to refuse to reopen the trial?

60 This Court provided in *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at para. 26:

> It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial.

Appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened. See *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257 (B.C.C.A.), at p. 295:

> [The trial judge] would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof.

61 Further, the case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and

abuse of the Court's processes" do not result (see *Clayton*, *supra*, at p. 295, cited in *Scott*, at p. 774).

62 In this case, the trial judge decided not to exercise his discretion to reopen the trial because neither of the two steps of the test in *Scott*, *supra*, was met to his satisfaction. First, he found that he could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. If the trial were to be reopened, Landow's evidence might well not be believed. His credibility would be in issue. Second, the trial judge found that Landow's evidence could have been obtained before trial. Design could have compelled Landow to testify under oath at trial. While this carried some risk, the trial judge viewed it as a trial strategy, a conclusion he was entitled to reach.

63 In my opinion, the Court of Appeal erred in substituting its discretion for that of the trial judge in deciding to reopen the trial. On the first branch of the test set out in *Scott*, the trial judge found that Landow's credibility would be in issue whereas the Court of Appeal found it difficult to see how the trial judge could make this determination without hearing Landow testify. In the Court of Appeal's determination, it was not sufficiently clear that Landow would be disbelieved. I disagree with the Court of Appeal on this point. Landow's affidavit evidence contradicts his sworn evidence on discovery, particularly with respect to the existence of the bribery scheme which Landow avoids acknowledging on discovery. To this significant extent, Landow is akin to a recanting liar. Lord Denning's comments in *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.), at p. 1491, are applicable:

> It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial,

> three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.
>
> We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to 'tell the truth'". It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. [Emphasis added.]

64 These comments, in my opinion, apply with equal force to the present case. Landow is akin to a "recanting liar" because he failed to tell his "truth" when he had the opportunity to do so on discovery and again when he declined to testify at trial. Although the determination in *Ladd* was made under the third branch of the test applied in that case, a branch that is absent from the two-part test in *Scott*, the application of the *Scott* test to the situation of a "recanting liar" has the same result in this case. Evidence which is not presumptively credible may fail to probably change the result under the first branch of the test in *Scott*. This is how the trial judge dealt with the affidavit evidence, and in my view he was correct in so doing. Further, it cannot be ignored that the trial decision imposing liability on Landow and AIM provided incentive for Landow to attempt to shift some responsibility to Kavana in order to share the liability of the corresponding damage award. The trial judge had also seen the evidence of Kavana in the first instance, which he found to be credible even in the face of a vigorous cross-examination.

65 The court in *Scott* mandated that both branches of the test to reopen a trial to admit fresh evidence must be met. Having failed to meet the first branch of the test, it is unnecessary to examine whether the precluded evidence in this case could have been obtained by the exercise of reasonable diligence. It is sufficient to say that that too is a matter largely within the discretion of the trial judge and, absent error by him, that finding should not be interfered with.

V. Disposition

66 The appeal is allowed with costs to the appellants in this Court and in the Court of Appeal. The order of the Court of Appeal is set aside. The order of Cumming J., dated December 23, 1998, is restored.

Appeal allowed with costs.

Solicitors for the appellants: Torys, Toronto.

Solicitors for the respondent: Teplitsky, Colson, Toronto.

COURT FILE No.: 407/08
DATE: 2014-10-28
Citation: *Windsor-Essex Children's Aid Society v. T.R.*, 2014 ONCJ 563

ONTARIO COURT OF JUSTICE

B E T W E E N :

WINDSOR-ESSEX CHILDREN'S AID SOCIETY,

Applicant,

— AND —

T.R. and
R.P.

Respondents.

Before Justice Barry M. Tobin
Heard on September 4, 2014
Released on October 28, 2014

Frank Philcox ..... **for the applicant Society**
J.J. Avery ..... **for the Respondent, T.R.**
R.P. ..... **on his own behalf**
Michael Frank ..... **for the Office of the Children's Lawyer, legal representative for the child**

TOBIN J.:

RULING ON MOTION

[1] The respondent, T.R., ("mother"), moves for an order setting aside my Order of February 3, 2014, ("Order") which made her daughter K.E.P., born [...], 2010, ("child") a ward of the Crown with no access.

[2] The mother brings this motion pursuant to Rule 59.06(2)(a) of the *Rules of Civil Procedure* which allows the court to set aside an order on the basis of "facts arising or discovered after it was made". She also asks that the child be placed in her care under "strict terms of supervision".[1]

1: ISSUES RAISED

[3] The issues raised on this motion are:

a) whether Rule 59.06(2)(a) should apply in this child protection matter;

[1] Notice of Motion, C.R. Vol 6, Tab 23.

b) if Rule 59.06(2)(a) does apply, should the Order be set aside on the basis of facts arising or discovered after it was made; and

c) if set aside, should the child be placed in the mother's care subject to terms of supervision.

2: FACTS

[4] The Society brought a Status Review Application, issued March 1, 2012, concerning the child in which it sought a finding that the child remained in need of protection and an order making her a ward of the Crown without access.

[5] In the mother's Answer, she pleaded that the child was not in need of protection. In the alternative, if found to be in need of protection, she requested that the child be returned to her care.

[6] This case was tried over eight days before me between September 30 and December 10, 2013. Reasons for Judgment were released on February 3, 2014. The child was found to remain in need of protection and was ordered to be a ward of the Crown without access to the respondents.

[7] The reasons for judgment stated the following with respect to the continued finding:

> "**[58]** I find that the child remains in need of protection under subclauses 37(2)(b)(i) and (ii). There is a risk this child is likely to suffer physical harm in the manner described in these subclauses based upon the following:
>
> 1) There has been a longstanding pattern of non-compliance with terms of supervision orders designed to protect the children. [The mother] failed to sign a release when asked. She would not refer [her other children] D. and C. to Windsor Regional Children's Centre. She introduced the children to a new partner in circumstances where she was not to do so. She had a history of being in relationships where there was domestic violence. She allowed [R.P.], a person the court ordered should not have contact with the children, access to the children. She has not undertaken counselling recommended for her; and
>
> 2) Failure to demonstrate an ability or a willingness to abide by terms of supervision raises the risk of harm to the child. [The mother] has, in many respects, failed to address the causes for the child being in need of protection. Her actions speak to her exercising poor judgment."

and the following with respect to disposition:

> "**[92]** The observations and opinions of Dr. McGrory were clear and have been accepted by the court. [The mother] did not engage in meaningful counselling. Dr. McGrory identified challenges for [the mother]: addressing her low self-esteem, ability to cope, poor problem solving ability and vulnerability in relationships. These have not been addressed though [the mother] has been given considerable time to do so. She allowed contact with Mr. Pitt at a time when she was about to have K. returned to her care. She also was seeing other males at that time, contrary to the term of supervision that male persons be vetted.
>
> **[94]** [The mother] did not exercise access diligently so as to demonstrate she was committed to developing and strengthening a relationship with K. Many of her reasons for not attending access demonstrated that visiting with K. was not a primary priority for her. The evidence of the access supervisors, whose duty it was to observe and record access visits, did not disclose that when access took place the child's relationship and emotional ties to her mother and siblings was being enhanced.
>
> **[95]** The child has been in care for over three years. Permanency planning is essential.
>
> **[96]** [The mother] has not addressed those risk factors which give rise to the child remaining in need of protection. I am not satisfied that the permanency planning so required by this child can be achieved if she is in the care of the respondent mother. The child's emotional needs would not be met by having her placement in the care of her mother be uncertain. The significance of the child-centered approach is that good intentions are not enough. The test is not whether the parent has seen the light and intends to change, but whether they have in fact changed and are now able to give the child the care that is in his or her best interests. There is not to be experimentation with a child's life with the result that in giving the parent another chance, the child would have one less chance: *Children's Aid Society of Winnipeg (City) v. R.*, (1980), 19 R.F.L. (2d) 232 (Man. C.A.). There has to be some demonstrated basis for a determination that the parent is able to parent the child without endangering her safety: *Children's Aid Society of Brockville, Leeds and Grenville v. C.*, 2001 CarswellOnt 1504 (Ont. Sup.Ct.).
>
> **[97]** K. remains in the care of the same family with whom she has resided since she was brought into foster care, the day after her birth. While this family has not decided whether they will adopt her, the evidence is and I accept that if they choose not to adopt her, K. can remain with them until she is adopted. This plan would allow for continuity in the child's care."

[8] An appeal from the Order was filed by the mother on March 5, 2014. Within that appeal proceeding, the mother brought a motion in the Superior Court of Justice seeking a stay of the "no access" provision of the Order. This motion was dismissed by Justice Quinn on April 17, 2014.

[9] The factum filed by the mother on this motion states that subsequent to the dismissal of the stay motion, a motion to dismiss the appeal was brought "for want of transcripts." The appeal was then withdrawn by the mother on a without costs basis.

[10] It was after the appeal was withdrawn that the mother states fresh evidence came to her attention.

3: ANALYSIS

3.1: Should Rule 59.06(2)(a) Apply?

[11] The mother did not make any reference to the *Family Law Rules* in her notice of motion or factum as a basis upon which the relief requested could be brought.

[12] The *Family Law Rules* apply to all cases heard in courts that exercise jurisdiction under the *Child and Family Services Act, Part III:* See *Family Law Rules* , subrule 1(2). [2] The Order that the mother seeks to set aside was made under *Child and Family Services Act, Part III.*

[13] It is only where the *Family Law Rules* do not cover a matter adequately that a court may give directions and, if the court considers it appropriate, decide the matter by reference to the *Rules of Civil Procedure*: See *Family Law Rules* subrule *1(7).*

[14] The submission on behalf of the mother is that evidence came to her attention after the Order was made which may undermine important findings of fact upon which it was made and consequently it must be set aside. It is submitted by the mother that the best interests of the child are put in issue as a result.

[15] The *Family Law Rules* do not contain any provisions that allow an order to be set aside on the basis of facts arising or discovered after an order is made. Rule 25(19) is formulated as follows:

> "25(19) The court may, on motion, change an order that,
>
> (a) was obtained by fraud;
>
> (b) contains a mistake;
>
> (c) needs to be changed to deal with a matter that was before the court but that it did not decide;
>
> (d) was made without notice; or

[2] Except the Court of Appeal: *Ireland v Ireland* 2011 ONCA 263

(e) was made with notice, if an affected party was not present when the order was made because the notice was inadequate or the party was unable, for a reason satisfactory to the court, to be present."

[16] Rule 25(19) provides that a court may change – though not set aside – an order in certain enumerated circumstances but not on the basis of facts arising or discovered after the order was made.

[17] The ability of a party to make a motion to set aside an order in civil proceedings on the basis of "facts arising or discovered after [an order] was made" is provided for in *Rules of Civil Procedure,* Rule 59.06(2)(a). This Rule is formulated as follows:

"59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed."

[18] The use and limits associated with Rule 59.06(2) were considered in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R.(3d) 257 (Ont. C.A.) where the court, at para. 39 stated:

> "A party who would otherwise be bound by a previous judgment can bring an action to set aside that judgment. ...Rule 59.06 allows that kind of relief to be claimed by way of a motion in the original proceedings. The rule does not, however, confer the power to set aside a previous judgment, nor does it articulate a test to be applied in deciding whether a previous judgment should be set aside. The rule merely provides a more expeditious procedure for seeking that remedy: *Glatt v. Glatt, supra*; *Braithwaite v. Haugh* (1978), 19 O.R. (2d) 288 (Ont. Co. Ct.), at 289. The language of Rule 59.06 does, however, provide insight into the varied factual circumstances which may give rise to motions to set aside a judgment."

[19] The *Family Law Rules* do not provide for this expeditious procedure.

[20] Society counsel concedes that for the purpose of this motion Rule 59.06(2)(a) should apply. As the issue was not argued by counsel, I will assume without deciding that it is appropriate to consider this motion by reference to Rule 59.06(2)(a).[3]

[3] It is not a simple matter to decide whether the absence of a particular point in the Family Law Rules was deliberate or not. See *Starr v. Gordon*, 2010 ONSC 4167 (Ont. S.C.J.) para.14.

3.2: Should the Order be set aside?

Legal principles

[21] Case law decided under rule 59.06 (2)(a) establishes that a party wanting to set aside an order on the basis of new or newly discovered evidence must offer evidence that meets the following conjunctive criteria:

1. The evidence would probably have changed the result at trial;
2. The evidence must be apparently credible; and
3. The evidence could not, with reasonable diligence, have been obtained at the time of the trial.

See *Dawi v. Armstrong* (1992), 17 CPC (3d), 196 (O.C.G.D.) [affd. (1993), 17 C.P.C. (3d), 196n (Ont. C.A.)]

[22] The onus is on the moving party to demonstrate that all of the criteria are met so as to justify making an exception to the fundamental rule that final judgments are final.

[23] This rule is to be applied strictly because finality is the norm and exceptions are rare: See *Tsaoussis (Litigation Guardian of) v. Baetz, supra*; *L.R.F. v. D.M.H.*, [1999] O.J. 2757 (Ont. S.C.J.) at para 15. This strict application must be the case where the order sought to be set aside was made under the *Child and Family Services Act Part III*. Any decision to set aside the order must take into account the paramount purpose of that *Act* which is to promote the best interest, protection and well-being of children. The evidence presented in support of the set-aside request must be sufficiently cogent – in the context of these legal principles – to upset the finality and permanency of the plan in place that was made in the child's best interests.

Legal principles applied

[24] The mother relies upon the evidence now offered by R.P., K.K. and L.D. as being new or newly discovered.

[25] The mother also provided evidence that purports to reply to the findings made in the judgment following the trial. This evidence is not helpful on this motion to set aside the Order. A misapprehension of the evidence could have been dealt with in an appeal.

(i) The evidence of R.P.

[26] The respondent, R.P., is the child's father. He attended the first three days of the trial though his counsel attended throughout. He did not give evidence at the trial.

[27] Evidence regarding R.P.'s involvement with the mother and her children was given at the trial by Society workers. In summary, this evidence was as follows:

a) The Society and mother planned for the child to be placed in her care beginning February 28, 2012.

b) On February 27, 2012, the day before the scheduled return, R.P. made a number of disclosures to the Society worker.

c) He advised that during the previous few months he had been attending the mother's home and had access with the mother's three children, contrary to existing court orders.

d) This disclosure was corroborated by a video on his cell phone which depicted the interior of the mother's apartment and the child, D., seated on a couch.

e) As well, R.P. allowed the worker to listen in on a telephone conversation between him and the mother. Their conversation was consistent with their having an ongoing relationship.

f) He was able to describe a recent event in the mother's home where one of the children lost a tooth.

g) He told the worker about the steps that he and the mother took to hide his presence from Society workers, including having the children refer to him by a different name.

h) Society workers interviewed the children who made statements that were admitted at trial which corroborated R.P.'s disclosures.

[28] On the basis of this information provided to the society worker the child was not returned to the mother's care as had been planned.

[29] R.P.'s affidavit, sworn May 5, 2014, was filed in support of the mother's

request to set aside the Order. The new or newly discovered evidence contained in the affidavit and relied upon by the mother is as follows:

a) He was not aware of the damage his disclosures made to the Society would have upon the mother.

b) He acted out of jealousy.

c) He had no reason to be jealous.

d) He did not attend for access or visit with the children at the mother's home rather they spoke with each other by telephone. That is how we learned one of the mother's other children lost a tooth.

e) The video he showed to the worker was sent to him by the mother and then downloaded to his telephone. That is how it came to be in his possession and on his telephone.

[30] The evidence now presented by R.P. is not sufficient to support setting aside the Order for three reasons; it is not new evidence, it would not have changed the outcome, and his credibility is in question.

it is not new evidence

[31] The mother was aware that R.P. recanted his statement to the worker well before the trial took place. R.P. swore an affidavit on March 9, 2012 wherein he retracted everything he had said earlier in 2012 to the worker. This evidence could have been put before the court by compelling R.P. to testify at the trial. The mother has not shown that R.P.'s evidence, as contained in his affidavit sworn May 5, 2014, could not have been put forward by the exercise of reasonable diligence.

[32] The mother was aware that the Society was relying upon the video found on R.P.'s telephone in support of its case. She did not deal with this evidence as part of her case. R.P.'s evidence on this point is not evidence that would constitute facts discovered after the Order was made.

it would not have changed the outcome

[33] The finding that the child remained in need of protection and the disposition order were based on facts in addition to the disclosures made by R.P. His disclosures of February 27, 2012 precipitated the apprehension but were but one factor in the determination that the child remained in need of protection and the disposition made was in the her best interests.

his credibility is in question

[34] Even if R.P.'s evidence could somehow be considered as fresh evidence, there is another reason I doubt it would change the result. Because he changed his story, R.P.'s credibility would be an issue.

[35] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the court considered an appeal from a trial judge's decision not to re-open a trial after reasons were released but before the formal judgment was entered. In that case, on the motion to reopen, a witness swore an affidavit admitting to certain activities that helped the defendant's case. This evidence was contrary to evidence he had given on discovery and the basis for the motion to re-open. The court upheld the trial judge's decision not to re-open the case in part because of the problem with the witness' credibility. In upholding the trial judge, the court made reference to Lord Denning's comments in *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.) at p. 1491, as being applicable:

> "It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.
>
> We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to 'tell the truth.'" It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. [Emphasis added.]"

[36] R.P. was not under oath when he made the disclosures to the Society but he knew they would affect the return of the child to the mother. He explained that he acted at first instance because he was jealous. Knowing how important this evidence would be at the trial his explanation for not attending – because he was working out of town – is not a good excuse. It does not explain sufficiently why he would tell the truth now. His initial disclosures, recanting before trial, failing to attend the trial, and evidence presented now affects his credibility, especially in light of the evidence presented at the trial which corroborated his disclosures. It would have been helpful had he provided evidence that corroborated his recanted

version of events.

(ii) The Evidence of K.K.

[37] The evidence of K.K., contained in her affidavit of May 8, 2014, was known to the mother before the trial but not put in evidence by her trial counsel. She did not testify at the trial. The mother submits that the evidence of K.K. is important for the court to review.

[38] Ms. K.K.'s evidence is that she is a neighbour and friend of the mother and describes her as, "an amazing mom."

[39] The important evidence is that the housing complex where she and the mother lived with their respective children was "plagued by two people that made false allegations on a regular basis about many of us." One of the allegations was that these persons, R.V. and T.V., reported that someone was at the mother's house on the morning of September 26, 2013. The Society acted on this information at that time. Ms. K.K.'s evidence is that the allegations made by the V.s about the mother regarding that morning were not true because she saw that the mother's older children, C. and D., and her son were walked to school by the mother on September 26, 2013 at 8:30 a.m.

[40] Counsel for the Society referred to the affidavit of Justine Danford, sworn October 2, 2013, in which the Society's investigation of the events of September 26, 2013 was detailed. T.V. was referred to in that investigation. The mother also swore an affidavit, sworn October 17, 2013. This affidavit was before Justice Phillips on the motion to bring C. and D. into care, heard October 28, 2013. Attached to the mother's affidavit is a letter from her neighbour, Ms. K.K., setting out what she saw the morning of September 26, 2013.

[41] It is clear that the evidence of Ms. K.K. was well known to the mother at the time of the trial. It is not new evidence as contemplated by the Rule 59.06(2)(a). This rule does not come into play where, as in the present case, the plaintiff has a change in position regarding the importance of information already known: See *Hall v. Powers et al.* (2005), 80 O.R. (3d) 462 (Ont. S. C. J.).

(iii) The Evidence of L.D.

[42] Mr. L.D.'s is the mother's boyfriend and has been so since prior to the trial. Evidence as to his involvement with the mother was provided by her at the trial. He was not called as a witness by her. No explanation was given on this motion

that explains why his evidence was not presented at the trial.

[43] His evidence offered on this motion relates to events that occurred prior to the trial. The mother has not demonstrated that this evidence could not have been obtained by reasonable diligence prior to the trial.

4: DECISION

[44] The evidence put forward by the mother does not support setting aside the Order and thereby upsetting the finality and the permanency plan now in place which was made in the best interests of the child.

[45] The mother has not met her onus under Rule 59.06(2)(a). Consequently, the motion is dismissed.

RELEASED: October 28, 2014

"original signed and released"

Barry M. Tobin
Justice