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**September 30, 2016**

**VIA RESS AND COURIER**

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

Dear Ms. Walli:

**RE: EB-2016-0160 Hydro One Networks Inc. ("Hydro One") Notice of Motion to Review the OEB Decision on Confidentiality Request, EB-2016-0160 dated September 21, 2016 ("Confidentiality Decision")**

In accordance with Rules 8 and 40-43 of the Ontario Energy Board's *Rules of Practice and Procedure,* please find enclosed Hydro One's motion requesting review and variance of the Confidentiality Decision.

Yours truly,

McCarthy Tétrault LLP

Per:

Gordon M. Nettleton

GMN
Enclosure

**IN THE MATTER OF** a cost of service application made by Hydro One Networks Inc. Transmission with the Ontario Energy Board (OEB) on May 31, 2016 under section 78 of the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its transmission revenue requirement and to the Ontario Uniform Transmission Rates, to be effective January 1, 2017 and January 1, 2018.

**AND IN THE MATTER OF** the OEB Decision on Confidentiality Request, EB-2016-0160 dated September 21, 2016.

**HYDRO ONE NETWORKS INC.**

**September 30, 2016**

## A. NOTICE OF MOTION

Hydro One Networks Inc. ("**Hydro One**") hereby makes this motion to the Ontario Energy Board ("**OEB**" or "**Board**") requesting that the Board review and vary its *Decision on Confidentiality Request* dated September 21, 2016 ("**Confidentiality Decision**"), pursuant to Rules 8 and 40-43 of the OEB's *Rules of Practice and Procedure* (the "***Rules***"). Hydro One requests review and variance of the Confidentiality Decision pursuant to Rule 40.01, and that the Board stay the Confidentiality Decision pending the determination of this motion pursuant to Rule 40.04.

In this motion, the specific relief Hydro One seeks is to file the entire Inergi Outsourcing Agreement requested in Interrogatory I-2-11 (the "**Inergi Agreement**"), with only such redactions necessary to protect sensitive information.

## B. GROUNDS FOR THE MOTION

In this motion, Hydro One seeks review and variance of the finding in the Confidentiality Decision requiring Hydro One to fully disclose all portions of the Inergi Agreement. The Confidentiality Decision is unclear in its reasons why certain information found in the Inergi Agreement should now be disclosed, namely, information related to (a) corporate security; (b) areas beyond the scope of proceeding EB-2016-0160; and (c) pricing information historically afforded confidential treatment (and thus not disclosed publicly due to the prejudicial impact to Hydro One and ratepayers).

## C. FACTS IN SUPPORT OF THE MOTION

### 1. Background

In accordance with Procedural Order No. 1, on August 31, 2016, Hydro One filed over 550 Responses to Interrogatory Requests (comprising of 5,507 pages) that were made by intervening parties. All responses were prepared and filed within 13 business days. Building Owners and Managers Association ("**BOMA**") Interrogatory #11 requested a copy of the Inergi Agreement. Hydro One's Response was as follows:

> "Please see attached a confidential copy of the requested agreement. Hydro One has redacted all terms and conditions specifically relating to Customer Service Operations, as these services are not provided to Hydro One's transmission business and are therefore beyond the scope of Hydro One's current application. Also redacted is information that is sensitive from a security viewpoint (e.g. server names, addresses etc.). If this information were to be disclosed to the public, there is significant risk that individuals or organizations could use the information to the detriment of Hydro One and Inergi".[1] [Emphasis added]

On August 31, 2016, and in accordance with Rule 10 of the Board's *Rules of Practice and Procedure* and *Practice Direction on Confidential Filings*, Hydro One filed a formal request to have the content of certain interrogatory responses kept confidential. A summary table was included in this submission and provided general descriptions of the confidential documents and the justifications relied upon to maintain confidential treatment of the information. As it concerned BOMA Interrogatory #11, Hydro One stated:

> "Inergi Outsourcing Agreement
>
> This agreement is described in Exhibit C1, Tab 3, Schedule 2. The document contains terms and conditions defining the scope of services, fees payable to Inergi for performing the services, the governance structure and protocol applicable to the arrangement, and the allocation of risk and responsibility between the parties for various related matters.
>
> Inergi LP has requested that this document be treated confidentially as it contains very commercially sensitive information which would be impactful to its commercial activities outside of Hydro One.

[1] Hydro One Response to BOMA Interrogatory #11: EB-2016-0160, Exhibit I, Tab 2, Schedule 11, Page 1 of 1.

> Portions of this agreement pertaining only to Hydro One's distribution business have been redacted."[2] [Emphasis added]

Reference to pricing information contained in the Inergi Agreement is, implicitly, commercially sensitive both to Hydro One's commercial interests and those affairs of Inergi LP.

Hydro One's concerns regarding the disclosure of pricing information were elaborated upon in its Reply Submission filed on September 16, 2016. Specific reference was first made to the fact that the same types of information found in prior outsourcing agreements between Hydro One and Inergi LP were afforded confidential treatment by the Board.[3] With respect to pricing information, the Reply Submission stated:

> "Hydro One also notes that the Inergi Agreement includes pricing information, which is highly sensitive, commercial information. Parties seeking to use this information for the purposes of presenting their case before the Board may do so through the proposed confidential treatment of the document."[4]

In summary, three substantive arguments were made to protect information from public disclosure:

1. Information contained in the Inergi Agreement pertaining to Hydro One's distribution business should be redacted and not placed on the record because it is not relevant to the present proceedings.

2. Information contained in the Inergi Agreement affecting the security of Hydro One's operations should be redacted because this information is highly sensitive and prejudicial to the ongoing operations and need to provide customers with safe and reliable transmission service.

3. Pricing information found in the Inergi Agreement is commercially sensitive to the affairs of both Hydro One and Inergi LP. Hydro One had a reasonable expectation that this information would be kept confidential and not disclosable to the public because of prior decisions made by this Board in this regard.

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[2] Letter to Kirsten Walli, Board Secretary, re: EB-2016-0160 – Hydro One Networks Inc.'s 2017 and 2018 Transmission Cost-of-Service Application and Evidence Filing – Interrogatory Responses – Request for confidential treatment of certain documents (31 August 2016), Page 2 of 5.

[3] Hydro One Reply Argument to Submissions on Confidentiality, EB-2016-0160 (16 September 2016) at pages 5-6.

[4] *Ibid*.

The Confidentiality Decision may be described as having two components: (1) a discussion of the overall onus to justify confidentiality; and (2) individual findings regarding the specific documents in which confidential treatment was sought. With respect to the former, the Confidentiality Decision stated the following:

> "The Practice Direction on Confidentiality makes it clear that placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting the confidentiality to demonstrate to the satisfaction of the OEB that confidential treatment is warranted in any given case and that any alleged harm outweighs the public interest. Utility agreements with third parties related to the provision of regulated services are typically placed on the public record unless compelling reasons are provided not to do so. Similarly, third party studies commissioned by a particular utility for use in relation to its utility business are of interest, not only to the OEB and intervenors, but also to the ratepayers who effectively fund these studies."[5] [Emphasis added]

With respect to the latter, the Board's Confidentiality Decision, as revised, stated the following in relation to the Inergi Agreement:

> "Hydro One indicates that Inergi LP has requested that both these documents be treated confidentially because they contain information that is not in the public domain, the information is commercially sensitive and disclosure would adversely affect its commercial interests with other clientele.
>
> With respect to the Outsourcing Agreement, Hydro One stated that portions of the agreement pertaining only to Hydro One's distribution business have been redacted.
>
> SEC noted that Hydro One failed to provide any supporting rationale as to why the summary of Inergi's performance indicators are commercially sensitive and why disclosure would adversely affect its commercial interests with other clientele. With respect to the Outsourcing Agreement, SEC submitted that contract information entered into by a regulated entity and a service provider is readily provided in interrogatory responses and placed on the public record.
>
> OEB staff submitted that this type of information is of interest to the OEB and that Hydro One has not provided any information as to why public disclosure of the information would adversely affect Inergi's commercial interests."[6]

The Board's Confidentiality Decision, as revised, noted that portions of the Inergi Agreement had been redacted, but did not elaborate on why the redactions were impermissible. The Confidentiality Decision did not refer to Hydro One's position that the Inergi Agreement

[5] Confidentiality Decision, Page 3 of 9.

[6] Decision on Confidentiality Request (Revised), EB-2016-0160 (26 September 2016), at Page 4 of 9.

contained information affecting the security of its operations, such as its IT infrastructure and applications.

Finally, while the reasons referenced above noted a general practice of agreements made with utilities being placed on the public record, there was no discussion of past treatment of similar information contained in past outsourcing agreements between Inergi LP and Hydro One. The reasons did not include reference to any change in circumstance that might alter the parties' reasonable expectation of similar treatment.

The following sections detail past treatment of agreements between Inergi LP and Hydro One, and of pricing and other similar information. The Board has afforded confidential treatment of similar information in four proceedings.

### 2. 2005 Proceeding[7]

In the 2005 Proceeding, Board Staff requested a copy of the "Hydro One-Inergi Outsourcing Agreement."[8] The Hydro One-Inergi Outsourcing Agreement referenced in the Board Staff interrogatory response refers to the Master Services Agreement entered into by Hydro One and Inergi LP on or about March 1, 2002, with a ten year term, expiring on February 29, 2013 (the "**Original Inergi Agreement**").

Under the Original Inergi Agreement, Inergi provided "Base Services", which included Customer Service Operations, Supply Management Services, Finance and Accounting, Information Technology, HR Payroll, and Settlements, as well as "Project" services at predetermined rates. Hydro One provided a summary of that agreement in its original application.[9] Hydro One provided an extensive summary of the Original Inergi Agreement in the 2005 Proceeding[10], which underwent "considerable scrutiny"[11] during the proceeding.

[7] RP-2005-0020/EB-2005-0378.

[8] Hydro One Response to OEB Staff Interrogatory #171 List 1: RP-2005-0020/EB-2005-0378, Exhibit H, Tab 1, Schedule 171, Page 1 of 2.

[9] Hydro One – Inergi Outsourcing Agreement: RP-2005-0020/EB-2005-0378, Exhibit C1, Tab 3, Schedule 1, Page 1 of 68.

[10] Hydro One – Inergi Outsourcing Agreement: RP-2005-0020/EB-2005-0378, Exhibit C1, Tab 3, Schedule 1.

[11] Decision with Reasons: RP-2005-0020/EB-2005-0378, issued April 12, 2006, at 14.

In response to Board Staff's interrogatory in the 2005 Proceeding to provide the Original Inergi Agreement, Hydro One filed a redacted copy of the agreement. These redactions were made for the following reasons:

> "Some information in the Agreement is sensitive from a security viewpoint (e.g. server names, addresses, etc.). In case this information were to be disclosed to the public, there is significant risk that individuals/organizations could use the information to the detriment of Hydro One and Inergi.
>
> Portions of the Agreement are sensitive from a commercial perspective. In the process of releasing the Agreement, Hydro One has had discussions with Inergi and upon Inergi's request, has agreed to redact some commercially sensitive information. Inergi believes that this information may flow to competitors, the marketplace and organizations, who could then use it for their own commercial interests to the detriment of Inergi."[12]

Despite "considerable scrutiny" levied against the Original Inergi Agreement, to Hydro One's knowledge there were no complaints respecting the redacted treatment of the Original Inergi Agreement from either the Board or any of the participants in the proceeding. No parties raised objections or otherwise argued with Hydro One's justification forwarded above, that portions of the document are commercially sensitive.

### 3. 2007 Proceeding[13]

In the 2007 Proceeding, SEC requested that Hydro One provide a copy of its contract with Inergi LP. This contract contained the same scope of work and was similar to the Original Inergi Agreement. As in the 2005 Proceeding, Hydro One filed a redacted copy of the requested agreement.[14] No objections were raised.

### 4. 2010 Proceeding[15]

In the 2010 Proceeding, SEC requested that Hydro One "provide the new Inergi Agreement, with a list of all changes from the existing agreement."[16] The "new Inergi Agreement" did not materially differ in its scope of work from the Original Inergi Agreement. In response to SEC's interrogatory, Hydro One filed a redacted copy of the requested agreement. Neither the Board,

[12] Hydro One Response to OEB Staff Interrogatory #171 List 1: RP-2005-0020/EB-2005-0378, Exhibit H, Tab 1, Schedule 171, Page 1 of 2.
[13] EB-2007-0681.
[14] Hydro One Response to SEC Interrogatory #14 List 1: EB-2007-0681, Exhibit H, Tab 13, Schedule 14, Page 1 of 1.
[15] EB-2010-0002.
[16] Hydro One Response to SEC Interrogatory #6 List 1: EB-2010-0002, Exhibit I, Tab 7, Schedule 6, Page 1 of 2.

nor SEC, objected to the filing of a redacted version of the agreement. To Hydro One's knowledge, no objections were raised by any other participants with respect to the redacted version.

### 5. 2013 Proceeding[17]

In the 2013 Proceeding, SEC requested a copy of the agreement between Hydro One and Inergi. The agreement requested in that proceeding had a similar scope, but different specific terms, as the Inergi Agreement requested in the current proceeding. Material changes in the Inergi Agreement had been set out in Hydro One's Application.[18] In its interrogatory response, Hydro One filed a copy of the redacted agreement, similar to what Hydro One had filed in its past proceedings.[19] Neither the Board, nor SEC, objected to Hydro One filing a redacted version of the agreement. To Hydro One's knowledge, no objections were raised by any other participants with respect to the redacted version.

In the same proceeding, Hydro One requested confidential treatment of a benchmarking study of Inergi fees. Hydro One originally filed the document with its fee and unit cost amounts redacted, indicating that disclosure of pricing would harm both parties' commercial interests: Hydro One in relation to its negotiations with other vendors, and Inergi in its customer relationships. The Board required an unredacted copy of the benchmarking study to be filed, but afforded the document confidential treatment due to the pricing information it contained. The decision states, "[T]he Board recognizes the concerns of Inergi regarding public dissemination of unit price information, and will keep this information confidential."[20]

The basis for confidential treatment of that document was self-evident, as the benchmarking study dealt with outsourcing costs. Not only does publicly disclosing the price of outsourcing affect the negotiating positions of the parties involved, but lack of confidentiality in benchmarking and similar initiatives has a chilling effect on parties' willingness to participate. Public disclosure of pricing prejudices Hydro One and ratepayers in respect of future negotiating

[17] EB-2013-0416.
[18] Hydro One Application: EB-2016-0160, Exhibit C1, Tab 3, Schedule 2.
[19] Hydro One Response to SEC Interrogatory #20: EB-2013-0416, Exhibit I, Tab 3.01, Schedule 9, Page 1 of 1.
[20] Decision and Order on Confidentiality and Motion: EB-2013-0416, filed August 25, 2014, at 6.

positions, and public disclosure of benchmarking or similar performance information prejudices the Board's ability to use that information in its decision-making.[21]

## D. SUBMISSIONS

Hydro One submits that the above details respecting the Board's treatment of similar agreements and information cast at least some reasonable doubt on the correctness of the Confidentiality Decision, and specifically afford the opportunity to come to an alternative solution.

The reasons provided do not make it clear why security information and information concerning Hydro One's distribution business should be disclosed, and the Confidentiality Decision does not speak to Hydro One's concerns regarding such disclosures. Moreover, the Confidential Decision does not provide discussion as to why prior confidential treatment of the Inergi Agreement is no longer appropriate. No changes in facts or circumstances were raised by any party addressing this point. While a general principle favouring disclosure was cited, the individual facts and circumstances involving Inergi LP and Hydro One, and specifically the past confidential treatment of outsourcing agreements between the parties, were not discussed in the Confidential Decision.

If unit pricing information is not redacted, benchmarks would be made available for future potential bidders of outsourcing contracts that involve Hydro One. Disclosure of this information reduces Hydro One's likelihood of receiving the lowest cost bids. This hampers Hydro One's ability to negotiate the lowest cost outsourcing agreements and thus consequently is not in the best interests of ratepayers.

Allowing unit pricing information to be redacted is, again, consistent with the Board's prior treatment of similar information. Consistency is a valuable feature of regulatory decisions, as it allows parties a measure of predictability in their behaviour and submissions to regulators. Hydro One submits that in this instance, there is significant value in the Board deciding on disclosure of the Inergi Agreement in a manner consistent with its past decisions. As the Supreme Court of Canada ("**SCC**") has stated, "Consistency is a desirable feature in

[21] Another example of a publicly useful practice being discontinued due to confidentiality concerns is the Canadian Electricity Association's decision to shelve its Committee on Corporate Performance and Productivity benchmarking activities: EB-2013-0416, Transcript Vol 3, pp 22-23 and 160.

administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability."[22]

Hydro One's proposed solution, to redact the Inergi Agreement as described below, accords with past practices which have been acceptable to the parties and the Board. Further, in its protection of pricing information, Hydro One's proposed solution aligns with ratepayers' interests. As is the case with the current Inergi Agreement, these types of arrangements are negotiated through a competitive bid Request For Proposal (RFP) process. Hydro One seeks to ensure that such commercial processes are not compromised by undue access to information about past behaviour – such as past pricing practices. Rather, Hydro One seeks to have RFP participants base their decisions upon their own internal cost structures. Disclosure of past pricing information disturbs this dynamic. It places information in the public domain that is then allowed to influence pricing behaviour in the future and by potential service providers. This unnecessarily and adversely influences Hydro One's ability to negotiate the best arrangements on behalf of its ratepayers.

### 1. Hydro One's Proposal

Further to Hydro One's correspondence to the Board dated September 26, 2016, Hydro One has had discussions with two intervenors in order to consider whether providing a copy of the Inergi Agreement with limited redactions is a workable solution to balance parties' participatory interests with confidentiality concerns.

As a result of these discussions, Hydro One now proposes to place the Inergi Agreement on the public record with redactions in only three key areas:

- Information that is sensitive from a security viewpoint, as it includes information such as the location of servers ("**Security Information**"); and

- Information about services specific to Hydro One's distribution business, as it is beyond the scope of Hydro One's current application ("**Distribution Business Information**");

[22] *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles),* 1993 CanLII 106 (SCC), [1993] 2 SCR 756 at para 59, citing H Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie LJ 435, at p 446).

- Information on unit pricing and information that can be used to derive unit pricing, as it harms Hydro One's future negotiating position in respect of outsourcing agreements ("**Unit Pricing Information**").

Hydro One believes the rationale for redacting the Security Information and the Distribution Business Information is self-explanatory. Disclosure of the Security Information could cause a great deal of harm, in comparison to its limited utility to participants or the Board in determining just and reasonable rates in this proceeding. The Distribution Business Information is irrelevant in determining just and reasonable transmission rates in this proceeding. Redactions concerning Unit Pricing Information have, to the greatest extent possible, been minimized.

A description of all of the proposed redactions is attached to this motion as **Schedule 1**. Hydro One will provide to the Board an electronic version of the redacted Inergi Agreement which has been saved on a USB Drive. Given the size of the Inergi Agreement, Hydro One is not proposing to make paper copies or distribute the redacted agreement by way of electronic mail.

## E. CONCLUSIONS

Based on the foregoing, Hydro One respectfully submits this motion to review the Board's Confidentiality Decision and requests a stay of the Confidentiality Decision pending resolution of this matter.

All of which is respectfully submitted this 30th day of September, 2016.

Gordon M. Nettleton
Partner, McCarthy Tetrault LLP
Counsel to Hydro One Networks Inc.

# Schedule “1”

## Structure of Agreement

The Inergi Agreement is comprised of a Master Services Agreement including Schedules. In total, the Inergi Agreement is 1,962 pages. The Statements of Work ("**SOW**") also form part of the Inergi Agreement and have a consistent document structure. The SOWS are as follows:

1. Application Development and Maintenance (ADM)
2. Finance & Accounting (F&A)
3. Infrastructure Management Services (IM)
4. Payroll Services (PAY)
5. Source to Pay Services (S2P)
6. Settlement Services (SET)
7. Customer Services Operations (CSO)

## Redactions

Hydro One has made redactions to the Inergi Agreement for the following categories of information:

A. Information about services specific to Hydro One's distribution business, which is beyond the scope of Hydro One's current application ("**Distribution Business Information**");
B. Information that is sensitive from a security viewpoint ("**Security Information**"); and
C. Information on unit pricing and information that can be used to derive unit pricing ("**Unit Pricing Information**").

A chart detailing the redactions is attached.

### A. Distribution Business Information

The following components of the Inergi Agreement have been redacted for information falling under this category, specifically, information relating to the CSO:

- Master Services Agreement;
- Schedule 8.1 Key Positions;
- Schedule 8.4 Supplier Subcontractor; and
- CSO SOW.

### B. Security Information

The following components of the Inergi Agreement have been redacted for information falling under this category, specifically, publicly undisclosed locations, key personnel names, information pertaining to IT architecture and applications, and disaster recovery plans:

- Schedule 6.1 Client Assets;
- Schedule 8.1 Key Positions;
- Attachment B to Common Exh. 2.2 Disaster Recovery Plan Description;

- Attachment D to Exhibit 1 – Sites – All SOWs;
- Attachment E to Exhibit 1 – Equipment – where applicable; and
- Attachment G to Exhibit 1 – Applications – applicable only to IM and ADM.

### C. Unit Pricing Information

The following components of the Inergi Agreement have been redacted for information falling under this category, specifically, information pertaining to unit volumes of work, unit prices, and rate cards:

- Attachment A to Exhibit 3 – Supplier Pricing Forms – All SOWs.
- Attachment C to Exhibit 3 – Resource Unit Definition – “Full Time Equivalent”, where applicable.

# Table of Redactions

| MSA, Schedules and Attachments | Redactions |
|---|---|
| Master Services Agreement | Pages 1, 2 |
| Schedule 1.1(b) and Attachments - Supplemental Solution Documents | |
| Schedule 1.3 Form of Statement of Work | |
| Schedule 3.1(a) Project Methodology | |
| Attachment I to Schedule 3.1(a) Project Request Form | |
| Attachment II to Schedule 3.1(a) Project Definition Form | |
| Attachment III to Schedule 3.1(a) Project Order Form | |
| Attachment IV to Schedule 3.1(a) Project Change Request Form | |
| Schedule 3.1(b) Transition | |
| Attachment I to Schedule 3.1(b) Supplier Transition Plan Description | |
| Attachment II to Schedule 3.1(b) Transition Risk Management Plan | |
| Schedule 3.1(c) Transformation Methodology | |
| Attachment I to Schedule 3.1(c) Supplier Transformation Plan Description | |
| Attachment II to Schedule 3.1(c) Transformation Risk Management Plan | |
| Schedule 4.8 Procedures Manual Outline | |
| Schedule 4.11 Supplier Form of NDA | |
| Schedule 5.1 Service Level Methodology | |
| Schedule 5.4 Client Satisfaction Surveys | |
| Schedule 6.1 Client Assets | Pages 2,3,5,10 |
| Schedule 8.1 Key Positions | All Pages |
| Schedule 8.4 Supplier Subcontractor | Page 2 |
| Schedule 9.1 Governance | |
| Attachment I to Schedule 9.1 Governance Joint Committees and Protocols | |
| Attachment II to Schedule 9.1 Governance Process Priority Matrix | |
| Attachment III to Schedule 9.1 Governance Reports | |
| Attachment IV to Schedule 9.1 Governance Deliverables | |
| Attachment V to Schedule 9.1 Governance Deliverables Acceptance Form | |
| Schedule 9.2 Change and New Services Procedures | |
| Attachment I to Schedule 9.2 Change Request Form | |
| Attachment II to Schedule 9.2 Change Proposal Form | |
| Schedule 11.1(d) Supplier One Way NDA | |
| Schedule 14.5 Termination Transition Plan Requirements | |
| Attachment I to Schedule 14.5 Form of Termination Assistance Plan | |
| Schedule 15.1(e) Form of the Benchmarking Engagement Letter | |
| Schedule 16.1 Fee Methodology | |
| Attachment I to Schedule 16.1 Bundle Discount | |

| Common Documents | Redactions |
|---|---|
| Common Exhibit 1 Definitions | |
| Common Exhibit 2.1 Cross Functional General | |
| Common Exhibit 2.2 Cross Functional ITO | |
| Attachment A to Common Exh 2.2 Asset Inventory Data Element Requirements | |
| Attachment B to Common Exh 2.2 Disaster Recovery Plan Description | Page 13 |
| Attachment C to Common Exh 2.2 Business Impact Assessment Description | |
| Attachment D to Common Exh 2.2 Business Continuity Plan Description | |
| Common Exhibit 2.3 Cross functional Non ITO | |
| Attachment B to Common Exh 2.3 Disaster Recovery Plan Description | Pages 10, 11 |
| Attachment C to Common Exh 2.3 Business Impact Assessment Description | |
| Attachment D to Common Exh 2.3 Business Continuity Plan Description | |
| Common Exh 3 Client Policies and Guidelines | |
| Common Exh 4 Invoicing Requirements | |
| Attachment A to Common Exh 4 Form of Invoice | |
| **AM** | **Redactions** |
| AM Services Statement of Work | |
| Exhibit 1 – AM Services Description | |
| Attachment A to Exhibit 1 – Third-Party Software | |
| Attachment B to Exhibit 1 – Third-Party Service Contracts | |
| Attachment C to Exhibit 1 – Third-Party Equipment Maintenance | |
| Attachment D to Exhibit 1 – Sites | Fully Redacted |
| Attachment E to Exhibit 1 – Equipment Assets | |
| Attachment F to Exhibit 1 – Third Party Acceptance Services | |
| Attachment G to Exhibit 1 – Application Portfolio | Fully Redacted |
| Attachment H to Exhibit 1 – Support Levels | |
| Attachment I to Exhibit 1 – Types of Work | |
| Attachment J to Exhibit 1 – Priority Levels | |
| Attachment K to Exhibit 1 – Technical Architecture | |
| Attachment L to Exhibit 1 – Software Assets | |
| Exhibit 2 – Service Levels | |
| Exhibit 3 – Pricing | |
| Attachment A to Exhibit 3 – Supplier Pricing Forms | Pages 4-6, 16 |
| Attachment B to Exhibit 3 – FRM | |
| Attachment C to Exhibit 3 – Resource Unit Definition | Page 3 |
| Exhibit 4 – Service Reports | |
| Exhibit 5 – Current and Planned Projects | |

| IM | Redactions |
|---|---|
| Infrastructure Services Statement of Work | |
| Exhibit 1 – Infrastructure Services Description | |
| Attachment A to Exhibit 1 – Third-Party Software Contracts | |
| Attachment B to Exhibit 1 – Third-Party Service Contracts | |
| Attachment C to Exhibit 1 – Third-Party Equipment Maintenance Contracts | |
| Attachment D to Exhibit 1 – Sites | Fully Redacted |
| Attachment E to Exhibit 1 – Equipment Assets | Pages 3,4 |
| Attachment F to Exhibit 1 – Technical Architecture | |
| Attachment G to Exhibit 1 – Application Portfolio | Fully Redacted |
| Attachment H to Exhibit 1 – Hours of Operation | |
| Attachment I to Exhibit 1 – Types of Work | |
| Attachment J to Exhibit 1 – Priority Levels | |
| Attachment K to Exhibit 1 – Support Levels | |
| Attachment L to Exhibit 1 – Software Assets | |
| Exhibit 2 – Service Levels | |
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| Attachment A to Exhibit 3 – Supplier Pricing Forms | Pages 6-16, 32 |
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| Attachment C to Exhibit 3 – Resource Unit Definition | Pages 8, 10 |
| Exhibit 4 – Service Reports | |
| Exhibit 5 – Current and Planned Projects | |
| **F & A** | **Redactions** |
| Finance and Accounting Services Statement of Work | |
| Exhibit 1 – Finance and Accounting Services Description | |
| Attachment A to Exhibit 1 – Third-Party Software | |
| Attachment B to Exhibit 1 – Third-Party Service Contracts | |
| Attachment C to Exhibit 1 – Third-Party Equipment Maintenance | |
| Attachment D to Exhibit 1 – Sites | Page 3 |
| Attachment E to Exhibit 1 – Equipment Assets | |
| Exhibit 2 – Service Levels | |
| Exhibit 3 – Pricing | |
| Attachment A to Exhibit 3 – Supplier Pricing Forms | Pages 4-6,14 |
| Attachment B to Exhibit 3 – FRM | |
| Attachment C to Exhibit 3 – Resource Unit Definition | |
| Exhibit 4 – Service Reports | |
| Exhibit 5 – Current and Planned Projects | |

| PAY | Redactions |
|---|---|
| Payroll Services Statement of Work | |
| Exhibit 1 – Payroll Services Description | |
| Attachment A to Exhibit 1 – Third-Party Software | |
| Attachment B to Exhibit 1 – Third-Party Service Contracts | |
| Attachment C to Exhibit 1 – Third-Party Equipment Maintenance | |
| Attachment D to Exhibit 1 – Sites | Page 3 |
| Attachment E to Exhibit 1 – Equipment Assets | Page 3 |
| Attachment F to Exhibit 1 – Payroll Schedules | |
| Exhibit 2 – Service Levels | |
| Exhibit 3 – Pricing | |
| Attachment A to Exhibit 3 – Supplier Pricing Forms | Pages 5-10, 17 |
| Attachment B to Exhibit 3 – FRM | |
| Attachment C to Exhibit 3 – Resource Unit Definition | |
| Exhibit 4 – Service Reports | |
| Exhibit 5 – Current and Planned Projects | Pages 3-4 |
| **S2P** | **Redactions** |
| Source to Pay Services Statement of Work | |
| Exhibit 1 – Source to Pay Services Description | |
| Attachment A to Exhibit 1 – Third-Party Software | |
| Attachment B to Exhibit 1 – Third-Party Service Contracts | |
| Attachment C to Exhibit 1 – Third-Party Equipment Maintenance | |
| Attachment D to Exhibit 1 – Sites | Pages 3,4 |
| Attachment E to Exhibit 1 – Equipment Assets | Page 3 |
| Exhibit 2 – Service Levels | |
| Exhibit 3 – Pricing | |
| Attachment A to Exhibit 3 – Supplier Pricing Forms | Sections 4d, III, IV, IX, 4h |
| Attachment B to Exhibit 3 – FRM | |
| Attachment C to Exhibit 3 – Resource Unit Definition | Page 12 |
| Exhibit 4 – Service Reports | |
| Exhibit 5 – Current and Planned Projects | |

| SET | Redactions |
|---|---|
| Settlements Services Statement of Work | |
| Exhibit 1 – Settlements Services Description | |
| Attachment A to Exhibit 1 – Third-Party Software | |
| Attachment B to Exhibit 1 – Third-Party Service Contracts | |
| Attachment D to Exhibit 1 – Sites | Page 3 |
| Attachment E to Exhibit 1 – Equipment Assets | |
| Exhibit 2 – Service Levels | |
| Exhibit 3 – Pricing | |
| Attachment A to Exhibit 3 – Supplier Pricing Forms | Pages 4-6, 16 |
| Attachment B to Exhibit 3 – FRM | |
| Attachment C to Exhibit 3 – Resource Unit Definition | Pages 3-4 |
| Exhibit 4 – Service Reports | |
| Exhibit 5 – Current and Planned Projects | |
| **CSO** | **Fully Redacted** |
| **Misc.** | **Redactions** |
| Form of Guarantee (Financial) | |
| Form of Guarantee (Performance) | |

**EB-2016-0160**

**IN THE MATTER OF** a cost of service application made by Hydro One Networks Inc. Transmission with the Ontario Energy Board (OEB) on May 31, 2016 under section 78 of the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its transmission revenue requirement and to the Ontario Uniform Transmission Rates, to be effective January 1, 2017 and January 1, 2018.

**AND IN THE MATTER OF** the OEB Decision on Confidentiality Request, EB-2016-0160 dated September 21, 2016.

**AND IN THE MATTER OF** Hydro One's Notice of Motion to review and vary the Decision on Confidentiality Request in accordance with Rules 8 and 40-43 of the OEB *Rules of Practice and Procedure*, dated September 30, 2016.

**HYDRO ONE NETWORKS INC.**
**September 30, 2016**

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# BOOK OF AUTHORITIES OF HYDRO ONE NETWORKS INC.

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**September 30, 2016**

**Gordon M. Nettleton**

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Toronto ON M5K 1E6

**Counsel to Hydro One Networks Inc.**

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# ONTARIO ENERGY BOARD

**Rules of Practice and Procedure**
**(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)**

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# ONTARIO ENERGY BOARD

**Rules of Practice and Procedure**
**(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)**

## PART I - GENERAL

## 1. Application and Availability of Rules

1.01 These Rules apply to proceedings before the Board except enforcement proceedings. These Rules, other than the Rules set out in Part VII, also apply, with such modifications as the context may require, to all proceedings to be determined by an employee acting under delegated authority.

1.02 These Rules, in English and in French, are available for examination on the Board's website, or upon request from the Board Secretary.

1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or 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. Interpretation of Rules

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

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.

2.03 These Rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.

2.04 Unless the Board otherwise directs, any amendment to these Rules comes into force upon publication on the Board's website.

## 3. Definitions

3.01 In these Rules,

**"affidavit"** means written evidence under oath or affirmation;

**“appeal”** has the meaning given to it in **Rule 17.01**;

**"appellant"** means a person who brings an appeal;

**"applicant"** means a person who makes an application;

**"application"** when used in connection with a proceeding commenced by an application to the Board, or transferred to the Board by the management committee under section 6(7) of the *OEB Act* , means the commencement by a party of a proceeding other than an appeal;

**"Board"** means the Ontario Energy Board;

**"Board Secretary"** means the Secretary and any assistant Secretary appointed by the Board under the *OEB Act*;

**"Board's website"** means the website maintained by the Board at *www.ontarioenergyboard.ca*;

**"document"** includes written documentation, films, photographs, charts, maps, graphs, plans, surveys, books of account, transcripts, videotapes, audio tapes, and information stored by means of an electronic storage and retrieval system;

**"*Electricity Act*"** means the *Electricity Act, 1998*, S.O. 1998, c.15, Schedule A, as amended from time to time;

**"electronic hearing"** means a hearing held by conference telephone or some other form of electronic technology allowing persons to communicate with one another;

**“employee acting under delegated authority”** means an employee to whom a power or duty of the Board has been delegated under section 6 of the *OEB Act*;

**"file"** means to file with the Board Secretary in compliance with these Rules and any directions of the Board;

**"hearing"** means a hearing in any proceeding before the Board, and includes an electronic hearing, an oral hearing, and a written hearing;

**"interrogatory"** means a request in writing for information or particulars made to a party in a proceeding;

**"intervenor"** means a person who has been granted intervenor status by the Board;

**"management committee"** means the management committee of the Board established under section 4.2 of the *OEB Act*;

**"market rules"** means the rules made under section 32 of the *Electricity Act*;

**"Minister"** means the Minister as defined in the *OEB Act*;

**"motion"** means a request for an order or decision of the Board made in a proceeding;

**"*OEB Act*"** means the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, as amended from time to time;

**"oral hearing"** means a hearing at which the parties or their representatives attend before the Board in person;

**"party"** includes an applicant, an appellant, an employee acting under delegated authority where applicable, and any person granted intervenor status by the Board;

**"*Practice Directions*"** means practice directions issued by the Board from time to time;

**"proceeding"** means a process to decide a matter brought before the Board, including a matter commenced by application, notice of appeal, transfer by or direction from the management committee, reference, request or directive of the Minister, or on the Board's own motion;

**"reference"** means any reference made to the Board by the Minister;

**"reliability standard"** has the meaning given to it in the *Electricity Act*;

**"serve"** means to effectively deliver, in compliance with these Rules or as the Board may direct;

**"statement"** means any unsworn information provided to the Board;

**"writing"** includes electronic media, formed and secured as directed by the Board;

**"written"** includes electronic media, formed and secured as directed by the Board; and

**"written hearing"** means a hearing held by means of the exchange of documents.

## 4. Procedural Orders and Practice Directions

4.01 The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. Every party shall comply with all applicable procedural orders.

4.02 The Board may set time limits for doing anything provided in these Rules.

4.03 The Board may at any time amend any procedural order.

4.04 Where a provision of these Rules is inconsistent with a provision of a procedural order, the procedural order shall prevail to the extent of the inconsistency.

4.05 The Board may from time to time issue *Practice Directions* in relation to the preparation, filing and service of documents or in relation to participation in a proceeding. Every party shall comply with all applicable *Practice Directions*, whether or not specifically referred to in these Rules.

## 5. Failure to Comply

5.01 Where a party to a proceeding has not complied with a requirement of these Rules or a procedural order, the Board may:

(a) grant all necessary relief, including amending the procedural order, on such conditions as the Board considers appropriate;

(b) adjourn the proceeding until it is satisfied that there is compliance; or

(c) order the party to pay costs.

5.02 Where a party fails to comply with a time period for filing evidence or other material, the Board may, in addition to its powers set out in **Rule 5.01**, disregard the evidence or other material that was filed late.

5.03 No proceeding is invalid by reason alone of an irregularity in form.

## 6. Computation of Time

6.01 In the computation of time under these Rules or an order:

(a) where there is reference to a number of days between two events, the days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens; and

(b) where the time for doing an act under these Rules expires on a holiday, as defined under **Rule 6.02**, the act may be done on the next day that is not a holiday.

6.02 A holiday means a Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed.

## 7. Extending or Abridging Time

7.01 The Board may on its own motion or upon a motion by a party extend or abridge a time limit directed by these Rules, *Practice Directions* or by the Board, on such conditions the Board considers appropriate.

7.02 The Board may exercise its discretion under this Rule before or after the expiration of a time limit, with or without a hearing.

7.03 Where a party cannot meet a time limit directed by the Rules, *Practice Directions* or the Board, the party shall notify the Board Secretary as soon as possible before the time limit has expired.

## 8. Motions

8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion.

8.02 The notice of motion and any supporting documents shall be filed and served within such a time period as the Board shall direct.

8.03 Unless the Board directs otherwise, a party who wishes to respond to the notice of motion shall file and serve, at least two calendar days prior to the motion's hearing date, a written response, an indication of any oral evidence the party seeks to present, and any evidence the party relies on, in appropriate affidavit form.

8.04 The Board, in hearing a motion, may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply.

# PART II - DOCUMENTS, FILING, SERVICE

## 9. Filing and Service of Documents

9.01 All documents filed with the Board shall be directed to the Board Secretary. Documents, including applications and notices of appeal, shall be filed in such quantity and in such manner as may be specified by the Board.

9.02 Any person wishing to access the public record of any proceeding may make arrangements to do so with the Board Secretary.

9.03 All documents filed in a proceeding, with the exception of documents found by the Board to be confidential, may be accessed through the Board's website or examined free of charge at the Board's offices.

## 9A Filing of Documents that Contain Personal Information

9A.01 Any person filing a document that contains personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*, of another person who is not a party to the proceeding shall file two versions of the document as follows:

(a) one version of the document must be a non-confidential, redacted version of the document from which the personal information has been deleted or stricken; and
(b) the second version of the document must be a confidential, un-redacted version of the document that includes the personal information and should be marked "Confidential—Personal Information".

9A.02 The non-confidential, redacted version of the document from which the personal information has been deleted or stricken will be placed on the public record. The confidential, un-redacted version of the document will be held in confidence and will not be placed on the public record. Neither the confidential, un-redacted version of the document nor the personal information contained in it will be provided to any other party, including a person from whom the Board has accepted a Declaration and Undertaking under the *Practice Directions,* unless the Board determines that either (a) the redacted information is not personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act,* or (b) the disclosure of the personal information would be in accordance with the *Freedom of Information and Protection of Privacy Act.*

## 10. Confidential Filings

10.01 A party may request that all or any part of a document, including a response to an interrogatory, be held in confidence by the Board.

10.02 Any request for confidentiality made under **Rule 10.01** shall be made in accordance with the *Practice Directions*.

10.03 A party may object to a request for confidentiality by filing and serving an

objection in accordance with the *Practice Directions* and within the time specified by the Board.

10.04 After giving the party claiming confidentiality an opportunity to reply to any objection made under **Rule 10.03**, the Board may:

(a) order the document be placed on the public record, in whole or in part;

(b) order the document be kept confidential, in whole or in part;

(c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document prepared by the party claiming confidentiality be revised;

(d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality; or

(e) make any other order the Board finds to be in the public interest.

10.05 Where the Board makes an order under **Rule 10.04** to place on the public record any part of a document that was filed in confidence, the party who filed the document may, subject to **Rule 10.06** and in accordance with and within the time specified in the *Practice Directions*, request that it be withdrawn prior to its placement on the public record.

10.06 The ability to request the withdrawal of information under **Rule 10.05** does not apply to information that was required to be produced by an order of the Board.

10.07 Where a party wishes to have access to a document that, in accordance with the *Practice Directions*, will be held in confidence by the Board without the need for a request under **Rule 10.01**, the party shall make a request for access in accordance with the *Practice Directions*.

10.08 Requests for access to confidential information made at times other than during the proceeding in which the confidential information was filed shall be made in accordance with the *Practice Directions*.

10.09 The party who filed the information to which a request for access under **Rule 10.07** or **Rule 10.08** relates may object to the request for access by filing and serving an objection within the time specified by the Board.

10.10 The Board may, further to a request for access under **Rule 10.07** or **Rule 10.08**, make any order referred to in **Rule 10.04**.

## 11. Amendments to the Evidentiary Record and New Information

11.01 The Board may, on conditions the Board considers appropriate:

(a) permit an amendment to the evidentiary record; or

(b) give directions or require the preparation of evidence, where the Board determines that the evidence in an application is insufficient to allow the issues in the application to be decided.

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

11.03 Where all or any part of a document that forms part of the evidentiary record is revised, the party filing the revision shall:

(a) ensure that each revised document is printed on coloured paper and clearly indicates the date of revision and the part revised; and

(b) file with the revised document(s) a table describing the original evidence, each revision to the evidence, the date each revision was made, and if the change was numerical, the difference between the original evidence and the revision(s). This table is to be updated to contain all significant revisions to the evidence as they are filed.

11.04 A party shall comply with any direction from the Board to provide such further information, particulars or documents as the Board considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.

## 12. Affidavits

12.01 An affidavit shall be confined to the statement of facts within the personal

knowledge of the person making the affidavit unless the facts are clearly stated to be based on the information and belief of the person making the affidavit.

12.02 Where a statement is made on information and belief, the source of the information and the grounds on which the belief is based shall be set out in the affidavit.

12.03 An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit, and the exhibit shall be attached to and filed with the affidavit.

12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

## 13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

## 13A. Expert Evidence

13A.01 A party may engage, and two or more parties may jointly engage, one or more experts to give evidence in a proceeding on issues that are relevant to the expert's area of expertise.

13A.02 An expert shall assist the Board impartially by giving evidence that is fair and objective.

13A.03 An expert's evidence shall, at a minimum, include the following:

(a) the expert's name, business name and address, and general area of expertise;

(b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the proceeding to which the expert's evidence relates;

(c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;

(d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of the documents relied on by the expert in preparing the evidence; and

(e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence.

(f) an acknowledgement of the expert's duty to the Board in **Form A** to these Rules, signed by the expert.

13A.04 In a proceeding where two or more parties have engaged experts, the Board may require two or more of the experts to:

(a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and

(b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board, and providing comments on the views of another expert on the same panel.

13A.05 The activities referred to in **Rule 13A.04** shall be conducted in accordance with such directions as may be given by the Board, including as to:

(a) scope and timing;

(b) the involvement of any expert engaged by the Board;

(c) the costs associated with the conduct of the activities;

(d) the attendance or non-attendance of counsel for the parties, or of other persons, in respect of the activities referred to in paragraph (a) of **Rule 13A.04**; and

(e) any issues in relation to confidentiality.

13A.06 A party that engages an expert shall ensure that the expert is made aware of, and has agreed to accept, the responsibilities that are or may be imposed on the expert as set out in this **Rule 13A** and **Form A**.

## 14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document 24 hours before using it in the proceeding, unless the Board directs otherwise.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

# PART III - PROCEEDINGS

## 15. Commencement of Proceedings

15.01 Unless commenced by the Board, a proceeding shall be commenced by filing an application or a notice of appeal in compliance with these Rules, and within such a time period as may be prescribed by statute or the Board.

15.02 A person appealing an order made under the market rules shall file a notice of appeal within 15 calendar days after being served with a copy of the order, or within 15 calendar days of having completed making use of any provisions relating to dispute resolution set out in the market rules, whichever is later.

15.03 An appeal of an order, finding or remedial action made or taken by a standards authority referred to in section 36.3 of the *Electricity Act* shall be commenced by the Independent Electricity System Operator by notice of appeal filed within 15 calendar days after being served with a copy of the order or finding or of notice of the remedial action, or within 15 calendar days of receipt of notice of the final determination of any other reviews and appeals referred to in section 36.3(2) of the *Electricity Act*, whichever is later.

## 16. Applications

16.01 An application shall contain:

(a) a clear and concise statement of the facts;

(b) the grounds for the application;

(c) the statutory provision under which it is made; and

(d) the nature of the order or decision applied for.

16.02 An application shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

## 17. Appeals

17.01 An "appeal" means:

(a) an appeal under section 7 of the *OEB Act*;

(b) a review under section 59(6) of the *OEB Act;*

(c) a review of an amendment to the market rules under section 33 or section 34 of the *Electricity Act*;

(d) a review of a provision of the market rules under section 35 of the *Electricity Act*;

(e) an appeal under section 36, 36.1 or 36.3 of the *Electricity Act*;

(f) a review of a reliability standard under section 36.2 of the *Electricity Act*; and

(g) an appeal under section 7(4) of the *Toronto District Heating Corporation Act, 1998*.

17.02 A notice of appeal shall contain:

(a) the portion of the order, decision, market rules, reliability standard or finding or remedial action referred to in **Rule 15.03** being appealed;

(b) the statutory provision under which the appeal is made;

(c) the nature of the relief sought, and the grounds on which the appellant shall rely;

(d) if an appeal of an order made under the market rules under section 36 of the *Electricity Act*, a statement confirming that the appellant has made use of any dispute resolution provisions of the market rules;

(e) if an application by a market participant for review of a provision of the market rules under section 35 of the *Electricity Act*, a statement confirming that the market participant has made use of any review provisions of the market rules; and

(f) if an appeal of an order, finding or remedial action under section 36.3 of the *Electricity Act*, a statement confirming that the Independent Electricity System Operator has commenced all other reviews and appeals available to it and such reviews and appeals have been finally determined.

17.03 A notice of appeal shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

17.04 At a hearing of an appeal, an appellant shall not seek to appeal a portion of the order, decision, market rules, reliability standard or finding or remedial action referred to in **Rule 15.03** or rely on any ground, that is not stated in the appellant's notice of appeal, except with leave of the Board.

17.05 In addition to those persons on whom service is required by statute, the Board may direct an appellant to serve the notice of appeal on such persons as it considers appropriate.

17.06 The Board may require an appellant to file an affidavit of service indicating how and on whom service of the notice of appeal was made.

17.07 Subject to **Rule 17.08**, a request by a party to stay part or all of the order, Decision, market rules, reliability standard or finding or remedial action referred to in **Rule 15.03** being appealed pending the determination of the appeal shall be made by motion to the Board.

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

17.09 In respect of a motion brought under **Rule 17.07**, the Board may order that implementation or operation of the order, decision, market rules or reliability standard be delayed or stayed, on conditions as it considers appropriate.

## 18. Dismissal Without a Hearing

18.01 The Board may propose to dismiss a proceeding without a hearing on the grounds that:

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

18.02 Where the Board proposes to dismiss a proceeding under **Rule 18.01**, it shall give notice of the proposed dismissal in accordance with the *Statutory Powers Procedure Act*.

18.03 A party wishing to make written submissions on the proposed dismissal shall do so within 10 calendar days of receiving the Board's notice under **Rule 18.02**.

18.04 Where a party who commenced a proceeding has not taken any steps with respect to the proceeding for more than one year from the date of filing, the Board may notify the party that the proceeding shall be dismissed unless the person, within 10 calendar days of receiving the Board's notice, shows cause why it should not be dismissed or advises the Board that the application or appeal is withdrawn.

18.05 Where the Board dismisses a proceeding, or is advised that the application or appeal is withdrawn, any fee paid to commence the proceeding shall not be refunded.

## 19. Decision Not to Process

19.01 The Board or Board staff may decide not to process documents relating to the commencement of a proceeding if:

(a) the documents are incomplete;

(b) the documents were filed without the required fee for commencing the proceeding;

(c) the documents were filed after the prescribed time period for commencing the proceeding has elapsed; or

(d) there is some other technical defect in the commencement of the proceeding.

19.02 The Board or Board staff shall give the party who commenced the proceeding notice of a decision made under **Rule 19.01** that shall include:

(a) reasons for the decision; and

(b) requirements for resuming processing of the documents, if applicable.

19.03 Where requirements for resuming processing of the documents apply, processing shall be resumed where the party complies with the requirements set out in the notice given under **Rule 19.02** within:

(a) subject to **Rule 19.03(b)**, 30 calendar days from the date of the notice; or

(b) 10 calendar days from the date of the notice, where the proceeding commenced is an appeal.

19.04 After the expiry of the applicable time period under **Rule 19.03**, the Board may close its file for the proceeding without refunding any fee that may already have been paid.

19.05 Where the Board has closed its file for a proceeding under **Rule 19.04**, a person wishing to refile the related documents shall:

(a) in the case of an application, refile the documents as a fresh application, and pay any fee required to do so; or

(b) in the case of an appeal, refile the documents as a fresh notice of appeal, except where the time period for filing the appeal has elapsed, in which case the documents cannot be refiled.

## 20. Withdrawal

20.01 An applicant or appellant may withdraw an application or appeal:

(a) at any time prior to the hearing, by filing and serving a notice of withdrawal signed by the applicant or the appellant, or his or her representative; or

(b) at the hearing with the permission of the Board.

20.02 A party may by motion seek leave to discontinue participation in a proceeding at any time before a final decision.

20.03 The Board may impose conditions on any withdrawal or discontinuance, including costs, as it considers appropriate.

20.04 Any fee paid to commence the proceeding by an applicant seeking to withdraw under **Rule 20.01** shall not be refunded.

20.05 If the Board has reason to believe that a withdrawal or discontinuance may adversely affect the interests of any party or may be contrary to the public interest, the Board may hold or continue the hearing, or may issue a decision or order based upon proceedings to date.

## 21. Notice

21.01 Any notices required by these Rules or a Board order shall be given in writing, unless the Board directs otherwise.

21.02 The Board may direct a party to give notice of a proceeding or hearing to any person or class of persons, and the Board may direct the method of providing the notice.

21.03 Where a party has been directed to serve a notice under this Rule, the party shall file an affidavit or statement of service that indicates how, when, and to whom service was made.

## 22. Intervenor Status

22.01 Subject to **Rule 22.05** and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively

participate in the proceeding shall apply for intervenor status by filing and serving a letter of intervention by the date provided in the notice of the proceeding.

22.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.

22.03 Every letter of intervention shall contain the following information:

(a) a description of the intervenor, its membership, if any, the interest of the intervenor in the proceeding and the grounds for the intervention;

(b) in the case of a frequent intervenor, an attached document describing the intervenor, its mandate and objectives, membership, if any, the constituency represented, the types of programs or activities carried out, and the identity of their authorized representative in Board proceedings, unless such a document was otherwise filed within the previous 12 month period;

(c) subject to **Rule 22.04**, a concise statement of the nature and scope of the intervenor's intended participation;

(d) a request for the written evidence, if it is desired;

(e) an indication as to whether the intervenor intends to seek an award of costs;

(f) if applicable, the intervenor's intention to participate in the hearing using the French language; and

(g) the full name, address, telephone number, and email address, of no more than two representatives of the intervenor, including counsel, for the purposes of service and delivery of documents in the proceeding.

Subsection (b) applies to letters of intervention filed after June 1, 2014.

22.04 Where, by reason of an inability or insufficient time to study the document initiating the proceeding, a person is unable to include any of the

information required in the letter of intervention under **Rule 22.03(b)**, the person shall:

(a) state this fact in the letter of intervention initially filed; and

(b) refile and serve the letter of intervention with the information required under **Rule 22.03(b)** within 15 calendar days of receipt of a copy of any written evidence, or within 15 calendar days of the filing of the letter of intervention, or within 3 calendar days after a proposed issues list has been filed under **Rule 28**, whichever is later.

22.05 A person may apply for intervenor status after the time limit directed by the Board by filing and serving a notice of motion and a letter of intervention that, in addition to the information required under **Rule 22.03**, shall include reasons for the late application.

22.06 The Board may dispose of a motion under **Rule 22.05** with or without a hearing.

22.07 A party may object to a person applying for intervenor status by filing and serving written submissions within 5 business days of being served with a letter of intervention.

22.08 The person applying for intervenor status may make written submissions in response to any submissions filed under **Rule 22.07**.

22.09 The Board may grant intervenor status on conditions it considers appropriate.

## 23. Public Comment

23.01 Except as otherwise provided in a notice or procedural order issued by the Board, a person who does not wish to be a party in a proceeding, but who wishes to communicate views to the Board, shall file a letter of comment.

23.02 The letter of comment shall include the nature of the person's interest, the person’s full name, mailing address, email address and telephone number.

23.03 Before the record of a proceeding is closed, the applicant in the proceeding must address the issues raised in letters of comment by way of a document filed in the proceeding.

23.04 In any proceeding, the Board may make arrangements to receive oral comment on the record of the proceeding.

23.05 A person who makes an oral comment shall not do so under oath or affirmation and shall not be subject to cross-examination, unless the Board directs otherwise.

## 24. Adjournments

24.01 The Board may adjourn a hearing on its own initiative, or upon motion by a party, and on conditions the Board considers appropriate.

24.02 Parties shall file and serve a motion to adjourn at least 10 calendar days in advance of the scheduled date of the hearing.

# PART IV - PRE-HEARING PROCEDURES

## 25. Technical Conferences

25.01 The Board may direct the parties to participate in technical conferences for the purposes of reviewing and clarifying an application, an intervention, a reply, the evidence of a party, or matters connected with interrogatories.

25.02 The technical conferences may be transcribed, and the transcription, if any, shall be filed and form part of the record of the proceedings.

## 26. Interrogatories

26.01 In any proceeding, the Board may establish an interrogatory procedure to:

(a) clarify evidence filed by a party;

(b) simplify the issues;

(c) permit a full and satisfactory understanding of the matters to be considered; or

(d) expedite the proceeding.

26.02 Interrogatories shall:

(a) be directed to the party from whom the response is sought;

(b) contain a specific reference to the evidence;

(c) be grouped together according to the issues to which they relate;

(d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;

(e) be numbered using a continuous numbering system such that:
- the format is [issue number] [acronym of party] [interrogatory number for that party]
- the "issue number" corresponds to the issues list, or if there is no issues list in the proceeding, to the exhibit or chapter number or letter in the application;
- the "acronym of party" corresponds to the Board-issued list of acronyms;
- the "interrogatory number for that party" is sequential for that party despite a change in issue number (e.g. 2 Staff 4 represents Board staff's fourth interrogatory in total); and
- if a supplementary round of interrogatories is ordered, the "interrogatory number for that party" remains sequential for that party and the suffix "s" is added to the interrogatory number;

(f) be filed and served as directed by the Board; and

(g) set out the date on which they are filed and served.

## 27. Responses to Interrogatories

27.01 Subject to **Rule 27.02**, where interrogatories have been directed and served on a party, that party shall:

(a) provide a full and adequate response to each interrogatory;

(b) group the responses together according to the issue to which they relate;

(c) repeat each question at the beginning of each response;

(d) respond to each interrogatory on a separate page or pages;

(e) number the responses as described in Rule 28.02(e) ;

(f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;

(g) file and serve the response as directed by the Board; and

(h) set out the date on which the response is filed and served.

27.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

(a) where the party contends that the interrogatory seeks information that is not relevant, setting out specific reasons in support of that contention;

(b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or

(c) otherwise explaining why such a response cannot be given.

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**.

27.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

27.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.

## 28. Identification of Issues

28.01 The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

(a) the identification of issues would assist the Board in the conduct of the proceeding;

(b) the documents filed do not sufficiently set out the matters in issue at the hearing; or

(c) the identification of issues would assist the parties to participate more effectively in the hearing.

28.02 The Board may direct the parties to participate in issues conferences for the purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

28.03 A proposed issues list shall set out any issues that:

(a) the parties have agreed should be contained on the list;

(b) are contested; and

(c) the parties agree should not be considered by the Board.

28.04 Where the Board has issued a procedural order for a list of issues to be determined in the proceeding, a party seeking to amend the list of issues shall do so by way of motion.

## 29. Alternative Dispute Resolution

29.01 The Board may direct that participation in alternative dispute resolution ("ADR") be mandatory.

29.02 An ADR conference shall be open only to parties and their representatives, unless the Board directs or the parties agree otherwise.

29.03 A Board member shall not participate in an ADR conference, and the conference shall not be transcribed or form part of the record of a proceeding.

29.04 The Board may appoint a person to chair an ADR conference.

29.05 The chair of an ADR conference may enquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

29.06 The chair of an ADR conference may attempt to effect a settlement of issues by any reasonable means including:

(a) clarifying and assessing a party's position or interests;

(b) clarifying differences in the positions or interests taken by the respective parties;

(c) encouraging a party to evaluate its own position or interests in relation to other parties by introducing objective standards; and

(d) identifying settlement options or approaches that have not yet been considered.

29.07 Subject to **Rule 29.08**, where a representative attends an ADR conference without the party, the representative shall be authorized to settle issues.

29.08 Any limitations on a representative's authority shall be disclosed at the outset of the ADR conference.

29.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.

29.10 Admissions, concessions, offers to settle and related discussions shall not be admissible in any proceeding without the consent of the affected parties.

## 30. Settlement Proposal

30.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement in order to allow the Board to review and consider the settlement.

30.02 The settlement proposal shall identify for each issue those parties who agree with the settlement of the issue and any parties who disagree.

30.03 The parties shall ensure that the settlement proposal contains or identifies evidence and rationale sufficient to support the settlement proposal and shall provide such additional evidence and rationale as the Board may require.

30.04 A party who does not agree with the settlement of an issue will be entitled to offer evidence in opposition to the settlement proposal and to cross-examine on the issue at the hearing.

30.05 Where evidence is introduced at the hearing that may affect the settlement proposal, any party may, with leave of the Board, withdraw from the proposal upon giving notice and reasons to the other parties, and **Rule 30.04** applies.

30.06 Where the Board accepts a settlement proposal as a basis for making a decision in the proceeding, the Board may base its findings on the settlement proposal, and on any additional evidence that the Board may have required.

## 31. Pre-Hearing Conference

31.01 In addition to technical, issues and ADR conferences, the Board may, on its own motion or at the request of any party, direct the parties to make submissions in writing or to participate in pre-hearing conferences for the purposes of:

(a) admitting certain facts or proof of them by affidavit;

(b) permitting the use of documents by any party;

(c) recommending the procedures to be adopted;

(d) setting the date and place for the commencement of the hearing;

(e) considering the dates by which any steps in the proceeding are to be taken or begun;

(f) considering the estimated duration of the hearing; or

(g) deciding any other matter that may aid in the simplification or the just and most expeditious disposition of the proceeding.

31.02 The Board Chair may designate one member of the Board or any other person to preside at a pre-hearing conference.

31.03 A member of the Board who presides at a pre-hearing conference may make such orders as he or she considers advisable with respect to the conduct of the proceeding, including adding parties.

# PART V - HEARINGS

## 32. Hearing Format and Notice

32.01 In any proceeding, the Board may hold an oral, electronic or written hearing, subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises.

32.02 The format, date and location of a hearing shall be determined by the Board.

32.03 Subject to **Rule 21.02**, the Board shall provide written notice of a hearing to the parties, and to such other persons or class of persons as the Board considers necessary.

## 33. Hearing Procedure

33.01 Parties to a hearing shall comply with any directions issued by the Board in the course of the proceeding.

## 34. Summons

34.01 A party who requires the attendance of a witness or production of a document or thing at an oral or electronic hearing may obtain a Summons from the Board Secretary.

34.02 Unless the Board directs otherwise, the Summons shall be served personally and at least 48 hours before the time fixed for the attendance of the witness or production of the document or thing.

34.03 The issuance of a Summons by the Board Secretary, or the refusal of the Board Secretary to issue a Summons, may be brought before the Board for review by way of a motion.

## 35. Hearings in the Absence of the Public

35.01 Subject to the *Statutory Powers Procedure Act* and the statute under which the proceeding arises, the Board may hold an oral or electronic hearing or part of the hearing in the absence of the public, with such persons in attendance as the Board may permit and on such conditions as the Board may impose.

## 36. Constitutional Questions

36.01 Where a party intends to raise a question about the constitutional validity or applicability of legislation, a regulation or by-law made under legislation, or a rule of common law, or where a party claims a remedy under subsection 24(1) of the Canadian Charter of Rights and Freedoms, notice of a constitutional question shall be filed and served on the other parties and the Attorneys General of Canada and Ontario as soon as the circumstances requiring notice become known and, in any event, at least 15 calendar days before the question is argued.

36.02 Where the Attorneys General of Canada and Ontario receive notice, they are entitled to adduce evidence and make submissions to the Board regarding the constitutional question.

36.03 The notice filed and served under **Rule 36.01** shall be in substantially the same form as that required under the Rules of Civil Procedure for notice of a constitutional question.

## 37. Hearings in French

37.01 Subject to this Rule, evidence or submissions may be presented in either English or French.

37.02 The Board may conduct all or part of a hearing in French when a request is made:

(a) by a party;

(b) by a person seeking intervenor status at the time the application for intervenor status is made; or

(c) by a person making an oral comment under **Rule 23** who indicates to the Board the desire to make the presentation in French.

37.03 Where all or part of a hearing is to be conducted in French, the notice of the hearing shall specify in English and French that the hearing is to be so conducted, and shall further specify that English may also be used.

37.04 Where a written submission or written evidence is provided in either English or French, the Board may order any person presenting such written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

## 38. Media Coverage

38.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

38.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

# PART VI - COSTS

## 39. Cost Eligibility and Awards

39.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

39.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 39.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

# 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.

# 2


# ONTARIO ENERGY BOARD

Practice Direction

On

Confidential Filings

Revised October 13, 2011

# ONTARIO ENERGY BOARD

# PRACTICE DIRECTION ON CONFIDENTIAL FILINGS

## 1. INTRODUCTION AND PURPOSE

The purpose of this Practice Direction on Confidential Filings is to establish uniform procedures for the filing of confidential materials in relation to all proceedings that come before the Ontario Energy Board. This Practice Direction is also intended to assist participants in the Board's proceedings in understanding how the Board will deal with such filings.

The Board's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its proceedings should be open, transparent, and accessible. The Board therefore generally places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials. That being said, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such.

This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

The Board and parties to a proceeding are required to devote additional resources to the administration, management and adjudication of confidentiality requests and confidential filings. In this context, it is particularly important that all parties remain mindful that only materials that are clearly relevant to the proceeding should be filed, whether the party is filing materials at its own instance, is requesting information by way of interrogatory or is responding to an interrogatory. Parties are reminded that, under the Board's *Rules of Practice and Procedure*, a party that is in receipt of an interrogatory that it believes is not relevant to the proceeding may file and serve a response to the interrogatory that sets out the reasons for the party's belief that the requested information is not relevant. This process applies to all interrogatories, and is of particular significance in relation to confidential filings given the administrative issues associated with the management of those filings.

The Board's *Rules of Practice and Procedure* govern the conduct of all proceedings before the Board. Those *Rules* require compliance with this Practice Direction.

The Board will continue to monitor the effectiveness of its approach to confidential filings and will revise this Practice Direction on an as-needed basis.

## 2. APPLICATION

The procedures set out in this Practice Direction are to be followed by all participants in a proceeding before the Board, unless otherwise directed by the Board. This includes proceedings to be determined under delegated authority (see section 3.3) and proceedings commenced on the Board's own motion.

This Practice Direction is subordinate to existing law and regulations, including the *Freedom of Information and Protection of Privacy Act*, the *Ontario Energy Board Act, 1998*, and the *Statutory Powers Procedures Act,* Board instruments (i.e., licences, codes, rules and Board orders) and the Board's *Rules of Practice and Procedure*.

This Practice Direction does not address the manner in which Board members and Board staff will handle confidential information, which is an issue of the Board's internal processes. The Board has implemented internal procedures that are designed to ensure that confidential information is segregated from other information and is made available within the Board on a limited basis.

## 3. DEFINITIONS AND INTERPRETATION

### 3.1. Definitions

3.1.1. In this Practice Direction:

"**Act**" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

"**ADR**" means alternative dispute resolution;

"**applicant**" means a person who makes an application to the Board, and includes a person that is filing a notice under section 80 or 81 of the Act;

"**application**" when used in connection with a proceeding commenced by an application to the Board, means the commencement by a party of a proceeding before the Board, and includes a notice filed under section 80 or 81 of the Act;

"**Board**" means the Ontario Energy Board and includes any panels or delegates thereof;

"**Board Secretary**" means the Secretary of the Board and any Assistant Secretary appointed by the Board under the Act;

"**business day**" means any day which is not a holiday;

"**document**" or "**record**" includes a written document, film, audio tape, videotape, file, photograph, chart, graph, map, plan, survey, book of account, transcript, and any information stored by means of an electronic storage and retrieval system;

"**FIPPA**" means the *Freedom of Information and Protection of Privacy Act* (Ontario);

"**hearing**" means a hearing in any proceeding before the Board, and includes an electronic hearing, an oral hearing, and a written hearing;

"**holiday**" means any Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed for observance of a holiday within the meaning of the *Interpretation Act* (Ontario);

"**party**" includes an applicant, an appellant, any person granted intervenor status by the Board and any person ordered to produce information in a proceeding before the Board; and

"**proceeding**" means a process to decide a matter brought before the Board, including a matter commenced by application, notice of motion, notice of appeal, reference, request of the Minister, Order in Council or on the Board's own motion.

3.1.2. Except as otherwise defined in section 3.1.1, words and expressions used in this Practice Direction shall have the meaning ascribed to them in the Act and the Board's *Rules of Practice and Procedure.*

## 3.2. Interpretation

3.2.2. In this Practice Direction:

(a) words importing the singular include the plural and vice versa;

(b) words importing a gender include any gender;

(c) words importing a person include (i) an individual, (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) any government, government agency or body, regulatory agency or body or other body politic or collegiate;

(d) where a word or phrase is defined in this Practice Direction, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning;

(e) a reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision; and

(f) the expression "including" means including without limitation.

### 3.3. Matters Decided Under Delegated Authority

3.3.1. Under the authority of section 6 of the Act, the management committee of the Board has delegated certain powers or duties to an employee of the Board. In such cases, the delegate is responsible for making determinations in relation to confidential filings. The provisions of this Practice Direction otherwise apply in relation to confidential filings made in the context of a proceeding to be decided under delegated authority.

## 4. WHEN REQUEST FOR CONFIDENTIALITY IS NOT REQUIRED

### 4.1. Information Identified as Confidential in Board Templates and Filing Guidelines

4.1.1. The Board has developed certain templates and filing guidelines to assist applicants in preparing licensing and other applications. Certain of these templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences, identify predefined categories of information that will be considered confidential in the normal course. Where a Board template or filing guideline indicates that information will be treated in confidence, no formal request for confidentiality under Part 5 is required. However, to the extent practicable, any such information should be clearly marked "confidential".

4.1.2. Where a Board template or filing guideline indicates that information will be treated in confidence, the information will not be placed on the public record nor provided to any other party unless another party requests access to that information under section 4.1.4 and the Board rules in favour of that request.

4.1.3. In the absence of a request for confidentiality, all information that is not indicated on a template or in a filing guideline as being confidential will be included on the public record. An applicant that wishes information that would normally be included on the public record to be held confidential must follow the procedure

set out in Part 5, and the Board will determine the request in accordance with Part 5.

4.1.4. Where a Board template or filing guideline indicates that information will be treated in confidence, a party may request access to that information by filing a request with the Board Secretary and serving a copy of the request on the applicant and each party. The request must address the matters identified in paragraph (b) of section 5.1.7. The applicant will have an opportunity to object to the request for access to confidential information. The applicant must file its objection with the Board Secretary and serve it on all parties within the time specified by the Board. The Board will determine the request for access to confidential information in accordance with Part 5.

### 4.2. Information filed Under the Board's Reporting and Record Keeping Requirements ("RRR")

4.2.1. The Board's *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities*, *Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements* and *Electricity Reporting and Record Keeping Requirements* require that licensees and natural gas utilities file certain information with the Board on a regular basis. Each of these RRR identify information that the Board intends to treat in confidence. No formal request for confidentiality is required in relation to such information when it is filed with the Board as part of a regular RRR filing. However, to the extent practicable, any such information should be clearly marked "confidential". Where such information is filed as part of a regular RRR filing and is subsequently filed in a proceeding, Parts 5 and 6 apply.

### 4.3 Personal Information under FIPPA

4.3.1 Subject to limited exceptions, the Board is prohibited from releasing personal information, as that phrase is defined in FIPPA. When a person files a document or record that contains the personal information of another person who is not a party to the proceeding, the person filing the document or record must file two versions of the document or record in accordance with Rule 9A.01 of the Board's *Rules of Practice and Procedure*. As indicated in Rule 9A.02, the confidential, un-redacted version of the document or record will be held in confidence and neither that version of the document or record nor the personal information contained in it will be placed on the public record or provided to any other party, including a person from whom the Board has accepted a Declaration and Undertaking under section 6.1, unless the Board determines that the information is not personal information or that the disclosure of the personal information would be in accordance with the requirements of FIPPA.

## 5. GENERAL PROCESS FOR CONFIDENTIALITY IN MATTERS BEFORE THE BOARD

The processes set out in this Part and in Part 6 are intended to allow for the protection of information that has been properly designated as confidential. The onus is on the person requesting confidential treatment to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

It is also the expectation of the Board that parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the commercial sensitivity of the information at issue or with any legislative obligations of confidentiality or non-disclosure, and to prepare meaningful redacted documents or summaries so as to maximize the information that is available on the public record. This will provide parties with a fair opportunity to present their cases and permit the Board to provide meaningful and well-documented reasons for its decisions.

The processes set out in this Part and in Part 6 contemplate that the Board will play a central role in directing and managing the exchange of confidential filings and related materials (such as the Declaration and Undertaking). A party that independently serves other parties with documents containing confidential information other than through or at the direction of the Board does so at its own risk.

### 5.1. Process for Confidentiality Requests

5.1.1. All filings must be made in accordance with the Board's *Rules of Practice and Procedure*, specifically, Rule 10 of the *Rules of Practice and Procedure*, which deals with confidential documents before the Board.

5.1.2. In accordance with Rule 10.01 of the Board's *Rules of Practice and Procedure,* a party may request that all or part of a document be held confidential.

5.1.3. A request for confidentiality must be addressed to the Board Secretary.

5.1.4. A request for confidentiality must include the following items:

(a) a cover letter indicating the reasons for the confidentiality request, including the reasons why the information at issue is considered confidential and the reasons why public disclosure of that information would be detrimental;

(b) a confidential, un-redacted version of the document containing all of the information for which confidentiality is requested. This version of the document should be marked "confidential" and should identify all portions of document for which confidentiality is claimed by using shading, square brackets or other appropriate markings. If confidential treatment is

requested in relation to the entire document, the document should be printed on coloured paper; and

(c) either:

i. a non-confidential, redacted version of the document from which the information that is the subject of the confidentiality request has been deleted or stricken; or

ii. where the request for confidentiality relates to the entire document, a non-confidential description or summary of the document.

5.1.5. A copy of the cover letter requesting confidentiality, together with the non-confidential version or non-confidential description of the document (as applicable) must be served on all parties to the proceeding, and will be placed on the public record. The confidential, un-redacted version of the document will, subject to section 5.1.6, be kept confidential until the Board has made a determination on the confidentiality request.

5.1.6. A party to the proceeding may object to the request for confidentiality by filing an objection with the Board Secretary within the time specified by the Board. The objection must be served on all other parties to the proceeding, including the party that made the confidentiality request. Where the party requires access to the confidential version of the document in order to submit its objection, the party may request that the Board allow access for that purpose under suitable arrangements as to confidentiality. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board. The party that made the confidentiality request may object to the request for access within the time and in the manner specified by the Board.

5.1.7. An objection to a request for confidentiality must address the following:

(a) the reason why the party believes that the information that is the subject of the request for confidentiality is not confidential, in whole or in part, by reference to the grounds for confidentiality expressed by the party making the request for confidentiality; and

(b) the reason why the party requires disclosure of the information that is the subject of the request for confidentiality and why access to the non-confidential version or description of the document (as applicable) is insufficient to enable the party to present its case.

5.1.8. The party requesting confidentiality will have an opportunity to reply to the objection. The replying party must file its reply with Board Secretary and serve it on all parties to the proceeding within the time specified by the Board.

5.1.9. The Board will then assess whether the request for confidentiality should be granted, and may determine that a request for confidentiality is not warranted regardless of whether any party has objected to the request. Some of the factors that the Board may consider in making this assessment are listed in Appendix A, including whether the Board has in the past assessed or maintained the same type of information as confidential. An illustrative list of the types of information that the Board has previously assessed or maintained as confidential is set out in Appendix B, and parties may anticipate that the Board will accord confidential treatment to these types of information in the normal course.

5.1.10. In determining the request for confidentiality, the Board may:

(a) order the document placed on the public record, in whole or in part;

(b) order the document be kept confidential, in whole or in part;

(c) order that the non-confidential redacted version of the document or the non-confidential description or summary of the document (as applicable) be revised;

(d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality (see Part 6); or

(e) make any other order that the Board finds to be in the public interest.

5.1.11. The Board will notify all parties of its decision in relation to a request for confidentiality.

5.1.12. Where the Board has ordered that information that is the subject of a confidentiality request be placed on the public record or disclosed to another party, in whole or in part, the person who filed the information will, subject to section 5.1.13, have a period of 5 business days in which it may request that the information be withdrawn. Such request shall be made in writing to the Board Secretary or, where the request is made during an oral hearing, directly to the Board.

5.1.13. The ability to request the withdrawal of information under section 5.1.12 does not apply to information that was required to be produced by an order of the Board.

5.1.14. If the party that made the request for confidentiality indicates, within five business days of the date of receipt of the Board's order, that it intends to appeal or seek review of the decision, the Board will not place the document on the public record until the appeal or review has been concluded or the time for filing an appeal or review has expired without an appeal or review having been commenced. In the

absence of such an indication, the Board will deal with the information in the manner set out in its order.

### 5.2. Confidentiality Requests Made Orally During an Oral Hearing

5.2.1. The provisions of section 5.1 generally apply to requests for confidentiality made in the context of an oral hearing. However, the Panel presiding over the oral hearing may take such action as it considers appropriate to expedite the process when there is an immediate need for information that the Panel needs to hear.

### 5.3. Interrogatories

5.3.1. A party may request that all or part of a response to an interrogatory be held confidential. The provisions of section 5.1 apply to requests for confidentiality made in relation to a response to an interrogatory, with such modifications as the context may require.

## 6. ARRANGEMENTS AS TO CONFIDENTIALITY

Where the Board has agreed to a request for confidentiality, the confidential information will not be placed on the public record. Representatives of parties to the proceeding will generally be given access to the confidential information provided that suitable arrangements as to confidentiality are made, although the Board may limit access to confidential information to those parties that the Board has determined require access to the confidential information in order to present their cases. This Part sets out the principal arrangements that the Board will use in allowing limited and conditional access to confidential information by representatives of parties.

The processes set out in this Part require that parties file a Declaration and Undertaking with the Board. Parties to a proceeding will be notified when the Board has accepted a Declaration and Undertaking from a person. Parties should not independently serve a Declaration and Undertaking on other parties.

The Board considers violations of a Declaration and Undertaking given to the Board under this Part to be a matter of very serious concern. Such violations can be, and will continue to be, subject to sanctions imposed by the Board. In appropriate cases, the Board may also refuse to accept further Declaration and Undertakings from persons whose future compliance with a Declaration and Undertaking is in question.

### 6.1 Declaration and Undertaking

6.1.1. The Board may determine that confidential information should, in whole or in part, be disclosed to one or more persons that have signed a Declaration and

Undertaking in the form set out in Appendix C. The Declaration and Undertaking is a binding commitment by the person: (i) not to disclose the confidential information except as permitted by the Board; (ii) to treat the confidential information in confidence; (iii) to return or destroy the confidential information following completion of the proceeding; and (iv) in the case of confidential information in electronic media, to expunge the confidential information from all electronic apparatus and data storage media under the person's direction or control, and to continue to abide by the terms of the Declaration and Undertaking in relation to such confidential information to the extent that it subsists in an electronic form and cannot reasonably be expunged in a manner that ensures that it cannot be retrieved. A signed Declaration and Undertaking must be filed with the Board and will be placed on the public record.

6.1.2. Subject to section 6.1.4, the Board will, except where there are compelling reasons for not doing so, accept a Declaration and Undertaking from the following:

(a) counsel for a party; and

(b) an expert or consultant for a party.

As a general rule, such counsel, expert or consultant cannot be a director or employee of a party.

6.1.3. Subject to section 6.1.4, the Board may accept a Declaration and Undertaking from other persons in appropriate cases. In such a case, a modified version of the form of Declaration and Undertaking will be made available to such person.

6.1.4. The Board shall notify the party that filed the confidential information that would be the subject-matter of a Declaration and Undertaking of the persons from whom a Declaration and Undertaking will be accepted. The party shall have an opportunity to object to the acceptance of a Declaration and Undertaking from such person in the manner and within the time specified by the Board. The person to whom the objection relates shall have an opportunity to reply to the objection in the manner and within the time specified by the Board. The Board will then decide whether it will accept a Declaration and Undertaking from such person and may, as a condition of acceptance of the Declaration and Undertaking, impose such further conditions in relation to that person's access to the confidential information as the Board considers appropriate. Where the Board accepts a Declaration and Undertaking from a person, the Board will notify the other parties to the proceeding or direct that the other parties be notified accordingly. A person should not serve a Declaration and Undertaking on other parties unless directed by the Board to do so. A party is not required to serve confidential information on a person until such time as the party has been notified that the Board has accepted a Declaration and Undertaking from that person.

6.1.5. Where the Board determines that confidential information should be disclosed to one or more persons that have signed a Declaration and Undertaking, the Board may act as the conduit for the service of confidential information on such persons. In such cases, the confidential information need only be filed with the Board Secretary (in the appropriate number of copies), and the Board Secretary will attend to the distribution of the confidential information to persons that have signed a Declaration and Undertaking.

6.1.6. In accordance with the terms of the Declaration and Undertaking, confidential information must either be destroyed or expunged (as applicable) or returned to the Board Secretary for destruction promptly following the end of the proceeding for destruction. A person that chooses to destroy or expunge confidential information must file with the Board Secretary a certification of destruction in the form set out in Appendix D.

## 6.2. Hearings in the Absence of the Public (*In Camera* Hearings)

6.2.1. Under section 9 of the *Statutory Powers Procedure Act* (Ontario), oral hearings are required to be open to the public except where the Board is of the opinion that "intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public", in which case the Board may hold the hearing in the absence of the public. It is therefore the Board's normal practice is to hold oral hearings in public to comply with this obligation and to facilitate transparency, openness, and accessibility of the Board's processes.

6.2.2. The Board recognizes that there may be some instances where the proceedings may need to be closed to the public. This situation could arise when there is a possibility that information that the Board has agreed is confidential will be disclosed during an oral hearing. When this occurs, the Board will exclude from the hearing room all persons other than the following:

(a) representatives of the Board (i.e., Board staff, Board consultants, etc.);

(b) representatives of the party that filed the confidential information; and

(c) persons that have signed and returned to the Board a Declaration and Undertaking, provided that the confidential information at issue is covered by the Declaration and Undertaking and that the Board has determined that the persons require access to the confidential information in order to present their cases.

The hearing will then proceed *in camera* for such time as the confidential information is the subject of the hearing or is being referred to.

6.2.3. When part of a hearing is conducted *in camera*, transcripts of the *in camera* portion of the hearing will be dealt with in the same manner as the confidential information at issue. Subject to section 6.2.5, copies of the transcript of the *in camera* portion of the hearing will only be provided to the party that provided the confidential information and to applicable persons that have signed and returned to the Board a Declaration and Undertaking.

6.2.4. The party that filed the confidential information that is the subject of an *in camera* portion of a hearing shall, within five business days or such other time as the Board may direct, review the transcript of that portion of the hearing and shall file with the Board:

(a) a redacted version of the transcript that identifies all portions of the transcript for which confidentiality is claimed, using shading, square brackets or other appropriate markings; or

(b) where the party believes that the entire transcript should be treated as confidential, a letter identifying why the party believes that to be the case and a summary of the transcript for the public record.

6.2.5. The Board will assess the filing made under section 6.2.4 and may, among such other action as the Board may take, do one or more of the following:

(a) provide a redacted version of a transcript prepared under section 6.2.4(a) or this section to all applicable persons that have signed and returned to the Board a Declaration and Undertaking, or direct that it be so provided;

(b) direct that the party that filed a redacted version of a transcript under section 6.2.4(a) or this section prepare and file a revised redacted version of the transcript;

(c) provide a summary of a transcript prepared under section 6.2.4(b) or this section to all parties to the proceeding, or direct that it be so provided;

(d) direct that the party that filed a summary of a transcript under section 6.2.4(b) prepare and file a revised summary or a redacted version of the transcript;

(e) direct that any public testimony that is given *in camera* be placed on the public record and provided to all parties to the proceeding; or

(f) direct that a redacted version of the transcript suitable for being placed on the public record be prepared and provided to all parties to the proceeding.

### 6.3. Other

6.3.1. Where the Board has made arrangements for the disclosure of confidential information, the Board may give further directions to the parties from time to time to protect the confidential information from disclosure to persons that are not entitled to such disclosure. These directions may include the process for the filing and exchange of interrogatories that contain the confidential information and the manner in which confidential information may be addressed as part of closing arguments or final submissions.

6.3.2. Parties should make every effort to prepare their written argument such that the entirety of the document can be placed on the public record. Where it is necessary to make specific reference to confidential information in a written argument, the party filing the argument should either:

(a) file a public version of the written argument together with a confidential appendix that contains the confidential information; or

(b) file both an un-redacted confidential version of the written argument and a public, redacted version of the written argument from which all confidential information has been deleted.

6.3.3. Where the Board considers that a confidential appendix to, or a redacted version of, a written argument contains information that has not been determined by the Board to be confidential, the Board may order the party filing the written argument to file a revised appendix or redacted version.

## 7. ADR CONFERENCES

7.1.1. This Practice Direction does not apply to ADR conferences. [1] Confidentiality in the context of ADR conferences shall be governed by the Board's *Rules of Practice and Procedure*, Settlement Guidelines and any other applicable Practice Guidelines.

[1] For clarity, an ADR conference does not include a technical conference. Any confidentiality issues arising in relation to a technical conference will be addressed in accordance with Parts 5 and 6 of this Practice Direction.

## 8. INSPECTIONS AND INVESTIGATIONS

Sections 110 and 111 of the Act contain provisions that address the confidentiality of documents, records and information obtained by an inspector under Part VII of the Act. Sections 112.0.5 and 112.0.6 of the Act are to the same effect in relation to information obtained by an investigator under Part VII.0.1 of the Act.

8.1.1. All documents, records and information obtained by an inspector during the course of an inspection under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act are confidential. Generally speaking, such documents, records and information will not be disclosed to anyone other than Board staff or Board members. By way of exception, documents, records and information obtained during an inspection or investigation may be disclosed:

(a) to counsel for the Board;

(b) as may be required in connection with the administration of the Act or any other Act that gives powers or duties to the Board;

(c) in any proceeding under the Act or any other Act that gives powers or duties to the Board;

(d) with the consent of the owner of the document or record or the person that provided the information; and

(e) where required by law.

8.1.2. No document, record or information obtained by an inspector under section 107 or 108 of the Act or obtained by an investigator under Part VII.0.1 of the Act will be introduced in evidence in a Board proceeding unless the Board has given notice to the owner of the document or record or the person who provided the information, and has given that person an opportunity to make representations with respect to the intended introduction of that evidence.

8.1.3. If any document, record, or other information obtained by an inspector or investigator is admitted into evidence in a proceeding before the Board, the Board may determine whether the document, record, or information should be kept confidential and, if so, whether and the extent to which the document, record or information should be disclosed under suitable arrangements as to confidentiality (see Part 6). The Board will determine the matter in accordance with Parts 5 and 6.

## 9. *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Participants in the Board's processes are reminded that the Board is subject to FIPPA. FIPPA addresses circumstances in which the Board may, upon request, be required to release information that is in its custody or under its control, and generally prohibits the Board from releasing personal information. Accordingly, the Board will have regard to its obligations under FIPPA when making determinations in relation to confidential filings (see section 4.3.1). A brief overview of the more relevant provisions of FIPPA is set out in Appendix E.

## 10. ELECTRONIC INFORMATION

The Board will not, without the consent of the party that filed the confidential information, transmit materials containing confidential information by electronic mail. Materials containing confidential information, including transcripts of in camera proceedings, may be made available only in paper form or on diskette or other machine-readable media.

## 11. ACCESS TO CONFIDENTIAL INFORMATION OUTSIDE OF PROCEEDING

Interested persons may wish to see confidential information at times other than during the proceeding in which the confidential information was filed. In such a case, the interested person may request access to that information by filing a request with the Board Secretary. The person that filed the confidential information will have an opportunity to object to the request for access to that information. The objection must be filed with the Board Secretary and served on the person requesting access. The Board will determine the request for access to confidential information in accordance with Part 5.

## Appendix A

## Considerations in Determining Requests for Confidentiality

The final determination of whether or not information will be kept confidential rests with the Board. The Board will strive to find a balance between the general public interest in transparency and openness and the need to protect confidential information. Some factors that the Board may consider in addressing confidentiality of filings made with the Board are:

(a) the potential harm that could result from the disclosure of the information, including:

  i. prejudice to any person's competitive position;

  ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;

  iii. whether the information could interfere significantly with negotiations being carried out by a party; and

  iv. whether the disclosure would be likely to produce a significant loss or gain to any person;

(b) whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board;

(c) whether the information pertains to public security;

(d) whether the information is personal information;

(e) whether the Information and Privacy Commissioner or a court of law has previously determined that a record should be publicly disclosed or kept confidential;

(f) if an access request has previously been made for the information under FIPPA, whether the information was disclosed as a result of that request;

(g) any other matters relating to FIPPA and FIPPA exemptions;

(h) whether the type of information in question was previously held confidential by the Board; and

(i) whether the information is required by legislation to be kept confidential.

Information that is in the public domain will not be considered confidential.

## Appendix B

## Types of Information that Have Previously Been Held Confidential

This Appendix contains an illustrative list of the types of information previously assessed or maintained by the Board as confidential, and parties may anticipate that the Board will accord confidential treatment to these types of information in the normal course.

### 1. Individual Personal Records

Personal records of employees or other members of entities seeking licenses that are either filed with the Board or otherwise obtained have previously been held confidential. Individual personal records include police, tax, CPIC, and other personal records.

### 2. Credit Checks

Personal credit checks. These are credit checks filed with the Board, or obtained by the Board, from a variety of commercial sources including Dunn & Bradstreet and Standard & Poor's.

### 3. Information Covered by Solicitor-client Privilege or Litigation Privilege

Advice with respect to litigation or other legal information protected by solicitor-client privilege or litigation privilege.

### 4. Tax Related Information

Information from a tax return or information gathered for the purpose of determining tax liability or collecting a tax.

### 5. Third Party Information under FIPPA

Third party information as described in section 17(1) of FIPPA, including vendor pricing information.

### 6. "Forward Looking" Financial Information

"Forward looking" financial information that has not been publicly disclosed and that Ontario securities law therefore requires be treated as confidential.

## 7. Information Identified as Confidential in Board Templates and Filing Guidelines

Information identified as being considered confidential in Board templates and filing guidelines, including licence application forms for electricity licences and gas marketing licences.

## 8. Information Filed Under the RRR

Information identified in the Board's *Natural Gas Reporting & Record Keeping Requirements: Rule for Natural Gas Utilities*, *Natural Gas Reporting and Record Keeping Requirements: Gas Marketer Licence Requirements* and *Electricity Reporting and Record Keeping Requirements* as being treated as confidential.

## Appendix C

## Form of Declaration and Undertaking

EB-[•]

IN THE MATTER OF [•]

DECLARATION AND UNDERTAKING

I, _____, am counsel of record or a consultant for _____.

DECLARATION

I declare that:

1. I have read the *Rules of Practice and Procedure* of the Ontario Energy Board (the "Board") and all Orders of the Board that relate to this proceeding.

2. I am not a director or employee of a party to this proceeding for which I act or of any other person known by me to be a party in this proceeding.

3. I understand that this Declaration and Undertaking applies to all information that I receive in this proceeding and that has been designated by the Board as confidential and to all documents that contain or refer to that confidential information ("Confidential Information").

4. I understand that execution of this Declaration and Undertaking is a condition of an Order of the Board, that the Board may apply to the Superior Court of Justice to enforce it.

UNDERTAKING

I undertake that:

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

2. I will not divulge Confidential Information except to a person granted access to such Confidential Information or to the Board.

3. I will not reproduce, in any manner, Confidential Information without the prior written approval of the Board. For this purpose, reproducing Confidential Information includes scanning paper copies of Confidential Information, copying the Confidential Information onto a diskette or other machine-readable media and saving the Confidential Information onto a computer system.

4. I will protect Confidential Information from unauthorized access.

5. With respect to Confidential Information other than in electronic media, I will, promptly following the end of this proceeding or within 10 days after the end of my participation in this proceeding:

   (a) return to the Board Secretary, under the direction of the Board Secretary, all documents and materials in all media containing Confidential Information, including notes, charts, memoranda, transcripts and submissions based on such Confidential Information; or

   (b) destroy such documents and materials and file with the Board Secretary a certification of destruction in the form prescribed by the Board pertaining to the destroyed documents and materials.

6. With respect to Confidential Information in electronic media, I will:

   (a) promptly following the end of this proceeding or within 10 days after the end of my participation in this proceeding, expunge all documents and materials containing Confidential Information, including notes, charts, memoranda, transcripts and submissions based on such Confidential Information, from all electronic apparatus and data storage media under my direction or control and file with the Board Secretary a certificate of destruction in the form prescribed by the Board pertaining to the expunged documents and materials; and

   (b) continue to abide by the terms of this Declaration and Undertaking in relation to any such documents and materials to the extent that they subsist in any electronic apparatus and data storage media under my direction or control and cannot reasonably be expunged in a manner that ensures that they cannot be retrieved.

7. For the purposes of paragraphs 5 and 6, the end of this proceeding is the date on which the period for filing a review or appeal of the Board's final order in this

proceeding expires or, if a review or appeal is filed, upon issuance of a final decision on the review or appeal from which no further review or appeal can or has been taken.

8. I will inform the Board Secretary immediately of any changes in the facts referred to in this Declaration and Undertaking.

Dated at _____ this _____ day of _____, _____.

Signature:
Name:
Company/Firm:
Address:
Telephone:
Fax:
E-mail:

## Appendix D

## Form of Certification of Destruction

CERTIFICATION OF DESTRUCTION

TO: The Ontario Energy Board (the "Board")

RE: Confidential information received in proceeding [•] *[insert proceeding number]* ("Confidential Information")

I hereby confirm that I have:

1. Destroyed all Confidential Information and all documents and materials in all non-electronic media containing Confidential Information governed by the Declaration and Undertaking signed by me in the above-referenced proceeding, including notes, memoranda, transcripts and written submissions.

2. Expunged all Confidential Information and all documents and materials in electronic media containing Confidential Information governed by the Declaration and Undertaking signed by me in the above-referenced proceeding, including notes, memoranda, transcripts and written submissions, from all electronic apparatus and data storage media under my direction or control.

Dated at _____, this _____ day of _____, _____.

Signature:

Name:

Company/Firm:

Address:

Telephone:

Fax:

E-mail:

## Appendix E

## Summary of Pertinent FIPPA Provisions

FIPPA allows any person to request access to records or information in the custody or under the control of the Board.

Subject to limited exceptions, the Board is prohibited from releasing personal information.

Following receipt of a request, the Board must release non-personal information that is in its custody or under its control unless the information falls within one of the exemptions listed in the legislation. Some of the exemptions are mandatory (in which case the information must be withheld) and others are discretionary (in which case the information may be withheld). For example, records do not need to be released if disclosure would:

(a) reveal advice to the government from a public servant or a consultant;

(b) interfere with law enforcement;

(c) reveal confidential information received from another government; or

(d) violate solicitor-client privilege.

The exemptions that are likely to be of most relevance in the context of confidential filings with the Board are those contained in section 17 of FIPPA, which relates to commercially sensitive third party information.

Under section 17(1), the Board must not, without the consent of the person to whom the information relates, disclose a record where:

(a) the record reveals a trade secret or scientific, technical, commercial, financial or labour relations information;

(b) the record was supplied in confidence implicitly or explicitly; and

(c) disclosure of the record could reasonably be expected to have any of the following effects:

i. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;

ii. result in similar information no longer being supplied to the Board where it is in the public interest that similar information continue to be so supplied;

iii. result in undue loss or gain to any person, group, committee or financial institution or agency; or

iv. reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Before granting a FIPPA request for access to a record that the Board has reason to believe might contain information referred to in section 17(1) of FIPPA, the Board must give written notice to the person to whom the information relates. That person then has an opportunity to make written representations as to why the record (or a part of the record) should not be disclosed. Where the Board subsequently decides to disclose the record (or a part of the record), the Board must again give written notice to the person to whom the information relates. That person then has an opportunity to appeal the decision to the Information and Privacy Commissioner.

Under section 17(2) of FIPPA, the Board must not, without the consent of the person to whom the information relates, disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

# 3

# ***Building Owners and Managers Association (BOMA) INTERROGATORY #011***

## ***Reference:***

Exhibit A, Tab 5, Schedule 2, Page 13

## ***Interrogatory:***

Please provide a copy of the Inergi Outsourcing Agreement.

## ***Response:***

Please find attached a confidential copy of the requested agreement. Hydro One has redacted all terms and conditions specifically relating to Customer Service Operations, as these services are not provided to Hydro One's transmission business and are therefore beyond the scope of Hydro One's current application. Also redacted is information that is sensitive from a security viewpoint (e.g. server names, addresses, etc.). If this information were to be disclosed to the public, there is significant risk that individuals or organizations could use the information to the detriment of Hydro One and Inergi.

# 4

**Hydro One Networks Inc.**
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**Oded Hubert**
Vice President
Regulatory Affairs

BY COURIER

August 31, 2016

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street
P.O. Box 2319
Toronto, ON, M4P 1E4

Dear Ms. Walli:

**EB-2016-0160 – Hydro One Networks Inc.'s 2017 and 2018 Transmission Cost-of-Service Application and Evidence Filing – Interrogatory Responses – Request for confidential treatment of certain documents**

In accordance with Rule 10 of the Board's *Rules of Practice and Procedure and the Board's Practice Direction on Confidential Filings*, Hydro One Networks Inc. hereby requests that responses provided to certain interrogatory requests made in the above proceeding be kept confidential and not be disclosed on the public evidentiary record.

The table below provides general descriptions of the confidential documents and the justifications relied upon to maintain confidential treatment of this information.

| Interrogatory | Document/Summary/Rationale |
|---|---|
| I-1-20 | *Fosters Associates 2014 Failure Analysis Report*<br><br>The report presents a 2014 statistical analysis of physical and inspection failures observed in selected plant categories classified in Transmission Lines, Transmission Stations and Distribution Lines owned and operated by Hydro One. The report contains asset survival analysis and data proprietary to Hydro One. The study compares service life indications derived using the Iowa curve family with indications derived by Hydro One using the Weibull survival function. The scope of the investigation was limited to a statistical life analysis.<br><br>Hydro One has been advised by Fosters Associates that this report is a proprietary commercial work product. The development of the hazard curves described in the report is proprietary information and the subject-matter of work products prepared by Fosters Associates to various clientele. Public disclosure of the report would adversely affect the commercial and financial interests of Foster Associates as potential clients could otherwise access and make use of the report information free of charge. |

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| I-1-118 | *Summary of actual results for Inergi's performance indicators (PIs), which include the monthly, quarterly and yearly measures, for the period from March 2015 to February 2016*<br><br>The summary categorizes the PIs and provides the following information: the number of PIs in each category; the number and percentage of PIs for which Inergi met performance expectations; and the number of PIs for which Inergi missed target or minimum performance levels. As an explanatory note in the summary, Hydro One indicates how many PIs were adjusted upward to achieve continuous improvement as per the Inergi Agreement, effective as of January 1, 2016.<br><br>Inergi LP has requested that this information be treated confidentially because it is not information that is in the public domain, the information is commercially sensitive and disclosure would adversely affect its commercial interests with other clientele. |
| I-2-11 | *Inergi Outsourcing Agreement*<br><br>This agreement is described in Exhibit C1, Tab 3, Schedule 2. The document contains terms and conditions defining the scope of services, fees payable to Inergi for performing the services, the governance structure and protocol applicable to the arrangement, and the allocation of risk and responsibility between the parties for various related matters.<br><br>Inergi LP has requested that this document be treated confidentially as it contains very commercially sensitive information which would be impactful to its commercial activities outside of Hydro One.<br><br>Portions of this agreement pertaining only to Hydro One's distribution business have been redacted. |
| I-2-25 | *Amended and Restated Operating Agreement with the Independent Electricity System Operator (IESO) dated April 25, 2014*<br><br>This agreement contains terms and conditions describing each party's respective role, rights, and responsibilities with respect to the secure and reliable use and operation of the "transmission facilities", as described therein. In addition to provisions addressing the allocation of risk and responsibility and the governance structure applicable to the relationship, the document also contains information on special protection systems and operating parameters and practices.<br><br>Hydro One has been advised by the IESO that the requested operating agreement is not publicly available. It contains both commercially sensitive information and information regarding operation of the integrated electric system ("IES"). Public disclosure could adversely impact security and safety of the IES. |
| I-3-11 | *Canadian Electricity Association's (CEA) report "2014 Bulk Electricity System Delivery Point Interruptions & Significant Power Interruptions"*<br><br>The 2014 annual report provides "All Canada" composite numbers for delivery point performance measures. Both the single year (2014) and five-year (2010 to 2014) average performance figures are provided in this report. This report is produced by the Transmission Consultative Committee on Outage Statistics (T-CCOS) with the CEA. Hydro One is a member of this committee. The CEA 2014 composite numbers in Figures 8a, 8b, 9, 10, and 11 in that Exhibit are from this report. |

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| | Hydro One has been advised by the CEA that the requested report is not publicly available and is sold on a subscription fee basis only. Public disclosure would adversely affect the commercial and financial interests of the CEA as potential clients could otherwise obtain access and make use of the Report information free of charge. |
| | *2014 Annual Report, Forced Outage Performance of Transmission Equipment*<br><br>The 2014 annual report provides "All Canada" composite numbers for equipment performance measures. Only the five-year (2010 to 2014) average performance figures are provided. This report is produced by the Transmission Consultative Committee on Outage Statistics (T-CCOS) with the CEA. Hydro One is a member of this committee. The CEA 2014 composite five-year moving averages in Figures 12 and 13 on page 26 of that Exhibit are based on information from this report.<br><br>Hydro One has been advised by the CEA that the requested report is not publicly available and is sold on a subscription fee basis only. Public disclosure would adversely affect the commercial and financial interests of the CEA as potential clients could otherwise obtain access and make use of the Report information free of charge. |
| I-6-1 | *Submission to Hydro One's Board of Directors regarding the 2017-2018 Transmission Application*<br><br>This is a submission to Hydro One's Board of Directors summarizing the company's proposed application to the OEB, seeking approval of cost of service transmission revenue requirement for 2017 and 2018. In its submission, management summarizes the form of application (i.e. cost of service), addresses the applicable transmission filing requirements, and the *Renewed Regulatory Framework for Electricity Distributors* ("RRFE"). Management details the financial metrics of the proposed application, the rationale behind the May 31st filing date, and the alignment of Hydro One's vision, values and business objectives with the RRFE. The submission also summarizes Hydro One's customer engagement approach, the Transmission System Plan, its development, and the current status of Hydro One's critical transmission assets. The document also contains a discussion on the impact on rates of the proposed application and the technical and strategic positions the proposed application adopts on certain issues.<br><br>The requested information is not publicly available and consistently treated in a confidential manner. Board of Director materials have been afforded confidential treatment in prior proceedings, see for example EB-2013-0416 Exhibit I-1.1-9 SEC 1. |
| I-6-57 | *Hydro One: Updated Discussion Notes – Preliminary CEO/CFO Pay Benchmarking* by Hugesson Consulting (April 2015)<br><br>Hugessen Consulting was engaged by Hydro One's Board of Directors to perform a competitive market assessment and provide advice for appropriate compensation for the recruitment of a new President and CEO and Chief Financial Officer. The report describes the compensation philosophy employed, the primary peer group and other reference groups used, and the benchmarking results. Based on Hugesson Consulting's market assessments, the CEO's total direct compensation was positioned close to the average (P50) of four other larger Canadian utilities and sits in the fourth quartile of the bottom 30 companies making up the S&P/TSX 60 Index. The CFO's total direct compensation is also in the fourth quartile of the bottom 30 companies making up the S&P/TSX 60 Index. |

| | |
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| | Hydro One has been advised by Hugesson Consulting that the content of its report is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the report would adversely impact Hugesson Consulting's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis. |
| I-6-57 | *Hydro One: Executive Compensation Benchmarking Report* dated October 16, 2015<br><br>This report was prepared after Hydro One engaged Towers Watson to complete a competitive market assessment of its total rewards program for executive-level management employees. On a total rewards basis, Hydro One is positioned on average below the 25th percentile. The report compares peer group organization profiles and compensation levels. It provides some market compensation data and observations regarding the data in relation to Hydro One.<br><br>Hydro One has been advised by Towers Watson that the content of its report is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the report would adversely impact Towers Watson's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis. |
| | *Hydro One: Non-executive Compensation Benchmarking Report dated October 16, 2015*<br><br>This report was prepared after Hydro One engaged Towers Watson to complete a competitive market assessment of its total rewards program for non-executive-level management employees. On an aggregate basis, Hydro One's position is aligned "at" or slightly above market median with any above market variance largely attributable to its "Support" segment identified in the report. The report describes its benchmark methodology and peer groups. It divides Hydro One's subject group into two segments and provides applicable benchmarking results. It also considers the role of pension and benefits in Hydro One's total rewards program.<br><br>Hydro One has been advised by Towers Watson that the content of its report is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the report would adversely impact Towers Watson's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis. |
| I-9-6 | *Results and Analysis of Phase 1 Insulator Tests Performed in Support of Hydro One Insulator Replacement Program*<br><br>This report entitled 'Results and Analysis of Phase 1 Insulator Tests Performed in Support of Hydro One Insulator Replacement Program' was produced by Electric Power Research Institute ("EPRI"). The report contains condition and testing data of insulators that is representative of a large installed insulator population. The condition of Hydro One insulators was assessed through benchmarking to EPRI and public domain test data. The test data supports the urgent replacement of COB and CP insulators manufactured between 1965 and 1982 that were installed at locations that pose safety concerns to the public.<br><br>This report has been prepared in contemplation of Hydro One carrying out an asset replacement program. The information contained in the report is commercially sensitive and may adversely impact negotiations with equipment vendors involved in the replacement program. |

| | |
|---|---|
| I-9-6 | *Galvatech Coating System Assessment – Aging Performance, Service Life and Evaluation of Field Applications by EPRI*<br><br>This report documents various test approaches and the performance evaluation of Galvatech 2000. It provides information on anticipated service life of the coating system, application methods and quality control.<br><br>This report has been prepared in contemplation of Hydro One carrying out an asset replacement program. The information contained in the report is commercially sensitive and may adversely impact negotiations with equipment vendors involved in the replacement program. |

This letter is being filed on the Regulatory Electronic Submission System. In accordance with the Practice Direction, the documents will be marked as confidential and delivered to the Board by way of courier.

Kindly advise the undersigned should the Board have any questions or concerns with this request.

Sincerely,

ORIGINAL SIGNED BY ODED HUBERT

Oded Hubert

cc. Parties to EB-2016-0160 (electronic only)

# 5

McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
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**Gordon M. Nettleton**
Partner
Email: gnettleton@mccarthy.ca

mccarthy tétrault

September 15, 2016

**VIA RESS AND COURIER**

Mx. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**RE: EB-2016-0160 Hydro One Networks Inc. – Reply Argument to Submission on Confidentiality**

In accordance with Procedural Order No. 2, please find enclosed the submissions of Hydro One Networks Inc. concerning its requests for confidential treatment of certain evidence.

Yours truly,

McCarthy Tétrault LLP

Per:

Gordon M. Nettleton

GMN/mpf
Enclosure

**IN THE MATTER OF** a cost of service application made by Hydro One Networks Inc. Transmission with the Ontario Energy Board (OEB) on May 31, 2016 under section 78 of the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its transmission revenue requirement and to the Ontario Uniform Transmission Rates, to be effective January 1, 2017 and January 1, 2018.

**HYDRO ONE NETWORKS INC.**

**REPLY ARGUMENT TO SUBMISSIONS ON CONFIDENTIALITY**

**September 16, 2016**

## A. INTRODUCTION

In accordance with Procedural Order No. 2, Hydro One provides this Reply to the submissions made by School Energy Coalition ("**SEC**"), Anwaatin Inc. ("**Anwaatin**") and OEB Staff ("**Staff**") in respect of the requested confidential treatment of the following documents:

| Interrogatory | Document |
|---|---|
| I-1-118 | Summary of actual results for Inergi's performance indicators (PIs), which include the monthly, quarterly and yearly measures, for the period from March 2015 to February 2016 ("**Inergi PIs**") |
| I-2-11 | Inergi Outsourcing Agreement ("**Inergi Agreement**") |
| I-2-25 | HONI-IESO Operating Agreement ("**IESO Agreement**") |
| I-3-11 | Canadian Electricity Association Reports:<br>• 2014 Bulk Electricity System Delivery Point Interruptions & Significant Power Interruptions<br>• 2014 Annual Report, Forced Outage Performance of Transmission Equipment<br>(collectively, the "**CEA Reports**") |
| I-6-1 | Submission to Hydro One's Board of Directors regarding the Transmission Application ("**Board Submission**") |
| I-6-57 | Compensation Benchmarking Reports:<br>• Preliminary CEO/CFO Pay Benchmarking (Hugessen Consulting)<br>• Executive Compensation Benchmarking Report (Towers Watson); and<br>• Non-Executive Compensation Benchmarking Report |

(Towers Watson)
(collectively, the "**Benchmarking Reports**")

I-9-6 EPRI Reports:
- Results and Analysis of Phase 1 Insulator Tests Performed in Support of Hydro One Insulator Replacement Program; and
- Coating System Assessment (Galvatech)

(collectively, the "**EPRI Reports**")

I-1-20 Fosters Associates 2014 Failure Analysis Report ("**Fosters Report**")

(collectively, the "**Documents**")

By way of summary, SEC objected to the confidential treatment of the Fosters Report, the Inergi PIs, the Inergi Agreement, the Board Submission, the Benchmarking Reports, and the EPRI Reports. Anwaatin submitted general comments with respect to confidentiality, but did not specifically object to any of the Documents. Staff objected to the confidential treatment of the Fosters Report, the Inergi PIs, the Inergi Agreement, the Board Submission, the Benchmarking Reports, and the EPRI Reports, but agreed with Hydro One that the IESO Agreement and the CEA Reports should be afforded confidential treatment. This Reply addresses each of the documents in turn.

## The Applicable Standard

Persons requesting confidential treatment bear the burden of demonstrating to the Board that such treatment is necessary in a given case. Hydro One submits that it has provided sufficient information for the Board to find that the Documents meet this standard, based on their inherent commercial sensitivity. Prejudice to the authors of the documents and to Hydro One would reasonably result from their disclosure. Moreover, none of the objecting parties have demonstrated how the requested confidential treatment would prejudice presentation of their case in this proceeding.

The latter point above is important. Section 5.1.7. of the Practice Direction requires persons objecting to confidential treatment to address: (a) why that party believes the information is not confidential; and (b) why the party requires disclosure of the information that is the subject of the request for confidentiality, and *why access to the non-confidential version or description of the document is insufficient to enable the party to present its case*.

The OEB's Practice Direction fulfills a crucial function of balancing the ability to view confidential materials relevant to regulatory proceedings with the need for businesses to conduct themselves in a commercially reasonable manner, which includes (i) the ability to obtain 3rd party commercially sensitive advice from experts, and (ii) allowing the governance function of the organization to be conducted in a manner that promotes open dialogue amongst independent directors and without the risk of public dissemination. The objecting parties have failed to explain, specifically, why maintaining the information as confidential through application of the Practice Direction is inadequate or insufficient to allow their full participation in the present proceeding.

**The Documents**

**1. I-9-6: EPRI Reports**

The EPRI Reports have been prepared by expert consultants retained to provide analysis and recommendations to Hydro One, and should be treated in a confidential manner based on the commercially sensitive nature of the information; disclosure of such would harm EPRI's competitive position.

Businesses which provide advisory services do so on a fee-for-service basis by producing proprietary work products. Consulting firms depend on human capital in order to run their businesses, which are dependent on the sale of reports containing the sum of their expertise and analysis on various issues. Placing intellectual work products, such as the EPRI Reports in the public domain, devalues EPRI's expertise with other potential clients and allows the information to be readily available to its competitors. Notably, Staff did not object to the confidentiality request in respect of the reports prepared by CEA (as detailed below), on the basis that the CEA reports are sold on a subscription fee basis. In a similar vein, the proprietary nature of the CEA reports is analogous to the EPRI Reports.

Hydro One's additional concern with the public dissemination of consultant work products concerns the impact this may have upon the quality and scope of produced work product. The expectation that work products remain confidential allows for unencumbered exchanges of views. Conversely, the expectation that work products must be prepared with the risk of full, public dissemination, accessible worldwide through the internet can reasonably be expected to

diminish the work product content. The result of disclosing such information creates the opposite result as intended: less material will be published, reducing the amount of evidence available for parties to examine. This is an impracticable result which is more harmful to the regulatory process than the requested confidential treatment of the materials in the present circumstances, and is entirely avoidable. Allowing such information to remain protected by restricted disclosure as per the Practice Direction solves this issue.

One of the unique aspects to the content of the EPRI Reports concerns the assessment of 3rd party manufacturer information. The manufacturers' identities are easily ascertainable to anyone in the industry who reads the EPRI Reports, as there are so few manufacturers producing these materials. As a result, a simple process of elimination will cause unintended disclosure of commercially sensitive information. Disclosure places commercial information of those 3rd party manufacturers on the public record in a proceeding in which those manufacturers' interests are not represented.

Hydro One continues to deal with these manufacturers. Disclosure of the EPRI Reports could compromise Hydro One's dealings with the manufacturers on an ongoing basis, prejudicing Hydro One's commercial dealings and interests in current and future negotiations. Similarly, disclosure of the Coating System Assessment may prejudice Hydro One's commercial dealings with the coating supplier identified in the document, as well as prejudice Hydro One's interests in the course of future negotiations with that vendor.

Public disclosure of this information could be used for unintended motives and purposes, potentially exposing the EPRI Reports' authors to legal risks asserted by the 3rd party manufacturers. Practically speaking, if expert advice regarding asset conditions and the causes of those conditions cannot be reasonably discussed and presented in a confidential manner to management, then affairs of the underlying business are unduly compromised.

**2. I-6-57: Hugessen and Towers Watson Reports (the Benchmarking Reports)**

The reports produced by Hugessen and Towers Watson are commercially sensitive for the same reasons as the EPRI Report, and should similarly be afforded the same protections from broad public dissemination. Hugessen and Towers Watson have each provided a letter to this effect, which are attached herein as **Schedule "A"**.

In addition, broader confidentiality and disclosure issues are at play with respect to expert reports on benchmarking. As the Board is aware, in recent years organizations that have historically conducted or participated in benchmarking activities have ceased to do so because of their concerns about potential disclosure of the information; for instance, CEA has shelved its COPE benchmarking activities (Committee on Corporate Performance and Productivity).[1] CEA previously conducted its voluntary COPE benchmarking activities to provide peer utilities with an opportunity to share performance information, the cornerstone of which was a database to facilitate the exchange of high level performance data. CEA discontinued these activities in 2011.

There is a real concern that lack of confidentiality leads participants in voluntary benchmarking activities, such as CEA's COPE benchmarking, to cease providing their information, which in turn causes the quality and effectiveness of benchmarking activities to erode. Here again is another example of the counterproductive results that can reasonably be expected from public dissemination without due regard to its consequences. Given the growing importance and utility of benchmarking activities, there is now more than ever a valuable public interest in encouraging, but protecting, information disclosure for the purposes of participation in and the conduct of benchmarking activities.

### 3. I-2-11: Inergi Agreement, and I-1-118: Inergi PIs

For the same reasons articulated above in respect of the EPRI Reports and the Benchmarking Reports, Hydro One submits that the Inergi Agreement and Inergi PIs should be afforded protection, as outlined in the Practice Direction, from broad public dissemination. Inergi has provided a letter which includes its concerns with respect to the confidential treatment of the Inergi Agreement and the Inergi PIs. This letter is attached herein as **Schedule "B"**.

Recall that in 2014, an earlier version of the Inergi Agreement was treated confidentially by the OEB.[2] The only intervenors making submissions on the matter, SEC and Energy Probe, did not object to confidential treatment of the Inergi Agreement's predecessor. The subject-matter of the two agreements is the same. The substantive content is the same. SEC has failed to

[1] EB-2013-0416, Transcript Vol 3, pp 22-23 and 160.
[2] EB-2013-0416, Exhibit I-3.1-SEC-20, Attachment.

provide any explanation as to why the current Inergi Agreement should be treated differently than its nearly-identical predecessor.

Hydro One also notes that the Inergi Agreement includes pricing information, which is highly sensitive, commercial information. Parties seeking to use this information for the purposes of presenting their case before the Board may do so through the proposed confidential treatment of the document.

## 4. I-6-1: Board Submission

The Board Submission is not a publicly available document. Under the Company's new governance structure, information provided to Hydro One's independent board of directors has and will continue to be consistently treated in a confidential manner because this information is commercially sensitive, and at all times is in regard to the governance and business affairs of the organization.

SEC's argument – that the prior practices of Hydro One publicly disclosing information provided to its board of directors should govern the present circumstances – is not persuasive. Hydro One's transition to a publicly traded company, governed by an independent board of directors, is a fundamental change in circumstances. In order to facilitate this change in oversight and governance structure, it is important to afford the independent directors the opportunity to freely and frankly exchange ideas and consider information provided by management without the uncertainty created by the threat of public dissemination of the board's affairs. Such an outcome should be avoided, as it would impede Hydro One from achieving its objectives of becoming more commercially oriented and achieving consistency with the practices and expectations of other publicly traded companies. Securities legislation in Canada sets forth continuous disclosure requirements for publicly traded companies. These requirements, however do not go so far as to mandate the disclosure of board of directors information. Without a more compelling submission from the objecting parties, there is no reason for the Board to effectively establish an inconsistency with these requirements.

The principle here is important. Courts have noted that board of directors materials are an "important commercial interest" warranting protection from disclosure.[3] Boards of directors

[3] *SRM Global Master Fund Limited Partnership v Hudbay Minerals Inc.,* 2009 CanLII 9377 (ON SC) at para 23, referring to minutes of board meetings [**SRM**].

"must be able to conduct open and frank discussions if they are to discharge their responsibilities to the corporation and the shareholders … in the ordinary course, it is certainly arguable that, for this reason, disclosure of minutes of board meetings, and related notes of participants, would give rise to a serious risk to an important commercial interest."[4]

In this proceeding, SEC has argued that given the similarity of the Board Submission to the filed application, public disclosure would not cause any material harm. However, that argument fails on three grounds. First, to the extent that the Board Submission is consistent with the public record, there is little to no probative value in disclosing that information publicly. Second, there is a strong principled basis for maintaining confidentiality in respect of board of directors' materials. Third, SEC has failed to demonstrate how public disclosure of this information is essential to put forward its case. If the information is so similar to that already on the public record, then it remains unclear what prejudice is caused to the objecting parties.

In summary, Hydro One submits that the limited probative value of the Board Submission should not outweigh the chilling effect on open, frank discussions at the managerial level that is caused by disclosure of such discussions.

**5. I-2-25: IESO Agreement**

SEC did not mention this agreement, and Staff does not object to its confidential treatment. Anwaatin did not provide specific arguments in respect of each of the Documents; as such, Anwaatin is effectively the only intervenor who has objected to confidential treatment of the IESO Agreement.

Anwaatin provides two general submissions: (i) to the extent the Documents are publicly available through public sources or access to information requests, they do not meet the Practice Direction requirements; and (ii) Anwaatin takes instructions from its First Nations members, and confidential treatment of the documents may present challenges to Anwaatin's ability to receive instructions. Hydro One addresses each of these general arguments in turn.

First, the IESO Agreement commercially sensitive information, and information which may impact the security and safety of the integrated electric system, which is a significant potential harm given the importance of preventing damage to Ontario's electricity infrastructure. As such,

[4] SRM at para 23.

this information is not otherwise publicly available, and would not be available through an access to information request.

Second, Hydro One respectfully submits that the difficulties presented to Anwaatin's ability to receive instructions should not take precedence over the need to ensure confidentiality of information possessed by Hydro One and 3rd parties. Administrative inconvenience cannot in itself justify the disclosure of information with an important commercial interest, or more importantly in the case of the IESO Agreement, the safe and secure operation of Ontario's electricity infrastructure.

**6. I-3-11: CEA Reports**

SEC did not mention this agreement, and Staff does not object to its confidential treatment. Thus, Anwaatin's two general arguments outlined above are the only objections to confidential treatment of the CEA Reports.

First, the CEA Reports are not publicly available and are sold on a subscription fee basis only. Unrestricted public disclosure of the CEA Reports would place CEA at a competitive disadvantage, as potential clients could access the documents free of charge. As such, the CEA Reports fall within the requirements in the Practice Direction to treat the information confidentially. Second, as noted above, administrative inconvenience should not trump important commercial interests in confidentiality.

**7. I-1-20: Fosters Report**

Hydro One has reviewed the information contained within the Fosters Report and has had further discussions with Fosters Associates concerning its confidentiality, and is prepared to disclose the Fosters Report on a non-confidential basis at this time.

## B. CONCLUSIONS

Based on the foregoing, Hydro One submits that, with the exception of the Fosters Report, all of the originally identified documents in question should be afforded confidential treatment by the Board. The Documents contain commercially sensitive information, and the intervenors' submissions have failed to demonstrate why the confidential filing process is insufficient to allow their full participation in the proceeding.

All of which is respectfully submitted this 16th day of September, 2016.

Gordon M. Nettleton
Partner, McCarthy Tetrault LLP

Counsel to Hydro One Networks Inc.

**SCHEDULE “A”**

HUGESSEN
CONSULTING

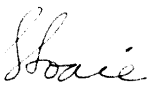
| | |
|---|---|
| **To:** | Keith McDonell, Director, HR Operations<br>Hydro One<br>483 Bay Street, South Tower<br>Toronto, Ontario<br>M5G 2P5 |
| **CC:** | Judy McKellar, SVP, People and Culture / Health, Safety and Environment |
| **Date:** | September 15, 2016 |
| **Subject:** | Confidentiality of Hugessen's Report for Hydro One (April 2015) |

As an independent executive compensation consulting firm, Hugessen advises Boards of Directors on executive compensation, corporate performance assessment and related corporate governance matters. We offer our clients independent, strategic advice based on our extensive industry experience supported by best practices.

Core to our business, reputation and competitive advantage is providing reports to organizations on a confidential basis. Our reports contain information such as (but not limited to) our methodology and approach, content, style, and proprietary information. The public release of any Hugessen reports may cause harm to our business, as our competitors will have access to such confidential information. Hence, we oppose the release of any Hugessen reports to the public domain, unless specifically contemplated from the outset.

Furthermore, the terms and conditions of our standard Engagement Letter restricts the divulgence or communication of confidential, sensitive or proprietary information, except for when a receiving party is required by applicable law or legal process to disclose.

Yours truly,



Georges Soaré

Partner, Hugessen Consulting Inc.



Royal Bank Plaza, South Tower | Suite 3200, PO Box 155, 200 Bay Street | Toronto, ON M5J 2J4
T +1.416.868.1288 F +1.416.868.4415 W hugessen.com

Willis Towers Watson

September 15, 2016

Mr. Keith McDonell
Director, HR Operations
Hydro One
483 Bay Street
Toronto ON M5G 2P5

**SUBJECT: COMPENSATION REPORTS**

Dear Keith,

Willis Towers Watson prepared two total compensation benchmarking reports (dated October 16, 2015) for Hydro One that were used as part of a regulatory filing with the Ontario Energy Board (OEB).

These reports were prepared on a confidential basis for Hydro One in support of the management and oversight of your total compensation programs, and for the regulatory filing.

Our reports should remain confidential as they contain market compensation data from our proprietary surveys that are confidential and proprietary in nature. As a condition of participation in our surveys, anonymous/aggregated survey results can only be shared with participants or purchasers of Willis Towers Watson's Compensation Survey and the data are to be used for their internal compensation purposes only. The results cannot be shared in a public forum. Releasing these data will cause competitive harm to Willis Towers Watson and impact Willis Towers Watson's ability to maintain a compensation survey and service clients.

Yours truly,

Ryan Resch
Practice Leader, Executive Compensation

Mr. Ryan A. Resch MBA
Practice Leader, Executive Compensation

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Toronto, Ontario
M4W 3T6

D 416-960-7099
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E ryan.resch@willistowerswatson.com
W willistowerswatson.com

**SCHEDULE “B”**

**Inergi LP**

20 Dundas St. W., Suite 831,
Toronto, ON, M5G 2C2

Sept 15, 2016

Frank D'Andrea
Hydro One Networks Inc.
483 Bay Street, Floor TCT6
Toronto, ON M5G 2P5

Dear Frank:

Re: EB-2016-0160 – Hydro One Tx 2017-2018 Confidentiality Submissions

This letter responds to objections by the School Energy Coalition, Anwaatin Inc. and the Ontario Energy Board to Hydro One's confidential treatment of:

**I-2-11** (Attachment 1) – Inergi Outsourcing Agreement; and
**I-1-118** Summary of actual results of Inergi's performance indicators (PIs), which include the monthly, quarterly and yearly measures, for the period of March 2015 to Feb 2016.

Inergi requests confidential treatment of the performance indicators and the Outsourcing Agreement, as it contains detailed Inergi pricing and rate information as well as actual performance indicators.

Disclosure into the public domain of all or any part of the Outsourcing Agreement and performance indicators would cause Inergi and its affiliates, irreparable harm, loss and damages, as well as prejudice significantly the competitive position of Inergi in current and further competitions for business with Hydro One and other potential customers. Awareness of this level of detailed information by Inergi's competitors would create an unfair advantage for them in competing with Inergi for future business. Disclosure of pricing information will be irreparably harmful to Inergi's relationship with other customers to whom we provide similar services.

In conclusion, the documents should remain treated as confidential.

Regards,

John Christens
Senior Vice President
Capgemini (Inergi LP)

# 6

Ontario Energy Board
Commission de l'énergie de l'Ontario

# DECISION ON CONFIDENTIALITY REQUEST

# EB-2016-0160

## HYDRO ONE NETWORKS INC.

**Application for electricity transmission revenue requirement and related changes to the Uniform Transmission Rates beginning January 1, 2017 and January 1, 2018**

**BEFORE: Ken Quesnelle**
Presiding Member and Vice-Chair

**Emad Elsayed**
Member

**Peter C. P. Thompson, Q.C.**
Member

**September 21, 2016**

# 1 INTRODUCTION

This is the Decision of the Ontario Energy Board (OEB) in response to a request by Hydro One Networks Inc. (Hydro One) for confidential treatment for 12 documents attached to eight of its interrogatory responses, which were filed on August 31, 2016. Hydro One's rationale for seeking confidential treatment for each of these documents is contained in the accompanying letter that it filed on August 31, 2016.

On September 8, 2016, the OEB issued Procedural Order No. 2 which provided for the filing of submissions on the confidentiality request by intervenors and OEB staff by September 13, 2018. In addition, Hydro One was provided with the opportunity to file reply submissions by September 16, 2016.

Procedural Order No. 2 also indicated that, as an interim measure, the OEB would allow any parties that wished to review the documents for which confidentiality was claimed, to do so after signing a copy of the OEB's Form of Declaration and Undertaking, and filing it with the OEB.

On September 13, 2016 the OEB received submissions from the School Energy Coalition (SEC), Anwaatin Inc. (Anwaatin) and from OEB staff. Hydro One filed its reply submissions on confidentiality on September 16, 2016.

# 2 DECISION

The Practice Direction on Confidentiality makes it clear that placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting the confidentiality to demonstrate to the satisfaction of the OEB that confidential treatment is warranted in any given case and that any alleged harm outweighs the public interest. Utility agreements with third parties related to the provision of regulated services are typically placed on the public record unless compelling reasons are provided not to do so. Similarly, third party studies commissioned by a particular utility for use in relation to its utility business are of interest, not only to the OEB and intervenors, but also to the ratepayers who effectively fund these studies.

The OEB will deal with each document in turn:

### 1) Attachment to Interrogatory Response I-1-20 Document: *Fosters Associates 2014 Failure Analysis Report*

Hydro One describes this report as a 2014 statistical analysis of physical and inspection failures observed in selected plant categories classified in Transmission Lines, Transmission Stations and Distribution Lines owned and operated by Hydro One.

Hydro One indicated that it has been advised by Fosters Associates that this report is a proprietary commercial work product. Hydro One claims that public disclosure of the report would adversely affect the commercial and financial interests of Foster Associates as potential clients could otherwise access and make use of the report information free of charge.

Both SEC and OEB staff filed submissions opposing the confidentiality request noting that there is no evidence that the public release of the information will adversely affect the commercial and financial interests of Forster and Associates.

**OEB Findings**

In its reply submission, Hydro One stated that it is prepared to disclose this report on a non-confidential basis. The OEB agrees with this position.

With respect to the Outsourcing Agreement, Hydro One stated that portions of the agreement pertaining only to Hydro One's distribution business have been redacted.

**2) Attachment to Interrogatory Response I-1-118 Document: *Summary of actual results for Inergi's performance indicators (PIs), which include the monthly, quarterly and yearly measures, for the period from March 2015 to February 2016***

**3) Attachment to Interrogatory Response I-2-11 Document: *Inergi Outsourcing Agreement***

Hydro One indicates that Inergi LP has requested that both these documents be treated confidentially because they contain information that is not in the public domain, the information is commercially sensitive and disclosure would adversely affect its commercial interests with other clientele.

SEC noted that Hydro One failed to provide any supporting rationale as to why the summary of Inergi's performance indicators are commercially sensitive and why disclosure would adversely affect its commercial interests with other clientele. With respect to the Outsourcing Agreement, SEC submitted that contract information entered into by a regulated entity and a service provider is readily provided in interrogatory responses and placed on the public record.

OEB staff submitted that this type of information is of interest to the OEB and that Hydro One has not provided any information as to why public disclosure of the information would adversely affect Inergi's commercial interests.

**OEB Findings**

The OEB denies Hydro One's confidentiality request for both these documents for the same reasons provided for the EPRI Reports and the Compensation Benchmarking Reports (addressed later in this decision). In addition, information regarding Inergi's performance is of interest to the utility customers who are paying for these services

**4) Attachment to Interrogatory Response I-2-25 Document: *Amended and Restated Operating Agreement with the Independent Electricity System Operator (IESO) dated April 25, 2014***

Hydro One submitted that it has been advised by the IESO that the requested operating agreement is not publicly available. It contains both commercially sensitive information and information regarding operation of the integrated electric system (IES). Public disclosure could adversely impact security and safety of the IES

**5) Attachments to Interrogatory Response I-3-11**

**Document 1:** ***Canadian Electricity Association's (CEA) report "2014 Bulk Electricity System Delivery Point Interruptions & Significant Power Interruptions"***

**Document 2:** ***2014 Annual Report, Forced Outage Performance of Transmission Equipment***

Hydro One submits that it has been advised by the CEA that the requested reports are not publicly available and are sold on a subscription fee basis only. Public disclosure would adversely affect the commercial and financial interests of the CEA as potential clients could otherwise obtain access and make use of the reports free of charge.

The OEB notes that neither OEB staff nor SEC opposed Hydro One's confidentiality request.

**OEB Findings**

These reports are sold on a subscription fee basis only. The OEB agrees with Hydro One that unrestricted public disclosure of these reports would place CEA at a competitive disadvantage, as potential clients could access the documents free of charge. The OEB grants Hydro One's confidentiality request for these two documents.

**6) Attachment to Interrogatory Response I-6-1 Document:** ***Submission to Hydro One's Board of Directors regarding the 2017-2018 Transmission Application***

Hydro One indicates that this is a submission to Hydro One's Board of Directors summarizing the company's proposed application to the OEB, seeking approval of cost of service transmission revenue requirement for 2017 and 2018.

**OEB Findings**

These reports are sold on a subscription fee basis only. The OEB agrees with Hydro One that unrestricted public disclosure of these reports would place CEA at a competitive disadvantage, as potential clients could access the documents free of charge. The OEB grants Hydro One's confidentiality request for these two documents.

Hydro One states that the information is not publicly available and consistently treated in a confidential manner. Board of Directors materials have been afforded confidential treatment in prior proceedings, see for example EB-2013-0416, Exhibit I-1.1-9 SEC 1.

OEB staff submitted that there is nothing in the information provided to Hydro One's Board of Directors presentation that would make this document confidential. SEC noted

that the information contained in the document is not confidential and should not be granted confidential treatment.

**OEB Findings**

The OEB denies Hydro One's confidentiality request. The Hydro One board submission is simply a summary of Hydro One's application to the OEB and does not contain any information that is beyond the scope of this proceeding. Also, the Hydro One board submission does not include any meeting minutes or board discussions as implied by Hydro One in its reply submission. Furthermore, the OEB is not persuaded that Hydro One's transition to a publicly traded company, governed by an independent board of directors, would in itself render this board submission confidential.

## 7) Attachments to Interrogatory Response I-6-57

**Document 1: *Hydro One: Updated Discussion Notes – Preliminary CEO/CFO Pay Benchmarking* by Hugesson Consulting (April 2015)**

Hydro One submitted that it has been advised by Hugesson Consulting that the content of its reports is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the reports would adversely impact Hugesson Consulting's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis.

**Document 2: *Hydro One: Executive Compensation Benchmarking Report dated October 16, 2015***

**Document 3: *Hydro One: Non-executive Compensation Benchmarking Report dated October 16, 2015***

Hydro One indicates that these reports were prepared after Hydro One engaged Towers Watson to complete a competitive market assessment of its total rewards program for executive-level management employees.

Hydro One has been advised by Towers Watson that the content of these reports is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the reports would adversely impact Towers Watson's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis.

OEB staff submitted that the information contains important benchmarking information that will allow the public to see how Hydro One`s compensations compare to other

utilities and to other companies. It is relevant information to the application and the setting of just and reasonable rates.

SEC submitted that the information should not be confidential, or at least not in its entirety. To the extent that some aspects of the reports contain specific information that is proprietary to Hugesson Consulting and Towers Watson and could harm its commercial interests then only that information should be confidential.

**OEB Findings**

The OEB denies Hydro One's confidentiality request. The information in these reports is presented at an aggregate level. The reasonableness of Hydro One's compensation levels is an important aspect of this application, not only from the OEB perspective, but from the perspective of the public at large. The OEB puts significant weight on benchmarking information and has made such information public in other proceedings. The OEB finds that the probative value of this information outweighs any potential prejudice it might cause Hydro One or any other party. The OEB is not persuaded that public disclosure of these reports will result in reduced participation in such studies.

**8) Attachments to Interrogatory Response I-9-6**

**Document 1: *Results and Analysis of Phase 1 Insulator Tests Performed in Support of Hydro One Insulator Replacement Program and***

**Document 2: *Glavatech Coating System Assessment – Aging Performance, Service Life, and Evaluation of the Field Applications by EPRI***

Hydro One indicates that that the Insulator Test Report was produced by the Electric Power Research Institute (EPRI) and contains condition and testing data of insulators that is representative of a large installed insulator population.

Hydro One submits that the system assessment report has been prepared in contemplation of Hydro One carrying out an asset replacement program.

The information contained in the report is commercially sensitive and its public disclosure may adversely impact negotiations with equipment vendors involved in the replacement program.

OEB staff submitted that there does not seem to be a compelling reason for why these two documents should be treated as confidential.

SEC submitted that it was not clear how the information in the reports would harm Hydro One's negotiations with equipment vendors for the replacement program.

## OEB Findings

The OEB denies Hydro One's confidentiality request. These are technical reports specific to Hydro One and are relevant to this proceeding. Unlike the CEA reports (addressed earlier), Hydro One did not provide compelling reasons to support its statements that disclosure of these reports would "harm EPRI's competitive position". The subject matter of the reports appears to be of limited value beyond Hydro One's use.

The OEB also disagrees with Hydro One's contention that the risk of public disclosure would diminish the work product content. Furthermore, the OEB does not agree that making these reports public would have any significant adverse impact on future negotiations with vendors involved in the replacement program. Overall, the OEB concludes that the risks identified do not outweigh the public interest in these reports.

The OEB does however consider that there is potential for reputational harm to the insulator manufactures identified in the report on that subject and that some effort to lessen that potential is warranted. The OEB requires the redaction of the manufacturers' names from the report prior to it being placed on the public record.
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# 3 ORDER

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. The requests for confidentiality made by the applicant with respect to documents related to interrogatory responses I-2-25, I-3-11 (documents 1 and 2) are granted.

2. The manufacturer names contained in the reports related to the interrogatory response I-9-6 are to be redacted before the documents are placed on the public record.

**DATED** at Toronto September 21, 2016

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary

# 7

Ontario Energy Board
Commission de l'énergie de l'Ontario

# DECISION ON CONFIDENTIALITY REQUEST (Revised)

# EB-2016-0160

## HYDRO ONE NETWORKS INC.

**Application for electricity transmission revenue requirement and related changes to the Uniform Transmission Rates beginning January 1, 2017 and January 1, 2018**

**BEFORE: Ken Quesnelle**
Presiding Member and Vice-Chair

**Emad Elsayed**
Member

**Peter C. P. Thompson, Q.C.**
Member

**September 26, 2016**

# 1 INTRODUCTION

This is the Decision of the Ontario Energy Board (OEB) in response to a request by Hydro One Networks Inc. (Hydro One) for confidential treatment for 12 documents attached to eight of its interrogatory responses, which were filed on August 31, 2016. Hydro One's rationale for seeking confidential treatment for each of these documents is contained in the accompanying letter that it filed on August 31, 2016.

On September 8, 2016, the OEB issued Procedural Order No. 2 which provided for the filing of submissions on the confidentiality request by intervenors and OEB staff by September 13, 2018. In addition, Hydro One was provided with the opportunity to file reply submissions by September 16, 2016.

Procedural Order No. 2 also indicated that, as an interim measure, the OEB would allow any parties that wished to review the documents for which confidentiality was claimed, to do so after signing a copy of the OEB's Form of Declaration and Undertaking, and filing it with the OEB.

On September 13, 2016 the OEB received submissions from the School Energy Coalition (SEC), Anwaatin Inc. (Anwaatin) and from OEB staff. Hydro One filed its reply submissions on confidentiality on September 16, 2016.

# 2 DECISION

The Practice Direction on Confidentiality makes it clear that placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting the confidentiality to demonstrate to the satisfaction of the OEB that confidential treatment is warranted in any given case and that any alleged harm outweighs the public interest. Utility agreements with third parties related to the provision of regulated services are typically placed on the public record unless compelling reasons are provided not to do so. Similarly, third party studies commissioned by a particular utility for use in relation to its utility business are of interest, not only to the OEB and intervenors, but also to the ratepayers who effectively fund these studies.

The OEB will deal with each document in turn:

### 1) Attachment to Interrogatory Response I-1-20 Document: *Fosters Associates 2014 Failure Analysis Report*

Hydro One describes this report as a 2014 statistical analysis of physical and inspection failures observed in selected plant categories classified in Transmission Lines, Transmission Stations and Distribution Lines owned and operated by Hydro One.

Hydro One indicated that it has been advised by Fosters Associates that this report is a proprietary commercial work product. Hydro One claims that public disclosure of the report would adversely affect the commercial and financial interests of Foster Associates as potential clients could otherwise access and make use of the report information free of charge.

Both SEC and OEB staff filed submissions opposing the confidentiality request noting that there is no evidence that the public release of the information will adversely affect the commercial and financial interests of Forster and Associates.

**OEB Findings**

In its reply submission, Hydro One stated that it is prepared to disclose this report on a non-confidential basis. The OEB agrees with this position.

**2) Attachment to Interrogatory Response I-1-118 Document: *Summary of actual results for Inergi's performance indicators (PIs), which include the monthly, quarterly and yearly measures, for the period from March 2015 to February 2016***

**3) Attachment to Interrogatory Response I-2-11 Document: *Inergi Outsourcing Agreement***

Hydro One indicates that Inergi LP has requested that both these documents be treated confidentially because they contain information that is not in the public domain, the information is commercially sensitive and disclosure would adversely affect its commercial interests with other clientele.

With respect to the Outsourcing Agreement, Hydro One stated that portions of the agreement pertaining only to Hydro One's distribution business have been redacted.

SEC noted that Hydro One failed to provide any supporting rationale as to why the summary of Inergi's performance indicators are commercially sensitive and why disclosure would adversely affect its commercial interests with other clientele. With respect to the Outsourcing Agreement, SEC submitted that contract information entered into by a regulated entity and a service provider is readily provided in interrogatory responses and placed on the public record.

OEB staff submitted that this type of information is of interest to the OEB and that Hydro One has not provided any information as to why public disclosure of the information would adversely affect Inergi's commercial interests.

**OEB Findings**

The OEB denies Hydro One's confidentiality request for both these documents for the same reasons provided for the EPRI Reports and the Compensation Benchmarking Reports (addressed later in this decision). In addition, information regarding Inergi's performance is of interest to the utility customers who are paying for these services.

**4) Attachment to Interrogatory Response I-2-25 Document: *Amended and Restated Operating Agreement with the Independent Electricity System Operator (IESO) dated April 25, 2014***

Hydro One submitted that it has been advised by the IESO that the requested operating agreement is not publicly available. It contains both commercially sensitive information and information regarding operation of the integrated electric system (IES). Public disclosure could adversely impact security and safety of the IES.

OEB staff stated it did not object to the request for confidential treatment on the grounds put forward by Hydro One and SEC did not make any submission with respect to this document.

**OEB Findings**
The OEB grants Hydro One's confidentiality request based on the fact that public disclosure of this information could adversely impact the security and safety of the integrated electric system.

**5) Attachments to Interrogatory Response I-3-11**

**Document 1: *Canadian Electricity Association's (CEA) report "2014 Bulk Electricity System Delivery Point Interruptions & Significant Power Interruptions"***

**Document 2: *2014 Annual Report, Forced Outage Performance of Transmission Equipment***

Hydro One submits that it has been advised by the CEA that the requested reports are not publicly available and are sold on a subscription fee basis only. Public disclosure would adversely affect the commercial and financial interests of the CEA as potential clients could otherwise obtain access and make use of the reports free of charge.

The OEB notes that neither OEB staff nor SEC opposed Hydro One's confidentiality request.

**OEB Findings**
These reports are sold on a subscription fee basis only. The OEB agrees with Hydro One that unrestricted public disclosure of these reports would place CEA at a competitive disadvantage, as potential clients could access the documents free of charge. The OEB grants Hydro One's confidentiality request for these two documents.

**6) Attachment to Interrogatory Response I-6-1 Document: *Submission to Hydro One's Board of Directors regarding the 2017-2018 Transmission Application***

Hydro One indicates that this is a submission to Hydro One's Board of Directors summarizing the company's proposed application to the OEB, seeking approval of cost of service transmission revenue requirement for 2017 and 2018.

Hydro One states that the information is not publicly available and consistently treated in a confidential manner. Board of Directors materials have been afforded confidential treatment in prior proceedings, see for example EB-2013-0416, Exhibit I-1.1-9 SEC 1.

OEB staff submitted that there is nothing in the information provided to Hydro One's Board of Directors presentation that would make this document confidential.

SEC noted that the information contained in the document is not confidential and should not be granted confidential treatment.

**OEB Findings**

The OEB denies Hydro One's confidentiality request. The Hydro One board submission is simply a summary of Hydro One's application to the OEB and does not contain any information that is beyond the scope of this proceeding. Also, the Hydro One board submission does not include any meeting minutes or board discussions as implied by Hydro One in its reply submission. Furthermore, the OEB is not persuaded that Hydro One's transition to a publicly traded company, governed by an independent board of directors, would in itself render this board submission confidential.

## 7) Attachments to Interrogatory Response I-6-57

### Document 1: *Hydro One: Updated Discussion Notes – Preliminary CEO/CFO Pay Benchmarking* by Hugesson Consulting (April 2015)

Hydro One submitted that it has been advised by Hugesson Consulting that the content of its reports is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the reports would adversely impact Hugesson Consulting's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis.

### Document 2: *Hydro One: Executive Compensation Benchmarking Report dated October 16, 2015*

### Document 3: *Hydro One: Non-executive Compensation Benchmarking Report dated October 16, 2015*

Hydro One indicates that these reports were prepared after Hydro One engaged Towers Watson to complete a competitive market assessment of its total rewards program for executive-level management employees.

Hydro One has been advised by Towers Watson that the content of these reports is not publicly available; the information is proprietary and commercially sensitive. Public disclosure of the reports would adversely impact Towers Watson's commercial interests in providing similar analysis of this information to other clientele which it does on a fee for service basis.

OEB staff submitted that the information contains important benchmarking information that will allow the public to see how Hydro One`s compensations compare to other utilities and to other companies. It is relevant information to the application and the setting of just and reasonable rates.

SEC submitted that the information should not be confidential, or at least not in its entirety. To the extent that some aspects of the reports contain specific information that is proprietary to Hugesson Consulting and Towers Watson and could harm its commercial interests then only that information should be confidential.

**OEB Findings**

The OEB denies Hydro One's confidentiality request. The information in these reports is presented at an aggregate level. The reasonableness of Hydro One's compensation levels is an important aspect of this application, not only from the OEB perspective, but from the perspective of the public at large. The OEB puts significant weight on benchmarking information and has made such information public in other proceedings. The OEB finds that the probative value of this information outweighs any potential prejudice it might cause Hydro One or any other party. The OEB is not persuaded that public disclosure of these reports will result in reduced participation in such studies.

**8) Attachments to Interrogatory Response I-9-6**

**Document 1: *Results and Analysis of Phase 1 Insulator Tests Performed in Support of Hydro One Insulator Replacement Program and***

**Document 2: *Glavatech Coating System Assessment – Aging Performance, Service Life, and Evaluation of the Field Applications by EPRI***

Hydro One indicates that that the Insulator Test Report was produced by the Electric Power Research Institute (EPRI) and contains condition and testing data of insulators that is representative of a large installed insulator population.

Hydro One submits that the system assessment report has been prepared in contemplation of Hydro One carrying out an asset replacement program.

The information contained in the report is commercially sensitive and its public disclosure may adversely impact negotiations with equipment vendors involved in the replacement program.

OEB staff submitted that there does not seem to be a compelling reason for why these two documents should be treated as confidential.

SEC submitted that it was not clear how the information in the reports would harm Hydro One's negotiations with equipment vendors for the replacement program.

### OEB Findings

The OEB denies Hydro One's confidentiality request. These are technical reports specific to Hydro One and are relevant to this proceeding. Unlike the CEA reports (addressed earlier), Hydro One did not provide compelling reasons to support its statements that disclosure of these reports would "harm EPRI's competitive position". The subject matter of the reports appears to be of limited value beyond Hydro One's use.

The OEB also disagrees with Hydro One's contention that the risk of public disclosure would diminish the work product content. Furthermore, the OEB does not agree that making these reports public would have any significant adverse impact on future negotiations with vendors involved in the replacement program. Overall, the OEB concludes that the risks identified do not outweigh the public interest in these reports.

The OEB does however consider that there is potential for reputational harm to the insulator manufactures identified in the report on that subject and that some effort to lessen that potential is warranted. The OEB requires the redaction of the manufacturers' names from the report prior to it being placed on the public record.

# 3 ORDER

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. The requests for confidentiality made by the applicant with respect to documents related to interrogatory responses I-2-25, I-3-11 (documents 1 and 2) are granted.

2. The manufacturer names contained in the reports related to the interrogatory response I-9-6 are to be redacted before the documents are placed on the public record.

**DATED** at Toronto September 26, 2016

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary

# 8

***Ontario Energy Board (Board Staff) INTERROGATORY #172 List 1***

***Interrogatory***

Ref. ExhC1/Tab 3/Sch1/pg1

Please provide a copy of the Hydro One-Inergi Outsourcing Agreement.

***Response***

Please find attached/enclosed a copy of the Hydro One – Inergi Outsourcing Agreement. Please note the following:

- Hydro One has redacted approximately 2% of the Agreement. These redactions were done because of the following:
    - Some information in the Agreement is sensitive from a security viewpoint (e.g. server names, addresses, etc.). In case this information were to be disclosed to the public, there is significant risk that individuals/organizations could use the information to the detriment of Hydro One and Inergi

- Portions of the Agreement are sensitive from a commercial perspective. In the process of releasing the Agreement, Hydro One has had discussions with Inergi and upon Inergi's request, has agreed to redact some commercially sensitive information. Inergi believes that this information may flow to competitors, the marketplace and organizations, who could then use it for their own commercial interests to the detriment of Inergi

The information on the costing of the contracted has been provided in the evidence in response to H-1-33 and evidence submitted in C1-3-1, page 8, Table 1.

# 9

# HYDRO ONE - INERGI OUTSOURCING AGREEMENT

## 1.0 SUMMARY OF TERMS

- Hydro One Networks Inc. (Networks) entered into an outsourcing agreement with Inergi LP (Inergi) in December 2001 (the "Master Services Agreement" or "MSA").
- Inergi is a wholly owned subsidiary of Capgemini and is not an affiliate of Hydro One Networks Inc.
- "Base Services" refers to the basket of services Inergi assumed provision of as of the commencement date. Inergi committed to providing Base Services for a fee of $122.5 M in contract year one assuming performance remained at historical service levels and volumes remained unchanged, declining in real terms over the term of the agreement by 30%.
- Base Services commenced under the MSA on March 1, 2002 ("commencement date") and includes Customer Service Operations, Supply Management Services, Finance and Accounting, Information Technology, HR Payroll, and Settlements.
- In addition to Base Services and ongoing services added to the arrangement from time to time, Inergi also provides short term "Project" services at predetermined rates. Inergi fees for Base Services actually payable in any year vary according to agreed changes in volume and scope.
- In 2006, Networks expects to pay a fee of $115.6 M for Base Services.
- The arrangement involved the transfer of over 900 Networks' employees to Inergi.
- Networks' owns substantially all assets involved in Inergi's delivery of Base Services.
- Inergi has subcontracted the call centre operations to Vertex Canada (Vertex). Vertex is not an affiliate of Hydro One Networks Inc.

- The MSA provides for benchmarking of fees in contract years 3, 6 and 9 and downward adjustment of pricing in the event the benchmarking exercise determines the bundled pricing of Base Services is not competitive.
- The 10-year term of the MSA expires on February 29, 2012.

## 2.0 STATEMENT OF WORK SUMMARY

The contract includes the MSA, associated Schedules and Statement of Work (SOW) for each line-of-business which provide details of the Base Services provided. The following table summarizes the current SOW for each line-of-business (LOB).

| Line of Business | Domain | Service Description |
|---|---|---|
| Information Technology | Infrastructure Operations | Services that facilitate the operation of shared devices and servers on a corporate level and services required to engineer and manage the computing network infrastructure |
| | End User Support | Help Desk and Desktop Support |
| | Application Maintenance and Sustainment | Services to maintain technology platform, operational quality assurance and application support customised to the service requirements and needs of the business applications |
| | Projects | Provides problem definition; requirement definition; business case development; design, development, configuration and testing; and commissioning, (including system enhancements) to meet specific line of business or enterprise needs. |
| | Cross Functional | Provides Service Management, Account Management, Vendor and Asset Management, and Resource Management to all other IT domains |
| | Mainframe Operations and Services | Services that facilitate the use of the mainframe computer and associated infrastructure |

| Line of Business | Domain | Service Description |
|---|---|---|
| Customer Care | Inbound Call contact Handling | Provides customer call handling services for billing, customer services, collections, outages and emergencies for Residential and small business segment. Includes corporate switchboard, maintain the day to day operational configuration of the IVR system, and responding to other contacts such as letters and email. |
| | Bill Production | Issue electricity bills, including bill print, insert delivery to Canada Post and remittance, managing exceptions, accuracy and timely delivery. Maintain accuracy of customer billing records to enable timely and accurate billing and print, envelope and dispatch bills to Canada Post. |
| | Collections | Manage the collection of outstanding customer debts and negotiate and collect deposits. |
| | Data Services | Administration and data input of timesheets, work order task packages and service and work orders for field personnel and transmission operations. |
| | Business Customer Centre | Selection of services for business customers, including inbound call and contact handling, retail settlements, billing exceptions and manual bills. |
| | Application support | Provide direction and work management for variety of billing systems.<br>▪ Perform systems/business analysis to define system changes to address bug fixes & enhancements.<br>▪ User acceptance testing for all code changes |
| Settlements | | Wholesale Settlements - Provide settlement and reconciliation services for power procured from the Independent Electricity System Operator and embedded Retail Generators with due consideration to legislative initiatives<br>for fixed energy prices for low volume customers, transmission revenues and inter-utility load transfers, and cost of power reporting, and<br><br>Retail Settlements - Provide complex billing for interval meter accounts. |
| Supply Management | Demand Planning | Preparing Material Requests and capital demand forecasts |
| | Demand Management and Procurement | Maintaining market intelligence of applicable commodities, processing purchase transactions and inspecting and expediting services to ensure delivery to contract |

| Line of Business | Domain | Service Description |
|---|---|---|
| | | commitments |
| | Sourcing, Vendor Management and Inventory Management | Services to support sourcing all commodities and services which include: managing and developing supply strategies (strategic sourcing), monitoring spend on all commodities and services, managing the size and composition of vendor base, resolving vendor issues, managing inventory levels, and negotiating vendor stocking arrangement. |
| | Process Development and Data Management | Services supporting the execution of daily transactions including ensuring the operation of automated systems and maintaining catalogue schema |
| | Transportation | Negotiating and managing transportation contract with logistics providers |
| | Asset Disposal | Managing the selling and disposal of surplus materials. |
| Payroll | Pay Operations | Services necessary to calculate all pay cycles |
| | Payroll Accounting | Services necessary for the distribution of pay and production of back up information for all pay cycles |
| | Inquiries and Application Support | Services necessary to support the performance of other payroll domains, including technology support and issue resolution |
| Finance | Accounts Payable | Services required for processing disbursements which include: maintaining Vendor Master Data and CCC Master Data, invoice processing, payments management, AP inquiries support, period end and reconciliations, management reporting and special projects. |
| | Billing and Accounts Receivable | Services required for processing non-energy miscellaneous billings and AR which include: maintaining AR Master Data, customer billing information, customer invoicing, customer collections support, applying AR payments and adjustments, AR inquiries support, period end and reconciliation, management reporting and special projects |
| | Fixed Asset and Project Cost Accounting | Provides fixed assets and project costing transaction processing, reconciliation of sub-ledger balances to general ledger accounts, reconciliation of the fixed assets and project costing suspense accounts, transfer of projects to fixed assets and recording sales and retirement of assets |

| Line of Business | Domain | Service Description |
|---|---|---|
| | General Accounting and Planning, Budgeting and Reporting | General Accounting – ensuring financial recognition consistent with corporate requirements, accounting adjustments, processing of transactions and maintenance of the general ledger system account blocks, support of financial systems and modules and interface and support for pay services and management reporting<br><br>Planning, budgeting and reporting – provide advice, guidance, consultation and project support on routine operating processes and business support initiatives. |

## 3.0 GOVERNANCE MODEL/ORGANIZATION

The parties have established the following committees to manage their relationship in connection with the agreement: Executive Committee, Operations Management Committee, Services Committees (one for each LOB) and a Contract Management Committee. The Executive Committee meets quarterly and is comprised of senior Management of each organization and responsible for oversight and management of the overall relationship between the parties and to address escalated matters. The Operations Management Committee meets monthly and is comprised of the accountable VP and Contract Manager within each organization and is responsible for the ongoing management of all operations including matters escalated from the Services Committees. A separate Services Committee is established for each LOB, includes the Contract Managers and LOB operational leads from each party and meets monthly to review operational performance, change management, business planning and other contact business. The Contract Management Committee includes the Contract Managers and support staff to monitor the change management process and other contract business.

Internally, Networks has established an Inergi Deal Steering Committee comprised of VP's accountable for LOB performance as delivered by Inergi with a mandate to ensuring common vision and purpose in all matters related to Inergi within Networks, setting

direction for transformation of the contract, resolving priorities and trade-offs amongst LOB service areas, and approval of material contract changes.

Capgemini's management team has established the Toronto Service Delivery Centre (TSDC) which is organized to provide common leadership to its multi-client base. The Inergi Account Team is dedicated to managing the commercial relationship with Networks. Currently, all service delivery staff providing Base Services to Networks (excluding the operational management team, project group and some specific areas such as data centre operations) are dedicated exclusively to Networks.

## 4.0 BENEFITS OF OUTSOURCING

The successful implementation of the outsourcing arrangements has resulted in significant cost savings to Networks. Networks has realized other positive business results that have multiplied the value of this business arrangement to the benefit of Networks' ratepayers. These benefits, as described in Section 8 below, are expected to continue throughout the term of the agreement.

Inergi's fees for Base Services have been prudently and reasonably set, consistent with Networks' business plan. The outsourcing arrangements have resulted in lower than historical costs at consistent and stable service quality. Networks has retained proper management control and decision making authority over the outsourcing arrangement to continue the safe, secure and reliable delivery of electricity in the Province of Ontario.

Financial, service quality and intellectual capital benefits in combination with the opportunity for utility management to reduce its focus on outsourced functions were believed to be sufficient to justify the pursuit of an outsource service agreement as further described in the Business Case in Appendix A. The NPV of the financial benefits as

compared with the Networks Business Plan was estimated to be $24 million over the life of the agreement and includes savings that Networks will make through guaranteed price reductions, strategic sourcing, growth royalties from Inergi, and is net of all incremental costs associated with the transaction. The Networks Business Plan used for comparison to the outsourcing contract alternatives contained significant savings that had no formal strategies for achieving them. The outsourcing contract not only added additional savings but also removed the risk of achieving the savings already identified in the Business Plan.

## 5.0 COST OF OUTSOURCING

Table 1 below contains the contracted price for Base Services (by Contract Year) along with adjustments that reconcile to the spend in the calendar year. Also included is the actual project spend with Inergi LP. This section explains the various inputs to fees shown in Table 1. Table 2 shows the amount of total contracted Inergi fees in 2006 allocated to Distribution.

### Base Service Fees

The contracted fees for Base Services paid by Networks under the outsource services agreements will decline over time so long as service is maintained at then prevailing service levels and activity volume levels are within the normal range of those for historical periods. The declining price curve reflects Networks and Inergi's expectation that Inergi will obtain cost savings over time as process re-engineering efforts are implemented and refined, and such savings are passed onto Networks as a guaranteed reduction in the fee for Base Services.

**Table 1**
**Summary of Inergi Fees ($ Million)**

| Description | Historic 2002 | Historic 2003 | Historic 2004 | Bridge 2005 | Test 2006 |
|---|---|---|---|---|---|
| | | | | | |
| **Contracted Fees for Base Services** | **94.2** | **102.6** | **95.6** | **91.9** | **89.7** |
| | | | | | |
| Market Ready Apps (part of IT) | - | 8.2 | 7.9 | 7.1 | 7.8 |
| Settlements | 1.9 | 2.3 | 2.3 | 4.3 | 2.5 |
| COLA, Pension & Benefits | 6.0 | 9.5 | 10.8 | 10.5 | 11.7 |
| Volume, Scope & Other | 0.9 | 0.6 | 5.5 | 9.3 | 4.0 |
| **Subtotal Base Services per BP** | **103.0** | **123.3** | **122.1** | **123.1** | **115.6** |
| | | | | | |
| Project Orders (all LOB's) | 6.2 | 12.4 | 17.4 | - | - |
| Application Enhancements (IT) | 1.3 | 6.5 | 10.7 | 4.7 | 4.6 |
| Supplier Initiatives (all LOB's) | 4.2 | 9.9 | 0.8 | - | - |
| In-Flight Projects (IT) | 5.7 | 1.5 | - | - | - |
| Managed Contract Reimbursement (IT) | (9.6) | (19.1) | (6.8) | (6.8) | (6.8) |
| Networks Contractor Reimbursement | (2.7) | (0.6) | - | - | - |
| Royalties | (2.0) | (2.0) | (2.0) | (2.0) | (2.0) |
| Pension Top-up | - | - | - | 6.6 | 7.9 |
| **Total Inergi Payments** | **106.0** | **131.9** | **142.4** | **125.6** | **119.3** |
| | | | | | |
| Minimum IT Project Spend | 4.8 | 5.0 | 4.9 | 4.7 | 4.6 |
| Actual IT Project Spend | 4.8 | 8.5 | 16.7 | | |

**Table 2**
**Allocation of Inergi Fees to Distribution ($ Million)**

| | Evidence Reference | 2006 Fees Allocated to Distribution |
|---|---|---|
| **Finance** | Exhibit C1-2-6 | 4.2 |
| **HR Pay** | Exhibit C1-2-6 | 1.6 |
| **IT** | Exhibit C1-2-6 | 31.1 |
| **Supply Management Services** | Exhibit C1-5-2 | 0.1 |
| **Settlements** | Exhibit C1-2-5 | 2.1 |
| **Customer Service Operations** | Exhibit C1-2-5 | 33.9 |
| | | |
| **Subtotal Fees for Base Services** | | 73.0 |
| | | |
| **Minimum IT Project Spend** | Exhibit C1-2-6 | 1.7 |
| **Managed Contract Reimbursement (IT)** | Exhibit C1-2-6 | (3.3) |
| **Royalties** | Exhibit E3-1-1 | (0.7) |
| **Pension Top-up** | Exhibit C1-4-3 | 5.9 |
| | | |
| **Total Fees for all Contract Commitments** | | 76.6 |

Incremental sustainment costs for Market Ready Systems were included in the IT contract pricing for year one at a level of $6.1 M but not for subsequent years as it was contemplated these costs may vary as the electricity market evolves. The parties have now agreed to lock-in these costs for the remainder of contract at a fixed and declining price as shown in Table 1 above. The parties agreed to "cost plus" pricing for the Settlements LOB rather than fixed, declining pricing because Inergi felt that it could not support a guaranteed declining price structure for these new and uncertain business processes and technology which were expanded co-incident with the MSA commencement date.

Base Fees and most other fees are subject to cost-of-living adjustments (COLA). The COLA formula is based upon the Statistics Canada Indices of total wages, salaries, and supplementary labour income in Ontario, and total number of employees in Ontario.

Over the first few years of the agreement, the parties have adjusted the contract to reflect sustained changes in the volume of transactions or scope of services purchased which has resulted in adjustments to the fees for Base Services for the remainder of the agreement. Examples of significant scope and volume changes are as follows:

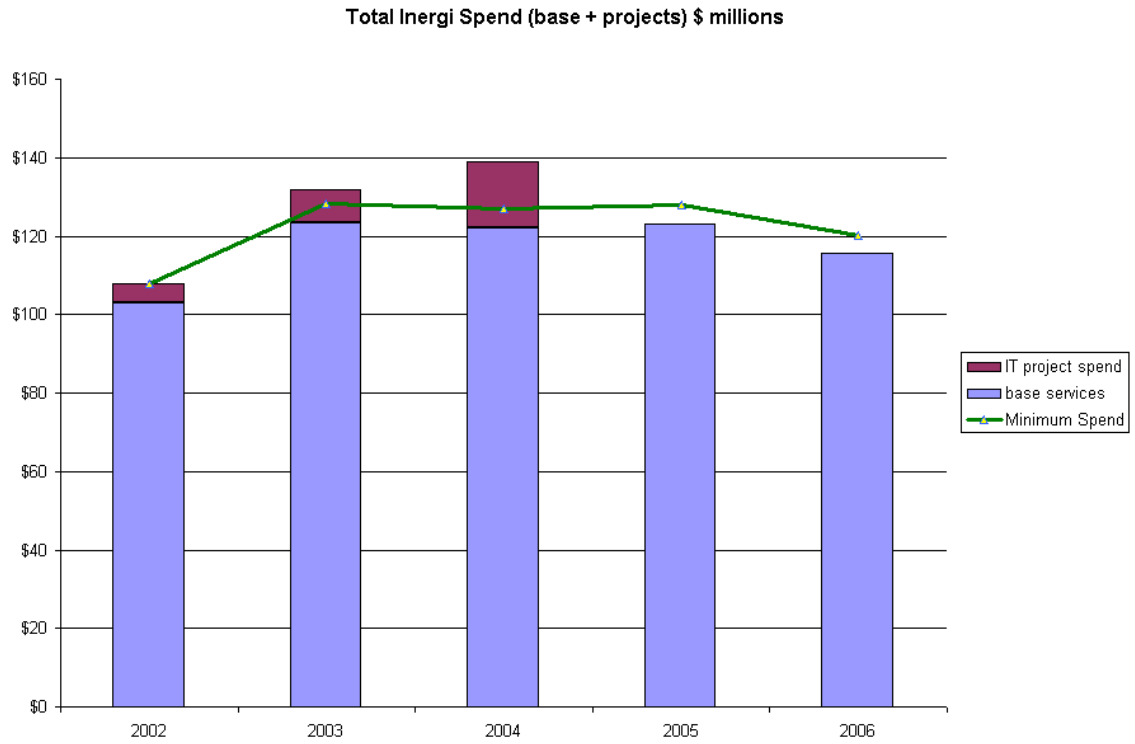
- Scope: In the interest of advancing the transformation of the Supply Chain to meet Networks' future needs, and to achieve an optimal warehouse network, the parties agreed to repatriate Warehouse Operations Services back to Networks resulting in a reduction in Base Fees effective May 2004. The 27 PWU stock-keepers who staff the warehouses and operate the delivery trucks together with three front line managers and one Warehouse Operations Manager returned to Networks. The negotiated price reduction of $3 million per year was based on actual costs that Inergi would avoid as a result of the transfer of staff back to Networks. Networks completed consolidation of its Warehouse Operation in January 2005.

- Volume: The number of new IT applications supporting Networks' operations increased significantly since commencement requiring an increase in volume of IT application support services.

**Systems Development Expenditures (Project Orders/Application Enhancements)**

The Master Services Agreement sets out Networks' spending commitment to Inergi for IT systems enhancements and other IT project development work for the duration of the agreement as shown in Table 1 above. Although Networks has a contractual obligation to award a minimum annual spend, Networks retains the option to competitively bid individual projects and has awarded several IT projects to other vendors since Commencement.

**Graph 1**




Over the first three years of the agreement, Networks decided to award to Inergi system enhancements and other IT development work above the contract minimum spend levels as shown in Graph 1 above for the following reasons.

- Inergi's project labour rates are comparable to top tier service providers,
- Inergi's in-depth experience with Networks' IT applications and infrastructure which tends to reduce required project effort and permit completion of projects under tight time constraints such as required by changes in retail billing regulations,
- As the incumbent service provider, Inergi can offer overall savings in implementation of new technologies by delivering both the project work and services to integrate the work with existing applications and/or infrastructures,
- Generally, Networks has experienced high client satisfaction with the delivery of Inergi IT projects, and

- Inergi has the broad skill base and technical and project management capabilities needed to manage large-scale projects.

Inergi assists Networks with assessment work as part of the fee for Base Services, which can range from data collection to the development of project business requirements used to award work. Inergi may choose to decline direct involvement in assessment work in order to be eligible to competitively bid on the resulting project work that Networks has declared to bring to market.

**Expenditures Supporting Productivity Improvements (Supplier Initiatives)**

Bidders to the outsourcing arrangement anticipated expenditures the first few years of the contract to change processes, technology and people in order to realize cost savings and share those cost savings with Networks in terms of price reductions. The MSA required Networks to provide $5 Million per year for the first three contract years to partially fund "Supplier Initiatives" in return for the promised fee schedule. The $15 Million expenditure is aligned with expenditures Networks estimated it would have made to achieve its business plan savings had it not outsourced Base Services. Although the contract identifies the specific initiatives that Inergi planned to undertake in each line of business, Inergi was unconstrained as to how, or if, the initiatives were implemented as the price reductions were guaranteed. The following describes two of the Supplier Initiatives completed.

<u>Speech Recognition Initiative – Customer Service Operations</u>

This initiative was designed to reduce the number of calls handled by agents through the implementation of self-serve telephony applications using Interactive Voice Response (IVR) and Speech recognition technology. The goal was to

understand 85% of customer speech on the first pass in both Canadian English and French.

By integrating Speech Recognition software in the existing IVR and Customer Service System platform, several of the high volume call types were automated freeing the agent to handle more complex and non-automated functions. In addition, Speech Recognition allowed all-speech user experiences for selected services. Speech Recognition technology is expected to improve customer satisfaction and experience.

Accounts Payable Process Improvements - Finance & Accounting

The objective of this initiative was to improve invoice processing and problem resolution processes in Inergi's Accounts Payable Services unit (AP) and improve the overall payment processing process (including cheque printing and distribution). The initiative focussed on rationalization and re-distribution of responsibilities and job duties, elimination of non-value added activities and improvement of and / or leveraging of existing information technology enablers.

**In-Flight Projects**

In-flight project fees reflect the fees paid to Inergi to complete selected projects which were initiated prior to the commencement date.

**Managed Contract Reimbursement**

Prior to the commencement date, Networks purchased certain products and services under contracts with third parties. In the context of IT Services, it was contemplated that Inergi would assume the majority of these contracts and provide the related products or

services directly as part of the fees for Base Services. The balance of the third party contracts would continue to be held by Networks, and simply 'managed' by Inergi. As of the commencement date, a final determination as to which contracts were to be assumed had not been made. The costs which Networks would otherwise have incurred under all third party IT contracts were included in Base Service fees as of the commencement date, to be adjusted later. However, payments to the third party vendors are made directly by Networks and Inergi reimburses Networks for those payments. Once certain contracts were identified for assumption by Inergi (mostly hardware and software contracts), Networks stopped paying these third party contractors. The actual assumption of these contracts over the first three years is reflected in a reduction of reimbursements and Networks' termination of the data centre agreement with IBM.

**Royalty Payments - Business Development**

Inergi agreed to make royalty payments to Networks concerning new business to be delivered by TSDC, which Networks assists, Inergi or Capgemini in attracting. The marketing support includes:

- conference and sales support programs as agreed to by both parties,
- hosting site visits and participating in occasional promotional meetings, and
- acting as a reference when required.

Networks' out-of-pocket costs to support Inergi marketing efforts are more than offset by the royalty payments.

**Royalty Payments - Asset Usage**

In addition to the forgoing, the contract requires Inergi to pay royalties as agreed upon to Networks where Networks permits Inergi to use Networks assets for the benefit of third

parties. With the minor exception of the use of 8-10 laptops by Inergi management staff for multiple clients, no such usage has occurred.

**Use of Networks Assets by Supplier**

Networks provided at the commencement date, all facilities and equipment necessary for Inergi to perform its contracted responsibilities (i.e., office buildings, workstations, partitions, desktop computers, network printers, telephones, servers, telecom equipment, etc.). Inergi's staff are located in Networks' facilities and the cost of those facilities and generally facility overhead costs (communication services, heating, lighting, consumable goods, etc.) are borne by Networks. Personal office tools are provided by Inergi such as cell phones, pagers, PDA's, personal desktop printers and associated cartridges, supplementary desk lighting, etc.

Inergi has not acquired any Networks assets as part of the transaction with the exception of certain third party agreements they have assumed. Ownership of assets remains with Networks and is unchanged as a result of the outsourcing. Networks retains an obligation to refresh those assets through the term of the contract. Upon termination of the contract all assets used to provide service to Networks are returned to Networks.

The outsourcing arrangements were structured in this way because at the time of bid solicitation, the desired services were not sufficiently defined to permit prospective bidders to identify the assets necessary for delivery.

**Pension, Supplementary Pension and Post Retirement Benefit Fees**

The employment of 913 Networks employees was transferred to the outsource service provider. Of these 913 employees, 569 were represented by the Power Workers Union

(the "PWU") and a further 277 were represented by the Society of Energy Professionals (the "Society"). The remaining 67 managers were not represented by a bargaining unit.

Agreement for the transfer of collective bargaining rights to Inergi respecting the outsourced work was obtained from the PWU directly on December 14, 2001 and from the Society by way of arbitration award in December 2001.

In order to simplify bid evaluation Networks requested pricing net of pension, supplementary pension and post retirement benefit costs. During the due diligence and contract negotiation phase of the contracting process with Inergi, it was agreed that Networks would fund these costs on the following terms:

- Inergi would be held harmless for pension (funding) costs and for the Other Post Retirement Benefits (OPRB) accruing due to transferred staff prior to the deal, and
- Inergi would provide benefit plans to transferred employees which would be no less favourable than the Networks' plans in place prior to the transfer.

Inergi set up a pension plan mirroring Networks', to provide benefits accruing to the transferred employees following the commencement date. Networks agreed to transfer assets and liabilities from Networks' pension plan to Inergi's pension plan, with respect to benefits accruing due to transferred employees prior to the commencement date, on no less than a solvency basis. The pension regulator has not yet approved the transfer.

The current service cost for the pension plan has been calculated using a going concern actuarial valuation basis that produces a going concern liability for transferred employees approximately equal to the solvency liability. The fees for current service cost decline annually, and from Networks perspective, reflect expected reductions in numbers of employees needed to deliver Base Services and inflationary increases in a manner consistent with the escalation of other cost elements of fees for Base Services.

The forgoing arrangement keeps Networks pension plan whole as no more or less than the liability and assets associated with the transferred staff are to be transferred. Actuarial calculations have been used to determine the amount of the transfer and the actuarial calculations have been filed as required and approved by the appropriate regulatory authorities. The asset transfer report has been prepared in accordance with Section 80 of the pension Benefits Act (Ontario).

Networks is obliged to fund over three years, the difference between the solvency liabilities for the transferred employees on the Commencement date and the end of 2004 and a 4% funding cushion, to the extent such amounts are not offset by pension fund performance during the same period. This shortfall has been determined by Networks' actuary to be $23.6M and $1/36^{th}$ of this amount was added to the monthly outsourcing fee commencing in March 2005. This adjustment is described as "Pension Top-up" in Table 1.

Inergi also set up a supplementary pension plan (SPP) mirroring Networks', to provide benefits accruing to the transferred employees following the Commencement date. Networks pays SPP benefits based on credited service with both Networks and Inergi.

Networks pays a portion of the Other Post Retirements Benefits (OPRB) ultimately payable based on the provisions of Networks' plan as at the commencement date but allowing for dental fee guide increases. Networks' share is based on the proportion of continuous service with Networks, ignoring service under reciprocal agreements.

If Inergi reduces the SPP benefits or OPRB of transferred employees, Networks will pay to Inergi, an amount equal to any resulting reduction in its SPP liabilities and/or OPRB

liabilities, determined using Networks' then current accounting methods and assumptions is in exchange for satisfactory indemnities and releases.

Current service costs for the Inergi pension plan, SPP and OPRB are described as 'pension & benefits' in Table 1.

## 6.0 SUPPLIER PERFORMANCE

### Benchmarking

The MSA allows for adjustment of Inergi fees for Base Services on the third, sixth and ninth anniversary of the commencement date in accordance with the findings of a mutually acceptable independent third party engaged for the purpose of benchmarking. The MSA listed a number of industry-recognized benchmarking providers deemed acceptable.

For purposes of the first and second benchmarking study the analysts shall restrict themselves to considering comparable companies that are unionized in the same proportion as that of Inergi relative to the services being reviewed. In the third benchmarking study period the analyst is permitted to consider for comparison purposes a reasonable mixture of unionized and non-unionized companies.

Fees for the benchmarking are to be borne equally by Networks and Inergi.
The agreement requires the analyst to compare the Inergi fees adjusted for employment costs (i.e. current pension cost, other post retirement benefits and supplementary pension plan costs) and applicable cost of living increases with the market price as determined by the analyst, for Base Services delivered under each statement of work in the MSA. The

fees chargeable under each statement of work are to be adjusted to align with the 50th percentile of the fair market value range identified by the analyst.

An RFP for the benchmarking project was released to the analysts listed in the MSA in June 2004 with the expectation that the benchmarking study would be completed by the end of 2004. No compliant bids were received as none of the bidders were capable of completing the benchmarking work on all lines-of-business. In general, industry analysts involved in price benchmarking work advised Networks that with the exception of IT and certain portions of Customer Care, there is very little maturity in benchmarking work of other lines-of-business. Further pursuit of this work would be based on relatively expensive primary research and involve a limited number of companies with comparable characteristics such as size, type of service, unionization, etc.

A second RFP was released in January 2005 to solicit a benchmarking study for IT Services. IT Services represents over 50% of the total value of the fees for Base Services and it was felt that benchmarking results of this line-of-business provide a general indicator of Inergi's market competitiveness.

P.A. Consulting was awarded the work of completing an IT Services price benchmark study and their report is included in Appendix B of this evidence. The results of this analysis show that Inergi fees for IT Services are $0.514M above the 50th percentile of the Fair Market Value Range established to be $50.341M (that is, within 1.0%). In addition, PA Consulting has identified several intangible factors that could not be presently quantified and could conceivably influence the outcome of the benchmarking results within the Fair Market Value Range slightly above or below the 50th percentile.

**Service Performance**

As of the end of year three (February 2005) of the agreement Networks can say with confidence that outsourcing objectives are being realized.

- **Delivery of service against defined service levels** is assessed on a monthly and yearly basis. One of the benefits of the outsourcing process was the definition of Base Services, associated roles and responsibilities of client and supplier and establishment of measures of service volume and service performance. Service level performance has been satisfactory to date with overall improvement from the time period before outsourcing.

| **DELIVERY OF SERVICE AGAINST DEFINED SERVICE LEVELS** | | | | | |
|---|---|---|---|---|---|
| | Number of Service Levels | Number of Service Failures in 2004 | | | |
| | | Severity | | | |
| | | 1 | 2 | 3 | QSL |
| 1. CSO | 20 | | | | |
| 2. Supply Management | 37 | | | 1 | |
| 3. HR Payroll Operations | 18 | | | 1 | |
| 4. Inergi Information Technology | 35 | 1 | 3 | 12 | |
| 5. Finance & Accounting | 21 | | | | |
| 6. Settlements | 11 | | | | |
| Total | 142 | 1 | 3 | 14 | 0 |

Overall: Inergi met or exceeded 99% of the service level measurements in 2004.
(Tiers 1, 2 and 3 are levels assigned to Service Levels based on criticality, QSL is a quarterly trend failure associated with Tier 2 service levels.)

In the event of a failure by Inergi to achieve any service level, Inergi provides a Cure Plan and service credits to Networks according to severity and frequency of such failures.

Service credits increase as the situation warrants. Termination of individual statements of work or the whole agreement is allowed under defined circumstances.

Inergi's performance to-date has been such that only one minor service credit has been issued; that in connection with IT services in February 2005. A Tier 1 service failure (Passport System restoration failure) occurred but Inergi's response was exemplary and Networks did not invoke its right to collect significant service credits. Networks' agreement not to pursue contractual or other legal remedies arising from the failure to restore Passport were contingent on Inergi i) improving the relationship commensurate with the teamwork shown during the incident, ii) delivering a Cure Plan to ensure restoration of the Passport System can meet the service level and iii) developing system security and business continuity recommendations with Networks. Inergi satisfied these requirements in 2005.

- **Three major utility incidents** occurred and were addressed successfully: a major surge of customer calls to the Call Centre in the spring and summer of 2003 caused an overflow of calls to internal operating units and the government; loss of the power grid throughout Ontario and the North East United States in the summer of 2003 caused loss of critical IT systems; and outage of the computer-based supply chain and work management system (Passport System) in 2004 resulted in data integrity issues and manual processing of transactions. In each case, emergency measures undertaken; restoration efforts and subsequent root cause analysis performed by Inergi were exemplary.
- **Service at lower cost** is being provided as promised. Base Service fees including adjustments for COLA, Pension & Benefits, Settlements and Market Ready Applications are forecast to fall by $11.3 M, or 9.2%, from Contract Year 1 to Year 5 (2002 - 2006).

**Other Standards and Measures of Performance**

In addition to service level obligations, the MSA requires that Inergi delivery of Base Services meet various other standards and measures of performance. Close oversight ensures that all such commitments are honoured; the result has been full compliance.

**Networks Policies & Procedures**

Inergi is required to comply with the Networks' policies as amended and Networks routinely advises Inergi of changes to pertinent policies such as Networks Safety and Environment policies or 3rd Party Access to Network Stations.

Inergi has reviewed and assumed applicable Disaster Recovery Plan and Emergency Response Plan (ERP) obligations. No lapses have been observed. Inergi demonstrates on an annual basis that all ERP plans and procedures have been tested and are effective through drills that are coordinated and witnessed by the Networks' Emergency Preparedness Department.

**Internal Controls Review**

Inergi is required to retain an external auditor to review and report on internal controls as contemplated under Section 5900 of the Handbook of the Canadian Institute of Chartered Accountants. Inergi has provided Networks with its Annual Internal Controls Review report for 2003 and 2004 and has executed plans to address identified control weaknesses.

**Audits**

Networks itself has the right to audit Inergi's operations exclusive of information related to Inergi's own costs and financial statements). Inergi is required to respond to and bring itself into compliance with any audit findings of material non-compliance with the MSA, generally accepted accounting principles or other requirements for which Inergi has responsibility. Several audits have been completed by Networks "internal audit" department, mostly as part of a larger audit of Networks business processes that are dependent upon Inergi's performance. The parties have addressed all gaps identified through these audits.

**Regulations, Codes, Laws**

Inergi is required to ensure that all Base Services are provided in accordance with law as law applies to Inergi and Networks. In support of Inergi's responsibilities in this regard, Networks has directed Inergi's attention to new privacy and safety legislation, and relevant proceedings and judgments from the OEB. Inergi has accepted responsibility for staying abreast of electricity marketplace evolution and related regulations.

**Code of Conduct and Confidentiality**

Inergi is to comply with the requirements of the OEB and applicable law as regards the protection, security and segregation of Networks' confidential information. Capgemini requires its employees and contractors to follow its Code of Conduct with respect to client business information and personal information. The Code of Conduct addresses confidentiality as it applies to proprietary, technical, business, marketing, financial and personal information about Inergi / New Horizon System Solutions / Toronto Service

Delivery Centre and Inergi's clients; disclosure of Networks' sensitive information only on direction from Networks.

**Security of Information**

Inergi is required to maintain physical or logical separation and security of Networks applications and data from Capgemini's other clients. Applications and data reside on facilities within Networks premises or at the Capgemini Data Centre. No other Inergi or Capgemini client application or data resides on facilities on the Networks premises. Networks applications and data at the Capgemini Data Centre reside on Networks equipment and are physically separated from other clients or, in some cases, utilize equipment shared with Capgemini with logical separation achieved through appropriate security technologies managed by Capgemini. The Data Centre is physically secure and guarded 24x7 hours per day.

**Best Practices**

Inergi was required to meet the programming criteria of excellence designated as CMM Level 2, by March 2004. This has been accomplished and Inergi is now focused on attaining certification at Level 3. [The Capability Maturity Model (CMM) is a method for evaluating the maturity of the software development process of organizations on a scale of 1 to 5. The CMM was developed by the Software Engineering Institute (SEI) at Carnegie Mellon University. It has been used extensively for avionics software and for government projects since it was created in the mid-1980s.]

With respect to Customer Service Operations (Billing Domain), continued performance to the international standard of ISO 9000 was required of Inergi and met in 2004. Certification for other areas within Customer Service Operations is being pursued by

Inergi. Similarly, Inergi Finance was certified under ISO 9000 standards in 2005. [ISO 9000 has become an international reference for quality management requirements in business-to-business dealings. The ISO 9000 standard is primarily concerned with "quality management". This is what the organization does to fulfil the customer's quality requirements, and applicable regulatory requirements, while aiming to enhance customer satisfaction, and achieve continual improvement of its performance in pursuit of these objectives.]

**Operations Procedure Manual**

Inergi was to deliver an Operations Procedures Manual by the end of the third contract year and be in a form and substance sufficient to enable Networks, or a successor outsourcer to fully assume the provision of Base Services. Inergi completed this manual for all lines of business in 2005.

**Development of a Termination Transition Plan**

Inergi is required to prepare termination transition plans laying out the process, effort, schedule and information requirements necessary to enable Networks or a third party to take over provision of Base Services on termination of the contract. The first such plan was completed for IT Services in 2004. The remaining five plans are to be completed in 2005 using the IT template.

**Financial Guarantees**

Capgemini SA is a publicly listed international consulting and information technology firm with annual worldwide revenues of approximately $9.4 billion. In May 2000, Capgemini (a public company since 1987) and Ernst & Young Consulting Services

merged to form the Canadian consulting practice firm now known as Cap Gemini Ernst & Young (CGEY). CGEY was subsequently rebranded to Capgemini in 2004. Capgemini SA operates with more than 50,000 people worldwide, and is a leading management and IT consulting service provider. Capgemini US operates as part of the America's group of Capgemini SA. Inergi LP is a wholly owned subsidiary of Capgemini Canada and is the partnership vehicle created by Capgemini Canada to contract with Networks to provide Base Services. Capgemini US has provided financial and performance guarantees of the MSA.

**Client Satisfaction**

Inergi surveys Networks relevant business managers and internal users in respect of their satisfaction with performance of the Base Services and projects and is required to address material dissatisfaction revealed by the survey. In some cases, corrective action may require the parties to agree on process changes, incremental investments and/or changes in service levels. The scores of this bi-annual survey have recently been 3.9 out of 5 for Base Services and 4.1 out of 5 for project work.

## 7.0 BUSINESS RATIONALE FOR OUTSOURCING

The outsourcing solution was selected to resolve a number of business issues that Networks faced. Those business issues were:

- Improving cost competitiveness,
- Addressing a legacy payroll structure,
- Minimizing the requirement for non core capital investment, and
- Improving business focus on operations.

Networks recognized the requirement to become increasingly more cost competitive in a regulated market with external cost pressures. Hampering Networks' ability to become more cost competitive was a legacy payroll and benefit structure, which makes its labour costs higher than most of its competitors. To decrease its per unit labour costs Networks either had to invest in greater process automation or had to invest in business growth to attract additional customers to spread its fixed costs over more transactions and thereby reduce the per unit cost of services. The latter, however, would have drawn management focus away from the core electricity delivery business.

Prior to proceeding with the outsourcing initiative, Networks held discussions with various outsourcing companies. Those discussions confirmed the need to aggressively expand the existing customer base in order to obtain efficiencies of scale in customer service and IT development.

Growth would, as noted, have required either significant capital investment or diversion of senior management attention to the pursuit of new business. General market wisdom held there would only be a few successful market participants who would have sufficient business scale to be successful. To succeed, the focus would have to include all of North America and all utility markets.

Market credibility was a required ingredient to attract these new third party customers. Obtaining credibility would have required the entering into of partnership arrangements with an existing recognized outsource provider or with other companies pursuing similar strategies.

Regardless of how the growth was to be achieved, the pursuit of a growth strategy would have resulted in additional business risk being borne by the Networks business directly or indirectly. Networks management therefore chose to pursue a strategy where the

business risk was transferred to a third party and where the desired savings would be guaranteed.

## 8.0 OBJECTIVES FOR OUTSOURCING

In proceeding with its outsourcing initiative, Networks wished to achieve the following objectives:

- Defined service levels,
- Services at lower cost,
- Access to change management and intellectual knowledge that understands Networks business and can provide benefit to Networks operations,
- Improved career opportunities for transferred Networks employees, and
- Reduced management distraction from operation and maintenance of the Transmission and Distribution system.

The outsourcing objectives as set out above are incorporated in the agreement between Inergi and Networks and serve to provide direction as the contract evolves.

- **Change management and intellectual knowledge** has been demonstrated by Inergi in re-engineering and optimizing Networks business processes in order to meet Inergi's pricing commitments. With Inergi's expertise in the Customer Service Operations, Networks has been able to meet all timetables for changing billing and pricing imposed by Bill 210, Bill 4 and Bill 100 and Inergi has responded with the appropriate resources to address associated increased customer call handling demands. Inergi successfully completed the complex task of migration of Networks' Data Centre operation from IBM without incident and now offer Data Centre services at pricing below IBM's prices to Networks.
- **Improved career opportunities for transferred Networks employees** have resulted from Capgemini US transfer of its own back-office processing to the Markham

Accounting Centre (MAC). Sixty-eight (68) additional jobs have resulted for the PWU membership; Eighty-nine (89) employees are located at the MAC. Of this total, Seventy-seven (77) were employees redundant to Inergi's needs. Capgemini is also in the process of investigating the movement of IT processing workloads from its US work centres to its newly established Data Centre location in Mississauga.

- **Improving business focus** on Networks operations has been achieved with the reduction of Networks management time spent on monitoring and controlling transactions, labour management and operational direction with a commensurate increase in time spent on core T&D business. To effectively manage the outsource service provider and the delivery of service under the contracts Networks has established small scale vendor management resources within each line of business and a centralized team of contract management professionals that carry out overall management of the contract, contract amendments, formal governance, remedies, fees and the relationship. Across Networks and including functional support from Finance, Law, Procurement, HR, etc., the full time equivalent of sixteen Networks staff are engaged in contract management, representing about 1.4% of the contract value.

(The 2004 World Outsourcing Conference reports average outsourcing contract management costs ranging from 3% to 6% of contract value.)

## 9.0 OUTSOURCING PROCUREMENT PROCESS

In November 2000, Networks considered options to reduce costs for non-core functions through various discussions with potential partners. These discussions progressed over the next 8 months with a variety of potential partners and outsource service providers. Networks identified two qualified candidates, Accenture and CGEY. Inergi LP is the

partnership vehicle originally created by CGEY to contract with Networks to provide Base Services.

In the late Spring and Summer of 2001 Accenture and CGEY conducted due diligence on the potential of providing a range of internal services to Networks through an outsource arrangement. The due diligence period took place over 60 days during which each proponent revised and re-crafted their proposals. Accenture and CGEY were provided with due diligence packages consisting of financial and staff information on which to base their business proposals. The two companies were asked to provide competitive bids and to respond in a predetermined format. Networks developed a request for proposal format that permitted it to evaluate proposals on a comparable basis. Both parties were requested to provide their responses in accordance with the requested formats. Both companies were aware they were competing in a competitive process against the other.

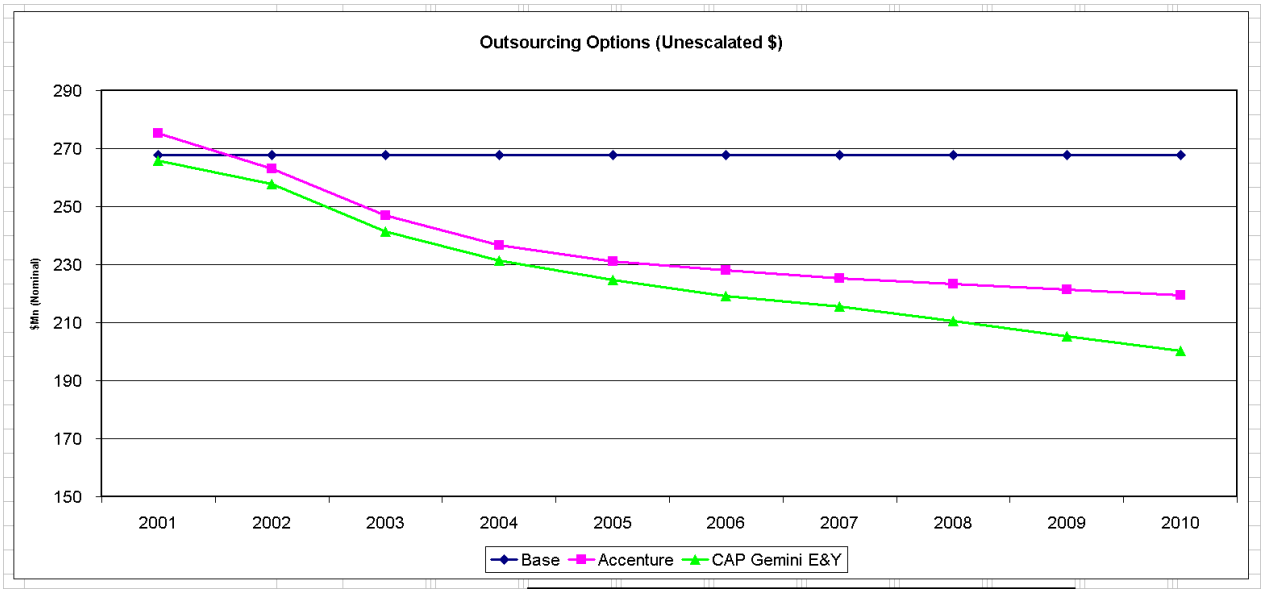
Both parties spent a significant amount of time talking with the various Networks service line managers who potentially would be in receipt of their services, discussing organization structure, operations and performance requirements and developing a detailed understanding of the business.

Both Accenture and CGEY presented their confidential and proprietary business proposals to Senior Networks management. On the basis of these bids (which were to be confirmed through a next phase of due diligence and through the negotiation of binding agreements) it was concluded that savings could be realized. Senior Networks team members who would be the service recipients provided an independent assessment of the two proposals based on the merits of the proposals.

The graph below shows the financial analysis of the two bidders proposals compared against one another and shows the CGEY proposal to be lower than Accenture. Both proposals exclude procurement savings as a result of Strategic Sourcing.

**Graph 2**

**Comparative Financial Analysis**




On the basis of the written proposals and other discussions with the two proponents it was concluded that Networks would undertake negotiations with CGEY for the provision of services in the following areas:

- Customer care, including billing , call handling, accounts receivable and collections,
- Settlements,
- Information technology services, including desk top support, application development, system operations,
- Finance, accounting and accounts payable,
- Payroll,
- Inventory management, and

- The management of hazardous waste.

In addition the company undertook the negotiation of a consulting assignment with CGEY respecting the implementation of Strategic Procurement processes that would have the impact of reducing the cost of procured goods and services.

Networks decided that in addition to price reductions, service quality would be maintained at defined service levels at or better than historic service levels. By contracting with a party that had aspirations to maintain these functions as a core to their outsource service business Networks could gain access to best outsourcing practices and intellectual capital it might otherwise not have available to it.

Management recommended to the Board of Directors that Networks engage in a second phase of due diligence and enter contract negotiations for outsourced service arrangements with CGEY. The proposal from CGEY was deemed superior, in summary, due to (a) experience with the Networks unions; (b) instant benefits of scale and employment opportunities from the Markham Accounting Centre proposal to incorporate CGEY's own North American back office services within the Work; (c) the strong credibility of the proposed Call Centre subcontractor Vertex; (d) better economic returns flowing from the Strategic Procurement proposal.

The internal business case to move forward with the outsourcing arrangements is described more fully in Appendix A.

CGEY has specifically recognized the unique nature of providing service to a unionized and regulated business and has committed to implement any requirements of the OEB and applicable laws. CGEY has also agreed during the life of the agreement to allow Networks, its internal or external auditors, or any applicable governmental authority the

right to verify the compliance with all applicable laws including OEB standards and requirements. The knowledge, understanding and willingness to comply with OEB standards provides additional confidence that CGEY is a knowledgeable provider of services and recognizes the rules under which its operating behavior must be governed.

In order to address concerns that it did not have sufficient outsource service experience with customer care and call centre operations, CGEY has retained Vertex Customer Management (Canada) Limited, a wholly owned subsidiary of Vertex a UK based business process outsourcing company owned by United Utilities (85%) and CGEY (15%, since divested). Vertex is a large customer relationship management and call centre operation in the UK handling 14 million client customers annually and 106 million calls, printing and sending out 36 millions bills and processing 93 million payment transactions to a value of over £6 billion. Vertex Canada has entered into a separate sub contractor agreement with CGEY to provide management expertise for customer relationship management, including call centre outsourcing operations, for Networks.

On October 12, 2001 the Hydro One Board of Directors approved management's recommendation that Networks proceed to a second phase of due diligence with CGEY and that negotiations commence respecting outsource service agreements.

To undertake this task, negotiation and due diligence teams were established that would lead the process of confirming in detail:

- Services that would be outsourced,
- Service levels that would be provided,
- The current cost associated with the provision of those services,
- The employment positions and employees associated with services that would be outsourced and retained,

- Issues pertaining to pension, benefit and post retirement benefit obligations retained by Networks or assumed by the outsource service provider including obligations for past service periods,
- The interaction that would exist between outsourced and retained services, and
- The many contract terms and conditions that would apply through the future contractual relationship.

Negotiations took place between October 2001 and January 2002. An agreement in principle was reached on December 28, 2001 and a Master Services Agreement, Statements of Work and supporting schedule, were signed on February 8, 2002.

**Outsourcing Process**

To assist Networks in the development of an outsourcing agreement, Networks retained various experienced outsourcing consultants and practitioners to develop the material needed to assist in the preparation of proper service agreements. The process undertaken included identifying the services to be provided in each functional area, describing the services requirements, assessing the current performance measurement criteria, the service target levels, the base line performance, cost drivers, the performance drivers and identifying existing opportunities for improvement. These documents were used extensively in the preparation of the Statements of Work and as the basis for further documentation prepared during the Transition period.

The external consultants also provided input into the negotiation process and helped in developing the contract sections covering performance remedies, cost adjustments, change management and benchmarking.

Networks retained experienced external legal counsel from Osler Harcourt & Hoskins and consultants from Pricewaterhouse Coopers to assist in the above work.

## 10.0 Contract Summary

Overview:

In 2002, Networks entered into a 10-year Outsourcing arrangement with CGEY to provide business process and information technology services. The service contract was predicated on "same service/volumes for a declining price for Base Services in each of the agreed service areas."

Document Objective:

This document provides a summary of the Master Services Agreement (MSA) signed on December 28, 2001 between Hydro One Networks Inc. and Inergi LP. This document outlines the structure and sections of the MSA and its schedules and highlights the intent and requirements of various sections.

The MSA covers the 10-year, approximately $1Billion outsourcing agreement between the Networks and Inergi. The outsourcing agreement covers the following service areas (referred to as Statements of Work (SOW):

- SOW 1: Customer care or Customer Service Operations (CSO)
- SOW 2: Supply Chain or Supply Management Service (SMS)
- SOW 3: Human Resources & Payroll (HR Pay)
- SOW 4: Information Technology or Inergi Information Technology (IIT)
- SOW 5: Finance & Accounting (F&A)
- SOW 6: Settlements

Base Services under these SOW's were largely performed by Networks prior to the MSA. Each SOW describes 'what' service Inergi delivers and Networks expects. Each SOW is further broken down into Domains to describe detailed functional services.

Structure of the MSA:

The MSA is structured as follows:

- MSA
- Schedules to the MSA, which include exhibits and tables
- Statement of Works

Master Services Agreement (MSA):

The MSA is organized into segments called Articles, which outline the details of the outsourcing agreement.

General Articles:

The initial Articles deal with various terms of transition, which were carried out in 2002. This section also calls for the development of an Operations Procedure Manual (OPM) by the 3rd anniversary to guide the parties in their relationship. It also covers topics like Networks assets and restrictions on use, consents regarding Networks assets, replenishment of assets, client service area - access and renovations, assumed and managed contracts, data centre contract, shared service centre and equitable adjustments. Inergi is required to set up a Shared Service Center in Toronto at no cost to Networks.

Services:

This article covers aspects like Scope of services, participation agreement, participation and affiliation, policies and guidelines, emergency and disaster plans, and exclusivity. Inergi provides all the services as noted in Statement of Works that were not retained by Networks and that were provided by transferred employees during their normal course of employment for the 12 month preceding the agreement. Inergi is required to comply with all Networks' policies and guidelines and to assume both the emergency response plan and the disaster recovery plan. Inergi was required to develop a termination transition plan for an orderly, cost efficient and timely wind down and transition of services for each SOW.

Service Levels:

This article covers the intent on service levels and provisions around service level reporting and failures, customer satisfaction surveys, and planning and improvements to service levels. They contain the measurable level of service Inergi provides to Networks against a defined volume. Service levels describe measurable events specific to each Domain (e.g. average speed of answer by the Help Desk). Each Service Level has a Remedy Point. Performance worse than the Remedy Point results in development of a cure plan and/or a penalty. Service Levels within each Domain are organized into 3 Tiers with Tier 1 having the highest level of importance. Each SOW contains a number of volumetric measurements called Resource Units to measure, and adjust if required the volume of service.

Governance:

This article describes the governance structure between the parties for the outsourcing deal including procedures for dispute escalation and resolution. The following are the main governing committees:

- Executive committee: comprised of 3 managers (2 Networks, 1 Inergi) with responsibility for oversight and management of overall relationship between the parties
- Steering committee: comprised of minimum 6 managers (3 Networks, 3 Inergi) with responsibility for oversight and planning for services and service changes
- Operations Management committee: comprised of 2 managers (1 Networks, 1 Inergi) with responsibility for overall and ongoing management of the operations

General Articles:

There is an article that covers various aspects around Intellectual Property. In it the parties grant each other a non-exclusive, non-transferable right and license during the contract term for the sole purpose of providing services and fulfilling obligations under this agreement. There is further an article which details the rights and obligations of the parties concerning audits, the rights to audit, compliance and insurance. The MSA contains an article in which the rights and requirements related to confidential information is detailed. This article includes the obligation of Inergi to with the laws and requirements of the OEB as relates to confidential information. There are also articles which cover such standard deal issues as Fees and Charges, Warranties and Covenants, Indemnities and Limitations of Liability.

Term and Termination:

This article talks about the term and aspects around renewal, and termination under different circumstances. Key provisions are:

- Term is for 10 years, unless terminated early
- Termination for cause of a SOW or SOW's can be invoked by the parties in case of a material breach by the other party
- Termination of a Service Domain or SOW in case Inergi is in a service level default situation as a consequence of failure to achieve Service Levels
- Parties will work towards mitigating all termination costs and undertake an orderly termination

## 11.0 APPENDICES

Appendix A: Outsourcing Business Case Summary - January 2002

Appendix B: IT Benchmarking Study - PA Consulting - July 2005

# OUTSOURCING BUSINESS CASE SUMMARY

# JANUARY 2002

# APPENDIX A

# BUSINESS CASE SUMMARY (BCS)

January 31, 2002

## Project Name: Project Excel – E Business Outsourcing Project

### Information Update

Hydro One has completed negotiations with Cap Gemini Ernst & Young (CGEY) in respect to the outsourcing to Inergi LP, a wholly owned subsidiary of CGEY, of the following services:

- Call Handling and Customer Care
- Billing
- Supply Chain
- E-Enabled transactions including ETS supported functions
- Back office – Payroll and Finance

The agreement reflects in all material respects the agreement in principal reached with CGEY December 28th, 2001

**Agreement Terms**

The contract has a term of 10 years. At the end of the term Hydro One' may renew for a further 3 years.

The contract has a nominal value of $1.2 billion.

If after the 3rd year Hydro One decides to exit the contract before term it may do so on payment of certain penalties.

Agreement in principle was reached with CGEY on December 28, 2001 and the contract commencement date is March 1, 2002.

Inergi LP will assume 921 (812 full time and 109 part time employees) unionized and non unionized Hydro One staff (21% of Hydro One's existing staff complement). Hydro One will retain the assets and systems required to operate the outsourced services.

A summary of the terms of the agreement is attached in Exhibit A.

**Results to be Delivered**

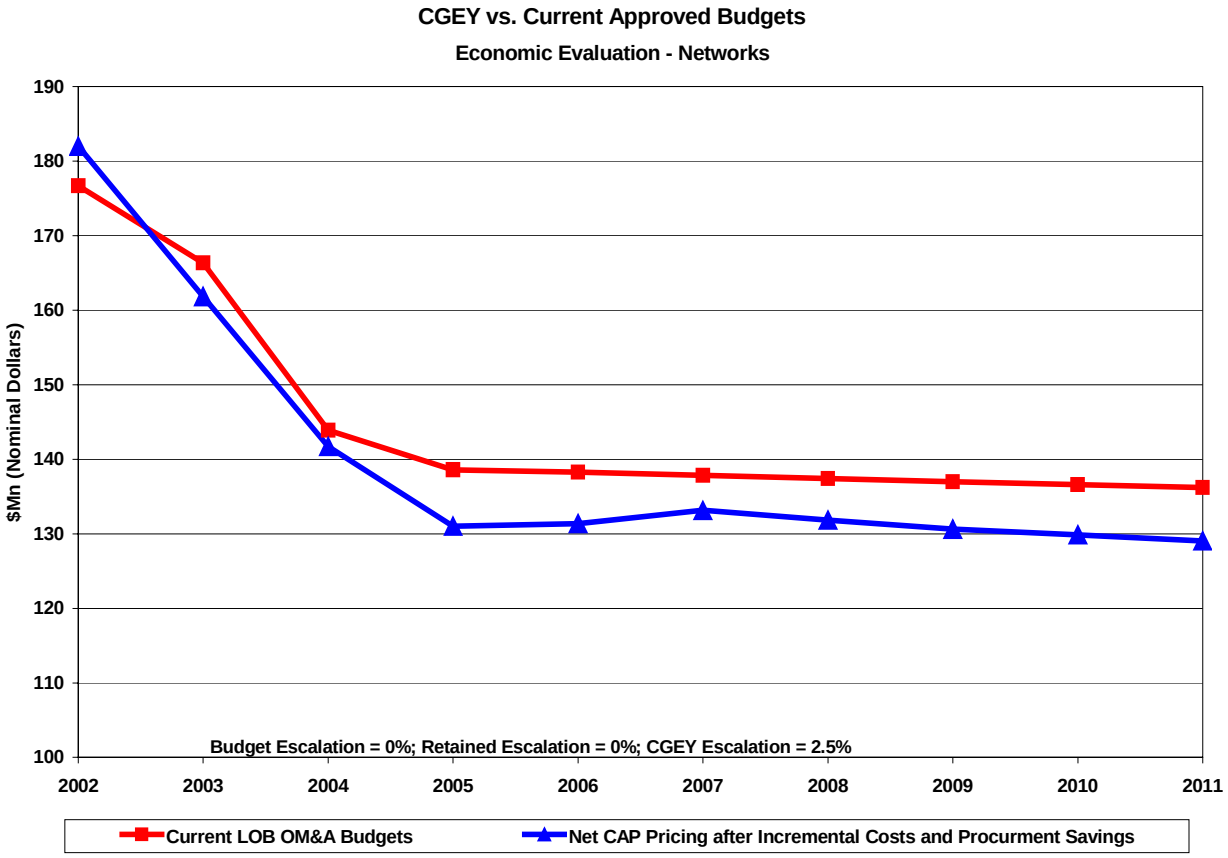
Hydro One will receive:

- Defined service levels and performance measurement.
- A lower overall cost of service.
- Access to state of the art processes, change management and intellectual knowledge.
- Enhanced career opportunities within CGEY for transferred employees.
- Allow Hydro One to focus on core business skills relating to operating and maintaining Transmission and Distribution.

**Background**

The decision to proceed to outsource these functions to CGEY was made after an extensive process which included discussions with Onex, IBM, CGI, and Customerworks and Accenture regarding various options including partnership and the outsourcing of one or more elements of the in-scope services. CGEY was selected following a competitive bidding process with Accenture. CGEY was selected on the

basis of its business proposal, including service provision, labour guarantees, technical skill, risk mitigation, and pricing. The selection of CGEY was made by senior Hydro One management based on the evaluation and recommendations of the line management who will be responsible for the areas that CGEY will provide the services for. The comments of PWU and Society union representatives were also considered. Since October 17th Hydro One and CGEY have been involved in contract negotiations, the completion of extensive contract documentation, and in the development of detailed statements of work for the services being provided.




**Financial**

The agreement has the following financial impact to Hydro One Networks Inc.

- The NPV of the guaranteed benefit is $24 million over the life of the agreement. This includes savings that HONI will make through strategic sourcing, guaranteed growth royalties from CGEY, and is net of incremental costs associated with the transaction.

- The original CGEY proposal as compared to the original Accenture proposal provides better financial results through lower OM&A costs and higher financial guarantees for supply chain savings. The

overall NPV of the original CGEY proposal exceeded the Accenture proposal by approximately $30 million. Since October 5th CGEY has reaffirmed its OM&A pricing which has remained effectively unchanged from its original proposal. CGEY will assume the business risk and responsibility for achieving the cost savings.

- The Line of Business budget for HONI above is presented in comparison to the projected budget including pricing from CGEY. The CGEY pricing assumes inflation at the rate of 2.5% over the life of the agreement. The current HONI budget assumes that all inflation is absorbed against improved productivity. The CGEY proposal assumes that cost reductions are obtained through business process efficiencies and redeployment of staff to other clients. The HONI budget does not include any amount for severance.

- The incremental cash costs associated with the contract amount is $10.4 million in 2002, $10.7 million in 2003 and approximately $2 million per year thereafter. The net present value of these incremental costs is $28.8 million over the life of the contract. The costs for 2002 and 2003, which relate primarily to pension costs associated with the transfer of staff, will be charged to operations in 2001 as a one-time charge associated with exiting the business. As a result of splitting the pension plan, HONI will incur pension charges in 2002 and 2003 which it would not have otherwise incurred had the pension plan remained whole and the pension holiday been available to the transferred employees.

- CGEY has guaranteed the savings related to the strategic sourcing procurement process of $65 million (NPV $40 million). Hydro One expects that it can achieve total, organization-wide procurement savings of $110 million (NPV $62 million) through leveraging the CGEY team based buying approach. CGEY will also guarantee royalty payments to HONI associated with the growth of Inergi LP in the amount of $17.5 million (NPV $11 million). In total, the forecast procurement savings and royalty payments have an NPV of $73 million.

- Inergi LP has provided a competitive IT project consulting fee schedule for Hydro One IT projects

- Hydro One and CGEY have agreed to the structure and calculation of marginal cost increases and decreases resulting from changes in service levels or material volume changes.

- Hydro One will bear the financial risk associated with using an inflationary index based on the Ontario Labour index. Over 10 years this index exceeds CPI annually by approximately 0.5%.

Even with the guaranteed savings from the Inergi LP contract, HONI's budgeted operating costs may exceed the business plan in 2004 and 2005. In order to meet its budget HONI may require access to the Hydro One contingency amount for those years.

**Qualitative Factors**

In addition to the financial factors above the agreement includes certain qualitative factors. These include:

**Guarantee of Cap Gemini Ernst & Young US**

- CGEY US has guaranteed the performance of Inergi LP during the 24 months after the commencement date and at the end of term.
- CGEY US has provided a financial guarantee equivalent to 12 months fees to a maximum of $125 million throughout the term of the agreement.

**Provision of New Work (Merlot)**

- CGEY has legally committed to move a shared service centre to the GTA providing not less than 150 persons of similar full-time work, which is currently being performed for CGEY by Ernst & Young

(Merlot Commitment). An additional 150 persons of work may also be transferred to the shared service centre during term of the agreement, however CGEY is not legally bound to create these jobs. Redundant staff from Inergi LP will be eligible for positions in the shared service centre. The Merlot Commitment was highly regarded by both unions

**Service commitment by CGEY to Hydro One**

- CGEY has stated that a core business service will be to provide outsourcing services to utility companies. Hydro One with OPG and Bruce Power (New Horizons) are keystones to the development of this market presence in North America. A failure to obtain a significant market share and volume of business may reduce CGEY's enthusiasm to support these services in the event that Inergi LP proves to be unprofitable.
- The services agreement includes certain performance remedies, escalating service failure penalties which could lead to Hydro One terminating the contract. While this option exists it is unlikely that Hydro One would take this action
- CGEY has committed to provide existing service levels in accordance with certain performance metrics that will be more fully defined, subject to changes requested by Hydro One. In the transition period CGEY will provide services on a business as usual basis as both service levels and metrics are better defined.
- Employees providing services to Hydro One after the commencement date will be the same employees that had previously provided the same services to Hydro One. Similarly, Management staff will be the existing staff who had provided supervisory and management direction before the commencement date.

**Migration of services to CGEY/Inergi LP**

- CGEY has had experience migrating similar services in the Ontario utility environment with both the Society and PWU. The experience gained by CGEY with OPG reduces the risk with transferring operating services from Hydro One to CGEY.
- CGEY has received the acceptance and support of the PWU and the Society to proceed with the outsourcing. The approval should lead to a smooth transition of unionized staff to Inergi LP. It is expected that the majority of transferred management staff will accept their transfer, however if less than 97.5% of transferred staff accept then either CGEY or Hydro One may terminate the agreement.
- Staff providing the functions to Hydro One will be knowledgeable Hydro One staff managed by Hydro One management staff, working for CGEY, as supplemented by CGEY staff.
- CGEY has developed an extensive migration plan that has been reviewed and agreed to by Hydro One line management.
- CGEY has developed and Hydro One management has approved transition principles applicable to the first 6-12 months of the contract. A complete transition plan will be developed within 60 days of the contract commencement. During the transition period Hydro One and CGEY will work to better define service levels, performance metrics and marginal costs associated with each line of business. At the commencement of the contract certain metrics and data will exist for each line of business which will be verified.

**Regulatory/ Benchmarking**

- CGEY will, in years 3, 6 and 9, benchmark service costs to ensure cost competitiveness of similar 3$^{rd}$ party services. The benchmarking is a one way process that will reduce service costs which are in excess of market prices. At issue will be the ability of a third party benchmarker to obtain proper comparisons to the services provided for comparable sized companies with unionized employees.
- CGEY is committed to work with Hydro One to address any regulatory changes specifically identified by the OEB or to work with Hydro One to reduce costs in accordance with general regulatory reductions imposed by the OEB.

**CGEY's knowledge of Hydro One's Systems**

- CGEY's prime subcontractor for the customer call centre is Vertex (owned 13% by CGEY). Vertex, a UK based company, has extensive utility call centre operations experience and is familiar with the Customer 1 billing system being operated by Hydro One.
- CGEY has worked with Hydro One on a variety of IT related and business process assignments and as a result CGEY knows the management and staff that it will be managing.
- CGEY understands the Ontario electricity market and the issues surrounding market opening.

**Flexibility**

- The agreement has been structured to allow for growth or reduction in services as needed over the 10 yr. Life and provides operational flexibility through a defined change management process. While this flexibility exists for the growth or divestiture of the various business units there are, however, financial costs and additional complexities associated with divestitures or business changes that significantly change service levels.

**CGEY Commitments**

- CGEY will assume the operating risk associated with Hydro One back office operations and the management of 921 transferred employees.
- CGEY will assume the financial risk for obtaining the efficiencies required to meet the operating savings provided to Hydro One.
- CGEY is responsible for providing defined service levels and will incur defined penalties for performance failure. While CGEY may be penalized for performance failure, customers will still perceive the failure to be as a result of Hydro One's actions.
- CGEY will adhere to Hydro One's Emergency Response Program.
- CGEY will continue to provide services in the event of a strike and has provided a work around plan to do so. There is no certainty, however, that the work plan will ensure that service to Hydro One is not significantly impacted in the event of a labour disruption.

**Best In Class**

- Outsourcing represents a significant milestone towards a demonstration of Hydro One management's objective of moving to best in class performance.

**Specific Risk Analysis and Mitigation**

**IPO**

- Performance issues will be magnified due to IPO attention. CGEY has committed to enabling Hydro One to meet its IPO needs. Failure by CGEY to perform the contracted services will reflect badly on CGEY's ability to obtain new 3rd party client work. Inadequate performance by CGEY will also negate CGEY being awarded further consulting work by Hydro One. Regardless, however, Hydro One will be at greater risk during this period.

**Market Opening**

- Hydro One is unable to operate at market opening due to a failure by CGEY. This would reflect badly on Hydro One and could delay market opening. CGEY staff providing services to Hydro One comprises the existing Hydro One staff who understand the electricity business and Hydro One's operations and customers. CGEY has committed to leaving IT systems "as are" for a period of 30 days prior to and 60 days after market opening. Existing plans with respect to market opening, developed by Hydro One, will be implemented by CGEY.

**Financial Risk associated with Inergi LP business plan**

- Inergi LP's business plan for the Hydro One services forecasts a reduction in head count due to technology improvement and change management. Redundant staff would be employed on new client work or in the Merlot Commitment. The Merlot work enhances the economic viability of the

Inergi LP business plan. As noted above, the Hydro One contract is being guaranteed by CGEY US and CGEY Canada.

**Structuring of the agreements**

- Hydro One staff is responsible for daily operations. The teams have built heavily on the expertise of internal staff recruited from outside the organization who have experience in an outsourcing environment and in the development of the required contracts. Hydro One teams have been supplemented as required by outside experts who have knowledge working in an outsourced environment. These teams have been developing performance data and were actively involved in assessing and developing the individual Statements of Work and in the contract negotiations.

**Contract Evolution**

- The agreements will evolve over the term of the contract and will undergo significant change. While mechanisms and governance exists to track those changes, managing the contract and Inergi LP are crucial to obtaining the identified savings and performance. Much of the success of the contract to Hydro One is dependent on successful change management wherein Hydro One moves to become a smart buyer of services previously provided internally.

**Involvement of Hydro One in obtaining savings**

- Achievement of additional savings identified in the supply procurement area are dependent on Hydro One adopting and adhering to the team based buying approach being proposed by CGEY. Hydro One management responsible for this function will be measured against the achievement of those savings. However, there is the risk that the additional savings identified, in excess of the CGEY guaranteed savings, will not be achieved.
- Additionally, the deal relies on the realization of efficiency savings in the retained portions of the out-sourced departments.

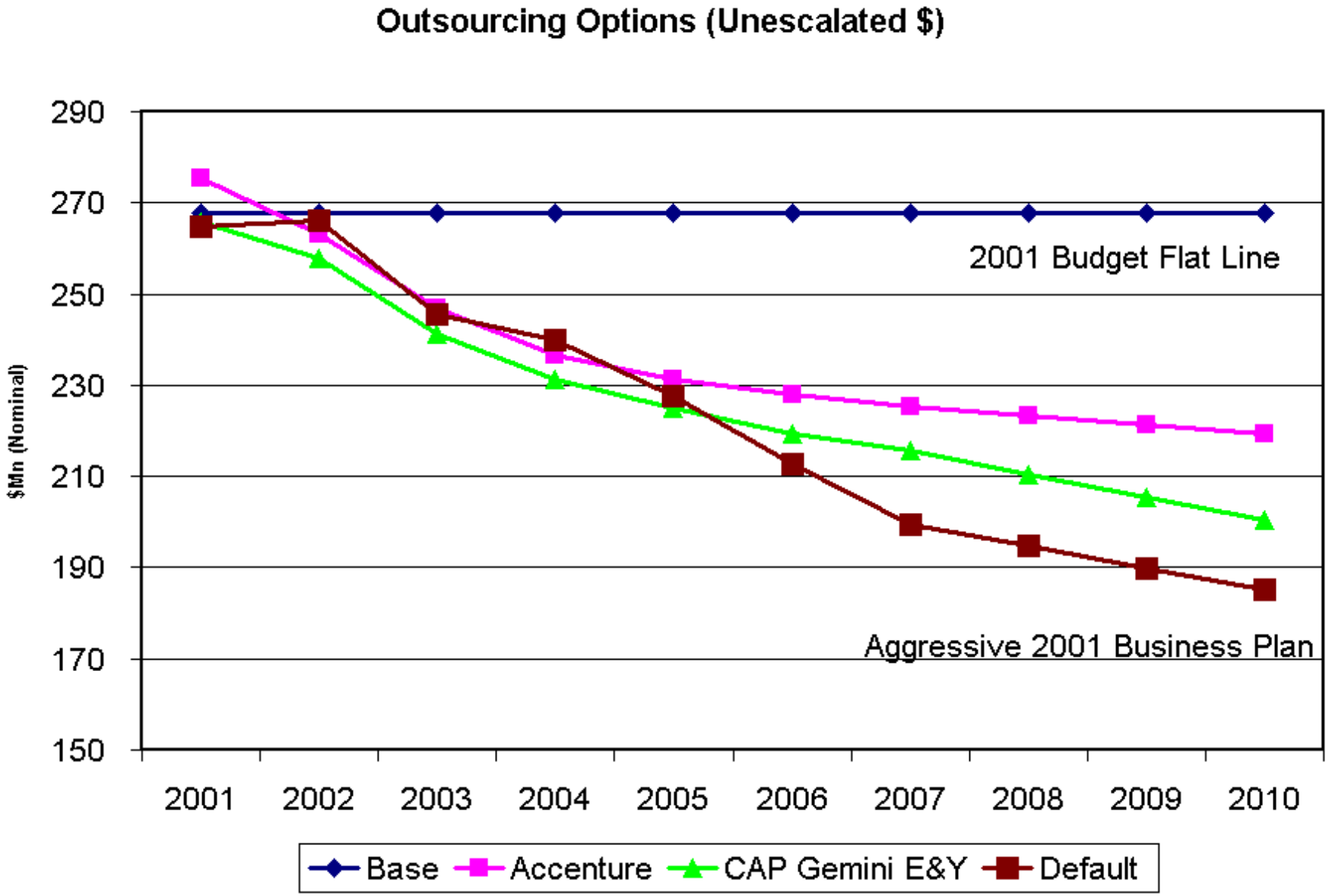
# Exhibit A

| | CGEY |
|---|---|
| Term | · 10 years, benchmark price check at year 3,6,& 9 |
| Scope | · IT, SMS, CSO, Finance, HR<br>· CSO managed by Vertex for CGEY<br>· In use assets to be retained by Hydro One. Hydro One and CGEY will determine best approach for ownership of assets refreshed |
| Management | · Hydro One team supplemented in selected areas. Senior members join Inergi LP |
| Unions | · 2-year job guarantee. No anticipated downsizing due to Merlot project<br>· Collective agreements go as is<br>· Automatic transfer of PWU and Society to Inergi LP<br>· MCP staff to be offered employment on the same conditions |
| Pension | · Transfer on solvency basis with potential top up in yr. 3<br>· Hydro One funds actual annual cost $7.3 M: Yr. 1-3 then reset |
| Financial | · In scope OM&A Yr. 1 - $ 133M: Yr. 10 - $89 before CPI and PST. Total costs including In scope and Out of Scope costs reduce from Yr. 1- $185M to Yr. 10- $122M<br>· Separate agreement covers Strategic Sourcing Project<br>· Average wage index for Ontario to be applied as Inflation index applicable to CGEY service fees |
| Regulatory Risk | · Inergi LP assumes market price risk except for risk on market ready asset costs and commits to work with Hydro One on other regulatory decisions |
| Service Levels | · Maintain at existing levels with defined remedies for performance failure |
| Ownership | · New entity to provide services will be 100% owned by CGEY – Financial guarantee provided by CGEY US |

# Hydro One Inc - Project Excel

## Amalgamated Summary

| (all numbers in $Mn) | | 2001 Base | 2002 Forecast | 2003 Forecast | 2004 Forecast | 2005 Forecast | 2006 Forecast | 2007 Forecast | 2008 Forecast | 2009 Forecast | 2010 Forecast |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Extrapolated Base Case (no savings)** | | **268** | **268** | **268** | **268** | **268** | **268** | **268** | **268** | **268** | **268** |
| | | | | | | | | | | | |
| **Default (Internal Hydro One) Case ($Mn)** | | | | | | | | | | | |
| Estimated Default Costs | | 265 | 255 | 241 | 232 | 217 | 203 | 197 | 192 | 188 | 183 |
| Estimated Severance Required | | - | 12 | 5 | 8 | 10 | 10 | 2 | 2 | 2 | 2 |
| **Tot** | | **265** | **266** | **246** | **240** | **228** | **213** | **200** | **195** | **190** | **185** |
| **Benefit of Default vs. Base Case** | | **3** | **1** | **22** | **28** | **40** | **55** | **68** | **73** | **78** | **83** |
| | | | | | | | | | | | |
| **Accenture ($Mn)** | | | | | | | | | | | |
| Revised Partner Costs (Partner Revenue) | | 158 | 155 | 141 | 133 | 131 | 131 | 131 | 131 | 131 | 131 |
| Remaining Hydro One Costs | | 117 | 108 | 106 | 103 | 100 | 97 | 94 | 92 | 90 | 88 |
| Extraordinary Pension Costs | | - | | | | - | - | - | - | - | - |
| **Gross Total Costs** | | **275** | **263** | **247** | **237** | **231** | **228** | **225** | **223** | **221** | **219** |
| **Benefit of Accenture vs. Base Case** | | **(8)** | **5** | **21** | **31** | **37** | **40** | **42** | **44** | **46** | **48** |
| **Benefit of Accenture versus Default Business Plan** | | **(11)** | **3** | **(1)** | **3** | **(4)** | **(15)** | **(26)** | **(29)** | **(31)** | **(34)** |
| | **$183** | | | | | | | | | | |
| **CAP Gemini E&Y ($Mn)** | | | | | | | | | | | |
| Revised Partner Costs (Partner Revenue) | | 136 | 135 | 123 | 116 | 113 | 111 | 110 | 108 | 105 | 102 |
| Remaining Hydro One Costs | | 130 | 123 | 118 | 115 | 112 | 108 | 105 | 103 | 101 | 98 |
| Extraordinary Pension Costs | | - | - | - | - | - | - | - | - | - | - |
| **Gross Total Costs** | | **266** | **258** | **241** | **231** | **225** | **219** | **216** | **211** | **205** | **200** |
| **Benefit of CAP vs. Base Case** | | **2** | **10** | **26** | **36** | **43** | **49** | **52** | **57** | **62** | **67** |
| **Benefit of CAP versus Default Business Plan** | | **(1)** | **8** | **4** | **9** | **3** | **(6)** | **(16)** | **(16)** | **(16)** | **(15)** |
| | **$229** | | | | | | | | | | |


Outsourcing Options (Unescalated $)
$Mn (Nominal)
290
270
250
230
210
190
170
150
2001 Budget Flat Line
Aggressive 2001 Business Plan
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
Base
Accenture
CAP Gemini E&Y
Default

# IT BENCHMARKING REPORT

# PA CONSULTING

# APPENDIX B

# Appendix B

Exhibit C1 Tab 3 Schedule 1

# IT Benchmarking Report

## A Review of the Hydro One-Inergi Information Technology Pricing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8/10/05

## *FOREWORD*

This report was completed in response to a request from Hydro One and Inergi to conduct price benchmarking of its Information Technology Statement of Work (SOW) within the outsourcing arrangement. The SOW covers the operations and support of the IT infrastructure, end user services and ongoing sustainment of existing applications that were outsourced to Inergi. Contractual obligations allow that the prices be benchmarked periodically to validate their adherence to market prices.

This report presents the results of a customized benchmarking. The project consisted of development of data input instrument and soliciting participation of entities with similar arrangements in the North America, and consolidation and analysis of the results. Additionally, existing ancillary data, both government and private were used to normalize participant data and to make like-for-like comparisons. The participant data was used to develop the Fair Market Value range and average price to which Hydro One prices were compared. Ultimately, the IT outsourcing financial arrangements were benchmarked and evaluated.

PA is a multi-disciplinary consultancy operating primarily in North America and in Europe both in private markets and government space. PA Consulting is a sixty year old, employee-owned, global consultancy and our position in the consulting market is based on independent advice.

Our competence to provide benchmarking evaluation is based on the following:

- Multi-level expertise in the development, negotiation and evaluation of outsourcing arrangements between clients and suppliers
- Extensive benchmarking experience of the utility industry in North America and Europe during the past 15 years
- Ability to organize a benchmarking survey to collect and successfully analyze appropriate data
- Experience in performing the Information Technology audits
- Experience in the regulatory and litigation processes assisting either utilities or regulatory commissions
- Deep knowledge of the utility industry and the Information Technology space
- Practical experience in performing a wide variety of projects both within the utility industry and IT
- Multi-disciplinary team of seasoned consultants who participated in the development of this report

Specific references can be provided on request.

## *LIMITATIONS*

### Disclaimer

While every effort has been made to ensure that the data enclosed in this report is correct and accurate, PA Consulting is not responsible for any omissions and inaccuracies. Proper care must be undertaken when interpreting and using any of the data as well as findings included in this report.

### Caveats

The data provided in this report has been obtained based on responses from surveyed companies providing certain type of Information Technology (IT) services in North America. The surveyed companies do not constitute a statistically (in a strict sense of the word) valid sample based on size, type, and company location.

However, the data is deemed useful and representative of IT offerings received by clients in North America due to the design of the data input form, the number of data points and auxiliary reports and comparisons to PA Consulting group experience. The data is most useful to provide ranges of values rather than be a guide for exact values.

All findings were based on the data available at the time of analysis.

All pricing is in Canadian dollars. Any data from U.S. participants was converted using a factor of $1 CDN equals $0.8065 US based on *2005 Q2 Corporate Exchange Rates* as published by PA's Corporate Tax and Treasury department.

### Confidentiality

PA Consulting Group served as an impartial third party for the purpose of assimilating and collating the data. All results are presented anonymously to preserve the confidentiality of the participants. ALL PARTICIPANT DATA WAS HELD IN STRICT CONFIDENCE AND AT NO TIME WAS THE IDENTITY OR DATA OF ONE PARTICIPANT SHARED WITH ANOTHER, INCLUDING HYDRO ONE AND INERGI DATA.

### Legal Advice

While PA Consulting Group is well qualified to comment on typical IT outsourcing arrangements and make observations on issues of benchmarking from the perspective of what is currently in use in the industry, PA Consulting Group is not qualified to render legal advice. For any legal questions, the readers are encouraged to engage appropriate counsel to review any contractual issues.

## TABLE OF CONTENTS

## *1. EXECUTIVE SUMMARY*

### Introduction

PA Consulting ("PA") was asked to perform an Information Technology ("IT") Benchmarking Survey Project ("Project") by Hydro One ("Client"), a regulated utility operating transmission and distribution networks in Canada and by Inergi ("Supplier"), the service provider engaged in delivering IT services to Hydro One under the outsourcing agreement. The Client outsourced selected IT services for a 10-year agreement. The contract allows parties to benchmark charges at the three, six and nine year points in the agreement. The benchmarked pricing is intended to be an estimate of the Fair Market Value ("FMV") range charged for such services. PA was asked to design and conduct the benchmarking to determine the Supplier pricing in relation to the 50$^{th}$ percentile of the estimated FMV range.

The Client and the Supplier established contractual conditions to conduct this benchmarking and subjected this process to several conditions. The scope of services provided by the Supplier to the Client included the following domains:

- Application Support and Maintenance
- Infrastructure including the following services: Mainframe, Unix and Wintel Servers, Storage, and Database
- End User Services including the following services: Personal Computer support (PCs): Installs, Moves, Adds and Changes (IMACs); and Help Desk
- Cross-Functional services and charges including the following: 3$^{rd}$ party contract management, managed contracts, assumed contracts, and fixed labour
- Projects

The first three domains were benchmarked; the last two were deemed too specific to each company to be comparable and were not benchmarked.

### Project Approach

The approach to benchmarking was to create a customized data input form and use it to gather data from a set of qualified participants.

To identify participants, PA conducted a survey of known IT outsourcing arrangements. A best effort was made to select participants that had characteristics of their outsourcing that were the closest match to the Client's. Ultimately, there were ten participants in the benchmarking sample including the Client. Four data points were from Canada and six from the U.S.; altogether two were unionized. Data was collected from participants using a structured form and follow up interviews. All data were normalized to the Client's environment.

Requested data were defined within each form so that participants had clarity regarding the meaning of each data point. In addition, PA Consulting held a dialogue with each of the participants to get more in-depth understanding of their data and to ensure consistency.

PA then compiled results while maintaining the anonymity of all the participants. The data was used to determine the FMV for an IT outsourcing of the same size and scope as the Client's. In this report the 50$^{th}$ percentile of the FMV was defined as the average of those data points collected in the marketplace.

The participant prices were normalized to the Client environment to the extent that the factors were known or could be estimated. There were some additional intangible factors that affected and influenced uncertainty about price ranges. These latter factors and their potential impacts on prices were discussed, but no adjustments were made using them.

**Findings**

There were three distinct steps in the data analysis process for the Client and each participant:

- Development of normalized monthly unit prices within each service domain
- Development of the annual FMV price range for each service domain
- Development of the overall annual FMV range for all service domains

Results from the last step are summarized below.

**Table 3.1 Overview of IT Services Provided to the Client**

| Domain | Service | Fair Market Value (C$) | |
|---|---|---|---|
| IT Outsourcing Services | Annual Price to Hydro One (C$) | Range (+/- 1S.D.) | 50% Percentile |
| Total | $50,855,770 | $44,417,865 to $56,264,242 | $50,341,054 |

The Client base figure is fully loaded and includes the base fees (year 4 of the contract with agreed changes as of April 1, 2005), the associated pension and benefits costs, the monthly volume adjustments (ARCs/RRCs), COLA adjustments, and costs for those incremental applications still in interim sustainment

Regarding the Client –Supplier contract benchmarking distribution:

- The benchmarked services represented 58.3% value of the Client's contract
- Not benchmarked pass through of contract costs represented 28.9% of the contract.
- Other not benchmarked services represented 12.8% value of the contract.

Overall, the annual prices paid by the Client were close to C$50.86M and they were C$0.51M above the 50$^{th}$ percentile.

## *2. INTRODUCTION*

### Overview

This project was undertaken during the period of April-July 2005 on behalf of Hydro One and Inergi to benchmark the IT outsourcing contract against other contracts in the marketplace. Specifically, the Client wished for a comparison of its IT outsourcing contract prices against the Fair Market Value ("FMV") of such services provided in the marketplace.

To make equitable comparisons, it was necessary to normalize prices for services observed in the market place as acceptable proxies for FMV through the use of factors. It was also to account for material differences in the IT outsourcing contracts. There are both quantifiable and intangible factors that affect FMV and these are discussed in detail later in this report.

The development of the overall FMV range for IT outsourcing services and comparison to the Client's prices involved several tasks, which are listed below:

- Development of the project approach -- PA proposed a targeted benchmarking project that would rely on identifying and soliciting participation from entities with IT outsourcing arrangements already in the marketplace
- Identification of participants out of the potential participant pool -- the participating companies were solicited based on their relative comparable status in identified criteria
- Identification of IT services provided by the Supplier to the Client – this served to define services, their groupings and scope
- Development of the data input form to collect data -- it reflected the Client's current operations and was to adequately capture each participant outsourcing arrangements, while keeping the data general to accommodate the greatest number of participants
- Development of the normalization approach -- since each participants had different contract arrangements, the raw participant data has to be normalized over a number of different factors to arrive at comparable pricing
- Participant data analysis -- after participant data was compiled and normalized, the analysis phase began; service domain values for each participant were subjected to analysis
- Report development -- this report is a structured representation of key activities that took place in the course of the project

## *3. METHODOLOGY*

### 3.1 DATA GATHERING

This section describes the overall approach to the data gathering and includes a discussion of the following details of the process:

- Establishment of the baseline
- Participant qualification
- Data form design
- Participant response
- Documents analyzed

#### 3.1.1 Establishment of the Baseline

The IT service components were categorized and prices were grouped as presented in the table below. First three domains were benchmarked; the last two were deemed too specific to each participant to be comparable and were not benchmarked. The benchmarking covered a broad range of IT services delivered to the Client in domains summarized in the table below[1]:

**Table 3.1 Overview of IT Services Provided to the Client**

| Domain | Service | Description / Definitions | Representative Units of Measure | Approach to Benchmarking | Scope / Discussion |
|---|---|---|---|---|---|
| Application Maintenance and Support | Application Maintenance and Support | Ongoing support and maintenance of installed applications. | Total $ | Compared to market salary data and IT surveys | Ongoing sustainment and maintenance of business applications, excluding new development. |
| Infrastructure Management | Mainframe Operations | Batch and on line processing | Millions of Instructions per Second (MIPS) | Compared to participant data | Ongoing management and operation of the infrastructure services indicated. |
| | UNIX Server Operations | Unix servers | Server instances | | |
| | Wintel Server Operations | Wintel servers | Server instances | | |
| | Database Management | Mainframe and non-mainframe database support (quantity) | Number of production and development databases | | |
| | Storage | SAN disk storage (GB) | Gigabytes (GB) | | |
| | Tape Operations | Tape storage and manual tape mounts | Manual tape transactions (mounts) | | |

[1] The data provided by the Client and Supplier

| Table 3.1 Overview of IT Services Provided to the Client | | | | | |
|---|---|---|---|---|---|
| **Domain** | **Service** | **Description / Definitions** | **Representative Units of Measure** | **Approach to Benchmarking** | **Scope / Discussion** |
| End-user Services | PC Support | Desktop and laptop support (quantity) | Physical devices (PCs) supported | Compared to participant data | Daily support and management of the end user services indicated. |
| | IMAC (combined with PC support in findings) | Service tickets (quantity) | Service tickets processed | | |
| | Help Desk | Help desk support (quantity) | Contacts to the Help Desk | | |
| Cross-Functional | Third party contract management | Management of vendors and 3rd party contracts | N/A | Not benchmarked | These charges are pass-through of hardware and software contract costs, dedicated resources. These were outside the scope of services that were benchmarked |
| | Managed contracts | Pass through of contract costs | N/A | | |
| | Assumed contracts | Pass through of contract costs | N/A | | |
| | Fixed Labour | Dedicated labour for special requests | N/A | | |
| Projects | Projects | Project work on an as requested basis. | N/A | Not benchmarked | Each project is unique and the project mix varies from year to year making these charges not comparable |

The Client's conditions of service delivery were used to develop the baseline for equitable comparison of services received by participants. Those service delivery conditions affected ultimate contract prices; the same was true for other contracts as each was different. For example, space and facilities were provided to the Supplier at no price. When other suppliers had to make payments for the same, their circumstances were adjusted to match this contract (i.e., such prices were excluded from considerations). The establishment of baseline conditions and other normalizations enabled pricing comparisons between participants, which are discussed later in the report.

### 3.1.2 Participant Qualification

An original pool of over 250 potential recent outsourcing arrangements[2] was screened to identify potential candidates for the benchmarking. The participating companies were solicited based on their following characteristics:

[2] *Customer Needs and Strategies, IDC's Top 100 Outsourcing Deals of 2002, IDC's Top 100 Outsourcing Deals of 2003*, internal research and contacts, ongoing monitoring of outsourcing news and announcements by PA.

- Service domains – targeting contract arrangements that included domains of interest to the Client
- Industry – Outsourcing engagements in regulated and unregulated industries
- Size – comparable to the Client's circumstances
- Union representation – targeting of industries with union representation in their work force

PA identified approximately twenty-five arrangements as meeting the initial considerations. Ultimately, there were eleven participants in the sample with a variety of arrangements and scopes of service.

The outsourcing arrangements of the participants included the top suppliers or their unionized subsidiaries. In all there were six different suppliers. Where the supplier workforce was unionized, they established subsidiaries around the collective bargaining unit. This diversity of suppliers ensures there was a fair representation of a variety of deal structures and delivery models in determining the market value. There was difficulty locating unionized participants due to their limited number.

Confidentiality was a necessary condition for securing the participation of other companies; their identities were kept secret. The raw data was normalized to a number of factors that provided comparability. The table below details the industries of the eleven participants in the study.

**Table3.2 Project Participants by Industry**

| Industry | Number (Total=10) |
|---|---|
| Retail | 1 |
| Financial Services | 2 |
| Government | 2 |
| Utility | 4 |
| High Technology | 1 |

In general participants bundled services in a manner similar to the Client; the only difference was that end user services (PC support, IMAC and Help desk) were sometimes bundled together. No participant had the same portfolio of service domains as the Client. Typically, participants' service domain represented smaller or larger subset of the Client outsourcing portfolio.

### 3.1.3 Data Form Design

Each participant filled out the data input form consisting of the following sections:

- Cover – front page
- Introduction – detailed explanations of the purpose of the data form
- General Information – questions about the Client and Supplier
- Volume – questions regarding consumed units of services or quantities

- Charges – questions regarding prices of the above services or quantities
- Price Composition – questions regarding on-shore and off-shore labour components
- Asset Ownership – questions regarding percentages of ownership by each asset
- Performance – questions regarding service levels
- Scope Map – questions regarding the split of tasks between a client and a supplier

Key points about selected sections to indicate data collection intricacies and reasons for approaches to data collection:

- Volume
    - Service quantities across domains were collected in basic units (servers – number of instances, IMACs – number of service tickets, help desk – number of contacts, etc.) selected to capture representative differences such as availability, service levels, equipment locations
    - Application Support and Maintenance was requested in terms of FTE per month to obtain the broadest possible common denominator
    - Projects data was collected to capture effort associated with any non-recurring work
    - Administration and Other Support volumes were collected to capture effort associated with administration of third party, software license, asset and account management
- Charges
    - Charges associated with the above services or quantities were collected on a fully loaded, current year (2005) basis.
    - Charges were presented in terms of monthly fees per service in each domain
- Price Composition
    - A percentage breakdown of charges into on-shore, off-shore labour and non-labour components was collected to appropriately normalize the data
- Asset Ownership
    - The percentages of ownership by each asset type was also collected to insure all appropriately adjust value of the contract
- Performance
    - Representative performance targets for each service were requested to enable normalization on quality of service.
- Scope Map
    - Identification of types of tasks within each service domain and whether completed by the Client or the Supplier

### 3.1.4 Documents Analyzed

PA used the following documents in preparation of this report:

- Selected portions of the agreement between the Client and the Supplier (relevant to this project scope)

- IT budget spreadsheet provided by the Client
- Data input forms filled out and provided by the survey participants and the Client
- PA confidential data representing data related to IT outsourced arrangements
- External data sources (government reports, industry reports, and published articles)

## 3.2 DATA ANALYSIS

This section describes the overall approach to the data gathering and includes the discussion of the following details of the process:

- Fair Market Value discussion
- Normalization
- Application analysis
- Unit price comparison

### 3.2.1 Fair Market Value Discussion

The FMV is a useful concept and it is meant to identify price ranges at which willing buyers and seller enter into commercial relationships. FMV can have different meaning to different people and it can also vary depending on a number of factors. Usually, FMV is not represented by a single discrete price point for services or goods, but rather is represented by a range of values.

There are different definitions of FMV, but they essentially amount to stating the prices that an interested but not desperate buyer would be willing to pay and an interested but not desperate seller would be willing to accept on the open market assuming a reasonable negotiating period of time [3].

In order to develop or deconstruct FMV, it is first necessary to compare prices over the same type and quantities of services to perform like-for-like comparisons. Contracts covering delivery of IT services have similarities and differences; the differences make it necessary to perform adjustments or normalizations.

For the purposes of this project, the FMV range was defined as that which represented all transactions that was used consistently for all participant data.

The adjustment of physical quantities in each of participant's arrangements to the same baseline allowed for the development of comparable financial values. The normalization process involved multiple factors to adjust for discrete characteristics of each contract. Factors affecting FMV fell into both quantifiable and intangible categories.

The following approach was used to ultimately compare participant data points:

- Development of unit prices for each service domain
- Development of FMV for each service domain; including average FMV with a range of values

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[3] No single, scientific FMV definition was identified during background search in this project; many organizations use a similar one or a variation that is without a distinction.

- Development of overall FMV for the whole contract

### 3.2.2 Normalization

Normalization of the data was an essential task to enable like-for-like comparisons. Due to differences in contracts between participants, reporting of raw volume and price data would be improper for comparing participant operations. For data comparability to exist, it is necessary that the raw data be appropriately adjusted to account for differences in both contractual arrangements between participants and their suppliers and objective factors such as exchange rates.

Quantifiable adjustment factors were applied to the raw data:

- Location cost index (place all costs in the same market location using a cost index)
- Exchange rates (presentation in the same currency)
- Geographic diversity (the relative spread of services between central, local and remote locations)
- Offshore component (% of labour provided offshore)
- Pension (treatment of benefit payments)
- Scope (composition of HW and labour)
- Scale (number of servers)
- Service levels (availability, time to respond, etc.)
- Unionization (% of unionized workforce)
- Workweek duration (35 hours versus 40 hour workweek)

Each of these adjustments is discussed below in more detail to provide their context and definitions were applicable:

- Cost Index [4]
    - There are differences in relative costs of doing business in each of the participant cities; the Client's city was set at 100 and using established comparative cost index appropriate adjustments were made to all other locations. The KPMG survey is explicitly a measure of the "relative costs of doing business" for each service, which is distinct from a price index such as CPI.
- Exchange Rates[5]
    - Any data from U.S. participants was converted using a factor of $1 CDN equals $0.8065 US based on *2005 Q2 Corporate Exchange Rates* as published by PA's Corporate Tax and Treasury department
- Geographic Diversity [6]

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[4] *KPMG Alternative Study 2004*, Industry: software design, Operation: advanced software; this cost index was normalized to 100 for Toronto.

[5] *2005 Q2 Corporate Exchange Rates* as published by PA's Corporate Tax and Treasury department.

  - The costs of providing a service in a centralized data center or office facility is usually less than local or remote sites due to the availability of on-site resources and higher utilization due to the density of units. In remote locations, support may involve additional costs associated with travel and lost time getting to and from the support location. Since each participant has a different mix of these geographies, an adjustment was made to reflect the same mix at that of the Client.

- Offshore Component[7]
  - Any service that was provided by offshore labour was adjusted to the basis that all labour was on-shore. The cost of the off shore labour averaged 25% below the domestic markets.
- Pension (treatment of payments)[8]
  - Pension costs are part of the labour costs paid by the Client. This separate pension payment was spread to component charges. All participant costs were set at a fully loaded basis.
- Service Levels (availability, time to respond, etc.)[9]
  - Services delivered at different service levels would entail different unit prices; experiential data was used to make adjustments to the Client service levels.
- Scope[10]
  - Both mainframe and server prices can be composed of hardware and labour prices, depending on who owns the hardware
- Scale[11]
  - The scale discussion relates to economies of scale based on the number of units – operations with fewer units will be more expensive on a per unit basis than operations with a larger number of units. Different adjustments were made to various towers reflecting the expected economies in that service.
- Unionization[12],[13],[14]

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[6] Cost adjustments were based on the Clients contractual ARC/RRC differentials and PA internal experience.

[7] Cost adjustments were based on the PA internal experience.

[8] Based on the review of the Client agreement and participant data.

[9] Cost adjustments were based on the PA internal experience.

[10] Based on the Client and participant agreement details.

[11] Cost adjustments were based on the PA internal experience.

[12] The U.S. government web site (Bureau of Labor Statistics) was used to estimate direct wage differential between union and non-union jobs, http://www.bls.gov/news.release/union2.t04.htm.

[13] For the development of a differential between union and non-union benefits (health care and pension) a document “Economic Bytes: Union wage premium continues 15 year decline” from Employment Policy

- Both U.S. and Canadian reports and sources were used to make comparisons between union and non-union labour. Overall a 14% adjustment was made to account to the difference between direct wages, health care and pension.

- Workweek duration[15]
  - The union agreement covering this outsourcing arrangement mandates a 35-hour workweek. Other participants were adjusted to a 35-hour workweek basis (by 12.5%).

These normalizations allowed for a comparison of the data between participants. Normalizations were made to each service using the above quantifiable factors where relevant and available.

In addition to the above factors, there are certain intangible factors-- those that could not be obtained, were not obtainable due to confidentiality clauses, or were difficult to estimate. These factors were listed in the table below.

**Table 3.3 Intangible Factors**

| Factor Type | Discussion |
|---|---|
| Actual versus contracted service levels | There is a strong positive correlation between service levels and price of services. In some cases reported prices were provided without specific actual service levels achieved, making it difficult to judge how comparable the prices were. |
| Application diversity, complexity and volume | Differing applications require various amounts of labour because of their complexity, age, and a host of other factors. There will be large amounts of variability between clients and from year to year due to a number of factors that were not captured in this study. These factors included the exact set of applications under management, their versions, levels of customization, level of documentation, level of competence of staff, etc. |
| Detailed operational knowledge | There is a trade-off between the study response rate and the depth of information requested. Gaining detailed operational information was beyond the scope of this study. |
| Exact scope of services delivered | There are varying amounts of knowledge about each participant's scope of services and the resulting impact on their price structure |
| Economic and business cycles and conditions at contract finalization | Economic and business cycles may have an impact on pricing of contracts. The individual business conditions of participants at the time of contracting may also have an impact on pricing and terms, and that was not captured in this study. In weak markets, vendors often lower their prices to get the deal while in a tight market they strive for higher margins. |
| Job type mix, non-compensation prices, | The combination of these characteristics affects ultimate |

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Foundation was used. Additionally, writings by the following academic authors were consulted: Barry Hirsch, Richard Vedder, Leo Troy (the U.S. experts on labor and union) and the National Right to Work Organization.

[14] Tony Fang and Anil Verma, "Union Wage Premium," Statistics Canada - Catalogue no. 75-001-XPE, Winter 2002 PERSPECTIVES / 17

[15] Based on the participants' data.

| Table 3.3 Intangible Factors | |
|---|---|
| **Factor Type** | **Discussion** |
| supplier margins, prices at remote locations | prices and this information is difficult to obtain for each participant |
| Manual versus automatic administration of operations | Manual operations are expected to be more expensive on a recurring basis; automatic require larger up-front investment; participants are on different equipment cycles |
| Overall contract size (IT plus other areas) | IT outsourcing alone is likely to have different prices than IT outsourcing plus other areas contracted to a supplier |
| Penalties and gain-sharing | Total contract prices are affected by these two components and these details are often not available |
| Ability to leverage/share assets across multiple clients | Typically, an ability to spread services over several clients from a common location would tend to reduce unit costs |

For each of the intangible factors listed in the table above, there is a potential for price impact. Taken together, these impacts could be significant, or cancel each other out, depending on specific arrangements between a client and a supplier. The precise impact of each factor within participants' prices was not easily quantifiable and therefore there was uncertainty regarding the FMV range.

### 3.2.3 Application Sustainment Analysis

Unlike the benchmarking of infrastructure or end user services, the benchmarking of applications sustainment proved to be more complicated and the same approach could not be used. Participants either did not or could not provide the necessary information; there was no clear and objective method to do so.

PA benchmarked applications using two approaches. The two approaches helped to answer the FMV questions from two angles. Overall, PA finds that Client spends more on application sustainment than similar organizations. However, the effective labour rate charged by Supplier for application sustainment is a fair market value. The higher spending is accounted for by the Client's volume resulting from its extensive use of IT and the unique demands of its open market software and is not the result of Supplier's rate.

The first analysis takes both rate and volume into consideration by comparing Supplier price vs. spend on application sustainment of other electric utilities. PA used published data[16] to determine that a sample of North American electric utilities spends approximately 9% of IT operating budget on application sustainment while Client spends approximately 13% of IT operating budget on sustainment with Supplier. This can be due to various reasons: a) open market applications that other participants may not have, b) extensive use of technology etc. PA also found that Client's Open Market software accounts for the 4% difference between Client's spend and that of the sample of North American electric utilities; this software is a unique requirement in Client's application environment.

The second analysis investigated labour rates for performing application sustainment against a normalized Toronto market price to determine if rates were responsible for the greater expenditure.

[16] Based on a combination of public and private sources.

The data were normalized to Supplier pricing to adjust for unionized wages, benefits, and a shorter workweek. The finding is that Supplier's labour rate is only slightly different than an adjusted market labour rate for Toronto and essentially Fair Market Value.

The third analysis investigated the possibility that unique circumstances of the Client's business are driving greater volumes of applications sustainment. PA found that while the Client spends more on IT as a percent of revenue it spends much less per employee on IT than similar organizations. This finding suggests that Client is driving more efficiency through technology than similar organizations.

### 3.2.4 Unit Price Comparison

The subject agreement between the Client and the Supplier is not based on unit prices across all service domains, unlike most of the participants. Indeed, the contract is essentially set for a lump sum amount for a defined scope of work. This total amount is scheduled to decrease from year to year with partial offsetting factors due to cost of living adjustments and additions to the scope.

In order to make comparisons between this outsourcing agreement and those of other participants, it was necessary to determine the effective unit prices for each of the domains. The component contract amounts and associated volumes were assigned to each of the service domains. For the Client, this was also established by the contractual terms for scope adjustments using additional resource costs (ARCs) and reduced resource credits (RRCs). The prices for each service were fully loaded and an effective unit price developed.

These surrogate prices based on the assigned costs are representative of the services being provided and are a fair basis for comparison among the participants. All normalization and other adjustments were made on this effective unit price basis.

## *4. RESULTS*

There were three distinct steps in the data analysis process for the Client and each participant:

- Development of normalized monthly unit prices within each service domain
- Development of the annual FMV price range for each service domain
- Development of the overall annual FMV range for all service domains

Results from the last step are summarized below.

| Table 3.1 Overview of IT Services Provided to the Client | | | |
|---|---|---|---|
| **Domain** | **Service** | **Fair Market Value (C$)** | |
| **IT Outsourcing Services** | **Annual Price to Hydro One (C$)** | **Range (+/- 1S.D.)** | **50% Percentile** |
| **Total** | **$50,855,770** | **$44,417,865 to $56,264,242** | **$50,341,054** |

The Client base figure is fully loaded and includes the base fees (year 4 of the contract with agreed changes as of April 1, 2005), the associated pension and benefits costs, the monthly volume adjustments (ARCs/RRCs), COLA adjustments, and costs for those incremental applications still in interim sustainment

Regarding the Client –Supplier contract benchmarking distribution:

- The benchmarked services represented 58.3% value of the Client's contract
- Not benchmarked pass through of contract costs represented 28.9% of the contract.
- Other not benchmarked services represented 12.8% value of the contract.

Overall, the annual prices paid by the Client were close to C$50.86M and they were C$0.51M above the 50$^{th}$ percentile.

# 10

Ontario Energy Board

Commission de l'Énergie de l'Ontario


# RP-2005-0020
# EB-2005-0378

**IN THE MATTER OF AN APPLICATION BY**

# HYDRO ONE NETWORKS INC.

**FOR ELECTRICITY DISTRIBUTION RATES 2006**

## DECISION WITH REASONS

April 12, 2006

**Summary of Decision with Reasons[1]**
**Hydro One Distribution 2006 Rates**
**(RP-2005-0020/EB-2005-0378)**

| Issue | Board Decision |
|---|---|
| • $423 million OM&A budget<br>• Inergi Outsourcing Agreement<br>• Compensation Costs<br>• Pension Costs | • Accepted<br>• Satisfied with cost consequences<br>• Approved for test year, future documentation required.<br>• Accepted |
| • Load Forecast<br>• Associated CDM Forecast<br>• LRAM | • Approved<br>• Approved<br>• Not required at this time |
| • Revenue from other Services<br>• Associated Variance Account | • Accepted<br>• Not Required |
| • Benchmarking Study | • Independent study required |
| • Corporate Cost Allocation | • Accepted. Consequences must be reflected in future Transmission rates application. |
| • Depreciation Costs | • Accepted submitted study with recommended lower expense. |
| • $265.6 million Working Capital Allowance<br>• $333 million capital budget<br>• Additional Line Loss Expenditures<br>• AFUDC | • Accepted submitted study with recommended lower expense.<br>• Accepted<br>• Not required<br>• Interest Rate Amended to 6.2% |
| • Service Quality Performance | • Accepted |
| • Capitalization & Cost of Capital<br>• Capital Structure<br>• Rate of Return on Equity | • Approved<br>• Approved<br>• Maintained at 9% as per Rate Handbook |
| • Regulatory Asset Recovery | • Approved with interest rate adjustments |
| • Harmonization Plan for Acquired LDCs | • Not Approved, should wait for results of cost allocation work. |
| • All other proposed rates and charges | • Approved |

[1] This summary does not form part of the Decision nor does it itemize all findings and is not to be relied on for the purpose of applying or interpreting the Decision.

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**RP-2005-0020**
**EB-2005-0378**

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

**AND IN THE MATTER OF** an Application by Hydro One Networks Inc. for an order or orders approving or fixing just and reasonable rates and other charges for the distribution of electricity commencing May 1, 2006.

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

Paul Vlahos
Member

Bob Betts
Member

# DECISION WITH REASONS

April 12, 2006

# 1. INTRODUCTION

## 1.1 THE APPLICATION

1.1.1 Hydro One Networks Inc. ("Hydro One", the "Company", or the "Applicant") filed an application dated August 17, 2005 with the Ontario Energy Board (the "Board") under section 78 of the *Ontario Energy Board Act, 1998*; S.O. c.15, Schedule B, for an order or orders approving or fixing just and reasonable rates for the distribution of electricity effective May 1, 2006 ("2006 test year" or "test year"). The Board assigned file number RP-2005-0020/EB-2005-0378 to the Application.

1.1.2 Appendix 1 contains details regarding some of the procedural aspects of the Application, including a list of witnesses and a list of parties.

## 1.2 THE SETTLEMENT CONFERENCE

1.2.1 An initial Issues List was provided to parties with Procedural Order No. 2 on October 18, 2005. On November 28, 2005 a Settlement Conference was held with the objective of reaching settlement on as many of the topics on the Issues List as possible, and also to refine the Issues List into a list of actual issues that the Board was to determine. While no settlement was achieved, a revised Issues List was proposed which included a more refined list of issues. The revised list also identified a number of topics which would not be the subject of questioning by the intervenors at the oral hearing. The revised Issues List was approved by the Board in Procedural Order No. 5.

## 1.3 THE HEARING, SUBMISSIONS AND EXHIBITS

1.3.1 The hearing took place at the Board offices in Toronto on January 9, 10, 12, 13, 17, 18, 23, 26, 27, 31 and February 6, 7 and 9, 2006. Copies of the evidence, exhibits,

arguments, and transcripts of the proceeding are available for review at the Board's offices.

1.3.2 The Company's filing and the record produced was voluminous. The Board deals in this decision mainly with matters that were raised as issues by parties. Even then, the Board has summarized the record only to the extent necessary to provide context to its findings. The absence of Board commentary on other matters of the Company's evidence should not be construed by the Company as acceptance of those matters beyond the cost consequences for the test year.

# 2. REVENUE FROM OTHER SOURCES AND LOAD FORECAST

The Company's proposed $965 million distribution revenue requirement is net of revenue from other sources. The concern about revenue from other sources focused on emergency services provided to other utilities following unexpected events, such as the hurricanes in the State of Florida. The distribution revenue requirement is recovered through the Company's rate classification based on the load forecast. The concerns about load forecasting focused on the Company's forecast for customer additions, its load forecast methodology, and the reduction to the load from Conservation and Demand Management ("CDM") programs. These matters are dealt with in turn below.

## 2.1 IS THE REVENUE FORECAST FROM OTHER SOURCES REASONABLE AND DOES IT RECOVER COSTS?

2.1.1 The review of this issue focused on the revenues and associated costs of providing emergency support to other electricity utilities in North America. The specific area of focus was support provided to the State of Florida during hurricane seasons in 2004 and 2005. The Company testified that revenues received from Florida for the services provided were based upon the actual cost to Hydro One.

2.1.2 CCC argued there was no evidence that costs for services provided to other states and provinces were tracked correctly or that ratepayers were reasonably compensated for those costs, but also acknowledged that the likelihood of a windfall was remote. CCC recommended that a variance account be created to track both costs and revenues associated with the provision of services to other utilities, so that they can be settled on an annual basis.

2.1.3 The Board accepts the Company's testimony that the revenues generated from services provided to other North American utilities represent a flow through of

costs incurred and this activity has minimal impact on Hydro One's ratepayers. The Board therefore will not require the establishment of a deferral account to track the costs and revenues for those services.

## 2.2 IS THE LOAD FORECAST REASONABLE?

2.2.1 SEC raised concerns regarding the forecasting factors used to predict housing starts and customer additions. The Company predicted a reduction in housing starts in 2006 despite the fact that housing starts had grown in 2002, 2003 and 2004. The Company also forecast the share of housing starts in its service territory to be less than in previous years. SEC challenged both aspects of the forecast. It argued that the Company provided no evidence in support of the predicted decline in housing starts and the Company erred when it failed to base its calculation of future customer additions on an examination of the historic relationship between customer additions and housing starts. SEC asked the Board to find that 13,000 customer additions per year, the average of the last four years, was a more reliable estimate.

2.2.2 Hydro One responded to SEC's concerns in an undertaking. Hydro One has estimated that its share of provincial housing starts will decline from about 12% in 2004 to 10% in 2006. Hydro One attributes this decline in its share to the recent growth in the multi-residential segment which occurs primarily in the GTA and other urban centers (not in Hydro One's service territory).

2.2.3 For the province as a whole, the current forecast of housing starts by the Canada Mortgage and Housing Corporation (CMHC Housing Market Outlook, Canada Edition, Third Quarter 2005) is about 1,000 higher than the Hydro One forecast included in application. This difference was raised by Board staff. In response to a Board staff interrogatory, Hydro One calculated the impact assuming the CMHC forecast for 2006 was correct. The result would be about 1.2 GWh of additional load for Hydro One Distribution, or only about 0.005% of the total load in the test year.

2.2.4 The Board finds that SEC's challenge of the Company's prediction of customer additions and housing starts was largely anecdotal in nature and provided insufficient grounds to displace the forecasting factors used by the Company and the forecasts based upon them. The Company's estimates were based upon its experience and specific knowledge with respect to customer additions and its probable share of provincial housing starts. The Board finds that Hydro One's assumption underlying the decline in its provincial share of housing starts is reasonable. The Board also takes comfort in the fact that Hydro One's forecast, for the province as a whole, is relatively close to the more recent CMHC forecast.

2.2.5 The Company's load forecasting methodology combines elements of consensus input; mechanical adjustments to models to include changes in economic forecasts; energy prices; population and household trends; industrial development and production; residential and commercial building activities; and efficiency improvement standards. It employs both a monthly and annual econometric (top-down) and end-use (bottom-up) modeling approach, as well as specific methodology for low voltage, system-connected customers. The prefiled evidence described the logarithmic factors used in the regression equation, as well as the dummy variables applied to adjust for abnormal historical events, such as the 1998 ice storm and the August 2003 Blackout.

2.2.6 Several parties questioned the use of "dummy variables" in the forecasting formula as a method of adjusting for unusual events. Certain intervenors expressed concerns with a methodology that used 30-year rather than 5-year historic weather data and the use of dummy variables to adjust the 30-year weather history for unusual weather events.

2.2.7 Hydro One responded that the use of dummy variables is a well-established and accepted technique in econometric forecasting, and clarified that dummy variables were not included to normalize for weather. With respect to the use of 30 year versus five-year historic weather data, it was Hydro One's position that its weather normalization methodology was consistently shown to be very accurate,

and no compelling evidence or reason had been presented by the intervenors which warranted changing it.

2.2.8 To order Hydro One to alter or change its proven forecasting methodology, the Board would require convincing expert evidence supporting the need for change. No such evidence was led by any of the intervenors. The use of dummy variables in econometric analysis is a standard tool and its very purpose is indeed to increase the fit of the observed data. The evidence indicated a very minimal variation between forecast loads resulting from the use of the Company's methodology and actual loads in the planning years between 1997 and 2004. Within that reporting period, the weather corrected actual energy consumed was within one standard deviation of the forecast. The Board therefore accepts Hydro One's load forecast of 41,509 GWh for the 2006 test year.

## 2.3 WHAT IMPACT SHOULD CDM ACTIVITIES HAVE ON LOAD FORECAST?

2.3.1 Another issue associated with the Company's load forecast was the appropriateness of the assumed reduction in load that would result from CDM activities. The Company forecast the reduction in the load to be 194 GWh in the 2006 test year. In reaching this estimate, Hydro One used the provincial CDM target for 2007 of 5% of peak load or 1350 MW, it assumed that half, or 675 MW, would be achieved during 2006, with 375 MW attributable to load management programs and 300 MW attributable to energy efficiency programs. Of the 300 MW, Hydro One estimated its share to be 43.6 MW using Hydro One Distribution's share of the Provincial peak in 2004.

2.3.2 The position of intervenors with respect to the forecast reduction varied greatly. Some parties argued that the load reduction estimate due to CDM was overstated and it should be reduced or even eliminated. Others argued that it should remain as proposed in order to support the provincial CDM objectives, and to promote a conservation culture within Hydro One.

2.3.3 All parties, including Hydro One, agreed that the reduction estimate was the result of a statistical dissection of provincial targets, rather than an estimate of reasonable results from Hydro One CDM programs.

2.3.4 A Board imposed LRAM was suggested by certain intervenors as a means of protecting the ratepayers and Hydro One from a material difference between the CDM reduction forecast and the actual reduction.

2.3.5 Hydro One submitted that its commitment to conservation is reflected in the 194 GWh target and that meeting the target, which requires half of the CDM savings to be achieved in the first two years of the three year program, was a reasonable and conservative assumption.

2.3.6 Hydro One resisted the inclusion of an LRAM on the grounds that it is premature to implement an LRAM for the 2006 test year because there is too much uncertainty respecting the nature of an LRAM mechanism. Furthermore, the Company is currently unable to predict the market participation rates or to reliably and cost-effectively measure the impact that CDM programs will have on utility revenues. It was the Company's position that LRAM concepts for the electricity industry should be reviewed in a generic proceeding.

2.3.7 The Board has not been convinced that the reduction in load forecast related to CDM programs should be changed or eliminated. On balance, the Board favours the Company's position on this question. It has the best vantage point from which to assess the reasonableness of the projects.

2.3.8 The Board acknowledges that electricity utilities are still gaining experience in forecasting the achievable results of CDM programs. The Board further acknowledges that the Hydro One's system loads may be impacted by the effects of CDM programs run by the province and other LDCs.

2.3.9 While intervenor arguments opposing the CDM factor in the load forecast were not based upon sound technical evidence, the problem may well have stemmed from the fact that Hydro One's CDM forecast was established on provincial targets and some estimate of how those targets will influence Hydro One loads. The Board was dissatisfied with the clarity and precision of the determination of the forecast CDM, and expects Hydro One to provide a more sound analysis of CDM program details and reduction objectives in future applications.

2.3.10 The Board agrees that the forecast load reduction due to CDM efforts should be based upon thoughtful expectations of results from a defined CDM program; however, that is not how the reduction was conceived in this case.

2.3.11 The Board also acknowledges that there appears to be an insufficient understanding at this time, of the CDM programs and expected participation to define an LRAM capable of protecting either the ratepayer or the utility.

2.3.12 The Board accepts Hydro One's arguments regarding the complexity of establishing an LRAM at this time. However, the Board is dissatisfied with Hydro One's efforts to evaluate and analyze the quantum of the forecast load reduction due to CDM programs. The Board understands that Hydro One is not in direct control of the load reductions that may result from CDM activities of others, but no other party, except perhaps the OPA, is in a better position to estimate those effects, and certainly no other party, has a greater interest in doing so.

2.3.13 Several parties observed that Hydro One needs to internalize a Conservation Culture and the Board agrees. The Board expects Hydro One to present future CDM load reduction forecasts with a bottom-up analysis estimating the expected results of their CDM activities and those of others that affect their loads. The Board expects Hydro One's next CDM load reduction forecast, of this order of magnitude, to include a proposal for an LRAM.

# 3. OM&A AND OTHER COSTS

This chapter deals with Hydro One's costs of operating its distribution business and includes operating, maintenance and administration (OM&A) costs, depreciation expenses, income taxes and other taxes. The issues for intervenors centered around OM&A costs but the Board also makes findings on the other cost issues.

## 3.1 OM&A COSTS

3.1.1 Total proposed OM&A costs for the 2006 test year are $423.1 million. Grouped by category, they are as follows:

| **OM&A Cost Categories** | **2006 Total Costs ($ million)** |
|---|---|
| Sustaining | $230.3 |
| Development | $4.9 |
| Operations | $14.3 |
| Customer Care | $101.1 |
| Shared Services and Other Costs | $67.9 |
| Taxes other than Income Taxes | $4.6 |
| **Total OM&A** | $423.1 |

3.1.2 The Sustaining OM&A budget represents expenses required to maintain existing distribution lines and stations facilities.

3.1.3 The Development OM&A budget funds the analysis needed to expand the system for meeting load growth.

3.1.4 The Operations OM&A budget represents the annual expenditures required for the Central Distribution Operations function, operated out of Hydro One's Ontario Grid Control Centre.

3.1.5 The Customer Care OM&A work program represents the set of work activities that are required to provide services to distribution customers, served either under standard supply or retailer contracts.

3.1.6 The Shared Services and other OM&A programs include the provision of Common Corporate Functions and Services and Asset Management programs to support the Distribution business, as well as the maintenance of existing infrastructure, including business systems, facilities, and information technology.

3.1.7 Taxes Other than Income Taxes consist of property and proxy taxes, and indemnity payments to the Province.

3.1.8 It was agreed by the parties that all of the above expense groupings would be subjects to be addressed by witness panels at the hearing. Associated with these expense groupings were Hydro One's compensation provisions (including benefits and pension provisions), Hydro One's contract with Inergi LP for the provision of services in several areas and the allocation of common corporate expenses to Hydro One Distribution.

3.1.9 Based on parties' submissions, the Board needs to address the following issues:

- Should there be a reduction in Hydro One's OM&A costs through either a general reduction or on line-by-line basis?
- Are the costs flowing from Hydro One's contract with Inergi reasonable?
- Are Hydro One's compensation, benefits and pension costs reasonable?

- Should the Board order a benchmarking study?

- Is the proposed methodology of allocating common costs reasonable?

## 3.2 SHOULD THERE BE A REDUCTION IN HYDRO ONE'S OM&A COSTS?

3.2.1 A contextual theme of intervenors' submissions was that, given the history of regulation of Hydro One, it is difficult for intervenors and the Board to assess the reasonableness of the proposed OM&A expenses. Intervenors expressed general concern with the 10.6% increase in OM&A costs for 2006 on the heels of a similar increase in 2005 and a 25% increase since 2002. Only two intervenors made specific recommendations for a reduction in the OM&A budget.

3.2.2 In the view of the CCC, there is no objective evidence that the proposed costs are either necessary or reasonable without a true baseline and in the absence of comparison with other utilities. CCC also noted that Hydro One itself has acknowledged that its compensation costs are too high. CCC suggested that the Board reduce the proposed budget by 10% and allow Hydro One to make a decision where it will make the cuts.

3.2.3 In the Board's view, while global or envelope reductions to costs proposed by a utility can be and have served as a practical tool in other circumstances, this approach is not appropriate in this case. It is true, given the history of regulation of Hydro One, and its anomalous nature, that there is no solid historical baseline to compare the proposed costs. However, Hydro One's filing, interrogatory responses and testimony were thorough and this was recognized widely by intervenors, Board staff and the Board itself. In the circumstances, it would neither be fair for the utility nor would it be appropriate to forego the opportunity to establish a baseline for future rate reviews. An arbitrary reduction would in fact perpetuate the problems perceived by the absence of a baseline. Therefore, the Board does not accept CCC's suggestion. The Board has instead assessed the specific OM&A cost issues that have arisen on their own merits.

3.2.4 In addition to a $38 million reduction associated with pensions, which is dealt with elsewhere in this decision, SEC argued that a line-by-line review of the OM&A costs would support a reduction of $40.2 million. In calculating this amount SEC used 2002 as the base year, allowed $28.7 million for inflation and by comparing the proxy amounts with the proposed 2006 amounts, the excess over the proxy amounts totalled $89 million. The $40.2 million figure was the result of SEC accepting increases over the proxy amounts for certain categories on the basis that these were justified by Hydro One's evidence.

3.2.5 The Board notes that the inflation escalator assumed by SEC is a surrogate, not the actual inflation escalator experienced by the utility. The Global Insight report filed in evidence shows that the total cost escalator for OM&A during the period was about 400 basis points higher than the 8.5% assumed by SEC. Further, SEC's analysis ignores the overall increased level of work over time and the prioritization of work in the test year compared to other years. The analysis also does not consider improvements in service quality. For the above reasons, the Board does not accept SEC's suggested cost reductions.

3.2.6 The issue of benchmarking OM&A costs with other utilities was raised by several intervenors. The Board deals with this item later in this chapter in conjunction with benchmarking beyond OM&A costs.

3.2.7 By way of general comment, while this first review of Hydro One's OM&A budget proved daunting for the intervenors and the Board, it is the Board's view that this proceeding has provided a good base for future examination of OM&A costs, which will permit a more rigorous assessment of OM&A costs in the future. It is expected that Hydro One will be mindful of, and guided by, concerns raised by intervenors as it is preparing future rate filings.

## 3.3 ARE THE COSTS FLOWING FROM HYDRO ONE'S CONTRACT WITH INERGI REASONABLE?

3.3.1 Hydro One has entered into an outsourcing agreement with Inergi LP, a non-affiliate, to receive a range of services starting March 1, 2002 in the areas of Information Technology, Customer Care, Settlements, Supply Management, Payroll, and Finance ("Base Services"). Under the agreement, Inergi is committed to provide Base Services for a fee of $122.5 million in the first contract year, assuming performance remained at historical service levels and volumes remained unchanged, and declining in real terms over the 10 year term of the agreement by 30%. Inergi fees for Base Services payable in any given year vary according to agreed changes in volume and scope. In addition to Base Services and ongoing services added to the arrangement from time to time, Inergi also provides short term Project services at predetermined rates. Hydro One owns substantially all assets involved in Inergi's delivery of Base services. In 2006, Hydro One expects to pay a fee of $115.6 million for Base services.

3.3.2 The arrangement involved the transfer of 913 Hydro One employees to Inergi. Of these employees, 569 were represented by the Power Workers Union and 277 by the Society of Energy Professionals. The remaining 67 were not represented by a bargaining union. It was agreed that Hydro One would be responsible for supplementary pension costs and post retirement benefit costs for the transferred employees.

3.3.3 The agreement provides for benchmarking of fees in contract years 3, 6, and 9 and downward adjustment of pricing in the event the benchmarking exercise determines the bundled pricing of Base Services is not competitive. The Company issued an RFP for benchmarking but no compliant bids were received as none of the bidders were capable of completing the benchmarking work on all lines of business. P.A. Consulting eventually was awarded the work of completing an IT Services price benchmarking study. The report by P.A. Consulting was filed in evidence in the proceeding. The results of the P.A.

Consulting analysis show that Inergi fees for IT service are $0.51 million or within 1% above the 50th percentile of the Fair Market Value Range.

3.3.4 The Board notes that despite considerable scrutiny regarding the Inergi arrangement, intervenors did not identify any concerns regarding the selection process, the terms of the contract and the performance to date. Only CME suggested that benchmarking processes could be improved. It is the Board's assessment that the Inergi contract represents a reasonable strategy by Hydro One to reduce costs, improve efficiencies and improve focus on the utility's primary operations. The Board is satisfied that the cost consequences flowing from the Inergi agreement for the test year are reasonable and therefore approved for ratemaking purposes.

## 3.4 ARE HYDRO ONE'S COMPENSATION, BENEFITS AND PENSION COSTS REASONABLE?

### Compensation Costs

3.4.1 A common theme that emerged among intervenors was the utility's high labour rates and generally rich compensation levels. Intervenors urged the Board to reduce compensation costs for ratemaking purposes in the test year or to make it abundantly clear to the utility that in future, excessive compensation levels will not be tolerated. Noting Hydro One's claim that it is a unique utility and cannot be compared against other utilities, some intervenors suggested that an independent benchmarking study be undertaken to compare Hydro One's compensation with other utilities in the Province.

3.4.2 Hydro One countered that while its compensation costs are high, management is aware of its obligations and will continue to address the problem. Hydro One submitted that the Board should find the proposed compensation costs are reasonable in the circumstances.

3.4.3 The Board notes that the high compensation issue for Hydro One has a considerable history before this Board, dating back to the Ontario Hydro days.

The Board has noted in this proceeding that since the de-merger of Ontario Hydro, Hydro One has taken a number of steps to control its overall compensation costs by, for example, instituting a voluntary retirement program, outsourcing, use of the PWU hiring hall, initiating various cost efficiency programs, holding the line on compensation increases for management employees and imposing a two-tiered pension structure or a pension plan that is less generous for new employees represented by the Society of Energy Professionals. These are positive steps and the Board expects the company to continue and enhance such efforts in the future and report to the Board at the next main rates case. The Board is particularly concerned about the apparently high labour rates. In this respect, the Board expects Hydro One to identify what steps the company has taken or will take to reduce labour rates.

3.4.4 Even so, the comparisons between Hydro One's cash compensation with certain other utilities presented by intervenors are of concern. For example, SEC calculated that by applying Ottawa Hydro's compensation costs to Hydro One employees there would a reduction of about $85 million in Hydro One's cash compensation. The Board recognizes that there may be some roughness in the derivation of that figure and some differences in the profile of the two utilities. However the contrast between the compensation structures is of concern to the Board.

3.4.5 The Board will not make an adjustment to the proposed OM&A costs based on compensation levels at this time but expects the utility to demonstrate in the future that lower compensation costs per employee have been achieved or demonstrate concrete initiatives whereby compensation costs will be brought more in line with other utilities.

3.4.6 VECC noted that none of the $3.4 million in incentive payments paid to employees have been charged to the shareholder when achievement of target net income is one of the factors in the criteria for incentive pay. While the Board does not consider the achievement of net income to be a factor that works only for

the benefit of the shareholder, as customers also benefit by a financially healthy utility through higher credit ratings and good service, the Board would be concerned if this factor predominated compared to the other factors determining incentive pay. The Board expects Hydro One to file appropriate evidence in the next main rates case to establish that none of the incentive compensation should be charged to the shareholder.

3.4.7 VECC also noted that Hydro One includes 50% of bonus payments in the calculation of pensionable earnings and suggested that the shareholder should be responsible for part of this liability. The Board notes from the evidence that approximately one in five government sector companies and half of the non-government sector companies listed in the Mercer database consulted by Hydro One provide this benefit. There is a sufficient number of companies that provide such benefit for the Board to conclude that it is a reasonable practice and the Board will not reduce Hydro One's proposed costs in this regard.

**Pension Costs**

3.4.8 Hydro One's pension plan is a contributory, defined-benefit plan. Pursuant to the Board Decision RP-1998-0001, the utility is allowed to record pension costs on a cash basis for ratemaking purposes.

3.4.9 Commencing on January 1, 2004, Hydro One Networks (including Transmission) is required to make annual cash pension contributions of approximately $81 million for the employer-paid portion. In addition, Networks has been paying to Inergi an annual amount of $7 million related to pension costs for the transferred employees. A further "top-up" payment of about $24 million became payable to Inergi beginning January 1, 2005. The "top-up" payment is being paid in 36 equal monthly payments, or $8 million per year.

3.4.10 For Hydro One Distribution, the annual amount to recover pension costs through rates is estimated to be $38 million. Approximately $19 million in pension costs were allocated to OM&A and $19 million to Capital projects. In addition, the

utility had received Board approval to record pension contributions starting in 2004. The disposition of this deferral account is dealt with elsewhere in this decision.

3.4.11 From its commencement of operations on April 1, 1999 to December 31, 2003, Hydro One did not incur pension costs due to the Plan surplus. The Company also used the accumulated Plan surplus to fund negotiated enhancements to employees in the Plan. The value of enhancements was estimated to be $109 million.

3.4.12 In 2000, Networks introduced a voluntary retirement program. The program was accepted by 1,401 employees. The cost of the program, $270 million, was funded out of the Plan surplus at the time.

3.4.13 SEC suggested that ratepayers should not be burdened with any of the costs associated with the utility's decision to fund the downsizing from the Plan surplus. SEC argued that the funding of the $270 million cost of downsizing has shifted the costs from a PBR period into the post-PBR period. If the funding did not draw down the Plan surplus, the contribution holiday would have continued until at least 2007. CME made similar submissions.

3.4.14 The Board notes that neither SEC nor any other intervenor questioned the prudence of the utility's initiative to downsize or "right-size" when it emerged from the former Ontario Hydro. On the contrary, it was accepted as being a prudent initiative and the Board agrees with that assessment.

3.4.15 The Board agrees with the utility that it is not the withdrawal of the $270 million that triggered the resumption of company pension contributions. The trigger was the down turn in the markets combined with lower interest rates which combined to reduce and eventually place the Plan in a deficit position. However, it is also true that the $270 million withdrawal advanced the resumption of contributions. The May 2000 coincident timing of the effective date of the PBR regime and the effective date of the voluntary retirement initiative may legitimately raise

questions, but we find no substantiation in SEC's argument that the utility knowingly and intentionally used the Plan surplus to shift costs from a PBR period to a post-PBR period.

3.4.16 Energy Probe argued that the costs associated with the $109 million drawdown for benefit improvements should not be allowed in rates because it represented an enrichment of an "already overly-rich" pension and an attempt to enhance the value of the company by enhancing its intellectual capital prior to the failed Initial Public Offering (IPO). In Energy Probe's view, this is a risk that the company took and that decision should not now burden ratepayers.

3.4.17 The Board notes the statement of Counsel to Hydro One that the cost associated with the $109 million drawdown for the test year is only about $1 million. In any event, the Board finds that there is no evidence to substantiate Energy Probe's contention that this action was driven by the IPO initiative. The Board is convinced by the utility's argument that the evidence substantiates that the enhanced pension entitlement were in lieu of pressures by the utility's unions for enhanced wages and other benefits.

3.4.18 CME suggested that Hydro One should look into changing its pension plan from defined benefit to a defined contribution type to avoid funding fluctuations. In the Board's view, changes to the type of pension plan selected is a management decision and likely a result of labour negotiations; as such, and given the cursory canvas of the matter in this proceeding, the Board leaves decisions concerning the pension plan to the discretion of Hydro One management. The Board will not provide any direction to the utility at this time. This does not prevent the utility from coming forward on its own accord with any plans that it may have in this regard.

3.4.19 The Board will not reduce Hydro one's proposed pension costs.

## 3.5 SHOULD THE BOARD ORDER A BENCHMARKING STUDY?

3.5.1 Although benchmarking was not identified as a formal issue in the proceeding, the issue was raised by a number of intervenors in the context of OM&A costs, in particular compensation and benefits costs, and overall rate levels.

3.5.2 Specifically, SEC submitted that the Board should direct Hydro One to study the reasons why its rates are higher than other LDCs, covering both the key external and internal factors. For each factor, the impact should be quantified and a plan developed to manage that factor. CCC alleged that Hydro One is selectively using benchmarking when results favour it and the Board should obtain an objective assessment of whether or to what extent Hydro One's costs, or discrete areas of its operations, can be compared with other utilities. VECC alleged that Hydro One has used comparisons with external parties and uses these results only when favourable to it. Both VECC and CCC took the position that Hydro One should be directed by the Board to undertake formal benchmarking comparisons with like LDCs and report the results at the next rate proceeding. Support for benchmarking was expressed by FONOM, Energy Probe, and CME. PWU expressed skepticism whether the benefits of such study would outweigh the effort and cost involved.

3.5.3 Hydro One acknowledged the appeal of benchmarking but cautioned that such efforts could be expensive and may not be productive in the end. Hydro One submitted that if the Board wished that a benchmarking study be conducted, it should be led by the OEB itself as it has the power to compel production of relevant information from all Ontario utilities.

3.5.4 The Board is of the view that a study comparing Hydro One's distribution rates with other LDCs should be ordered only if it is likely that the study would yield information of value, and with direct application, to the ratemaking process. Benchmarking Hydro One's rate levels to those of other utilities would not produce information which would assist the Board in setting Hydro One's rates.

Rate levels are underpinned by costs. It is the causation of relative costs that is at issue.

3.5.5 The Board recognizes that as part of its ongoing efforts to enhance productivity gains, Hydro One does engage in benchmarking studies of sorts. However, the Board also recognizes that a Board direction for the production of a comprehensive benchmarking study for direct ratemaking, whether it is undertaken by Hydro One or the Board itself, would involve substantial effort and expense.

3.5.6 While the Board is not prepared to order a comprehensive benchmarking study, the Board sees value in a high level benchmarking study for initial review at the next rate proceeding. The Board directs Hydro One to engage an independent party to develop a list of comparable North American companies with similar business models (transmission and/or distribution) and to report on high level comparative performance and cost information for Hydro One and these companies. In future rate cases, this information may assist with determination of areas for a more comprehensive benchmarking review. The Board does not anticipate that the high level benchmarking study will be overly costly. The Board anticipates that Hydro One will want to consult with intervenors regarding the scope of the study. The independent study should be submitted as part of Hydro One's next main application for distribution rates. On best efforts basis, Hydro would also submit the report as part of its transmission rates application for 2007.

3.5.7 In addition, the Board directs Hydro One to engage an independent party to develop a comparison of labour rates and overtime policies amongst Hydro One, other comparative Ontario electricity distributors, and other Canadian utilities as identified in the high level benchmarking study. This independent study should also be submitted as part of Hydro One's next main applications for distribution and transmission rates.

## 3.6 IS THE PROPOSED METHODOLOGY OF ALLOCATING COMMON COSTS REASONABLE?

3.6.1 Hydro One Networks provides common services to Distribution and Transmission and Hydro One on a centralized basis. The costs of the services and assets are assigned to business units on the basis of cost causation. Where possible, these costs are directly assigned. Otherwise, they are allocated based on cost drivers and other methods. Hydro One's evidence described the assignment or allocation of these common costs as well as the derivation of the overhead capitalization rate, which determines the assignment of overhead costs to capital expenditures. In support of its proposals, Hydro One filed a study by R.J. Rudden Associates.

3.6.2 The results of the Rudden cost allocation approach for all common costs are shown in the table below.

**Total Common Costs, 2006**
**Allocation to Transmission, Distribution and Other**
**($ million)**

| Function/Service | Total | Transmission | Distribution | Other |
|---|---|---|---|---|
| Common Corporate Functions & Services | 210.7 | 81.2 | 112.7 | 16.8 |
| Asset Management | 91.1 | 51.8 | 39.3 | 0 |
| Operating | 37.0 | 26.5 | 10.5 | 0 |
| Customer Care Management | 7.0 | 2.0 | 5.0 | 0 |
| **Total** | 345.8 | 161.5 | 167.5 | 16.8 |

3.6.3 Hydro One requested that the proposed methodology in the Rudden study be accepted for purposes of setting distribution rates. Hydro One also indicated that if accepted, the methodology would be used in the pending transmission rates proceeding.

3.6.4 VECC noted that the costs allocated to Hydro One Inc., the holding company, appear to be understated as they only represent 0.6% of the total common costs and only 2% of the total corporate costs. The proposed methodology does not assign any Board costs to the holding company or any of the costs associated with the President and CEO's office, even though the Board oversees Hydro One Inc., as well as the subsidiaries, and the President and CEO holds that position for both Hydro One Inc. and Hydro One Networks.

3.6.5 VECC acknowledges that its concerns regarding costs allocated to the parent company are influenced by VECC's experience with Ontario's gas utilities. Hydro One notes that, Hydro One Inc. only has regulated subsidiaries and there is no reason to assign more costs to it. The Board accepts Hydro One's explanation as reasonable at this time and will not make any adjustments to the Rudden methodology in this regard.

3.6.6 VECC also questioned the use of cost drivers based on the size of the entity rather than on effort expended, and the possible lack of transparency in demonstrating compliance with the Affiliate Relationships Code.

3.6.7 The Board notes that all intervenors accepted the Rudden study as a fair and balanced approach to allocate joint costs and the Board agrees with that assessment.

3.6.8 The Board therefore accepts the recommendations contained in the Rudden study and accepts the costs flowing to Hydro One Distribution for purposes of setting 2006 rates. The Board also considers it reasonable for the Company to employ the Rudden methodology in the pending transmission case. As noted by SEC, this should not prevent parties from raising issues that were not raised in this proceeding.

3.6.9 VECC also noted that there may be double recovery of costs from both the Transmission and Distribution customers until such time as the rates for both are based on the same cost methodology. Hydro One acknowledged that this is an issue. The Board agrees. In the Board's RP-2005-0501 decision of February 22, 2006 finding that an earnings/sharing mechanism shall apply to 2006 excess revenues for Hydro One Transmission, the Board addressed this issue by stating the following:

> "While the final disposition of the cost allocation issue in the distribution hearing, has not been made at this time the Board wishes to consider the potential for double recovery of certain costs by Hydro One in the 2006 rate year, by having the costs of certain activities and assets included in both the existing rates of transmission, and the new rates of distribution.
>
> To avoid that unreasonable result, the Board orders Hydro One Transmission to report revenue changes for the 2006 rate year resulting from the Board's decision on cost allocation in RP-2005-0020 / EB-2005- 0378. The report will be reviewed with the objective of crediting the resultant cost allocation adjustment to transmission customers in the 2007 rate application."

## 3.7 DEPRECIATION EXPENSES

3.7.1 In its previous revenue requirement rates case (RP-1998-0001), Hydro One was directed to file an independent Depreciation Study with its next revenue requirement application, which it did. The study, performed by Dr. Ron White of Foster Associates Inc., yields depreciation expenses of $152.3 million in the test year, compared to $161.2 million using the existing methodology. If Hydro One had used the depreciation rates in the Handbook, the expense for 2006 would be $247.4 million. The proposed depreciation rates yield a lower expense of $8.9 million over the existing rates and $95.1 million over the Handbook rates. Intervenors had indicated that they would not cross examine on the issue. Therefore, Hydro One was not required and did not produce witnesses to testify to the Depreciation Study.

3.7.2 The Board accepts the costs flowing from the Depreciation Study for purposes of setting rates in the test year. Such approval should not be construed as Board acceptance of each specific recommendation contained in the study or that the study should form the definitive basis for depreciation studies for other electricity distributors.

## 3.8 TAXES

3.8.1 Hydro One's cost of service includes provisions for Payments in Lieu of Income Taxes (PILS), Capital Tax and Large Corporation Tax, all paid to the Province of Ontario. The Company provided its estimates for these tax payments for 2006. No intervenor objected to the Company's estimates.

3.8.2 The Board accepts the Company's method of calculating these tax provisions, subject to any adjustments that may be required arising from the Board's findings on revenue and cost items in this decision. In a communiqué of December 2005, the Board set out the sources of possible changes to the tax provision for 2006, such as changes in income tax rates, and authorized the establishment of a variance account to capture these differences.

# 4. RATE BASE

Hydro One's distribution rate base for the 2006 test year is made up of a forecast of net plant (calculated as a mid-year average) and a working capital consisting of an allowance for cash working capital and materials and supplies inventory. Hydro One's proposed rate base for the 2006 test year is $3.7 billion as shown in the table below.

**2006 Rate Base**

| Rate Base Component | 2006 Test Year ($ Millions) |
|---|---|
| Gross Plant | $ 5,550.0 |
| Accumulated Depreciation | $ (2,126.7) |
| Net Plant | $ 3,423.3 |
| Cash Working Capital | $ 265.6 |
| Materials and Supplies Inventory | $ 22.9 |
| **Total Rate Base** | $ 3,711.7 |

The specific issues that arose and need to be addressed by the Board are as follows:

- Cash Working Capital
- Capital budget
- Adequacy of expenditures to reduce line losses
- Allowance for funds used during construction

- Overhead Capitalization
- Adequacy of funding for Service Quality Performance

## 4.1 CASH WORKING CAPITAL

4.1.1 The issue before the Board concerning cash working capital is whether the methodology used to produce the result is appropriate and whether the result itself is reasonable.

4.1.2 In 1999, the Board issued a directive to Hydro One in its RP-1998-0001 order, requiring that it perform a lead/lag study in preparation for its next distribution rate hearing. Navigant Consulting ("Navigant") was selected by Hydro One to conduct the study. The Navigant report, ("Navigant study" or "lead/lag study" or "study") was filed by Hydro One as part of the Application. Hydro One accepted all of the recommendations in the study without changes.

4.1.3 The lead/lag study calculated cash working capital using a methodology different than that contained in the Handbook. The net cash working capital allowance of $265.6 million for the 2006 test year requested by Hydro One represents 11.6% of Hydro One's OM&A and Cost of Power expenses, and is approximately $54.5 million lower than it would have been if the Handbook methodology had been used, resulting in a $5 million reduction to the 2006 revenue requirement.

4.1.4 While the amount requested is lower than the amount resulting from the application of the Handbook, it does represent an increase of $76.7 million over the $188.9 million approved by the Board in its RP-2000-0023 decision. According to the study, the increase relative to 2000 is primarily accounted for by: an increase in total cost of power, an increase in controllable expenses of $1,027 million, and the inclusion of four additional items that are not included in working capital as set out in the Handbook methodology. These additional items are removal costs, environmental costs, taxes, and interest on long-term debt.

4.1.5 The issue of security deposits and their inclusion in the calculation of cash working capital was the subject of some discussion. The Handbook (section 5.4) does not require an adjustment for customer security deposits in the calculation of the cash working capital. The Navigant study made no express recommendation regarding the treatment of security deposits collected from customers by Hydro One and did not use these deposits as an offset in the determination of working cash allowance.

4.1.6 Hydro One testified that it did not include these deposits in the cash working capital calculation because the Handbook did not require it and the Navigant study did not recommend it. Hydro One advised that the funds are kept in reserve, not used for cash flow purposes, and are placed in its general, not a segregated, account. Hydro One pointed out that the deposits are not assured; the Company must be prepared to refund them on short notice, and must pay interest on the deposits.

4.1.7 The amount of interest payable as set out in the Board's Distribution System Code is the prime bank rate less two hundred basis points, which is less than Hydro One's cost of debt. Depending on the type of customer, some deposits can be held for up to seven years. After deducting the interest payable to consumers, which would be approximately $600,000, the net amount of the cash represented by the security deposits is $21.2 million. As the interest rate is lower than the Company's cost of debt, Hydro One realizes a benefit of $300,000.

4.1.8 With the exception of the broader approach taken by Energy Probe, intervenors generally focused their attention on the appropriateness of excluding customer security deposits from the calculation of working capital requirement.

4.1.9 CCC noted that the Ontario natural gas utilities are required by the Board to deduct security deposits from cash working capital and stated that, as a forward test year applicant, Hydro One is not bound by the Handbook, and therefore could include customer security deposits in the calculation. CCC further submitted that Hydro One had not justified the exclusion of customer security deposits from the

working cash allowance calculation, and in the absence of evidence as to why a contrary position should be taken, Hydro One should follow the practice of the natural gas utilities.

4.1.10 VECC submitted that, at a minimum, the revenue requirement should be adjusted for the benefits accruing to Hydro One through the difference in interest rates. CME agreed with the position put forward by VECC, particularly if there is no specific obligation placed on Hydro One to segregate the deposits from its other accounts.

4.1.11 VECC also raised concerns regarding the lead/lag study, noting that there are a number of material differences between the methodology used by Navigant and that approved by the Board for Enbridge. VECC submitted that the cost elements included in Hydro One's working capital should generally align with those approved for natural gas utilities. This would lead to the exclusion of interest costs, capital and income tax, as well as a reduction for customer deposits.

4.1.12 Energy Probe objected to Hydro One using the Handbook to justify the exclusion of customer deposits and, at the same time, including in the calculation a number of cost elements that the Handbook specifically excludes. Energy Probe took the position that any lead/lag methodology employed should be broadly consistent with that approved for the gas utilities under the Board's jurisdiction and, therefore, both inventory and customer deposits should be used in the calculation of the working capital allowance component of rate base. Energy Probe pointed out that even though they pay interest on and refund customer deposits, the gas utilities must reduce the working capital requirements by the amount of customer security deposits they hold.

4.1.13 Energy Probe was the only intervenor with specific concerns related to the lead/lag study. In addition to its position that the lead/lag methodology used by Hydro One should be consistent with that used by all other utilities in Ontario, Energy Probe raised issues with the apparent internal inconsistencies in the

lead/lag study and the impact of Retail Settlement Code requirements on working cash allowance.

4.1.14 Although raised in argument by Energy Probe, the impact of the Retail Settlement Code was not an issue in this hearing. The Board has insufficient evidence available from this proceeding to determine what action, if any, is reasonable. The Board suggests that Energy Probe raise the matter when the Board next reviews the Retail Settlement Code.

4.1.15 The Board acknowledges the inconsistent calculation of working cash allowance between electricity and natural gas distributors. Inconsistencies between the natural gas and electricity utilities are not uncommon and are often reasonable based upon the operational differences that exist within the two sectors. In this case, relief has been requested by intervenors based upon that inconsistency rather than the merits of excluding or including any of the specific components in the calculation.

4.1.16 Another argument relied upon by the intervenors to challenge Hydro One's working cash allowance calculation was the inconsistencies between the Navigant and the Handbook methodologies. The Board recognizes the inconsistencies, however, as a forward test year filer, Hydro One is not required to follow the Handbook.

4.1.17 Hydro One was directed by the Board to undertake a lead/lag study, and the Board finds that it acted reasonably when it accepted the Navigant study and its methodology, even though that methodology is inconsistent in certain respects with that of the Handbook.

4.1.18 While the Board has concerns about the inconsistencies, the Board finds the Navigant study to be a well-balanced approach that benefits both the ratepayer and Hydro One. The most significant benefit to the ratepayer is a revenue requirement significantly less than that which would be derived by applying the Handbook methodology.

4.1.19 The Board agrees with the intervenors and Board staff that a review of the merits of either methodology, particularly on the issue of the cost elements excluded by one but included by the other is warranted. Such a review will take into account the methodology that has been previously approved by the Board for the natural gas utilities. Following this review, the Board will consider whether the formulaic approach used in the Handbook should be replaced with a revised version of the Navigant methodology for future rate-making purposes.

4.1.20 Similarly, while the Board accepts the exclusion of customer security deposits from the working cash allowance methodology in this case, the appropriateness of the exclusion remains unresolved by this proceeding. The Board may review this question before issuing the next EDR Handbook.

4.1.21 The Board approves Hydro One's request for a working cash allowance of $265.6 million for the 2006 test year.

## 4.2 CAPITAL BUDGET

4.2.1 Hydro One proposed a capital budget of $333.0 million for the test year with expenditures in the bridge year of $315.5 million. The capital budget was presented under the Sustaining, Development, Operations and Shared Services categories as shown in the table below.

**Capital Expenditures and Budget, 2002 – 2006**
**($ million)**

| Category/Year | 2002 | 2003 | 2004 | Bridge 2005 | Test 2006 |
|---|---|---|---|---|---|
| Sustaining | 99.4 | 116.3 | 104.9 | 117.9 | 119.6 |
| Development | 100.0 | 107.1 | 138.6 | 141.6 | 137.2 |
| Operations | 3.7 | 11.1 | 6.3 | 3.1 | 3.5 |
| Shared Services | 59.1 | 45.8 | 22.2 | 53.0 | 72.7 |
| **Total** | 262.2 | 280.4 | 272.0 | 315.5 | 333.0 |

4.2.2 SEC argued that capital expenditures should be reduced using the same approach SEC used in its OM&A reduction submissions. Using a 2002 base with a Pension adjustment of $19 million, an adjustment for more customer additions, and adjusting for inflation on the other line items ($45 million), SEC proposed a reduction in capital expenditures of $64 million, for a 2006 test year total of $269 million.

4.2.3 CCC proposed a 10% reduction in capital expenditures, matching its recommendation for OM&A costs.

4.2.4 VECC noted that capital spending levels for 2005 and 2006 were significantly higher than in previous years and expressed a concern that capital expenditures do not appear to reflect a concern for the price increases that customers will experience as a result of the increased capital spending. No submissions on the recommended level of capital expenditures were made.

4.2.5 In reply, Hydro One argued that consideration should be given to the reasons that capital expenditures are made by Hydro One such as a large increase in customer connections, and an increase in costs due to a change in the Distribution System

Code concerning capital contributions as cited in the Capital Budget evidence. Hydro One cautioned against accepting the argument of SEC to reduce capital expenditures as planned.

4.2.6 The Board has not been persuaded by intervenor argument that Hydro One's capital budget should be reduced from the amount sought. Neither the quantity nor the nature of the specific capital spending was discredited. Intervenor reasons for the requested relief were largely anecdotal and did not convince the Board that adjustments were necessary. The Board finds Hydro One's proposed capital budget for the test year to be reasonable.

4.2.7 The balance of this chapter discusses specific capital budget issues that were raised by intervenors.

## 4.3 ADEQUACY OF EXPENDITURES TO REDUCE LINE LOSSES

4.3.1 In 2005, Hydro One commissioned Kinetrics Inc. to carry out an independent assessment of the technical losses on Hydro One's distribution system (the 'Kinetrics study'). The Kinetrics study recommended the implementation of a Distribution Loss Reduction Program with spending of $12.75 million over a two year period (2006 and 2007). Hydro One proposed to spend only $8 million on this program. The issue was whether or not Hydro One's capital expenditures should be increased by $4.75, which was comprised of and increase of $1.45 million for 2006 and for 2007 increased by $3.3 million.

4.3.2 Hydro One's rationale was that the proposed lower level of spending of $8 million would result in higher savings per dollar spent and that Hydro One intends to pursue the remaining opportunities in the future. With regard to the expenditures related to shunt capacitor and phase balancing, Hydro One provided three reasons for its resistance to moving ahead with the full budget immediately: 1) incremental power outages resulting from line work; 2) impact on customers; and 3) equipment availability and staff availability issues, training of staff and managing the larger project in a compressed timeframe.

4.3.3 Intervenor submissions in support of the full implementation of the Kinetrics study recommendations focused on the net savings associated with reduction of line losses, the relatively small size of the incremental program viewed in light of Hydro One's ability to manage such programs, the need to support energy reduction objectives, and the usefulness of the program as a tool to internalize a conservation culture.

4.3.4 Hydro One argued that the implementation of some or all of a consultant's recommendations was purely a management decision, and interference would represent micro-management of the Company's affairs. The Company further argued that it could not prudently spend the balance of the $4.75 million in the time frame requested, and that the timing of the expenditure, not the expenditure itself, was the issue.

4.3.5 Hydro One denied that its decision to implement only part of the Kinetrics line loss recommendation reflected a lack of commitment to CDM and a conservation culture. Hydro One maintained that the decision to undertake part rather than all of the recommendations reflected an attempt to use ratepayers' money wisely, and reflected prudent management decisions made by those with practical experience and knowledge of the problems involved in fully implementing the recommendations.

4.3.6 In considering this issue, the Board has reviewed its conclusions contained in its recent decision on Generic CDM Programs by Electricity Distributors (LDCs), RP-2005-0020/EB-2005-0523, dated March 3, 2006.

4.3.7 Relevant conclusions taken from pages 8, 9 and 10 of the decisions are presented below:

- The Board, in a rate case, has the authority to direct that CDM expenditures be increased or decreased.

- A utility's expenditures are presumed to be prudent and there is an onus on those challenging them to demonstrate the lack of prudence

- LDC expenditures should be presumed to be prudent unless they are demonstrated to be unreasonable.

- The examination of the investments on the basis of the TRC Test may not be the end of the matter. The utility may have good reasons why it cannot carry forward an investment.

- The Board would not order any spending above the level proposed by the LDC's in the 2006 rate cases.

4.3.8 While this Board Panel recognizes that it is not obligated to find similarly in this case, it has not found sufficient reasons to adopt any conclusions different from those expressed above.

4.3.9 The Board finds that Hydro One acted thoughtfully and prudently with respect to delaying the implementation of the total recommendation of the Kinetrics study, to a timeframe beyond this 2006 rate application. The utility provided good reasons why it could not carry forward the incremental line loss reduction investment in the time frame recommended, primarily related to resources and resource management. The Company in reply argument indicated that they would undertake all of the Kinetrics study recommendations as soon as it was feasible to do so.

4.3.10 The Board does accept the submissions of intervenors regarding the expected benefits of the $4.75 million expenditure and directs Hydro One to include in its next main rates case filing a budget and a work plan to implement all the cost-effective line-loss reduction suggestions contained within the Kinetrics study. If Hydro One concludes that any of the recommendations in the Kinetrics study should not be implemented, it must clearly demonstrate the reasons for that

position, and an accompanying budget and work plan for its preferred implementation plan.

## 4.4 ALLOWANCE FOR FUNDS USED DURING CONSTRUCTION

4.4.1 Allowance for Funds Used During Construction (AFUDC) refers to the costs associated with financing the capital projects that have yet to be recognized in rate base. Hydro One Distribution applied to use its calculation of a pre-tax Weighted Average Cost of Capital (WACC) as the rate for AFUDC. This pre-tax rate of 8.9% resulted in $6.5 million being added to capital expenditures in the test year and therefore rate base. Hydro One calculated the post-tax AFUDC rate at 7.02% but interpreted the Board's 2006 Rate Handbook Report as allowing the use of a pre-tax WACC.

4.4.2 VECC submitted that the use of the term WACC generally refers to an after-tax number. It also referred to the Board's Distribution System Code which states in APPENDIX B Methodology and Assumptions for an Economic Evaluation, page 2: "A discount rate equal to the incremental after-tax cost of capital based on a prospective capital mix, debt, and preference to the cost rates and the latest approved rate of return on common equity." VECC did not provide a methodology for this after-tax calculation; it just referred to the Distribution System Code. The discounted cash flow approach is applicable to determining contributions from customers, and perhaps in ranking capital proposals.

4.4.3 The Board's 2006 Rate Handbook Report suggests that WACC be used as the AFUDC rate but the report does not indicate whether the rate would be calculated on a pre-tax or on a post-tax basis, or how the calculation would be made. In the absence of a prescribed method in the Rate Handbook, the Board finds it appropriate to adopt the same method used for gas utilities which relates to interest during construction based on forecast actual borrowing costs. These costs, or rates, may have been decided by the Board in the case, or approved as part of a settlement agreement.

4.4.4 The Board therefore directs Hydro One to recalculate the AFUDC using a rate of 6.2%, which is the Company's blended long-term debt rate. In the generic cost of capital review to be held in 2006, the Board may consider an appropriate methodology for the determination of AFUDC.

## 4.5 OVERHEAD CAPITALIZATION

4.5.1 In its original evidence, Hydro One applied for capitalized overhead of $48.4 million to be added to distribution rate base in the 2006 test year, reflecting a capitalization rate of 17% contained in the Rudden study. Through an update, the capitalization rate was changed to 15.9% resulting in an adjusted $46.5 million capitalized overhead to be added to rate base. The Applicant noted that, as recommended in the Rudden study, the calculation for overhead capitalization will be done afresh every year, and an appropriate amount will be trued-up in the following year.

4.5.2 No intervenor took issue with the methodology, results or recommendations in the Rudden study or Hydro One's proposals. The Board accepts the cost consequences for the test year flowing from the Rudden study and the study's recommendations and also accepts Hydro One's truing-up proposal as reasonable.

## 4.6 ADEQUACY OF EXPENDITURES FOR SERVICE QUALITY PERFORMANCE

4.6.1 There were two issues raised concerning the service quality and performance: Will the service quality targets of Hydro One be maintained with the proposed levels of spending; and, should Hydro One increase investment in the Greater Sudbury Area to improve service quality?

4.6.2 With regard to the first issue, the evidence shows that Hydro One met most of its reliability performance targets and that it intends to increase its spending in areas that would improve its reliability and performance, such as the vegetation management program.

4.6.3 With regard to the second issue, anecdotal evidence provided by the witness for Greater Sudbury suggested that there is a higher service quality level provided to area residents served by the local municipally owned utility than that provided to residents served by Hydro One.

4.6.4 Evidence provided by Hydro One indicated that there is little material difference in the reliability indicators between customers served by Hydro One and those served by Greater Sudbury Hydro. This evidence also indicated that even if there are differences in the service reliability indicators, Hydro One advised that allocating resources to elevate performance standards above the norm in one part of the system would need to be subsidized by other customers, which would be inequitable and unfair to those customers.

4.6.5 The Board has not been convinced that service quality indicators for Hydro One's customers in the Greater Sudbury Area are any different than those of Hydro One's other customers, and thus the Board has not been convinced that any additional investment is required by Hydro One to improve service quality in the Great Sudbury Area. In making this finding, the Board found no evidence to suggest that service quality targets of Hydro One will not be maintained based upon the proposed level of spending.

# 5. CAPITALIZATION AND COST OF CAPITAL

This chapter deals with the capitalization of Hydro One distribution's rate base and cost of capital for the 2006 test year. Hydro One's proposed capitalization and cost of capital for the purpose of setting 2006 rates are shown in the table below.

**Capital Structure and Cost of Capital, 2006**

| Instrument | $ Millions | % | Cost Rate (%) | Return (%) |
|---|---|---|---|---|
| Long-Term Debt | 1,994 | 53.7 | 6.24 | 3.35 |
| Unfunded Short Term Debt | 233 | 6.3 | 3.33 | 0.21 |
| Preference Shares | 149 | 4.0 | 5.50 | 0.22 |
| Common Equity | 1,336 | 36.0 | 9.00 | 3.24 |
| **Total** | 3,712 | 100.0 | | 7.02 |

Third party public investors hold all of the debt issued by Hydro One Inc. When it filed its application, Hydro One had $99 million in preference shares allocated to support the Distribution operation. In its application Hydro One stated that an additional $38 million in preferred shares would be issued by Hydro One Distribution during 2005 to maintain the preference shares at 4% of the capital structure.

The Capitalization and Cost of Capital issues that arose in the proceeding and which need to be determined by the Board are as follows:

- Should the deemed common equity component be reduced to 35% from 36%?
- What is the appropriate rate of return on common equity?

## 5.1 SHOULD THE DEEMED COMMON EQUITY COMPONENT BE REDUCED TO 35% FROM 36%?

5.1.1 Hydro One proposed to continue its present capital structure of 60% debt, 4% preference equity and 36% common equity as approved in the RP-2000-0023 decision. The Board's 2006 Rate Handbook establishes a deemed capital structure of 65% debt and 35% equity for a company of Hydro One's size. Hydro One claimed that its proposal was consistent with the Board's Handbook as the debt/equity structure for Ontario electricity distributors remained the same in 2006 as in the 2000 Handbook and Hydro One's proposed capital structure remained the same in 2006 as in 2000.

5.1.2 Only two intervenors commented on this issue. CCC accepted the capital structure as proposed but noted an apparent inconsistency in Hydro One's position in that it argued the Handbook should not be followed when the Board considered capital structure but should be followed when the Board considered the rate of Return on Common Equity ("ROE").

5.1.3 Energy Probe agreed that Hydro One's position was inconsistent. Energy Probe noted that the capital structure prescribed in the Rate Handbook for a utility the size of Hydro One was 65% debt and 35% equity, and argued that Hydro One should also have a deemed structure that includes a 35% equity component. Energy Probe argued that by proposing an equity portion higher than that in the Handbook, Hydro One was implying that the Company's risk profile is higher than other utilities of its size.

5.1.4 Hydro One noted that it has an actual debt/equity structure consisting of 36% common equity and this structure was approved by the Board in two previous rate applications.

5.1.5 The Board finds that the capital structure of Hydro One, for the purposes of 2006 rates, will remain unchanged. As Hydro One asserted, the Board has approved the proposed capital structure in two previous rate applications and there is no evidence that a change is required. Also, a change in the capital structure must

generally require a review of the equity risk premium embodied in the authorized rate of return. In any event, the Board plans to hold a generic proceeding on cost of capital this year and it is appropriate that changes to Hydro One's capital structure await the results of that proceeding.

## 5.2 WHAT IS THE APPROPRIATE RATE OF RETURN ON COMMON EQUITY?

5.2.1 Hydro One requested a ROE for the 2006 test year of 9%, which is the stipulated rate in the Rate Handbook.

5.2.2 Certain intervenors argued that the 9% ROE set out in the Handbook applied only to historical test year filers, not to those distributors that made applications based on a forward test year. They argued that the ROE should be changed by updating the bond yield data that were used to determine the rate of return in the Handbook. The resultant rate would be 8.3%. Hydro One maintained that the Handbook does not distinguish between past and future test years, and that it would inequitable to charge some ratepayers a different return on equity depending on whether the utility chooses to file on an historic or future test year.

5.2.3 Hydro One maintained that the ROE should be 9%. However, Hydro One and most intervenors agreed that if the economic indicators were to be updated, the equity risk premium should also be updated. That is, any change in the bond yield from the previous level underpinning the previous rate of return authorized by the Board should be multiplied by the .75 factor stipulated in the formulaic approach that had been previously been adopted by the Board. This approach was outlined by Kathleen McShane of Foster Associates in a January 19, 2006 document that was filed in the proceeding. Using this approach and based on December 2005 data, the calculated rate of return on common equity would be 8.65%.

5.2.4 Hydro One did not agree with this return. Hydro One argued that the bond yield data that determined the 9% rate were current for April 2005, the same time frame used in the determination of the other data in the application. Therefore, if the

bond yield data were to be updated, Hydro One maintained that other debt parameters and other costs should be updated as well.

5.2.5 Hydro One made reference to the financial markets' expectations that the ROE would be 9%, but did not provide any details of the effects of not meeting market expectations.

5.2.6 The Board agrees with Hydro One and most intervenors that if the ROE were to be updated from that in the Handbook, then the equity risk premium should be adjusted in accordance with the formulaic approach that has been used historically by the Board. However, it is not clear that the updates should end there. Hydro One argued that if the Company had been aware that the ROE would be disputed, it might have filed evidence questioning the method of calculating ROE. In fact, in this case, very little evidence was provided to justify an ROE different than that in the Handbook. The evidence that was provided arose in the Toronto Hydro Distribution Rates case, RP-2005-0020/EB-2005-0421. No witness was examined on the evidence that was provided in the instant case or in the Toronto Hydro case. The Board believes that it has insufficient evidence before it to confidently calculate the appropriate ROE.

5.2.7 We also note that the Report of the Board on the Handbook states:

> "Several parties commented on the certainty that the updated but pre-set return on equity and debt rates would provide to distributors, their shareholders, the financial community, and customers. The Board concludes that the simplicity and certainty provided by alternative 1, which is the predetermined and fixed rate on equity, are attractive attributes."

5.2.8 It is reasonable for Hydro One and other parties to expect, in this matter, that they could rely on the certainty mentioned in the Report, regardless of whether they used a forward test year application.

5.2.9 The Board finds that the ROE for 2006 will be 9.0%. It is in the Board's plans to examine the question of ROE in a generic proceeding in the near future.

## 5.3 SHOULD MORE RECENT INTEREST RATE FORECASTS BE USED DETERMINE THE COST OF NEW PROPOSED DEBT?

5.3.1 This issue primarily arose as a result of the ROE question.

5.3.2 Consistent with the decision not to update the interest rate data for the ROE, the Board finds that the debt rates should not be updated for 2006 rates.

# 6. REGULATORY ASSETS AND DEFERRAL /VARIANCE ACCOUNTS

Hydro One applied for the recovery of Regulatory Asset Deferral Accounts in the amount of $103.7 million. The Regulatory Assets claimed are dealt with in two groups: Pre-authorized accounts with previous prudence review ($6.6 million) and Pre-authorized accounts without previous prudence review ($97.1 million).

Hydro One forecast the values in both types of accounts up to April 30, 2006, consistent with the practice of the other distributors in filing their 2006 distribution rate applications for final Regulatory Asset recovery.

## 6.1 PRE-AUTHORIZED ACCOUNTS WITH PREVIOUS PRUDENCE REVIEW

6.1.1 As is the case with other electricity distributors, Hydro One incurred costs preparing for and making, the transition to the competitive market which opened in May 2002. Hydro One was authorized to record such costs in several Regulatory Assets accounts which also included the Retail Settlement and Retail Costs Variance Accounts. There was also a Low Voltage Costs Account dealt with previously by the Board in Hydro One's Low Voltage facilities application. The Board dealt with the disposition of the December 31, 2003 balances in the above accounts in its RP-2004-0117/0118 decision and order.

6.1.2 The net total balance which has accumulated since January 1, 2004 in these pre-authorized accounts is forecast to be $6.6 million at April 30, 2006, which consists of a $58.9 million credit in the Retail Settlement and Retail Costs Variance Accounts, a $63.3 million debit in the Low Voltage Costs account and a $2.3 million debit in the Rural and Remote Protection Account. The forecast balance reflects interest at the rate of 7.71% as per the RP-2004-0117/0118 Decision. Hydro One is proposing recovery over a four year period from May 1,

2006 to April 30, 2010. Hydro One proposed to allocate and recover the balance in the same way as the Board had previously approved.

6.1.3 With one exception, no intervenor took issue with Hydro One's proposals. VECC argued that the 7.71% interest rate applied to these and other accounts is too high and suggested that the interest rate be reduced to no more than 5%.

6.1.4 Subject to the finding below, the Board accepts Hydro One's proposed amounts and method of recovery.

6.1.5 The Board accepts the proposed 7.71% interest rate for balances to April 30, 2006 as that rate was previously approved by the Board for these Regulatory Asset accounts. However, as the balances in these accounts will be crystallized and transferred to Account 1590 as of May 1, 2006, the Board needs to determine the appropriate interest rate for electricity distributors to apply from that date forward. That rate will be prescribed by the Board following a consultation process in the near future. This process will also deal with the interest rate to be applied to all deferral and variance accounts post May 1, 2006.

## 6.2 PRE-AUTHORIZED ACCOUNTS WITHOUT PREVIOUS PRUDENCE REVIEW

6.2.1 The accounts noted below have been pre-authorized by the Board but no prudence review was undertaken until this proceeding.

**Pension Costs**

6.2.2 By decision dated July 14, 2004 (RP-2004-0180), the Board approved the authorization of a deferral account capturing pension costs but noted that it would address the prudence of such costs as part of this proceeding. The forecast balance for April 30, 2006 is $90.6 million, including interest at the rate of 7.71%. Hydro One proposed that distribution revenue be used as the basis for allocating and recovering the recorded amount from customer groups.

6.2.3 The Board has dealt with the prudence of the recorded pension costs in Chapter 3 of the decision. However, the Board notes that by letter dated February 20, 2006 to electricity distributors, the Board indicated that the interest rate to be applied to the pension deferral account would be 3.88%. The Board therefore directs Hydro One to recalculate the interest using 3.88% instead of 7.71%.

**OEB Costs Deferral Account**

6.2.4 In a letter dated December 20, 2004 to electricity distributors, the Board authorized the establishment of a deferral account to record OEB costs assessments that may not be included in rates. Hydro One calculated the difference to be $1.2 million based on the Board's invoice for its 2004 fiscal year and $3.9 million for its 2005 fiscal year. The April 30, 2006 balance is forecast to be $5.2 million and includes interest at the rate of 5.75% specified in the Board's December 20, 2004 letter to all electricity distributors. Hydro One proposed that distribution revenue be used as the basis for allocating and recovering the recorded amount from customer groups.

6.2.5 VECC argued that the costs claimed in the OEB Cost Assessment account should be reduced to reflect amounts already included in the rates of Hydro One's acquired electricity distributors. While the Board accepts the principle advanced by VECC, the Board finds that there is not convincing evidence that there is indeed double counting. In any event, even if some of the OEB assessment costs were reflected in some of Hydro One's acquired electricity distributors, the total amount would be inconsequential to Hydro One's total revenue requirement. The Board accepts the Company's proposed amounts and method of recovery.

**MEU Rate Mitigation**

6.2.6 In its March 15, 2005 decision (RP-2005-0014 *et al*) the Board directed Hydro One to adjust its proposals to reflect certain rate mitigation to its acquired electricity distributors and to capture the revenue shortfall in a deferral account. The forecast balance to April 30, 2006 is estimated to be $1.2 million, including interest at the rate of 7.71%. Hydro One proposed that the recorded amount be

allocated and recovered from its acquired electricity distributors on the basis of distribution revenue.

6.2.7 The Board accepts the Company's proposed amounts and method of recovery with the following exception. The Board did not specify a rate of interest when it authorized the establishment of this account. The Board-approved rate of interest for deferral accounts at or around that time was the 5.75% rate applied to the OEB Costs Deferral Account. The Board therefore directs Hydro One to recalculate the interest using 5.75% instead of 7.71%.

## 6.3 VARIANCE ACCOUNTS

6.3.1 Hydro One requested approval to establish new variance accounts for:

- Smart Metering – This account would track the costs related to expenditures for implementing smart meters to comply with government directions.
- Standby Rates - This account would capture the revenue from applying a new standby charge to customers who will use the services of Hydro One when their own generation facilities are out of service.
- OEB Cost Assessment Differential - This account would track the incremental OEB assessment costs for 2006.
- Loss of Revenue for Distributed Generation - This account would track the distribution revenue loss resulting from Distributed Generators locating in Hydro One's service territory.

6.3.2 No intervenor objected to the Company's proposals.

6.3.3 Except for Smart Metering and Loss of Revenue for Distributed Generation, the Board authorizes Hydro One to establish the variance accounts as proposed.

6.3.4 With respect to the proposed Smart Metering variance account, the Board's Generic Decision of March 21, 2006 dealing with certain generic matters

pertaining to the establishment of 2006 rates for electricity distributors contains a finding relevant to the Company's request. Hydro One did not file a specific smart meter investment plan or request approval of any associated amount in revenue requirement. In this situation, the Generic Decision provides that an amount determined as $0.30 per residential customer per month should be reflected in Hydro One's rates. The Board finds in this Decision that the recovery of this increase in the revenue requirement amount, as determined above, will be allocated to all metered customers and recovered through the applicable monthly service charge. This increment shall be reflected in the monthly service charges contained in the Tariff of Rates and Charges to be filed by Hydro One. The Board therefore rejects the Company's specific proposal for a variance account but notes that the Generic Decision on 2006 EDR specifies that capital and operating variance accounts will be established for smart meter expenses. The Decision states that the Board will provide specific details regarding the establishment of the accounts.

6.3.5 While the Board approves the proposed Standby Rates variance account, the Generic Decision provided that existing and proposed standby rates should be declared interim upon the effective date of the rates approved in this decision. Given that Hydro One proposes to introduce a standby rate, this rate shall be interim.

6.3.6 With respect to the proposed Loss of Revenue for Distributed Generation variance account, the Board's Generic Decision stated that it is premature at this time to establish such accounts and that this matter can be addressed at the time the Board considers a standard methodology for standby rates.

6.3.7 There were suggestions by intervenors for the Company to establish certain other deferral or variance accounts. The Board has dealt with these requests elsewhere in this decision. None of the suggestions were accepted by the Board.

# 7. RATE IMPACTS AND HARMONIZATION

Hydro One's evidence dealt extensively with the allocation of the revenue requirement to its customer groups and with the various other rates and charges. Intervenors either accepted or did not object to the Company's proposals, except on the matters of the Company's harmonization plans for the Acquired utilities and the proposed rates for line losses. The Board deals with these matters below as well as with the Company's proposals regarding rate mitigation.

## 7.1 ARE THE BILL IMPACTS AND MITIGATION PLANS APPROPRIATE?

7.1.1 The total bill impacts resulting from the Company's proposals were based on the commodity price for RPP eligible customers of 5¢/kWh for the first 750 kWh and 5.8¢/kWh over 750 kWh. For RPP ineligible customers, commodity costs were assumed to be 5.2 ¢/kWh when calculating the class average impact.

7.1.2 For Hydro One legacy customers, the requested change in the revenue requirement results in an approximate 6% increase in the total bill on average. The total bill increases on a class basis for legacy customers range from 2.0% to 6.4% depending on consumption as shown in the table below.

**Bill Impacts**

| Class | Monthly Consumption | Range | |
|---|---|---|---|
| | | Low | High |
| Residential | 1000 kWh | 3.3% | 6.4% |
| GS < 50 | 2000 kWh | 3.3% | 4.9% |
| GS > 50 | 100,000 kWh | 2.0% | 4.9% |

7.1.3 Hydro One's mitigation measures included the following:

- Recovery of balances in Regulatory Asset accounts over a four year period, instead of the two years contemplated the Board's Regulatory Asset Phase II Decision (RP-2004-0117/0118);

- Foregoing recovery of the revenue shortfall resulting from the establishment of the new Fixed Service Charge for unmetered scattered load for Acquired General Service customers; and

- Reduction to the proposed distribution rates for 19 Acquired LDC customer classes to reduce the impacts to an average level below 10%.

7.1.4 Hydro One appears to have approached rate mitigation in a relatively responsible and thorough manner including doubling the recovery period for Regulatory Assets.

7.1.5 Aside from the bill impacts resulting from the proposed harmonization process, no concerns were raised specific to the bill impacts resulting from the mitigation methodology outlined above. The Board finds the proposed rate mitigation plan for Hydro One legacy customers to be acceptable.

## 7.2 SHOULD RATES FOR ACQUIRED UTILITIES BE HARMONIZED?

7.2.1 Hydro One applied for approval to harmonize the distribution rates of the 87 acquired local utilities over a period of two years. Hydro One's proposed harmonization plan process entails the following steps:

1. Identify the Distribution revenue attributable to Acquired Residential customers for each Acquired LDC based on current rates and 2006 sales volumes;

2. Round service charges downward (e.g., $3.60 becomes $3.00), which serves to reduce the number of rate classes;

3. Determine the target fixed and volumetric rates that would be applicable to the Acquired Residential customers group recovering the current Distribution Revenue as calculated in Step 1 above. The target rates would be the weighted average rates for all Acquired LDCs;

4. Determine the incremental increase/reduction required to bring the rounded service charge to the target service charge;

5. Divide the increment into two (assuming a two year phase-in plan);

6. Apply the increment calculated in step 5 above to the rounded service charge to determine year one service charge;

7. Calculate year two service charge in the same manner as the target service charge calculated in step 3 above;

8. Determine a common volumetric charge for all Acquired LDCs to recover the remainder of Distribution revenue in each year of the plan.

9. Maintain two of Caledon's Residential rate classes in 2006 since they are similar to the Legacy Retail Residential normal density and seasonal rate classes in Hydro One's Legacy Retail group.

7.2.2 The first step of harmonization would result in 13 residential class rate groups and 20 general service class rate groups for the Acquired LDCs. After taking into account the mitigation plan to reduce bill impacts to 10% or less, an additional 16 residential rate groups and three general service rate groups would be created.

7.2.3 The first phase of harmonization proposed by Hydro One would result in 52 rate groups – 29 residential and 23 general service groups. Approximately 61,000 of the Acquired Residential customers would experience lower distribution rates while about 75,000 would experience higher rates.

7.2.4 According to Hydro One, the rationale for not harmonizing its legacy urban residential (UR) and urban general service (UG) customer class rates with those of the Acquired LDCs is that Hydro One's legacy rates are based on density

considerations whereas the acquired LDCs' rates are not. In order to undertake such harmonization, Acquired residential customers would first have to be assigned a density categorization. Cost allocation studies including density categorization are not part of the 2006 EDR process, but are associated with the Board's current Cost Allocation process.

7.2.5 Of all of the increases resulting from the implementation of Hydro One's Application, the proposed harmonization process would generate the greatest bill increases. Resulting bill impacts of over 10% drove Hydro One to propose mitigation for 19 of the Acquired Distributors. After mitigation, the bill impact of Hydro One's proposed harmonization plan would be below 10% for each customer class as a whole, but would generally exceed 10% for individual customers with relatively low levels of consumption. For a number of the acquired utilities, the impacts are greater than 10% for the residential customer groups with typical usage levels such as 750 and 1000 kilowatt hours. Customers of some acquired utilities would see such increases in both successive years of the harmonization plan, as Hydro One has applied for approval on both years of the plan in 2006 and 2007.

7.2.6 The Distribution Rate Handbook (the "Handbook") intends that the bill impact considerations be focused on distribution rate changes alone when approving a utility's revenue requirement to ensure the utility remains economically viable. However, as this particular harmonization process is a revenue allocation matter, it has no effect on revenue requirement and therefore has no impact on Hydro One's economic viability. As Hydro One notes "Hydro One, of course, is quite neutral in this exercise. In fact, it would be better off if the Board decided not to harmonize". The latter statement is associated with Hydro One's proposal to absorb about $300,000 in foregone revenue due to the mitigation.

7.2.7 While Hydro One submitted that the Handbook directs a utility that has acquired other utilities to harmonize their rates, the Board notes that Section 13.2 of the Handbook actually says "Distributors who have a merged, acquired, or

amalgamated service area … may file a rate harmonization plan." The Handbook is permissive in this instance because the Board expects distributors to take the timing of the harmonization and related circumstances into account.

7.2.8 Some intervenors took the position that rate harmonization and mitigation should take into account potential increases in commodity costs. If commodity costs are taken into account and the harmonization plan is implemented as requested, on May 1st some Acquired LDC customers could experience bill increases of 20% to 30% in the total bill.

7.2.9 Other intervenors were concerned about harmonizing rates before a cost allocation study is completed for the Acquired LDCs.

7.2.10 Concerns were expressed about the possibility that some customers might experience significant increases and decreases in their bills within a short period of time. For example, significant increases in distribution rates resulting from Hydro One's proposed harmonization plan could be followed by a significant rate reduction resulting from the cost allocation process, or conversely, a decrease could be followed by an increase after cost allocation analysis.

7.2.11 A harmonization plan needs to be supported by evidence that harmonization is necessary and the rates, which result from harmonization, will be reasonable. While the Board supports the harmonization of distribution rates in principle, the timing of harmonization is important. This is particularly true when the applicant is requesting approval for a harmonization process with significantly high bill impacts extending over a two year period.

7.2.12 The Board finds that Hydro One's proposed rate harmonization plan for the Acquired LDCs is premature. There is insufficient evidence to determine that resulting changes to individual Acquired LDC customers would be fair and reasonable based upon costs. Obviously rates for all Acquired LDC customers will increase as a result of the combination of the cost allocation process and harmonization with Hydro One's legacy customers. For these reasons, the Board

has not been convinced that sufficient merit exists to justify the proposed interim harmonization among Acquired LDCs alone, based on the yo-yo effect that some customers will see in their rates.

7.2.13 Harmonization is a utility process aimed at ensuring that all of a utility's customers share fairly in the utility distribution costs. This interim harmonization proposal by Hydro One does not appear to accomplish that objective.

## 7.3 ARE THE PROPOSED LINE LOSS FACTORS REASONABLE?

7.3.1 The term "distribution line losses" refers to the difference between the amount of energy delivered to the distribution system and the amount of energy consumed by customers.

7.3.2 Hydro One applied for two schedules of proposed Loss Factors to become affective May 1, 2006. One schedule is applicable to Hydro One's legacy retail customers and LV system-connected customers, and the other to Hydro One's Acquired LDCs.

7.3.3 In effect, there is no change between the proposed line loss factor schedules, and those currently in use. The issue in this case concerns the ongoing use of factors perceived by parties to be potentially flawed or inaccurate.

7.3.4 In RP-2002-0023, the Board directed Hydro One as follows: "For the longer term, the issue is the extent to which the current pooling of costs and customers in determining loss factors, as opposed to determining customer-specific loss factors, remains appropriate. The Board expects the applicant to review these issues further and report to the Board at the time of its next main rates filing."

7.3.5 Despite the Board's direction, Hydro One did not address the issue of customer-specific loss factors in its evidence, and questions regarding the appropriateness of the existing loss factors remain. Hydro One did contract with Kinetrics to

perform a line loss study of their distribution assets, the results of which were included in the prefiled evidence.

7.3.6 The Kinetrics study estimated slightly higher distribution loss factors than Hydro One is currently using and Hydro One did not propose any change at this time. Hydro One also proposed to undertake programs to reduce losses, which are discussed in Chapter 4 of this decision.

7.3.7 ECMI agreed with Hydro One that there should be no change to the current loss factors, but did so for entirely different reasons. ECMI cited two reasons why the Kinetrics study may not generate accurate results. First, Kinetrics relied upon 1980 load profiles in its study, which seemed inconsistent with a recent OEB-mandated load research project in conjunction with the 2007 Cost Allocation project. Second, Kinetrics relied largely upon evidence from the United States and Britain to evaluate non-technical losses, resulting in an increase in loss factors ranging from 0.28 to 1.2 percentage points.

7.3.8 When asked why meters could not be installed by Hydro One to more accurately determine individual line loss factors, Hydro One cited two primary reasons: firstly, the cost of doing so, which is approximately $80 million for approximately 3000 metering points; and secondly, the inability to reconcile meter readings taken on different reading dates over different reading periods.

7.3.9 The Board remains dissatisfied with the current application of distribution loss factors as a fair and reasonable allocation of costs to Hydro One's LV customers. The Board's thrust toward better cost allocation for electricity distributors in 2007 may be the catalyst for Hydro One to more accurately apportion line losses to specific customers in specific customer class.

7.3.10 The Board acknowledges that an $80 million program of metering to more accurately estimate line losses does not appear to be a prudent approach. The Board is of the view that either a less expensive metering program, or a second effort to evaluate line losses using current load data and local experience, may

provide loss factor estimates that are more acceptable and credible to stakeholders.

7.3.11 For these reasons and because of the Board's lack of confidence in the reasonableness of the historic load data used in the determining the factors by Kinetrics, the Board agrees with the recommendation of Hydro One and ECMI to leave the loss factors unchanged at this time.

7.3.12 The Board expects Hydro One to continue its efforts to refine line loss factors as they affect the bills of individual LV customers. This may become a more expressed requirement as part of, or following, the upcoming 2007 OEB cost allocation review process.

# 8. RATE IMPLEMENTATION AND COMPLETION OF THE PROCEEDING

8.1.1 The only changes to the Company's proposals are those associated with the Board's finding to recalculate the interest for AFUDC, the pension costs deferral account and the MEU rate mitigation account. In addition, Hydro One's revenue requirement will increase by $0.30 per residential customer per month as outlined in Chapter 6 of this decision, a result of the Board's generic decision on Smart Metering. The proposed allocation of the distribution revenue requirement to the various customer groups has been accepted by the Board, with the exception of the Company's proposal to harmonize the rates for the Acquired utilities. The Company's other proposed rates and charges are also accepted by the Board.

8.1.2 The Board directs the Company to file with the Board and all intervenors of record a draft rate order and its Tariff of Rates and Charges to reflect the Board's findings in this decision. The Tariff schedule shall have an effective date of May 1, 2006 and shall be final with the exception of the Standby Rate which shall be interim. The Company shall consult with Board Staff as to the form of the Tariff schedule so as to be consistent with the form approved or to be approved for the other electricity distribution utilities. Intervenors shall have five calendar days to respond to the Company's draft Rate Order. The Company should respond as soon as possible to any comments by intervenors.

8.1.3 A number of intervenors eligible for costs awards requested costs. These intervenors shall file their costs statements with the Board and Hydro One by April 27, 2006. Hydro One may respond by May 12, 2006 and intervenors may reply by May 29, 2006. Hydro One shall also pay the Board's costs upon receipt of the invoice.

**DATED** at Toronto, April 12, 2006

ORIGINAL SIGNED BY

Pamela Nowina
Vice Chair and Presiding Member

ORIGINAL SIGNED BY

Paul Vlahos
Member

ORIGINAL SIGNED BY

Bob Betts
Member

**APPENDIX 1**

# HYDRO ONE NETWORKS INC.

## 2006 DISTRIBUTION RATES

## DECISION WITH REASONS

## BOARD FILE NO. RP-2005-0020/EB-2005-0378

## PROCEDURAL DETAILS INCLUDING LISTS OF PARTIES AND WITNESSES

**April 12, 2006**

# PROCEDURAL DETAILS INCLUDING LISTS OF PARTIES AND WITNESSES

## THE PROCEEDING

On August 30, 2005, the Board issued a Notice of Application which was published and served in accordance with the Board's direction.

The Board issued Procedural Order No.1 on September 28, 2005, establishing the procedural schedule for a number of events prior to the oral hearing. These events included:

- Issues conference on October 4, 2005;
- Issues Day on October 7, 2005;
- Written interrogatories to the Applicant by October 18, 2005;
- Written interrogatory responses from the Applicant by November 1, 2005;
- Intervenor evidence filed by November 11, 2005.

On Issues Day, the Board heard submissions from the School Energy Coalition, Green Energy Coalition, Pollution Probe, the Schools Energy Coalition, the Low Income Energy Network, Consumers Council of Canada, Canadian Manufacturers and Exporters, the Vulnerable Energy Consumers Coalition, Energy Probe and Toronto Hydro Electric System Limited.

The Board issued Procedural Order No.2 on October 18, 2005, which included the Board's decision on the contested issues identified on Issues Day. The Issues List for the proceeding was attached to Procedural Order No. 2. The Board reminded parties that it considered the current Issues List to be a list of topics and expected a refined list of actual issues to be presented to the Board before the commencement of the oral hearing.

Procedural Order No. 2 also included the following scheduling dates:

- Filing of supplemental evidence by the Applicant on Line Loss Spending by October 21, 2005.
- Filing of written interrogatories to the Applicant on the Line Loss filing by October 26, 2005;
- Extending the date for submission of intervenor evidence to November 18, 2005.

The Board issued Procedural Order No.3 on November 16, 2005, which set the date for the Settlement Conference for November 28, 2005 and included the Board's direction that the Issues List be refined into a list of actual issues that the Board must determine. The Board set a filing date for the Settlement Proposal and/or refined issues list of December 15, 2005. A date of January 9, 2006 was set for the commencement of the oral hearing.

The Board received written evidence from the City of Sudbury on November 11, 2005.

Procedural Order No. 4, issued on November 30, 2005, outlined the interrogatory process for the evidence filed by the City of Sudbury. Interrogatories were due on December 2, 2005 and responses due on December 9, 2005.

The Board issued Procedural Order No. 5 on December 19, 2005 which included the revised Issues List and also provided the specific dates in January and February that the Board would not be sitting.

**PARTICIPANTS AND REPRESENTATIVES**

Below is a list of participants and their representatives who were active either at the oral hearing or at another stage of the proceeding. A complete list of intervenors is available at the Board's offices.

| | |
|---|---|
| Board Counsel and Staff | Donna Campbell<br>Jennifer Lea<br>Harold Thiessen<br>Nabih Mikhail<br>Chris Cincar<br>Duncan Skinner |
| Pollution Probe | Murray Klippenstein |
| ECMI – Coalition of Small and Medium Sized Distributors | Roger White<br>Andrew Bateman |
| Consumers Council of Canada (CCC) | Robert Warren |
| Green Energy Coalition (GEC) | David Poch |
| Canadian Manufacturers & Exporters (CME) | Brian Dingwall |
| Energy Probe | David Macintosh<br>Tom Adams |
| School Energy Coalition (SEC) | Jay Shepherd<br>Darryl Seal |
| Vulnerable Energy Consumer's Coalition (VECC) | John DeVellis<br>Bill Harper |
| Federation of Northern Ontario Municipalities and the City of Timmins (FONOM) | Peter Scully |
| Federation of Ontario Cottagers Association (FOCA) | John McGee |
| City of Greater Sudbury | Peter Ruby<br>Michael Stewart |
| Power Workers Union (PWU) | Richard Stephenson<br>Judy Kwik |
| Inergi Inc. | Philip Tunley<br>Mayank Sharma |

**WITNESSES**

There were 22 witnesses who testified at the oral hearing.

The following Company employees appeared as witnesses at the oral hearing:

| | |
|---|---|
| Stanley But | Manager, Economics and Load Forecasting |
| Allan Cowan | Manager, Business Planning and Analysis |
| Steven Vance | Manager, Process Management |
| George Juhn | Manager, Lines and Right of Way Programs |
| Raymond Gee | Director of Work Management and Technical Services Customer Operations |
| George Carleton | Director, Business Integration Asset Management |
| Mike Penstone | Director, System Investment |
| Kevin Thompson | Manager, Business Planning |
| Mark Fukuzawa | Director, Customer Care |
| Sandy Struthers | Chief Information Officer |
| Don McInnes | Senior Manager, Contract Management |
| Greg Van Dusen | Director, Corporate Accounting Policies and Systems |
| Ian Innis | Manager, Regulatory Finance |
| Frank D'Andrea | Manager, Financial Reporting and Accounting Policy |

| | |
|---|---|
| Judy McKellar | Director, Human Resources |
| Debra Vines | Manager, Compensation and Benefits |
| Ali Suleman | Vice President and Treasurer, Hydro One Inc. |
| Andy Poray | Director, Regulatory Policy and Support |
| Michael Roger | Manager, Strategic Support Distribution |

In addition, the Company called the following witnesses:

| | |
|---|---|
| Howard Gorman | Principal, R. J. Rudden Associates Inc. |
| Robert O'Brien | Principal, R. J. Rudden Associates Inc. |

Witnesses called by intervenors:

| | |
|---|---|
| David Courtemanche | Mayor, City of Greater Sudbury |

# 11

***School Energy Coalition (SEC) INTERROGATORY #14 List 1***

***Interrogatory***

Ref: C1/2/5: Customer Care OM&A:

a. C1/2/5- please file a copy of the contract with Inergi LP.

b. How much of the $103.8 million budget for Customer Care OM&A is forecast to be paid to Inergi LP and how much represents internal HON costs?

***Response***

a. Hydro One Networks files a copy of the Outsourcing Agreement Contract with Inergi LP as Attachment A.

b. Of the $103.8 million budget for Customer Care in 2008, $40.5 (39%) million is forecast to be paid to Inergi, for services provided including billing, call handling, collections and settlements. In addition, the majority of Regulatory Compliance project spending of $3.6 million and a portion of the $2.6 million Service Enhancement spending is forecast to be paid to Inergi for project implementation services.

The internal HON costs represent $34.4 million of the Customer Care OM&A, and include meter reading, field disconnect or related orders, and a portion of customer care management. The balance of the Customer Care work program costs represent 3rd party services ($9.8 million) for items such as postage, telephone and bill remittance services, and bad debt ($13.0 million).

# Attachment A

## Outsourcing Agreement Contract
## Inergi LP

Attachment A - Hydro One Networks redacted version of the Outsourcing Agreement Contract with Inergi LP available only in paper copy

The contract is available on request to –

Glen MacDonald – 416 345 5913
Anne-Marie Reilly – 416 345 6482

# 12

***School Energy Coalition (SEC) INTERROGATORY #6 List 1***

***Interrogatory***

**Ref:** [Ex. A/9/2. Attach 1] With respect to the Q1 report

a. Please advise when the Q2 report will be available, and provide a copy at that time.

b. P. 4. Please provide a copy of the commitment letter or other main document setting out the terms of the current syndicated facility.

c. P. 7. Please provide the new Inergi Agreement, with a list of all changes from the existing agreement.

d. P. 8. Please provide the results of the parallel tracking of CGAAP vs. IFRS for the first six months of 2010.

***Response***

a. The Q2 consolidated financial report is available as Attachment 1 to this Interrogatory Responses.

b. Attachment 2 is a copy of the commitment letter setting out the terms of the current syndicated facility.

c. A copy of the redacted contract will be filed in paper form.

d. Hydro One has been tracking certain CGAAP versus IFRS differences to enable to the Company to report its 2010 financial results on an IFRS basis when it was expected to implement IFRS effective January 1, 2011. This implementation date could be deferred as the Canadian Accounting Standards Board recently issued an Exposure Draft proposing that rate regulated utilities have the option to defer IFRS implementation for two years until 2013.

Hydro One has tracked depreciation of its in-service assets on a comparative CGAAP and IFRS basis. While no increase in depreciation expense was included in Hydro One's 2012 application, Hydro One Transmission's IFRS depreciation expense for fiscal 2010 is currently forecast to be higher than comparative CGAAP depreciation by approximately $4.6 million. This reflects the impact of changing from group depreciation to an IFRS-compliant straight-line item procedure method.

Hydro One continues to assess the OM&A impact expected to result from moving to an overhead accounting method that is consistent with IAS 16, the IFRS that governs the costing of property, plant and equipment. Hydro One is still in the process of finalizing its determination of which specific expenditures will be capitalizable under IFRS.

Other potential changes between IFRS for external reporting and CGAAP could still result but, due to uncertainties with respect to the outcome of the International Accounting Standards Board's project on accounting for rate regulated activities, we are awaiting further guidance to track these items.

# 13

# OUTSOURCING

## 1. INTRODUCTION

Hydro One relies on two main outsourcing arrangements in the operation of its businesses, one with Inergi LP ("Inergi") and another with Brookfield Asset Management.

## 2. INERGI LP

### 2.1 Background

Following a competitive procurement process, on March 1, 2015, Hydro One began a new services arrangement with Inergi ("Inergi Agreement"), a limited partnership wholly-owned by Capgemini Canada, which is held by Capgemini SA. The Inergi Agreement has a 58-month term and can be extended twice, at Hydro One's option, for additional one-year periods. Financial and performance guarantees have been provided by Inergi's affiliates.

In its procurement process, Hydro One retained an outsourcing advisory firm, Information Services Group, to assist in the design of the overall sourcing strategy and procurement process and supported the selection and negotiation processes.

### 2.2 Scope of Work

The scope of work under the Inergi Agreement is comprised of services ("Base Services") and project services performed over a finite period to produce a project deliverable, solution or result ("Project Services"). Base Services are divided into the

following areas (individually, a "statement of work" or a "SOW"), each of which relates to a line of business within Hydro One: (1) information technology services; (2) settlements; (3) supply chain services; (4) payroll; and (5) finance and accounting services. Supply chain services, excluding accounts payable, are recovered through the material surcharge rate, which is discussed in detail in section 2.3 of Exhibit C1, Tab 5, Schedule 1. Customer service operations is also a SOW under the Inergi Agreement, however it is not being considered in this Application as these services are not provided to Hydro One Transmission. Appendix A contains the descriptions of Base Services contracted for each SOW.

## 2.3 Fee Structure

Appendix B to this Exhibit sets out the outsourcing fees spent in historical period of 2013-2015.

Under the new Inergi Agreement, Inergi provides Base Services based on a declining fee structure. Fees for Base Services will decline over time so long as transaction volumes remain within normal volume ranges, as defined in the Inergi Agreement, while meeting or exceeding prevailing service levels. Additional charges apply if there are higher transaction volumes than the prescribed volumes. Conversely, Hydro One is entitled to fee credits if transaction volumes are lower than prescribed volumes.

Fees are subject to an economic cost adjustment ("ECA") using a government published index that reflects movements in a broad-based consumer-focused price index. The current index being used is "CPI - Ontario excluding Energy". The ECA is adjusted for inflation sensitivity as well.

The Inergi Agreement provides for optional benchmarking reviews of fees by an independent third party, the costs of which are borne equally by Hydro One and Inergi. The third party analyst is selected from a predetermined list included in the Inergi Agreement. The new agreement allows for continued competitive benchmarking cycles, but without restrictions on when the benchmarking can take place. Further, benchmarking can be undertaken at a SOW-level, rather than at a global level. The benchmarking exercises will use a group of peers who operate in a unionized, Ontario-only environment. The benchmarking arrangement retains the "automatic" feature of the previous agreement: if the benchmarking determines that Inergi fees are above the benchmark, Inergi must adjust its fees to the benchmark price.

## 2.4 Service Quality Assurances

The Inergi Agreement sets out a methodology to measure Inergi's performance, which includes defined service levels or performance indicators ("PIs") and client satisfaction surveys. Inergi's services are measured regularly (monthly, quarterly, and yearly) for achievement of PIs. The PIs vary based on the nature of the service in question and set both minimum and targeted service levels. When Inergi fails to meet certain PIs, Hydro One is entitled to either: (a) a service credit(s) calculated in accordance with predetermined formulae, (b) at Inergi's cost, remediation action based on a remediation plan that Hydro One has approved, or (c) both, depending on the level of criticality and frequency of such failures.[1] The PIs are adjusted upwards annually, where applicable, to drive continuous improvement. Inergi's performance for the contract life-to-date as of February 2016 met or exceeded 94% of all PIs for all SOWs.

[1] Termination of individual statements of work or any part thereof is allowed under defined circumstances without payment of any penalties or termination charges.

Inergi performs client satisfaction surveys of Hydro One's relevant business managers and internal users. Inergi must address dissatisfaction revealed by the surveys. Together, the parties are to identify opportunities and strategies for responding to any issues the surveys reveal. The scores of these surveys have recently been 3.36 out of 5 for Base Services and 4.16 out of 5 for Project Services and service desk support.

## 2.5 Continuous Improvement, Innovation and Transformation

The Inergi Agreement includes a continued commitment to continuous improvement, including a new process to proactively and continuously introduce global best practices from Capgemini to Hydro One. In addition, the Inergi Agreement introduced an annual requirement in the information technology services SOW to submit innovation proposals for commercially reasonable projects offering demonstrable savings to Hydro One.

Hydro One contracted for Inergi to deliver agreed changes under a transformation program. These projects target specific improvements in areas to increase operational efficiency of the services delivered by Inergi and increasing value to Hydro One across the business units. The program will further promote sustained continuous improvement and quality management. Key active projects highlighting benefits to Hydro One include: 1) implementation of SAP Close Cockpit to improve transparency and efficiency of financial period closing processes; 2) deployment of "service asset and configuration management and service catalogue", an information technology initiative aimed at improving the way applications and services are delivered to end-users; 3) implementation of a spend analytics and insight tool, driving visibility to corporate spending, which will allow the company to source strategically and buy smart to achieve savings.

## 2.6 Governance

The Inergi Agreement sets out a governing structure to manage the parties' relationship, which includes a joint executive committee, a joint governance committee, a joint SOW service strategy committee, a joint SOW services delivery oversight committee, and a joint project services oversight committee. These committees meet regularly, at different intervals, to ensure strategic alignment between the parties, oversee relationship, review Inergi's global business strategies, review operational and project performance, change management, continuous improvement, and address any risks and issues. The governing structure includes processes that have been tailored to monitor and derive value in areas of finance, compliance, performance etc. These processes have also been enhanced to provide greater integration with Hydro One's lines of business.

# 3. BROOKFIELD

## 3.1 Background

Following a competitive procurement process, and in accordance with terms of a purchased services agreement with the Power Worker's Union, on January 1, 2015, Hydro One began a new services arrangement (the "BGIS Agreement") with Brookfield Johnson Controls Canada ("BJCC"), a joint venture between Johnson Controls and Brookfield. Effective February 19, 2015, Brookfield Asset Management subsequently acquired the interest of Johnson Controls in BJCC and re-branded the entity as Brookfield Global Integrated Solutions ("BGIS"). BGIS is a wholly-owned subsidiary of Brookfield Asset Management.

The BGIS Agreement has a 10-year term, which can be extended at Hydro One's option for an additional three years. In its procurement process, Hydro One retained an

outsourcing advisory firm, Information Services Group, to assist in the design of the overall sourcing strategy and procurement process. Information Services Group also supported the firm selection and final negotiation processes.

### 3.2 Scope of Work

The scope of work under the BGIS Agreement is comprised of ongoing daily facilities management, accommodation activities and related maintenance and repair work at its operations centres, transmission stations facilities, distribution stations, administration facilities and rights of way locations. The BGIS Agreement also includes capital project management services related to new facilities as defined by Hydro One.

### 3.3 Fees

BGIS receives an annual management and administrative fees which include overhead and profit. This fee is adjusted annually for inflation in accordance with the consumer price index and as necessary in the event of material changes in the scope of the work. Built into the fee structure are incentives for BGIS to achieve cost savings.

Works and services that are self-performed by BGIS, and supplies and services provided by third parties through BGIS, are billed to Hydro One at full cost, as a pass through expense with no mark up.

Fees are subject to an economic cost adjustment using a government published index that reflects movements in a broad-based consumer-focused price index.

Hydro One may request third party benchmarking after three years and every two years thereafter, with a "benchmark fee adjustment", if the aggregate fees are above five percent of the target results.

### 3.4 Service Quality Assurances

The BGIS Agreement provides for critical service levels (CSLs), key performance measures (KPIs) and critical deliverables. BGIS's services are measured and reviewed regularly (monthly, quarterly and annually) to validate achievement of KPIs.

The CSLs and KPIs are based on the nature of the services provided by BGIS and set forth both expected and minimally accepted service levels. If BGIS fails to meet specific criteria, there are adverse financial consequences for BGIS.

BGIS performs client satisfaction surveys of Hydro One's relevant internal user. Results are measured with expected thresholds and reviewed regularly with Hydro One.

### 3.5 Continuous Improvement and Governance

The BGIS Agreement includes shared savings incentives which are directly attributable to process or service improvements made by BGIS.

As one of the world's leading commercial property owners, BGIS is able to leverage their capabilities and global reach of their broader organization to bring innovation and create value for clients.

The BGIS Agreement sets out a governing structure to manage the parties' relationship, which includes an executive steering committee, contract oversight committee and the

line of business facility management committee. These committees meet regularly, at different intervals, to ensure strategic alignment between the parties, oversee relationship, review operational and project performance, change management, continuous improvement, and address any risks and issues. The processes have also been enhanced to provide greater integration with Hydro One's lines of business.

# APPENDIX A: OUTSOURCING

| SOW | Service Description |
|---|---|
| Information Technology Services | End User Support services – Service desk serving as a single point of contact for Hydro One staff and providing a range of access options: phone, web, chat, email, and a service request portal. Manage incidents, problems and change to resolution.<br><br>Desktop Services – Desk side/remote/depot support to handle break fix, installs, moves, adds change and removal spanning hardware, operating systems, application software, software packaging/software publishing, etc.<br><br>Messaging Services – Range of messaging services provided spanning email, mobile, text that includes account administration, end-user support, directory access, usage management, capacity management, etc.<br><br>File and Print Services – Range of services managing file and printer/copiers across the Hydro One locations, including administration, performance, capacity, issue, problem, change, technical support, certification, etc.<br><br>Project Delivery Services – Range of project management/execution services that span all services and domains.<br><br>Innovation and Continuous Improvement – Methods, structure and process to improve business processes and service delivery.<br><br>Data center management services, data centre facility management, data center network services, server management services, database management, storage management, asset management – Range of services provided to manage/engineer the computing network infrastructure, availability, capacity, performance, protection/security, disaster recovery, contingency, data back-up/recovery, incident, problem, change, host intrusion & detection, etc.<br><br>Application Management, SAP BASIS Support, Monitoring Services – Range of services provided to manage application availability, interfaces, capacity, performance, access, incident, problem, change, etc. |

| SOW | Service Description |
|---|---|
| Settlements | Wholesale Settlements – Provide settlement and reconciliation services for power procured from the Independent Electricity System Operator and embedded retail generators with due consideration to legislative initiatives for fixed energy prices for low volume customers, transmission revenues and inter-utility load transfers, and cost of power reporting.<br><br>Retail Settlements – Provide complex billing for interval meter accounts. |
| Supply Chain | Maintain market intelligence of applicable commodities, source commodities and services, manage and develop supply strategies (strategic sourcing), process purchase transactions, monitor spend on all commodities and services. |
| | Services supporting the execution of daily transactions, maintenance and development of job aids, training, provision of audit files for compliance, quality checks and records management. |
| | Provision of order desk, expediting services, inspection services, general inquiries and transportation. |
| | Provision of support systems, statistical and data reporting. |
| | Services required for processing disbursements which include: invoice processing, payments management, accounts payable inquiries support, period-end reconciliations, management reporting and special projects. |
| Payroll | Services necessary to calculate all pay cycles, remit pay to all staff and pensioners, remit deductions to the appropriate authorities and organizations, and to provide appropriate supporting documentation and filing systems. |
| | Payroll accounting necessary to account for the pay cycles and to provide appropriate supporting documentation. |
| | Inquiries and application support services, including tool support and issue resolution. |
| | Contingency responsibilities to deal with eventualities which disrupt pay, such as system outages and inclement weather. |

| SOW | Service Description |
|---|---|
| Finance and Accounting Services | General Accounting – Ensuring financial recognition consistent with corporate requirements, accounting adjustments, processing of transactions, and support of financial systems. |
| | Services required for processing non-energy miscellaneous billings and accounts receivable which include: customer invoicing, customer collections support, applying accounts receivable payments and adjustments, accounts receivable inquiries support, period end and reconciliation, and management reporting. |
| | Provide fixed assets and project costing transaction processing, transfer of projects to fixed assets, recording sales and retirement of assets, minor fixed assets inventory certification, and depreciation analysis. |
| | Provide advice, guidance, consultation and project support on routine operating processes and business support initiatives for areas such as regulatory accounting, primary revenue and cost of power, actuarial support, and planning and budgeting. |
| | Provision of "centre of excellence" for analysis and reconciliation of general ledger accounts ensuring appropriate financial recognition according to corporate and legislative requirements. Also support and analysis for accounts that cross into other domains e.g. vendor master, material master, and fixed assets. |

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# APPENDIX B

## Table 1 - Summary of Contract Fees ($ Million)

| | Historic | | | Bridge | Test | |
|---|---|---|---|---|---|---|
| **Description** | **2013** | **2014** | **2015** | **2016** | **2017** | **2018** |
| Fees for Base Services | $128,286,028 | $119,869,783 | $127,436,383.16 | $131,938,400.98 | $127,455,555.16 | $124,587,512.42 |
| Volume, Scope & Other | $13,741,856 | $14,018,401 | $20,055,300.24 | $9,188,774.79 | $11,263,363.56 | $11,080,650.29 |
| ECA | $6,420,890 | $9,550,484 | $1,828,520 | $2,602,164.04 | $5,206,312.15 | $7,392,131.11 |
| **Subtotal Fees for Base Services** | **$148,448,774.75** | **$143,438,667.90** | **$149,320,203.49** | **$143,729,339.81** | **$143,925,230.88** | **$143,060,293.82** |
| Project Spend (all LOB's) | $56,763,827.44 | $84,464,566.38 | $65,264,996.70 | $25,704,782.76 | $13,506,713.57 | $15,488,046.93 |
| **Total Payments** | **$205,212,602.19** | **$227,903,234.28** | **$214,585,200.19** | **$169,434,122.57** | **$157,431,944.45** | **$158,548,340.75** |

## Table 2 - Allocation of Fees to Transmission ($ Million)

| | 2016 | 2017 | 2018 |
|---|---|---|---|
| Finance and Accounting | $3,607,813.13 | $3,472,278.73 | $3,542,558.68 |
| Payroll | $1,888,659.05 | $1,886,830.57 | $1,928,234.58 |
| Information Technology Services | $25,785,206.62 | $25,584,696.28 | $25,185,457.97 |
| Accounts Payable | $601,030.04 | $577,433.37 | $587,873.80 |
| Settlements | $429,305.70 | $438,437.10 | $451,017.20 |
| **Subtotal Fees for Base Services** | **$32,312,014.54** | **$31,959,676.06** | **$31,695,142.23** |
| Project Spend (all LOB's) | $2,976,613.84 | $1,564,077.43 | $1,793,515.83 |
| **Total Payments** | **$35,288,628.39** | **$33,523,753.49** | **$33,488,658.06** |

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***School Energy Coalition (SEC) INTERROGATORY #20***

**Issue 3.1** **Are the levels of planned operation, maintenance and administration expenditures for 2015-2019 appropriate, and is the rationale for the planning choices appropriate and adequately explained?**

***Interrogatory***

**Reference: Exhibit C1/Tab 2/Schedule 7**

Please provide a copy of the agreement between the Applicant and Inergi.

***Response***

A copy of the redacted agreement will be filed as Attachment 1 in paper form, similar to what Hydro One filed in past proceedings.

# 15

**Ontario Energy Board**

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

Ontario

**EB-2013-0416**

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

**AND IN THE MATTER OF** an application by Hydro One Networks Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2015, each year to December 31, 2019.

# DECISION AND ORDER
# ON
# CONFIDENTIALITY AND MOTION

**August 25, 2014**

Hydro One Networks Inc. ("Hydro One") filed a cost of service rate application with the Ontario Energy Board (the "Board") on December 19, 2013 under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that Hydro One charges for electricity distribution, to be effective January 1, 2015 and each year thereafter to December 31, 2019. The Board issued a Notice of Application and Hearing dated January 24, 2014. Hydro One supplemented its application with additional material filed January 31, 2014 and with an evidence update filed on May 30, 2014.

This decision and order deals with two matters: Hydro One's request for certain documents filed in the proceeding to be held in confidence, and a motion filed by an intervenor, the School Energy Coalition ("SEC"). Through Procedural Orders 4 and 5, the Board made provision for argument to be filed regarding Hydro One's request for confidential treatment, and on the SEC motion. All filings related to the request and the motion are available on the Board's website under file EB-2013-0416.

## 1. Request for Confidential Treatment

It is the Board's general policy that the record of a proceeding should be open for inspection by any person unless disclosure of information is prohibited by law. The Board's proceedings should be open, transparent and accessible. Placing materials on the public record is the rule and confidentiality is the exception, and the onus is on the person requesting confidentiality to demonstrate why confidentiality is appropriate. The Board's *Practice Direction on Confidential Filings* seeks to balance this principle with the need to protect information that has been properly designated as confidential. By letter dated July 17, 2014 Hydro One listed and described eight documents for which it was seeking confidential treatment. The Board, and counsel and consultants for intervenors who have signed the Board's Declaration and Undertaking, have received copies of these documents. The intervenor Energy Probe Research Foundation ("Energy Probe") was the only party that filed a response to the request.

a) Financial information protected by securities law

For the first three documents (attachments to the interrogatories 1.1 CCC 3, 1.1 SEC 1 and 2.6 Staff 36), Hydro One requested confidentiality on the basis that the documents contained non-public, forward-looking financial information that securities law requires be kept confidential. As indicated in section 6 of Appendix B of the Board's *Practice Direction*, the Board generally accords confidential treatment to such information, and will do so in this case.

b) IHS reports

The next four documents, provided as attachments to interrogatory 2.6 SEC 8, were described as non-public, proprietary reports prepared for Hydro One by a third party, IHS. A letter from IHS, attached to Hydro One's submission on confidentiality dated August 8, 2014, indicated that the reports contain a model which is exclusive and proprietary to IHS, represents significant work by IHS, and has considerable commercial value. While IHS consents to the disclosure of the model to the Board and parties to the hearing, public disclosure of the model would result in financial injury to IHS and cause that company to suffer a competitive disadvantage.

Energy Probe, opposing the request for confidential treatment of the reports, argued that the forecast filed in confidence has been superseded by a later forecast and has therefore questionable commercial value.

The Board will grant confidential treatment to the IHS reports. The Board accepts that the reports contain a proprietary model belonging to a third party, which if publicly disclosed could cause financial and competitive harm to that party.

c) Outsourcing RFP

The final item for which Hydro One sought confidential treatment in its letter of July 17 was an outsourcing Request for Proposals requested in interrogatory 3.1 SEC 22. Initially, Hydro One declined to provide the RFP, on the basis that it does not contain cost information but contains sensitive information about the utility which was provided only to pre-screened applicants. However, in its submission of August 8, Hydro One indicated it would file a copy of the RFP, and requested confidential treatment for the document.

Energy Probe submitted that the RFP should remain confidential only until the result of the outsourcing process is complete. Hydro One responded that the document contains commercial and technical material, public disclosure of which at any time would compromise the security of Hydro One's operations. Hydro One further submitted that the document had little probative value to the proceeding.

While the Board appreciates the need for confidential treatment of information which would compromise the security of a utility, the principle that information should be placed on the public record unless such disclosure is prohibited by law is important in maintaining the integrity of Board processes. The Board will require Hydro One to file on the public record a copy of the RFP, once the RFP process is complete, having removed information that would actually compromise security.

## 2. SEC Motion

The motion, filed by SEC on July 29, 2014, sought the production from Hydro One of documents that were not provided, or provided only in redacted form, in answer to certain interrogatories.

a) Customer satisfaction study

In response to interrogatory 2.6 Energy Probe 23(b), Hydro One filed copies of a customer satisfaction benchmarking study that it had commissioned. The names of utilities used as comparators were redacted. Hydro One submitted that the identities of the other utilities should not be provided, even on a confidential basis. Hydro One's pollster surveyed the customers of the utilities without the knowledge of those utilities, and Hydro One submitted that disclosure of the utility names would deter future benchmarking, and harm Hydro One's relationship with those utilities. Further, Hydro One submitted that the identity of the utilities is not relevant, as only Hydro One's relative performance to the peer group is needed for the Board and parties to understand the results of the surveys.

SEC submitted that the identities of the comparator utilities is relevant to allow the Board and parties to understand what organizations Hydro One is treating as comparators, and the appropriateness of that comparison. SEC argued that the absence of consent from the other utilities is no reason to refuse disclosure, as a pollster has the right to contact and survey customers in any utility's service territory if the customers agree to participate. No information belonging to the other utilities was included in the study, and the utilities would have no claim to confidentiality over the information provided by customers.

The Board finds that the identity of the utilities whose customer satisfaction was compared to that of Hydro One is relevant. Where benchmarking evidence is provided, it is important to understand whether the peer group selected provides an appropriate basis for comparison to the target utility. However, the Board finds that attribution of the results to a specific utility, other than Hydro One, is not necessary. The Board will therefore not require Hydro One to file an unredacted version of the study. The Board requires Hydro One to file, as a supplement to interrogatory 2.6 Energy Probe 23b, a list of the comparator utilities used in the study.

Energy Probe submitted that the identity of the peer group should remain confidential. The Board will provide confidential treatment for the list of comparator utilities.

b) Benchmarking study of Inergi fees

In response to interrogatories 3.1 SEC 21, 4.2 Staff 63a and 4.2 Energy Probe 33a Hydro One filed a copy of an ISG benchmarking review of Inergi fees, with the fee and unit cost amounts redacted. Hydro One indicated that disclosure of pricing would harm Hydro One in regard to its negotiations with other vendors, and harmful to Inergi's relationships with its other customers. Further, Hydro one submitted that the actual unit pricing of outsourced services is unnecessary, as aggregate spending information has been filed on the record.

Hydro One filed a letter from Inergi, which objected to the disclosure of the document, even on a confidential basis, except as redacted by Inergi. Inergi stated that disclosure of the redacted pricing information would be irreparably harmful to Inergi's relationship with its customers, and prejudice significantly its competitive position in future competitions for business. Inergi argued that the redaction of the unit costs does not alter the meaning of the study, as the benchmarking methodology and conclusions are available to all parties.

SEC argued that the redacted version of the study is not adequate as it does not show the numbers which are the underlying basis for the conclusions of the study. The fact that Hydro One has a confidentiality agreement with Inergi, or that Inergi objects to the release of the redacted information, does not remove Hydro One's obligation under the Board's *Practice Direction* to produce an unredacted copy of the study and seek confidential treatment if it chooses to do so.

The Board has confirmed many times that a confidentiality agreement between a regulated utility and a service provider does not prevent the Board from requiring disclosure of information on the public record. The fact that the ISG benchmarking study is subject to confidentiality restrictions in the service agreement between Hydro One and Inergi is not a sufficient reason for accepting a redacted version of the report. The Board finds merit in the argument that the unit prices and other figures which are the foundation of the conclusions of the study are necessary for a full understanding of the results. The Board will require Hydro One to refile the study with pages 7, 21 and 22 of the slide deck unredacted. The Board does not require that the redacted names and signatures be provided.

The Board will provide confidential treatment for the refiled study. Energy Probe argued that the majority of the redacted information should appear on the public record. However, the Board recognizes the concerns of Inergi regarding public dissemination of unit price information, and will keep this information confidential.

c) Budgeted in-service capital additions

Interrogatory 3.2 SEC 25 asked for a table of actual v. Board approved/budgeted in-service additions for 2010 – 2014. Hydro One provided the information for 2010 and 2011, but explained that there were no Board-approved amounts in 2012 – 2014 as Hydro One was operating under an incentive regulation mechanism in those years. SEC then sought the internal budgeted amounts for those years. Hydro One in its submission argued that the request was excessive and invasive, as some information should be kept within the utility. Further, the information is not relevant as annual reporting and other mechanisms exist to monitor Hydro One's performance against the plan.

SEC submitted the budget information is relevant, as it will enable the Board to see whether Hydro One has executed its capital plan in those years, which is some indication of whether its forecast of capital expenditures in this application can be relied upon. SEC noted that similar information has been provided by other utilities.
The Board finds that a comparison between budgeted capital additions and actual capital additions is relevant to its assessment of Hydro One's capital plan going forward. The Board will require Hydro One to produce the budgeted capital additions for 2012, 2013 and 2104. Hydro One may choose to seek confidential treatment for these numbers if the company believes confidential treatment of the information is warranted.

d) Internal audit reports

Through interrogatories 4.2 SEC 35 and 6.1 SEC 84, SEC sought copies of internal audit reports for 2010 – 2014 for material OM&A and capital expenditures. Hydro One refused to provide them on the grounds that the reports are for internal use only, intended to provide information and assistance to Hydro One management regarding controls on high risk processes and internal operations across the company. The reports include details which Hydro One states are not relevant to the rate proceeding.

However, Hydro One, in its submission of August 8, offered to provide summaries of the relevant audit reports containing details of the subject matter and recommendations of the reports, as well as the action Hydro One has taken in response to the reports and the status of the implementation of the actions.

SEC argued that the internal audits will provide the Board and parties with information to test the prudence of capital and O&M spending for past and future years, and the cost-effectiveness of the execution of Hydro One's projects. SEC submitted that the provision of summaries containing the information that was required to be produced in the decision on a motion in EB-2013-0326 is insufficient, given the broad mandate of the Board in setting electricity rates and the request of Hydro One for approval of past capital expenditures included in its 2015 rate base.

The Board finds that the summaries proposed to be filed by Hydro One are adequate for the Board's purposes in this case. The Board is interested in understanding the recommendations made and actions taken in areas of Hydro One's business relevant to this application. The Board will not require Hydro One to produce the actual internal audit reports. Hydro One may choose to seek confidential treatment for the summaries if the company believes confidential treatment of the information is warranted.

**THE BOARD ORDERS THAT:**

1. The Board will hold in confidence, and not place on the public record, the following documents:
    - The attachments to interrogatories 1.1 CCC 3, 1.1 SEC 1 and 2.6 Staff 36 as described in Hydro One's letter dated July 17, 2014; and
    - The IHS reports attached to interrogatory 2.6 SEC 8.

2. Hydro One is required to file the following documents, numbered as supplemental answers to the relevant interrogatories:
    - The outsourcing RFP requested in interrogatory 3.1 SEC 22, once the RFP process is complete, having removed information that would compromise security;
    - A list of the comparator utilities in the customer satisfaction study provided in answer to interrogatory 2.6 Energy Probe 23b. The Board will provide confidential treatment for this list;

- The benchmarking review of Inergi fees provided in response to interrogatory 3.1 SEC 21, 4.2 Staff 63a and 4.2 Energy Probe 33a, with pages 7, 21 and 22 unredacted. The Board will provide confidential treatment for this refiled document;
- Internal budget information for years 2012, 2013 and 2014 as requested in interrogatory 3.2 SEC 25. Hydro One may seek confidential treatment for this information at the time of filing; and
- Summaries of the internal audit reports requested in Interrogatories 4.2 SEC 35 and 6.1 SEC 84, as described in Hydro One's submission of August 8, 2014. Hydro One may seek confidential treatment for this information at the time of filing.

**DATED** at Toronto, August 25, 2014

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli
Board Secretary

# 16


# ONTARIO ENERGY BOARD

**FILE NO.:** **EB-2013-0416**

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**VOLUME:** **3**

**DATE:** **September 11, 2014**

| | | |
|---|---|---|
| **BEFORE:** | **Ken Quesnelle** | **Presiding Member** |
| | **Emad Elsayed** | **Member** |
| | **Marika Hare** | **Member** |

**EB-2013-0416**

**THE ONTARIO ENERGY BOARD**

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

**AND IN THE MATTER OF** an application by Hydro One Networks Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2015, each year to December 31, 2019.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Thursday, September 11th, 2014,
commencing at 9:08 a.m.

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VOLUME 3

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BEFORE:

| | |
|---|---|
| KEN QUESNELLE | Presiding Member |
| EMAD ELSAYED | Member |
| MARIKA HARE | Member |

MR. AMODEO: Correct.

MS. LEA: -- within the plan, and so a failure to achieve those savings will not rebound on ratepayers?

MR. AMODEO: Correct.

MS. LEA: Now, unregulated firms have market pressures on them to continuously improve. Customers might leave otherwise. You don't have those pressures. But I would like to suggest to you that, in order to mirror that, the Board has established explicit productivity and stretch-factor expectations for distributors in this sector.

Yet you are not proposing, in this case, to have a productivity factor or stretch factor. How is this justifiable, given Hydro One's large budget and the amount of rates that you need to recover from ratepayers?

MR. AMODEO: I think we could calculate a factor, but I think where our company's going is, we're looking at real initiatives, and we're accumulating those initiatives to a dollar value. I mean, sure, we could come up with a factor, and I believe one of the undertakings, I think it was on Tuesday or Monday, asked us to do that, and we have done that. But we like to deal with, you know, real live initiatives and calculate those savings that way.

MS. LEA: Okay. I'm not sure that working towards a stretch factor would in any way take away from pursuing real live initiatives, sir. It would be an externally imposed number, that's true. But it would provide assurance of -- to the Board and to ratepayers that you were going to have to achieve certain productivity gains.

Is that not the case?

MR. AMODEO: Yes. I'm sure that we should be able to -- to accept and provide certain efficiency gains.

MS. LEA: Now, if the Board were persuaded to impose some sort of stretch factor on Hydro One, one of the difficulties, I guess, is, how would we set one? What number would we choose? And in our discussions with panel 1, we talked about the possibility of using the Board's stretch factor of 0.6. Now, that's the stretch factor that came out of the total cost benchmarking exercise the Board undertook, and that is Hydro One's own stretch factor.

Do you think that that would be an appropriate choice?

MR. AMODEO: I mean, we did through an undertaking, do the analysis based on what we -- how we would calculate what that stretch factor would be. And based on our analysis using a 2014 base, I believe that we're better than that 0.6.

MS. LEA: Can you clarify that answer?

MR. AMODEO: 0.85.

MS. LEA: By looking at the savings that you plan to achieve?

MR. AMODEO: Correct.

MR. ROGERS: I don't think, Mr. Chairman, that undertaking has been filed yet. I think it's in the process. You will probably have it today.

MS. LEA: Okay. So we haven't seen that yet. But that would be -- the 0.85 would be -- what I am trying to figure out is, in addition to what you have forecast, if

the Board were to impose a stretch factor on you, so what you have calculated there, I think, is what stretch factor results from the savings you have already embedded. Is that correct?

MR. AMODEO: Correct.

MS. LEA: So is it your view that no additional stretch factor is needed?

MR. AMODEO: I would say yes. I think zero-point -- I mean, 0.6, I don't know exactly how 0.6 was come up with, but doing the calculations we did, it...

MS. LEA: Well, 0.6 came out of the total cost benchmarking exercise. It wasn't based on your -- anything to do with this case or the evidence before this panel. It was part of the Board's total cost benchmarking exercise.

Now, you have not filed any benchmarking or comparative performance analysis, as we understand your evidence.

And on Tuesday, Mr. Thompson was asking panel 1 about your participation in various industry benchmarking initiatives. Did you have an opportunity to look at that piece of transcript?

MR. AMODEO: I read --

MR. STRUTHERS: Sorry, I was going to say perhaps I can answer that question.

MS. LEA: Please, yes.

MR. STRUTHERS: I have had a look at the transcript. We do not participate in, as you indicated, in any industry benchmarkings. We used to participate in the CEA

benchmarking process.

As of 2011, the CEA actually effectively shelved that benchmarking and no longer funds it. So we don't have that information. We used to compare ourselves to NB Power, Manitoba Power and also BC Hydro because they we're effectively similar and similar structures in terms of distribution, rural nature, and geographies.

So there is no comparative information that is available, at least for benchmarking within Canada.

I should indicate that I think your assumption was that we didn't have the same pressures as a normal company did with respect to leaning ourselves or keeping ourselves as thin as we can. I am going to suggest that isn't the case. I am going to suggest that the Ministry of Energy is very much a pressure in ensuring that we do lean ourselves. You will have seen the KPMG benchmarking report that was provided, and I also -- I am assuming that you are aware of the Premier's Council Review, which is ongoing currently. And, again, it is another benchmarking review of both Hydro One and OPG.

So it would be unfair to say that the companies are not under consistent pressure in order to do the best that they can and to come up with as many structures and strategies to reduce costs.

MS. LEA: Is it your -- do I take from your answer, then -- thank you, Mr. Struthers -- that it is the company's view that even in the absence of an explicit stretch factor, you have an incentive to aggressively

continue to seek efficiencies and share those savings with your customers and continuously improve as a result of what you have just described?

MR. STRUTHERS: That is correct. Certainly this is -- it's not even a benchmarking or review that is being done by the company on the company.

It's being -- a review being done by the company by a third party for a third party.

So to the extent that there would be any bias to it and bias in favour of the company, you are not going to find that.

MS. LEA: Will the results of that -- when would the results of that be available?

MR. STRUTHERS: I don't know. As I say, it's being done for the Premier's Council, and that is an ongoing process.

MS. LEA: So there is no expectation that it would be available before the record closes in this case?

MR. STRUTHERS: I don't know when it might be available, but certainly the company will look at that report, to the extent that it is provided to it, and certainly we have had discussions with KPMG about what might be in it.

We've certainly looked at a number of those items. They're within the items that we have identified within our business plan.

They've certainly identified that those are the right way to go and that we should be aggressively pursuing them.

MR. STRUTHERS: I believe it is on the page above or down. Further down. Sorry. No, further up.

MS. BLANCHARD: Okay, which ones would lend themselves to benchmarking?

MR. STRUTHERS: If they are there, then effectively it would be -- sorry, I haven't got the document in front of me, so if I could --

MS. BLANCHARD: I have some paper copies, if that would be --

MR. STRUTHERS: That would be very helpful, thank you.

MS. BLANCHARD: Okay. I've got a couple printed here. They seem to all be stapled together, but there is many copies there. Late-night document preparation. I apologize. But I've got a few copies of those, and if my friend will just distribute them, maybe that will simplify things.

--- Mr. Rogers hands documents to witness panel.

MR. STRUTHERS: So for example, customer interruption duration would be one of those items that would be benchmarkable.

MS. BLANCHARD: And --

MR. STRUTHERS: It is under the category of continuous improvement and cost-effectiveness in the building and maintaining of reliable transmission and distribution systems.

MS. BLANCHARD: And would you describe that as an operating target?

MR. STRUTHERS: I would describe it as a target that

the company strives to continuously improve to.

MS. BLANCHARD: So have you benchmarked that target against any comparable utility company?

MR. STRUTHERS: The Canadian Electrical Association used to do benchmarking back in 2011. They haven't done benchmarking since that point in time.

So in effect, what we're doing is we're trying to cobble together what we think is arguably a target, but what we're looking for is continuous improvement year over year over year based on performance.

MS. BLANCHARD: And so you haven't benchmarked that one against -- against another company?

MR. STRUTHERS: Subject to check, I don't believe we have.

MS. BLANCHARD: Okay.

MR. STRUTHERS: Not on an official basis, no.

MS. BLANCHARD: Okay. And then just looking at the two lines above, would you agree with me that those are the two targets, the only two targets, that relate to financial -- sort of value for money? Those are your two costing targets?

MR. STRUTHERS: Well, those are specifically related, arguably, to getting the work done, because, in effect, what you're looking at is your OM&A costs, i.e., the work program that you have identified. Are you actually achieving that work program? So there is more of a measure of work program achievement, as to a degree are the in-service capital transmission and distribution targets.

# 17

**Roland Lapointe** *Appellant*

*v.*

**Domtar Inc.** *Respondent*

and

**Commission d'appel en matière de lésions professionnelles** *Mis en cause*

and

**Commission de la santé et de la sécurité du travail** *Mis en cause*

**INDEXED AS: DOMTAR INC. *v.* QUEBEC (COMMISSION D'APPEL EN MATIÈRE DE LÉSIONS PROFESSIONNELLES)**

File No.: 22717.

1993: April 1; 1993: June 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Workers' compensation — Income replacement indemnity — Commission d'appel en matière de lésions professionnelles — Interpretation of s. 60 of the Act respecting Industrial Accidents and Occupational Diseases — Evocation — Standard of review applicable to Commission's decisions — Whether Commission's interpretation patently unreasonable — Whether in the absence of a patently unreasonable error conflicting decisions by two administrative tribunals may give rise to judicial review — Act respecting Industrial Accidents and Occupational Diseases, R.S.Q., c. A-3.001, s. 60.*

*Judicial review — Standard of review — Appellate administrative tribunal — Workers' compensation — Standard of review applicable to decisions of Commission d'appel en matière de lésions professionnelles.*

*Judicial review — Basis for judicial intervention — Conflicting decisions by two administrative tribunals — Whether jurisprudential conflict constitutes an independent basis for judicial review.*

**Roland Lapointe** *Appelant*

*c.*

**Domtar Inc.** *Intimée*

et

**Commission d'appel en matière de lésions professionnelles** *Mise en cause*

et

**Commission de la santé et de la sécurité du travail** *Mise en cause*

**RÉPERTORIÉ: DOMTAR INC. *c.* QUÉBEC (COMMISSION D'APPEL EN MATIÈRE DE LÉSIONS PROFESSIONNELLES)**

N° du greffe: 22717.

1993: 1er avril; 1993: 30 juin.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

*Accidents du travail — Indemnité de remplacement du revenu — Commission d'appel en matière de lésions professionnelles — Interprétation de l'art. 60 de la Loi sur les accidents du travail et les maladies professionnelles — Évocation — Norme de contrôle applicable aux décisions de la Commission — L'interprétation de la Commission est-elle manifestement déraisonnable? — En l'absence d'une erreur manifestement déraisonnable, un conflit jurisprudentiel entre deux instances administratives peut-il donner ouverture au contrôle judiciaire? — Loi sur les accidents du travail et les maladies professionnelles, L.R.Q., ch. A-3.001, art. 60.*

*Contrôle judiciaire — Norme de contrôle — Tribunal administratif d'appel — Accidents du travail — Norme de contrôle applicable aux décisions de la Commission d'appel en matière de lésions professionnelles.*

*Contrôle judiciaire — Motif d'intervention judiciaire — Conflit jurisprudentiel entre deux instances administratives — Un conflit jurisprudentiel constitue-t-il un motif autonome de contrôle judiciaire?*

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The appellant, an employee of the respondent company, was injured in an industrial accident three days before the temporary closure of the plant. Citing the closure, the company refused to compensate the employee for more than those three days. The Commission de la santé et de la sécurité du travail and the Bureau de révision paritaire affirmed the company's decision and dismissed the complaint of the employee, who argued that under s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases* ("*A.I.A.O.D.*") he was entitled to an income replacement indemnity covering the entire period of his disability, that is a period of 14 days. On appeal, the Commission d'appel en matière de lésions professionnelles ("CALP") found for the employee and ordered the company to pay him, pursuant to s. 60, 90 percent of his net salary or wages for each day or part of a day he would normally have worked according to his usual work schedule, regardless of the plant closure. The Superior Court dismissed the company's motion in evocation because, in its view, the CALP had acted within its jurisdiction and its decision was not unreasonable. The Court of Appeal reversed this judgment and granted the application for evocation. While of the opinion that the CALP's decision was not patently unreasonable, the court nevertheless observed that with respect to the interpretation of s. 60 it was in the interest of justice to resolve at once the conflicting decisions of the CALP and the Labour Court, which has jurisdiction over penal proceedings under the *A.I.A.O.D.* Abandoning traditional curial deference, the court consequently intervened to resolve the unstable situation and held that under s. 60 an employer is not required to pay a salary or wages to an employee injured in an industrial accident when there is a plant closure. This appeal is to determine whether, in the absence of a patently unreasonable error, conflicting decisions by administrative tribunals may give rise to judicial review.

*Held*: The appeal should be allowed.

Strictly speaking, the interpretation of s. 60 is within the CALP's jurisdiction. A functional analysis of the *A.I.A.O.D.* clearly demonstrates that the legislature intended to give this tribunal the power to make a final ruling on the meaning and scope of s. 60. As an appellate administrative tribunal, the CALP hears and disposes exclusively of all appeals brought under the *A.I.A.O.D.* and its members have all the powers necessary for the exercise of their jurisdiction, including the power to rule on any question of law or of fact. Protected by a full privative clause, CALP decisions are final and without appeal and every person contemplated

L'appelant, un employé de la compagnie intimée, est victime d'un accident de travail trois jours avant la fermeture temporaire de l'usine. Invoquant cette fermeture, la compagnie refuse d'indemniser l'employé au-delà de ces trois journées. La Commission de la santé et de la sécurité du travail ainsi que le Bureau de révision paritaire confirment la décision de la compagnie et rejettent la plainte de l'employé qui soutient qu'en vertu de l'art. 60 de la *Loi sur les accidents du travail et les maladies professionnelles* («*L.A.T.M.P.*») il a droit à une indemnité de remplacement du revenu couvrant l'ensemble de son incapacité, soit une période de 14 jours. En appel, la Commission d'appel en matière de lésions professionnelles («CALP») donne raison à l'employé et ordonne à la compagnie de lui verser, conformément à l'art. 60, 90 p. 100 de son salaire net pour chaque jour ou partie de jour où il aurait normalement travaillé selon son horaire habituel de travail et ce, sans égard à la fermeture de l'usine. La Cour supérieure rejette la requête en évocation présentée par la compagnie estimant que la CALP a agi dans le cadre de sa compétence et que sa décision n'est pas déraisonnable. La Cour d'appel infirme ce jugement et fait droit à la demande d'évocation. La cour estime que la décision de la CALP n'est pas manifestement déraisonnable. Cependant, elle souligne qu'en ce qui concerne l'interprétation de l'art. 60 il est dans l'intérêt de la justice de trancher immédiatement le conflit jurisprudentiel qui existe entre la CALP et le Tribunal du travail dont relèvent les poursuites pénales intentées en vertu de la *L.A.T.M.P.* Laissant de côté la réserve judiciaire traditionnelle, la cour intervient donc pour mettre fin à l'instabilité de la situation et statue qu'en vertu de l'art. 60 il n'existe aucune obligation pour un employeur de payer un salaire à un employé victime d'un accident de travail lorsqu'il y a fermeture d'usine. Le présent pourvoi vise à déterminer si, en l'absence d'une erreur manifestement déraisonnable, un conflit jurisprudentiel au sein d'instances administratives donne ouverture au contrôle judiciaire.

*Arrêt*: Le pourvoi est accueilli.

L'interprétation de l'art. 60 relève de la compétence *stricto sensu* de la CALP. Une analyse fonctionnelle de la *L.A.T.M.P.* démontre clairement que le législateur avait l'intention de confier à ce tribunal le pouvoir de se prononcer de manière définitive sur le sens et la portée de l'art. 60. À titre de tribunal administratif d'appel, la CALP connaît et dispose exclusivement de tous les appels interjetés en vertu de la *L.A.T.M.P.* et ses membres possèdent tous les pouvoirs nécessaires à l'exercice de leur compétence, y compris le pouvoir de décider de toutes questions de droit et de fait. Les décisions de la CALP, protégées par une clause privative

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in the decision must comply with them without delay. Further, s. 60 is not only one of the legislative provisions on which the CALP has the express power to rule, it employs concepts which are at the core of its area of expertise. The interpretation of s. 60 by the CALP is thus a function directly relating to the objective sought by the legislature. Since the interpretation of s. 60 is within the tribunal's jurisdiction, the standard of review applicable is whether the decision is patently unreasonable.

The CALP's decision is not patently unreasonable. It can be rationally defended both on the facts and on the law. While the CALP may have overlooked several important aspects which are peculiar to the general system of compensation, this is not a basis for judicial intervention as this would simply be an error of law within jurisdiction.

It is doubtful whether there is a conflict between the decisions of the CALP and the Labour Court with respect to the interpretation of s. 60. For one thing, the Court of Appeal's conclusion on this point is based on a single judgment of the Labour Court in a penal matter and fails to take into account the numerous decisions rendered by the CALP, which has always adopted the same interpretation. The situation created by an isolated decision at variance with a consistent line of authority cannot *a priori* be characterized as a true "jurisprudential conflict". Furthermore, these two bodies interpreted the same legislative provision, but in the particular context of each one's jurisdiction, in the one case a penal one and, in the other, an administrative one. Since these are matters where the ground rules are completely different, a disagreement on the interpretation of a legislative provision does not necessarily place the CALP and the Labour Court in a jurisprudential conflict. In addition, it is wrong to suggest that the CALP's interpretation leads to a dead end as there exists, parallel to the penal remedy, a civil remedy (s. 429 *A.I.A.O.D.*). Finally, the allegedly irreconcilable "conflict" between these two tribunals is mitigated by the fact that the Labour Court's decisions, unlike those of the CALP, can be appealed to the Superior Court under the *Code of Penal Procedure*.

Assuming however, without deciding the point, that the CALP's interpretation and that of the Labour Court create a jurisprudential conflict, such a conflict does not constitute an independent basis for judicial review. When decisions made within jurisdiction are not patently unreasonable, the principles underlying curial

complète, sont finales et sans appel et toute personne visée doit s'y conformer sans délai. De plus, tout en comptant parmi les dispositions législatives sur lesquelles la CALP a le pouvoir explicite de se prononcer, l'art. 60 fait appel a des notions qui sont au cœur de son domaine d'expertise. L'interprétation de l'art. 60 par la CALP constitue donc une fonction qui participe directement à l'objectif poursuivi par le législateur. Puisque l'interprétation de l'art. 60 relève de la compétence du tribunal, la norme de contrôle applicable est le caractère manifestement déraisonnable de sa décision.

La décision de la CALP n'est pas manifestement déraisonnable. C'est une décision qui est rationnellement défendable sous l'angle tant des faits que du droit. Même si la CALP a peut-être omis des nuances importantes qui sont propres au régime global d'indemnisation, cela ne constitue pas, pour autant, un motif d'intervention judiciaire car il ne s'agirait là que d'une simple erreur de droit commise dans le cadre de sa compétence.

Il semble douteux qu'il existe un conflit jurisprudentiel entre la CALP et le Tribunal du travail relativement à l'interprétation de l'art. 60. D'une part, la conclusion de la Cour d'appel à ce sujet repose sur une seule décision du Tribunal du travail en matière pénale et ne tient pas compte des nombreuses décisions rendues par la CALP qui a toujours adopté la même interprétation. La situation créée par une décision isolée à l'encontre d'une jurisprudence constante ne saurait, à priori, être qualifiée de véritable «conflit jurisprudentiel». D'autre part, ces deux organismes interprètent un même texte législatif mais dans le contexte particulier de la compétence de chacun, l'un en matière pénale, l'autre en matière administrative. Puisque ces deux matières ont des règles de base totalement différentes, un désaccord sur l'interprétation d'une disposition législative ne place pas nécessairement la CALP et le Tribunal du travail en situation de conflit jurisprudentiel. De plus, il est faux de prétendre que l'interprétation de la CALP conduit à une impasse puisqu'il existe, parallèlement au recours pénal, un recours civil (art. 429 *L.A.T.M.P.*). Finalement, le caractère prétendument définitif du «conflit» entre ces deux tribunaux est tempéré par le fait que les décisions du Tribunal du travail sont, contrairement aux décisions de la CALP, appelables devant la Cour supérieure en vertu du *Code de procédure pénale*.

Toutefois, assumant sans en décider que l'interprétation de la CALP et celle du Tribunal du travail créent un conflit jurisprudentiel, un tel conflit ne constitue pas un motif autonome de contrôle judiciaire. Dans le cas de décisions intrajuridictionnelles qui ne sont pas manifestement déraisonnables, ce sont les principes sous-jacents

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deference should prevail. Consistency in the application of the law is a valid objective but is not an absolute one. This objective must be pursued in keeping with the decision-making autonomy and independence of members of the administrative bodies. Inquiring into a case of decision-making inconsistency and solving it where there is no patently unreasonable error means altering the institutional relationship between administrative tribunals and courts. Such intervention by a court of law risks eliminating the decision-making autonomy, expertise and effectiveness of the administrative tribunal and risks, at the same time, thwarting the original intention of the legislature, which has already determined that the administrative tribunal is the one in the best position to rule on the disputed decision. Administrative tribunals have the authority to err within their area of expertise, and a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would constitute a serious undermining of those principles given that administrative tribunals and the legislature have the power to resolve such conflicts themselves.

à la retenue judiciaire qui doivent primer. La cohérence dans l'application de la loi constitue un objectif valable mais il n'a pas un caractère absolu. Cet objectif doit se poursuivre dans le respect de l'autonomie et de l'indépendance décisionnelle des membres des organismes administratifs. Enquêter sur un cas d'incohérence décisionnelle et le solutionner en l'absence d'une erreur manifestement déraisonnable, c'est modifier le rapport institutionnel entre les tribunaux administratifs et les cours de justice. Une telle intervention de la part d'une cour de justice risque de réduire à néant l'autonomie décisionnelle, l'expertise et l'efficacité du tribunal administratif et risque, par la même occasion, de contrecarrer l'intention première du législateur qui a déjà déterminé que le tribunal administratif est celui qui est le mieux placé pour se prononcer sur la décision contestée. Les tribunaux administratifs ont la compétence de se tromper dans le cadre de leur expertise, et l'absence d'unanimité est le prix à payer pour la liberté et l'indépendance décisionnelle accordées aux membres de ces tribunaux. Reconnaître l'existence d'un conflit jurisprudentiel comme motif autonome de contrôle judiciaire constituerait une grave entorse à ces principes, compte tenu que les tribunaux administratifs et le législateur ont le pouvoir de régler eux-mêmes ces conflits.

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Mullan, David J. "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982), 27 *McGill L.J.* 250.

Ouellette, Yves. "Le contrôle judiciaire des conflits jurisprudentiels au sein des organismes administratifs: une jurisprudence inconstante?" (1990), 50 *R. du B.* 753.

Ouimet, Hélène. "Commentaires sur l'affaire Produits Pétro-Canada c. Moalli" (1987), 47 *R. du B.* 852.

APPEAL from a judgment of the Quebec Court of Appeal, [1991] R.J.Q. 2438, 39 Q.A.C. 304, reversing a judgment of the Superior Court, [1987] C.A.L.P. 254, dismissing a motion in evocation with respect to a decision of the Commission d'appel en matière de lésions professionnelles, [1986] C.A.L.P. 116. Appeal allowed.

*Laurent Roy*, for the appellant.

*René Delorme* and *Martin Roy*, for the respondent.

*Claire Delisle*, for the *mis en cause* CALP.

*Jean-Claude Paquet*, *Louise Chayer* and *Berthi Fillion*, for the *mis en cause* CSST.

The judgment of the Court was delivered by

L'HEUREUX-DUBÉ J.—This appeal raises questions which lie at the core of the institutional relationship between courts of law and administrative tribunals. The issue is whether, in the absence of a patently unreasonable error, conflicting decisions by administrative tribunals may give rise to judicial review. The provision at issue here (s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c. A-3.001 ("*A.I.A.O.D.*")) reads as follows:

**60.** The employer of a worker at the time he suffers an employment injury shall pay him, if he becomes unable to carry on his employment by reason of his injury, 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not

Morissette, Yves-Marie. «Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse» (1986), 16 *R.D.U.S.* 591.

Mullan, David J. «Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?» (1982), 27 *R.D. McGill* 250.

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POURVOI contre un arrêt de la Cour d'appel du Québec, [1991] R.J.Q. 2438, 39 Q.A.C. 304, qui a infirmé un jugement de la Cour supérieure, [1987] C.A.L.P. 254, qui avait rejeté une requête en évocation à l'encontre d'une décision de la Commission d'appel en matière de lésions professionnelles, [1986] C.A.L.P. 116. Pourvoi accueilli.

*Laurent Roy*, pour l'appelant.

*René Delorme* et *Martin Roy*, pour l'intimée.

*Claire Delisle*, pour la mise en cause CALP.

*Jean-Claude Paquet*, *Louise Chayer* et *Berthi Fillion*, pour la mise en cause CSST.

Le jugement de la Cour a été rendu par

LE JUGE L'HEUREUX-DUBÉ—Le présent pourvoi porte sur des questions qui sont au cœur du rapport institutionnel entre les cours de justice et les tribunaux administratifs. Il s'agit de déterminer si, en l'absence d'erreur manifestement déraisonnable, un conflit jurisprudentiel au sein d'instances administratives donne, néanmoins, ouverture au contrôle judiciaire. La disposition ici en cause (l'art. 60 de la *Loi sur les accidents du travail et les maladies professionnelles*, L.R.Q., ch. A-3.001 («*L.A.T.M.P.*»)) se lit ainsi:

**60.** L'employeur au service duquel se trouve le travailleur lorsqu'il est victime d'une lésion professionnelle lui verse, si celui-ci devient incapable d'exercer son emploi en raison de sa lésion, 90 % de son salaire net pour chaque jour ou partie de jour où ce travailleur aurait nor-

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been disabled, for fourteen full days following the beginning of his disability.

The employer shall pay the salary or wages referred to in the first paragraph to the worker at the time he would normally have paid them to him if the worker has furnished the medical certificate contemplated in section 199.

The salary or wages referred to in the first paragraph constitute an income replacement indemnity to which the worker is entitled for fourteen full days following the commencement of his disability and the Commission shall reimburse the amount thereof to the employer within fourteen days of receipt of his claim, failing which it shall pay him interest determined in accordance with section 323 from the first day it is late.

If the Commission subsequently decides that the worker is not entitled to the whole or part of the indemnity, the Commission shall claim reimbursement from the worker in accordance with Division I of Chapter XIII.

I—Facts

At about 11:30 a.m. on December 17, 1985, the appellant, a joiner permanently employed by the respondent Domtar Inc., was injured in an industrial accident. As a consequence of his employment injury, he was unable to carry on his employment from December 18, 1985 until January 2, 1986. In the days preceding the accident, Domtar had planned and announced the temporary closure of its newsprint plant for the period from 4 p.m. on December 21, 1985 to 8 a.m. on January 2, 1986.

Domtar compensated the appellant for the day of December 18 and for the days of December 19 and 20. Citing the temporary closure of the plant, Domtar refused to compensate the appellant for more than those three days. On January 6, 1986, in a complaint submitted to the *mis en cause* the Commission de la santé et de la sécurité du travail ("CSST"), the appellant argued that he was entitled to an income replacement indemnity covering the entire period of his disability, that is a period of 14 days ending on January 2, 1986. On January 24, 1986, the CSST dismissed the complaint and confirmed that Domtar had paid the correct amount. On January 30, 1986, the appellant asked the commalement travaillé, n'eût été de son incapacité, pendant les 14 jours complets suivant le début de cette incapacité.

L'employeur verse ce salaire au travailleur à l'époque où il le lui aurait normalement versé si celui-ci lui a fourni l'attestation médicale visée dans l'article 199.

Ce salaire constitue l'indemnité de remplacement du revenu à laquelle le travailleur a droit pour les 14 jours complets suivant le début de son incapacité et la Commission en rembourse le montant à l'employeur dans les 14 jours de la réception de la réclamation de celui-ci, à défaut de quoi elle lui paie des intérêts, déterminés conformément à l'article 323, à compter du premier jour de retard.

Si, par la suite, la Commission décide que le travailleur n'a pas droit à cette indemnité, en tout ou en partie, elle doit lui en réclamer le trop-perçu conformément à la section I du chapitre XIII.

I—Faits

Le 17 décembre 1985, vers 11 h 30, l'appelant, menuisier permanent à l'emploi de l'intimée Domtar Inc., est victime d'un accident de travail. En raison de sa lésion professionnelle, il est incapable d'exercer son emploi du 18 décembre 1985 jusqu'au 2 janvier 1986. Dans les jours précédant l'accident, Domtar avait planifié et annoncé la fermeture temporaire de son usine de papier journal pour la période du 21 décembre 1985 à 16 heures au 2 janvier 1986 à 8 heures.

Domtar indemnise l'appelant pour la journée du 18 décembre, ainsi que pour les journées du 19 et 20 décembre. Invoquant la fermeture temporaire de l'usine, Domtar refuse d'indemniser l'appelant au-delà de ces trois journées. Le 6 janvier 1986, par le biais d'une plainte adressée à la mise en cause la Commission de la santé et de la sécurité du travail («CSST»), l'appelant soutient qu'il a droit à une indemnité de remplacement de revenu couvrant l'ensemble de son incapacité, soit une période de 14 jours prenant fin le 2 janvier 1986. Le 24 janvier 1986, la CSST rejette la plainte et confirme l'exactitude du paiement effectué par Domtar. Le 30 janvier 1986, l'appelant s'adresse

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pensation branch of the CSST to issue a payment order against Domtar. On February 10, 1986, the compensation branch affirmed the CSST's original decision and denied the application for an order.

On February 21, 1986, the appellant filed an application for review with the Bureau de révision paritaire ("BRP") of the CSST. On April 10, 1986, a majority of the BRP affirmed the original decision. The appellant then appealed to the *mis en cause* the Commission d'appel en matière de lésions professionnelles ("CALP"). On November 27, 1986, the CALP found that on account of his employment injury and in accordance with s. 60 *A.I.A.O.D.*, the appellant was entitled to 90 percent of his net salary or wages for each day or part of a day on which, according to his usual work schedule, he would have worked between December 22, 1985, the date on which the plant closed, and January 1, 1986. The CALP accordingly reversed the decision of the BRP and ordered Domtar to pay the appellant this amount.

On December 23, 1986 Domtar brought a motion in evocation to the Quebec Superior Court from the decision of the CALP. By judgment dated June 30, 1987, the motion in evocation was dismissed. This decision was appealed to the Quebec Court of Appeal. By a unanimous judgment dated September 11, 1991, that court allowed the appeal, granted the motion in evocation and reversed the CALP decision.

II—Legislation

The mechanism set up by the legislature to implement the *A.I.A.O.D.* comprises several decision-making bodies.

The CSST, established by the *Act respecting Occupational Health and Safety*, R.S.Q., c. S-2.1, is the body responsible for administering the *A.I.A.O.D.* (s. 589). Section 349 *A.I.A.O.D.* gives it jurisdiction to decide any question contemplated by the Act:

**349.** The Commission has exclusive jurisdiction to decide any matter or question contemplated in this Act

au service de réparation de la CSST afin que celui-ci rende une ordonnance de paiement contre Domtar. Le 10 février 1986, le service de réparation confirme la décision originale de la CSST et rejette la demande d'ordonnance.

Le 21 février 1986, l'appelant dépose une demande de révision auprès du Bureau de révision paritaire («BRP») de la CSST. Le 10 avril 1986, ce dernier confirme majoritairement la décision originale. L'appelant interjette alors appel devant la mise en cause la Commission d'appel en matière de lésions professionnelles («CALP»). En date du 27 novembre 1986, celle-ci déclare qu'en raison de sa lésion professionnelle et conformément à l'art. 60 *L.A.T.M.P.*, l'appelant a droit à 90 p. 100 de son salaire net pour chaque jour ou partie de jour où il aurait travaillé, selon son horaire habituel de travail, du 22 décembre 1985, date de fermeture de l'usine, jusqu'au 1er janvier 1986. La CALP infirme ainsi la décision du BRP et ordonne à Domtar de verser cette somme à l'appelant.

Le 23 décembre 1986, Domtar se pourvoit en évocation devant la Cour supérieure du Québec à l'encontre de la décision de la CALP. Par jugement en date du 30 juin 1987, la requête en évocation est rejetée. Cette décision est portée en appel devant la Cour d'appel du Québec. Par jugement unanime en date du 11 septembre 1991, celle-ci accueille le pourvoi, fait droit à la requête en évocation et infirme la décision de la CALP.

II—Dispositions législatives

Le mécanisme mis en place par le législateur pour l'application de la *L.A.T.M.P.* comprend plusieurs instances décisionnelles.

La CSST, instituée par la *Loi sur la santé et la sécurité du travail*, L.R.Q., ch. S-2.1, est l'organisme chargé d'administrer la *L.A.T.M.P.* (art. 589). L'article 349 *L.A.T.M.P.* lui attribue la compétence de décider de toute question visée par celle-ci:

**349.** La Commission a compétence exclusive pour décider d'une affaire ou d'une question visée dans la pré-

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unless a special provision gives the jurisdiction to another person or agency.

Decisions of the CSST are subject to the following privative clause:

**350.** Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the Commission by reason of an act performed or decision rendered pursuant to an Act under its administration.

The BRP is an intermediary level of jurisdiction. A person aggrieved by a decision of the CSST may ask this body to review it. Section 358 *A.I.A.O.D.* reads as follows:

**358.** A person who believes he has been wronged by a decision rendered by the Commission under this Act may, within 30 days of notification of the decision, apply for review thereof by a review office established under the Act respecting occupational health and safety (chapter S-2.1).

However, a person may not apply for the review of any matter of a medical nature in respect of which the Commission is bound under section 224 or of any decision of the Commission rendered under section 256 or the first paragraph of section 365.2, or for the review of a refusal by the Commission to reconsider its decision pursuant to the first paragraph of section 365.

BRP decisions are not protected by a privative clause.

The CALP is the body to which BRP decisions may be appealed. Under s. 397 *A.I.A.O.D.*, the CALP has exclusive jurisdiction to hear and dispose of appeals brought under ss. 37.3 and 193 of the *Act respecting Occupational Health and Safety* and the *A.I.A.O.D.* Section 400 further provides:

**400.** The board of appeal may confirm the decision or the order brought before it; it may also quash the decision or the order and shall in that case render the decision or make the order that should have been given initially.

sente loi, à moins qu'une disposition particulière ne donne compétence à une autre personne ou à un autre organisme.

Les décisions de la CSST bénéficient de la clause privative suivante:

**350.** Sauf sur une question de compétence, une action en vertu de l'article 33 du Code de procédure civile (chapitre C-25) ou un recours extraordinaire au sens de ce code ne peut être exercé, et une mesure provisionnelle ne peut être ordonnée contre la Commission pour un acte fait ou une décision rendue en vertu d'une loi qu'elle administre.

Le BRP constitue une instance intermédiaire. Une personne qui se croit lésée par une décision de la CSST peut en demander la révision à cet organisme. L'article 358 *L.A.T.M.P.* se lit ainsi:

**358.** Une personne qui se croit lésée par une décision rendue par la Commission en vertu de la présente loi peut, dans les 30 jours de sa notification, en demander la révision par un bureau de révision constitué en vertu de la Loi sur la santé et la sécurité du travail (chapitre S-2.1).

Cependant, une personne ne peut demander la révision d'une question d'ordre médical sur laquelle la Commission est liée en vertu de l'article 224 ou d'une décision que la Commission a rendue en vertu de l'article 256 ou du premier alinéa de l'article 365.2, ni demander la révision du refus de la Commission de reconsidérer sa décision en vertu du premier alinéa de l'article 365.

Les décisions des BRP ne sont pas protégées par une clause privative.

La CALP est l'organisme devant lequel il est possible d'interjeter appel des décisions du BRP. En vertu de l'art. 397 *L.A.T.M.P.*, la CALP connaît et dispose, exclusivement à tout autre tribunal, des appels interjetés en vertu des art. 37.3 et 193 de la *Loi sur la santé et la sécurité du travail* et de la *L.A.T.M.P.* Par ailleurs, l'art. 400 dispose:

**400.** La Commission d'appel peut confirmer la décision, l'ordre ou l'ordonnance porté devant elle; elle peut aussi l'infirmer et doit alors rendre la décision, l'ordre ou l'ordonnance qui, selon elle, aurait dû être rendu en premier lieu.

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CALP decisions are final and not subject to appeal and they are protected by a full privative clause:

**405.** Every decision of the board of appeal must be in writing and substantiated, signed and notified to the parties and to the Commission.

Decisions are final and without appeal and every person contemplated in the decision shall comply therewith without delay.

**409.** Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the board of appeal or one of its commissioners acting in his official capacity.

A judge of the Court of Appeal may annul summarily, upon a motion, any action granted, any writ, order or injunction issued or granted contrary to this section.

The Labour Court was established by the Quebec *Labour Code*, R.S.Q., c. C-27, s. 112. Penal proceedings under the *A.I.A.O.D.* are brought before it. Section 473 reads as follows:

**473.** Proceedings pursuant to this chapter are instituted before the Labour Court created by the Labour Code (chapter C-27) and sections 118, 121, 124 to 128 and 133 to 136 of that Code apply.

No proceedings may be brought except by the Commission or by a person generally or specially designated by it for that purpose within one year after the Commission becomes aware of the offence.

A breach of s. 60 *A.I.A.O.D.* is dealt with in s. 458:

**458.** Every employer who contravenes the first paragraph of section 32 or 33, section 59, the first or second paragraph of section 60 . . . is guilty of an offence and liable to a fine of not less than $500 nor more than $1 000 in the case of a natural person and to a fine of not less than $1 000 nor more than $2 000 in the case of a legal person.

Decisions of the Labour Court may be appealed to the Superior Court under the *Code of Penal Procedure*, R.S.Q., c. C-25.1.

Les décisions de la CALP sont finales et sans appel et elles sont protégées par une clause privative complète:

**405.** Toute décision de la Commission d'appel doit être écrite, motivée, signée et notifiée aux parties et à la Commission.

Cette décision est finale et sans appel et toute personne visée doit s'y conformer sans délai.

**409.** Sauf sur une question de compétence, une action en vertu de l'article 33 du Code de procédure civile (chapitre C-25) ou un recours extraordinaire au sens de ce code ne peut être exercé, et une mesure provisionnelle ne peut être ordonnée contre la Commission d'appel ou l'un de ses commissaires agissant en sa qualité officielle.

Un juge de la Cour d'appel peut, sur requête, annuler sommairement une action accueillie, un bref ou une ordonnance délivré ou une injonction accordée à l'encontre du présent article.

Le Tribunal du travail a été institué par le *Code du travail* du Québec, L.R.Q., ch. C-27, art. 112. Les poursuites pénales intentées en vertu de la *L.A.T.M.P.* sont portées devant lui. L'article 473 se lit ainsi:

**473.** Une poursuite en vertu du présent chapitre est intentée devant le Tribunal du travail créé par le Code du travail (chapitre C-27) et les articles 118, 121, 124 à 128 et 133 à 136 de ce code s'appliquent.

Cette poursuite ne peut être intentée que par la Commission ou une personne qu'elle désigne généralement ou spécialement à cette fin, dans l'année qui suit la connaissance de l'infraction par la Commission.

L'infraction relative à l'art. 60 *L.A.T.M.P.* est prévue à l'art. 458:

**458.** L'employeur qui contrevient au premier alinéa des articles 32 ou 33, à l'article 59, au premier ou au deuxième alinéa de l'article 60 [. . .] commet une infraction et est passible d'une amende d'au moins 500 $ et d'au plus 1 000 $ s'il s'agit d'une personne physique, et d'une amende d'au moins 1 000 $ et d'au plus 2 000 $ s'il s'agit d'une personne morale.

Le jugement du Tribunal du travail est appelable devant la Cour supérieure conformément au *Code de procédure pénale*, L.R.Q., ch. C-25.1.

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III—Judgments

*Bureau de révision paritaire*, [1985-86] B.R.P. 505

The majority summed up the issue as follows (at p. 506):

[TRANSLATION] The issue raised before the Bureau de révision paritaire is whether the worker was entitled to more than two days' compensation for his period of disability from December 19, 1985 to January 2, 1986.

It added (at p. 507):

[TRANSLATION] In order to answer the question raised it must be determined whether, *had he not been disabled*, the worker would *normally* have worked during the 14-day period following the beginning of his disability. Specifically, if the worker had not suffered the industrial accident on December 17, 1985, would he have worked during that 14-day period?

In our opinion, the closure of the plant must be regarded as normal in this case as it was scheduled, and even if the worker had not suffered an accident he would only have received two days of his wages, that is up to December 20, 1985, as indeed most of the workers did. [Emphasis in original.]

In the absence of evidence establishing that the appellant intended to use his seniority right during the layoff period to bump another employee with less seniority, the majority concluded that the application should be dismissed (at p. 507):

[TRANSLATION] We accordingly believe that had he not been disabled, and based on the evidence presented, Mr. Lapointe would normally have worked only 2 days, namely December 19 and 20, during the 14-day period following the beginning of his disability.

The original decision is accordingly upheld.

In the opinion of the dissenting member, Mr. Tardif, there was no doubt that the appellant intended to use his seniority right. Being of the view that, had the appellant not been disabled, this seniority right would have enabled him to work during the layoff period, Mr. Tardif would have overturned the CSST's decision and ordered Domtar to compensate the appellant for each day or part of a day he would have worked during the

III—Jugements

*Bureau de révision paritaire*, [1985-86] B.R.P. 505

La majorité résume la question en litige ainsi (à la p. 506):

La question soulevée devant le Bureau de révision paritaire est à l'effet de déterminer si le travailleur avait droit à plus de deux jours d'indemnité pour sa période d'incapacité du 19 décembre 1985 au 2 janvier 1986.

Elle poursuit (à la p. 507):

Pour répondre à la question soulevée, il faut rechercher si le travailleur aurait *normalement* travaillé, *n'eût été de son incapacité*, durant la période de 14 jours suivant le début de son incapacité. Plus précisément, si le travailleur n'avait pas subi d'accident du travail le 17 décembre 1985, est-ce qu'il aurait travaillé durant cette période de 14 jours.

À notre avis, la fermeture de l'usine doit être considérée comme normale dans ce cas, car elle était prévue et même si le travailleur n'avait pas été accidenté, il n'aurait reçu que deux jours de son salaire soit jusqu'au 20 décembre 1985 comme la majorité des travailleurs, d'ailleurs. [En italique dans l'original.]

D'autre part, en l'absence de preuve démontrant que l'appelant avait l'intention d'utiliser son droit d'ancienneté afin de déplacer, durant la période de mise à pied, un autre employé ayant moins d'ancienneté, la majorité conclut au rejet de la demande (à la p. 507):

En conséquence, nous croyons que M. Lapointe, n'eût été de son incapacité et compte tenu de la preuve faite, n'aurait normalement travaillé que 2 jours, soit le 19 et le 20 décembre, et ce, pour la période de 14 jours suivant le début de son incapacité.

La décision originale est donc maintenue.

Le membre dissident, M. Tardif, est d'avis que l'intention de l'appelant d'utiliser son droit d'ancienneté ne faisait pas de doute. Estimant que ce droit d'ancienneté lui aurait permis, n'eût été de son incapacité, de travailler durant la période de mise à pied, M. Tardif aurait infirmé la décision de la CSST et ordonné à Domtar d'indemniser l'appelant pour chaque jour ou partie de jour où il aurait travaillé et ce, pour les 14 jours suivant le début de

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14 days following the beginning of his disability. (The dissenting member's reasons are not reported in the B.R.P.)

*Commission d'appel en matière de lésions professionnelles*, [1986] C.A.L.P. 116

After reviewing the wording and purpose of s. 60 *A.I.A.O.D.*, the CALP found that the expression "would normally have worked" could not be separated from the words "had he not been disabled" which immediately follow it. Accordingly, it considered that, in interpreting this provision, no account whatever could be taken of factors or circumstances extrinsic to the worker's inability to carry on his employment by reason of his employment injury. The CALP referred to its own decision in *Tousignant et Hawker Siddeley Canada Inc.*, [1986] C.A.L.P. 48, to the effect that the suspension or breach of an employment contract by a layoff has no effect on the worker's inability to carry on his employment as a result of an employment injury. Applying these principles to the facts of this case, it added (at p. 119):

[TRANSLATION] In the present case, the appellant was employed by the party concerned on December 17, 1985, the date on which he suffered an employment injury. By reason of this employment injury the appellant was unable to carry on his employment until January 2, 1986.

Under s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*, the party concerned was therefore obliged to pay the appellant, regardless of the plant closure, 90% of his net salary or wages for each day or part of a day he would normally have worked, according to his usual work schedule, had it not been for his inability to carry on his employment by reason of his injury for the first 14 full days following the beginning of that disability.

It concluded that Domtar should pay the appellant 90 percent of his net salary or wages for each day or part of a day he would normally have worked according to his usual work schedule, regardless of the plant closure.

son incapacité. (À noter que les motifs du membre dissident ne sont pas publiés au B.R.P.)

*Commission d'appel en matière de lésions professionnelles*, [1986] C.A.L.P. 116

Après avoir fait état du texte et de l'objet de l'art. 60 *L.A.T.M.P.*, la CALP juge que l'expression «aurait normalement travaillé» ne peut être dissociée des termes «n'eût été de son incapacité», qui la suivent immédiatement. En conséquence, elle estime que l'on ne saurait, aux fins d'interprétation de cette disposition, tenir compte de facteurs ou circonstances extrinsèques à l'incapacité du travailleur d'exercer son emploi en raison de sa lésion professionnelle. La CALP réfère à sa propre décision dans l'affaire *Tousignant et Hawker Siddeley Canada Inc.*, [1986] C.A.L.P. 48, à l'effet que la suspension ou la rupture du contrat de travail par une mise à pied n'a aucune incidence sur l'incapacité du travailleur d'exercer son emploi à la suite d'une lésion professionnelle. Appliquant ces principes aux faits de l'espèce, elle poursuit (à la p. 119):

Dans la présente instance, l'appelant était au service de la partie intéressée le 17 décembre 1985, date à laquelle il a subi une lésion professionnelle. En raison de cette lésion professionnelle, l'appelant a été incapable d'exercer son emploi jusqu'au 2 janvier 1986.

En vertu de l'article 60 de la *Loi sur les accidents du travail et les maladies professionnelles*, la partie intéressée devait donc verser à l'appelant, et ce, sans égard à la fermeture de l'usine, 90 % de son salaire net pour chaque jour ou partie de jour où il aurait normalement travaillé, selon son horaire habituel de travail, n'eût été de son incapacité d'exercer son emploi en raison de sa lésion pendant les 14 premiers jours complets suivant le début de cette incapacité.

Elle conclut que Domtar devait verser à l'appelant 90 p. 100 de son salaire net pour chaque jour ou partie de jour où il aurait normalement travaillé selon son horaire habituel de travail et ce, sans égard à la fermeture de l'usine.

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*Superior Court*, [1987] C.A.L.P. 254

Summarizing the CALP's conclusion in this case and in *Tousignant et Hawker Siddeley Canada Inc.*, *supra*, Masson J. recalled the purpose and wording of the *A.I.A.O.D.* Even if the CALP's decision was wrong, he was of the view that the CALP had nevertheless acted within its general jurisdiction (at p. 257):

[TRANSLATION] We are of the view that, by acting in this way, the respondent Commission d'appel carried out one of the duties imposed on it by law and acted within its general jurisdiction.

The decision of the Commission d'appel may be wrong, but it was nonetheless made within the limits of its jurisdiction.

Adding that the CALP's decision was not unreasonable, Masson J. concluded that the CALP had not exceeded its jurisdiction and he accordingly dismissed the motion in evocation.

*Court of Appeal*, [1991] R.J.Q. 2438

Mailhot J.A.

Mailhot J.A. first reviewed ss. 405 and 409 *A.I.A.O.D.*, which exclude, respectively, all appeals from decisions of the CALP and extraordinary remedies, except on a question of jurisdiction. She noted that, for the CALP's decision to be reversed, it had to be shown that the CALP had [TRANSLATION] "exceeded its jurisdiction or given the provision in question an interpretation so unreasonable that it could not be rationally supported on the relevant legislation" (p. 2441).

Recalling the wording of s. 60 *A.I.A.O.D.* and the arguments of the parties, Mailhot J.A. considered that the application of the patently unreasonable error test would not satisfactorily dispose of the case. In this regard, she cited the Labour Court's decision in *Commission de la santé et de la sécurité du travail v. BG Chéco International Ltée*, [1991] T.T. 405, where it was held that s. 60 raised a reasonable, significant and insurmountable doubt as to an employer's duty in the event of a layoff occurring within the 14-day period mentioned in that provision. Mailhot J.A. also referred

*Cour supérieure*, [1987] C.A.L.P. 254

Résumant la conclusion de la CALP en l'espèce ainsi que l'affaire *Tousignant et Hawker Siddeley Canada Inc.*, précitée, le juge Masson rappelle l'objet et la nomenclature de la *L.A.T.M.P.* Même si la décision de la CALP s'avérait mal fondée, il estime que cette dernière a néanmoins agi dans le cadre de sa compétence globale (à la p. 257):

En agissant ainsi, nous sommes d'opinion que la Commission d'appel intimée a rempli l'une des fonctions dont elle était chargée par la loi et a agi à l'intérieur de sa compétence globale.

La décision de la Commission d'appel est peut-être mal fondée, mais elle a néanmoins été prise dans les cadres de sa compétence.

Ajoutant que la décision de la CALP n'était pas déraisonnable, le juge Masson conclut que la CALP n'avait pas excédé sa juridiction et il rejette, en conséquence, la requête en évocation.

*Cour d'appel*, [1991] R.J.Q. 2438

Le juge Mailhot

Le juge Mailhot fait d'abord état des art. 405 et 409 *L.A.T.M.P.* qui excluent, respectivement, tout appel des décisions de la CALP et les recours extraordinaires, sauf en matière de compétence. Elle note que, pour que la décision de la CALP soit infirmée, il faut démontrer que celle-ci est «sortie de sa compétence ou a donné une interprétation au texte visé qui soit déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente» (p. 2441).

Rappelant le texte de l'art. 60 *L.A.T.M.P.* et les arguments des parties, le juge Mailhot estime que l'application du critère de l'erreur manifestement déraisonnable ne réglerait pas le litige de manière satisfaisante. Elle cite, à cet égard, la décision du Tribunal du travail dans l'affaire *Commission de la santé et de la sécurité du travail c. BG Chéco International Ltée*, [1991] T.T. 405, où il fut jugé que l'art. 60 laissait subsister un doute raisonnable, sérieux et insurmontable quant à l'obligation d'un employeur dans le cas d'une mise à pied survenant pendant la période de 14 jours prévue à cette dis-

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to the Court of Appeal's decision in *Produits Pétro-Canada Inc. v. Moalli*, [1987] R.J.Q. 261, and observed that it was in the interest of justice for the conflict to be resolved at once, regardless of traditional curial deference, because such deference, while ordinarily leading to dismissal of the application for evocation, did not resolve the unstable situation. Although there were two possibilities which could be rationally defended, in her opinion the ideal of justice, which promotes the rule of law, was not really served. She therefore felt it desirable that the intention of the legislature should prevail.

Concluding that the issue could only be resolved by the exception indicated in *Moalli*, Mailhot J.A. noted that the legislative intent was not to treat injured workers differently from other workers as regards the first 14 days covered by s. 60. In her view, the words "for each day or part of a day the worker would normally have worked" are intended to ensure that the injured person is treated like other workers, in other words, that he is entitled to the salary or wages to which he would have been entitled if the employer had work to give him and could do so, if these days were part of his regular schedule or if his contract was still in effect. Finally, Mailhot J.A. noted that this interpretation is fairer to everyone and is consistent with the other provisions of the *A.I.A.O.D.* She concluded that, as there is no obligation to pay a salary or wages when there is a plant closure, strike, lock-out, layoff, unpaid leave and so on, there can be no obligation on the employer to pay 90 percent of the net salary or wages during these periods.

Mailhot J.A. accordingly would have allowed the appeal and granted the application for evocation.

Baudouin J.A. (concurring)

While concurring in Mailhot J.A.'s conclusion, Baudouin J.A. was of the view that, even though the wording of s. 60 may be open to several interposition. Le juge Mailhot réfère aussi à la décision de la Cour d'appel dans l'affaire *Produits Pétro-Canada Inc. c. Moalli*, [1987] R.J.Q. 261, et souligne qu'il est dans l'intérêt de la justice de trancher immédiatement le conflit, laissant de côté la réserve judiciaire traditionnelle, parce que cette réserve, tout en conduisant normalement au rejet de la demande d'évocation, ne mettait pas fin à l'instabilité de la situation. Bien qu'elle soit devant deux thèses rationnellement défendables, selon elle, l'idéal de justice, qui veut que triomphe la règle de droit, n'y trouve pas vraiment son compte. Elle juge donc souhaitable que l'intention du législateur l'emporte.

Estimant que la résolution du litige appelle la voie d'exception indiquée dans l'arrêt *Moalli*, le juge Mailhot note que l'intention du législateur n'est pas de traiter les travailleurs accidentés de façon différente des autres travailleurs en ce qui concerne les 14 premiers jours visés par l'article 60. À son avis, les mots «pour chaque jour ou partie de jour où ce travailleur aurait normalement travaillé» visent à assurer que la personne accidentée soit traitée comme les autres personnes qui travaillent, c'est-à-dire qu'elle ait droit à un salaire comme elle y aurait droit si l'employeur avait du travail à confier et pouvait le faire ou si ces journées faisaient partie de son horaire habituel, ou si son contrat était toujours en vigueur. Finalement, le juge Mailhot note que cette interprétation est plus équitable pour tous et s'harmonise avec les autres dispositions de la *L.A.T.M.P.* Elle conclut que, comme il n'y a pas d'obligation de payer un salaire lorsqu'il y a fermeture d'établissement, grève, lock-out, mise à pied, congé non rémunéré etc., il ne peut en découler d'obligation pour l'employeur de payer 90 p. 100 du salaire net pendant ces périodes.

En conséquence, le juge Mailhot propose d'accueillir le pourvoi et de faire droit à la demande d'évocation.

Le juge Baudouin (motifs concordants)

Tout en partageant la conclusion du juge Mailhot, le juge Baudouin est d'avis que, même si la rédaction de l'art. 60 peut susciter plusieurs inter-

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pretations, it does not automatically follow that no interpretation can ever be patently unreasonable. He disposed of the appeal in the same way as Mailhot J.A. (at p. 2446):

[TRANSLATION] Like my colleague, I am of the view in this case that the function of this Court is to resolve the conflict between the two administrative agencies, a conflict which creates uncertainty and is not in the interests of effective justice. Accordingly, without necessarily finding that the interpretation given by the Commission d'appel is *patently* unreasonable (even though it seems illogical to me, given a rational interpretation of the Act read as a whole, and inconsistent with the resulting philosophy), I believe that this situation is identical to that confronting this Court in *Produits Pétro-Canada Inc. v. Moalli*. [Emphasis in original.]

## IV—Issues

As I said at the outset, this appeal raises questions which lie at the core of the institutional relationship between courts of law and administrative tribunals: was the CALP's decision patently unreasonable? If so, it is open to judicial review. If not, does the fact that there were, at least apparently, divergent interpretations of the same legislative provision by two administrative tribunals give rise to judicial review?

## V—Analysis

While the first question raises issues which this Court has already had an opportunity to decide on several occasions, the second raises a problem which has been the subject of some controversy. A review of the principles laid down by this Court in recent years will, first, provide the background against which this appeal must be analysed. This review will indicate the principles underlying the standard of review applicable to the CALP's decision and clarify the real issues presented here by the Court of Appeal's intervention.

prétations, il ne s'ensuit pas automatiquement que toute interprétation ne puisse jamais être manifestement déraisonnable. Il dispose du pourvoi de la même façon que le juge Mailhot (à la p. 2446):

En l'espèce, j'estime, comme ma collègue, que le rôle de notre Cour est de mettre fin à ce conflit entre les deux organes administratifs, conflit qui est source d'incertitude et qui n'est pas dans l'intérêt d'une saine justice. Sans donc nécessairement trouver que l'interprétation donnée par la Commission d'appel est *manifestement* déraisonnable (même si elle me paraît illogique, eu égard à une interprétation rationnelle de la loi lue dans son ensemble et peu conforme à la philosophie qui s'en dégage), je crois que nous sommes en présence d'une situation identique à celle à laquelle notre Cour a eu à faire face dans l'affaire *Produits Pétro-Canada Inc. c. Moalli*. [En italique dans l'original.]

## IV—Questions en litige

Le présent pourvoi, je le rappelle, soulève des questions qui sont au cœur du rapport institutionnel entre les cours de justice et les tribunaux administratifs: la décision de la CALP est-elle manifestement déraisonnable? Dans l'affirmative, il y a lieu à un contrôle judiciaire. Dans la négative, le fait qu'il y ait, du moins en apparence, divergence d'interprétation d'un même texte législatif de la part de deux instances administratives donne-t-il ouverture au contrôle judiciaire?

## V—Analyse

Si la première question fait appel à des notions sur lesquelles notre Cour a déjà eu l'occasion de se prononcer et ce, à plusieurs reprises, la seconde soulève, en revanche, un problème qui fait l'objet d'une certaine controverse. Un rappel des principes élaborés par notre Cour au cours des dernières années permettra, en premier lieu, d'éclairer la toile de fond sur laquelle le présent pourvoi se doit d'être analysé. Tout en précisant les principes sous-jacents à la norme de contrôle applicable à la décision de la CALP, ce rappel éclairera les enjeux véritables posés, en l'espèce, par l'intervention de la Cour d'appel.

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A. *Applicable Standard of Review*

Although the Court of Appeal recognized that, strictly speaking, the interpretation of s. 60 was within the CALP's jurisdiction, a functional analysis of the Act, however brief, seems desirable if not essential to decipher the legislative intent (see *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, at p. 258 (*per* La Forest J.); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC No. 2*"), at pp. 965 (*per* Cory J.) and 977 (*per* L'Heureux-Dubé J.); *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, at pp. 485-86 (*per* Lamer C.J.); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 ("*PSAC No. 1*"), at pp. 628 (*per* Sopinka J.) and 657 (*per* Cory J.); *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, at p. 1002, and *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1088). Determining the legislative intent as to the standard of review applicable to the decision of an administrative tribunal involves recognizing that, within its area of expertise, its decision-making autonomy may be of prime importance. Conversely, failing to go through the process of rejecting the correctness standard may conceal the real meaning of judicial intervention that falls outside the limits of the jurisdiction of an administrative agency. An initial conclusion that, for purposes of judicial review, the legislature admits several possible and rational constructions of the same legislative provision thus becomes of primary importance. This conclusion, while constituting the necessary starting-point of a discussion of the powers of supervision and control of courts of law, is ultimately the guiding principle for analyzing the appropriateness of judicial review.

In *Bibeault*, Beetz J. summarized the principles governing judicial review of decisions of an administrative tribunal, emphasizing its area of jurisdiction (at p. 1086):

A. *La norme de contrôle applicable*

Quoique la Cour d'appel ait reconnu que l'interprétation de l'art. 60 relevait de la compétence *stricto sensu* de la CALP, une analyse fonctionnelle de la Loi, si brève soit-elle, m'apparaît souhaitable, sinon nécessaire pour dégager l'intention du législateur (voir *Dayco (Canada) Ltd. c. TCA-Canada*, [1993] 2 R.C.S. 230, à la p. 258 (le juge La Forest); *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941 («*AFPC nº 2*»), aux pp. 965 (le juge Cory) et 977 (le juge L'Heureux-Dubé); *Université du Québec à Trois-Rivières c. Larocque*, [1993] 1 R.C.S. 471, aux pp. 485 et 486 (le juge en chef Lamer); *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1991] 1 R.C.S. 614 («*AFPC nº 1*»), aux pp. 628 (le juge Sopinka) et 657 (le juge Cory); *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, à la p. 1002, et *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, à la p. 1088). Cerner l'intention du législateur quant à la norme de contrôle applicable à la décision d'un tribunal administratif, c'est reconnaître que son autonomie décisionnelle peut, dans le cadre de son expertise, se révéler primordiale. À l'inverse, éluder les modalités d'une mise à l'écart de la norme de contrôle axée sur la justesse d'une interprétation donnée risque de masquer la portée véritable d'une intervention judiciaire qui s'articule au-delà du paramètre du champ de compétence de l'organisme administratif. Une conclusion initiale à l'effet que le législateur admet, aux fins du contrôle judiciaire, plusieurs lectures possibles et rationnelles d'une même disposition législative devient, par là, capitale. Tout en constituant le point de départ nécessaire d'un débat portant sur le pouvoir de contrôle et de surveillance des cours de justice, ce constat représente le fil directeur à l'aide duquel l'opportunité d'un contrôle judiciaire doit, en définitive, être analysée.

Dans l'arrêt *Bibeault*, le juge Beetz a résumé les principes régissant le contrôle judiciaire de la décision d'un tribunal administratif en mettant l'accent sur son champ de compétence (à la p. 1086):

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1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

The initial step advocated by this Court must therefore focus primarily on the concept of jurisdiction. This step must, however, take into account both the desirability of curial deference and the ease with which a question can be incorrectly characterized as one of jurisdiction (see *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233, and *Canada Labour Relations Board v. Halifax Longshoremen's Association, Local 269*, [1983] 1 S.C.R. 245, at p. 256). *Bibeault* explained the meaning of the concept of jurisdiction in the context of judicial review as follows (at p. 1090):

> Jurisdiction *stricto sensu* is defined as the power to decide. The importance of a grant of jurisdiction relates not to the tribunal's capacity or duty to decide a question but to the determining effect of its decision. As S. A. de Smith points out, the tribunal's decision on a question within its jurisdiction is binding on the parties to the dispute. . . . The true problem of judicial review is to discover whether the legislator intended the tribunal's decision on these matters to be binding on the parties to the dispute, subject to the right of appeal if any. [Emphasis added.]

This amounts to asking "Who should answer this question, the administrative tribunal or a court of law?" It thus involves determining who is in the best position to rule on the impugned decision. According to Beetz J., at p. 1088, in order to deal adequately with the question "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?", a court of law

1. Si la question de droit en cause relève de la compétence du tribunal, le tribunal n'excède sa compétence que s'il erre d'une façon manifestement déraisonnable. Le tribunal qui est compétent pour trancher une question peut, ce faisant, commettre des erreurs sans donner ouverture à la révision judiciaire.

2. Si, par contre, la question en cause porte sur une disposition législative qui limite les pouvoirs du tribunal, une simple erreur fait perdre compétence et donne ouverture à la révision judiciaire.

La démarche initiale préconisée par notre Cour exige donc, avant tout, de mettre l'accent sur la notion de compétence. Cette démarche doit, cependant, tenir compte à la fois de la valeur que représente la retenue judiciaire et de la facilité avec laquelle une question peut être incorrectement qualifiée de question de compétence (voir *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, à la p. 233, et *Conseil canadien des relations du travail c. Association des débardeurs d'Halifax, section locale 269*, [1983] 1 R.C.S. 245, à la p. 256.) L'arrêt *Bibeault* est venu, ainsi, préciser le sens de la notion de compétence dans le cadre du contrôle judiciaire (à la p. 1090):

> La compétence, *stricto sensu*, se définit comme le pouvoir de décider une question. L'importance d'un octroi de compétence se rattache non pas à la faculté ou à l'obligation du tribunal de traiter d'une question, mais au caractère déterminant de sa décision. Comme S. A. de Smith le souligne, la décision du tribunal sur une question qui relève de sa compétence lie les parties au litige. [. . .] Le véritable problème du contrôle judiciaire est de savoir si le législateur veut que la décision du tribunal sur ces questions lie les parties au litige, sous réserve du droit d'appel, s'il en est. [Je souligne.]

Ce problème se résume à se demander «Qui doit répondre à cette question, le tribunal administratif ou une cour de justice?» Il met donc en jeu la question de savoir qui est le mieux placé pour se prononcer sur la décision contestée. Selon le juge Beetz, à la p. 1088, afin d'aborder adéquatement la question «Le législateur a-t-il voulu qu'une telle matière relève de la compétence conférée au tribunal?», une cour de justice

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examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

examine non seulement le libellé de la disposition législative qui confère la compétence au tribunal administratif, mais également l'objet de la loi qui crée le tribunal, la raison d'être de ce tribunal, le domaine d'expertise de ses membres, et la nature du problème soumis au tribunal.

The legislature's intention to give the CALP the power to make a final ruling on the meaning and scope of s. 60 *A.I.A.O.D.* is not open to question. As an appellate administrative tribunal, the CALP hears and disposes exclusively of appeals brought under ss. 37.3 and 193 of the *Act respecting Occupational Health and Safety* and the *A.I.A.O.D.* (s. 397). It has exclusive jurisdiction to "confirm the decision or the order brought before it; it may also quash the decision or the order and shall in that case render the decision or make the order that should have been given initially" (s. 400). Its members are subject to specific obligations set out in ss. 373 *et seq. A.I.A.O.D.*, they have all the powers necessary for the exercise of their jurisdiction and may rule on any questions of law or of fact (s. 407). In addition to these significant powers, the CALP has an obligation to publish its own decisions (s. 391), the authority to make recommendations to the Minister (s. 396) as well as the authority to review or revoke its own decisions for cause (s. 406).

L'intention du législateur de confier à la CALP le pouvoir de se prononcer de manière définitive sur le sens et la portée de l'art. 60 *L.A.T.M.P.* ne souffre aucune ambiguïté. À titre de tribunal administratif d'appel, la CALP connaît et dispose, exclusivement à tout autre tribunal, des appels interjetés en vertu des art. 37.3 et 193 de la *Loi sur la santé et la sécurité du travail* et de la *L.A.T.M.P.* (art. 397). Elle possède une compétence exclusive pour «confirmer la décision, l'ordre ou l'ordonnance porté devant elle; elle peut aussi l'infirmer et doit alors rendre la décision, l'ordre ou l'ordonnance qui, selon elle, aurait dû être rendu en premier lieu» (art. 400). Ses membres sont soumis à des obligations spécifiques prévues aux art. 373 et suiv. *L.A.T.M.P.*, ils possèdent tous les pouvoirs nécessaires à l'exercice de leur compétence et peuvent décider de toute question de droit et de fait (art. 407). À ces pouvoirs significatifs s'ajoute l'obligation de la CALP de publier ses propres décisions (art. 391), le pouvoir de formuler des recommandations auprès du ministre (art. 396) ainsi que celui de réviser ou révoquer, pour cause, ses propres décisions (art. 406).

Several provisions are designed to ensure that CALP decisions are effective. The decisions are final and without appeal and every person contemplated in the decision must comply with them without delay (s. 405). They may be filed in the office of the prothonotary of the Superior Court of the district in which the appeal was brought and such filing makes them executory as if they were final judgments of the Superior Court without appeal, and with all the effects thereof (s. 429). CALP decisions are also protected by a full privative clause, which I reproduce here for the sake of convenience:

Plusieurs dispositions ont pour objet d'assurer l'efficacité des décisions de la CALP. Celles-ci sont finales et sans appel et toute personne visée doit s'y conformer sans délai (art. 405). Elles peuvent être déposées au bureau du protonotaire de la Cour supérieure du district où l'appel a été formé et ce dépôt la rend exécutoire comme un jugement final et sans appel de la Cour supérieure et en a tous les effets (art. 429). Les décisions de la CALP sont, de surcroît, protégées par une clause privative complète, que je rappelle ici pour fins de commodité:

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**409.** Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the board of appeal or one of its commissioners acting in his official capacity.

A judge of the Court of Appeal may annul summarily, upon a motion, any action granted, any writ, order or injunction issued or granted contrary to this section.

Finally, the nature of the problem presented here raises questions on which the CALP is eminently qualified. Section 60 *A.I.A.O.D.* is not only one of the legislative provisions on which the CALP has the express power to rule, it employs concepts which are at the core of its area of expertise, namely disability, employment injury and the complex system of compensation set up by the Quebec legislature. The interpretation of s. 60 by the CALP is, thus, a function directly relating to the objective sought by the legislature: to permit an administrative tribunal to issue a final ruling on decisions of first instance by giving a final interpretation of its enabling statute.

Since the interpretation of s. 60 *A.I.A.O.D.* is, strictly speaking, within the jurisdiction of the CALP, the standard of review applicable here is whether the decision is patently unreasonable. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, *supra*, Dickson J. formulated the question which courts of law must constantly keep in mind in such circumstances (at p. 237):

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review? [Emphasis added.]

The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an

**409.** Sauf sur une question de compétence, une action en vertu de l'article 33 du Code de procédure civile (chapitre C-25) ou un recours extraordinaire au sens de ce code ne peut être exercé, et une mesure provisionnelle ne peut être ordonnée contre la Commission d'appel ou l'un de ses commissaires agissant en sa qualité officielle.

Un juge de la Cour d'appel peut, sur requête, annuler sommairement une action accueillie, un bref ou une ordonnance délivré ou une injonction accordée à l'encontre du présent article.

Enfin, la nature du problème ici posé soulève des questions sur lesquelles la CALP est éminemment qualifiée. Tout en comptant parmi les dispositions législatives sur lesquelles la CALP a le pouvoir explicite de se prononcer, l'art. 60 *L.A.T.M.P.* fait appel a des notions qui sont au cœur de son domaine d'expertise, soit l'incapacité, la lésion professionnelle et le régime d'indemnisation complexe instauré par le législateur québécois. L'interprétation de l'art. 60 par la CALP constitue donc une fonction qui participe directement à l'objectif poursuivi par le législateur: permettre à un tribunal administratif de disposer, en dernier ressort, des décisions des instances inférieures en interprétant sa loi constitutive de façon finale.

Puisque l'interprétation de l'art. 60 *L.A.T.M.P.* relève de la compétence *stricto sensu* de la CALP, la norme de contrôle ici applicable est le caractère manifestement déraisonnable de sa décision. Dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, précité, le juge Dickson a formulé la question que les cours de justice devaient, dans ces conditions, constamment garder à l'esprit (à la p. 237):

La Commission a-t-elle interprété erronément les dispositions législatives de façon à entreprendre une enquête ou à répondre à une question dont elle n'était pas saisie? Autrement dit, l'interprétation de la Commission est-elle déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente et d'exiger une intervention judiciaire? [Je souligne.]

Le critère de l'erreur manifestement déraisonnable constitue le pivot sur lequel repose la retenue des cours de justice. Dans le cadre des questions

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administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in *PSAC No. 1* and *PSAC No. 2*, *supra*, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 (*per* Wilson J.)). Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *PSAC No. 2*, *supra*; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *National Corn Growers Assn. v. Canada (Import Tribunal)*, *supra*, and *CAIMAW v. Paccar of Canada Ltd.*, *supra*. In the recent decision *PSAC No. 2*, Cory J. noted that this was a strict test (at p. 964):

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be

relevant de la compétence spécialisée d'un organisme administratif protégé par une clause privative, cette norme de contrôle a une finalité précise: éviter qu'un contrôle de la justesse de l'interprétation administrative ne serve de paravent, comme ce fut le cas dans le passé, à un interventionnisme axé sur le bien-fondé d'une décision donnée. Le processus par lequel cette norme de contrôle a progressivement trouvé droit de cité chez les cours de justice est indissociable du principe contemporain de la retenue judiciaire, étroitement lié, à son tour, au développement d'une justice administrative à grande échelle (voir les motifs du juge Cory dans *AFPC nº 1* et *AFPC nº 2*, précités; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324 (le juge Wilson)). Substituer son opinion à celle du tribunal administratif afin de dégager sa propre interprétation d'une disposition législative, c'est réduire à néant son autonomie décisionnelle et l'expertise qui lui est propre. Puisqu'une telle intervention surgit dans un contexte où le législateur a déterminé que le tribunal administratif est celui qui est le mieux placé pour se prononcer sur la décision contestée, elle risque de contrecarrer, par la même occasion, son intention première. L'interprétation des lois a cessé, aux fins du contrôle judiciaire, d'être une science nécessairement «exacte» et notre Cour a confirmé, encore récemment, la règle de la retenue judiciaire énoncée pour la première fois dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *AFPC nº 2*, précité; *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, précité, et *CAIMAW c. Paccar of Canada Ltd.*, précité. Dans le récent arrêt *AFPC nº 2*, le juge Cory a rappelé qu'il s'agissait là d'une norme sévère (à la p. 964):

> Il ne suffit pas que la décision de la Commission soit erronée aux yeux de la cour de justice; pour qu'elle soit

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patently unreasonable, be found by the court to be clearly irrational.

B. *Is the CALP's Interpretation Patently Unreasonable?*

While agreeing with the interpretation adopted by the Court of Appeal, Domtar argues that the court should have concluded that the CALP's decision in the case at bar was patently unreasonable. The CALP interpreted s. 60 *A.I.A.O.D.*, which I reproduced earlier, as follows (at p. 118):

[TRANSLATION] That section imposes on the employer with whom the worker is employed when he suffers an employment injury an obligation to pay him, as an income replacement indemnity on account of his employment injury, 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not been unable to carry on his employment by reason of his injury, for the first 14 days following the beginning of his disability.

The Commission d'appel concluded in this regard that the words "would normally have worked" used in s. 60 should not be separated from the words "had he not been disabled" which immediately follow them, so that no account should be taken of factors or circumstances extrinsic to the worker's inability to work by reason of his employment injury in determining what period he would have worked, in the usual way and had he not been disabled, during the first 14 days following the beginning of his disability.

The Commission d'appel accordingly concluded that under s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*, the employer must pay the worker 90% of his net salary or wages for each day or part of a day on which he would normally have worked had he not been disabled by reason of his injury, regardless of any extrinsic cause, such as plant closure, which had no connection with the worker's inability to carry on his employment by reason of his employment injury. [Emphasis added.]

The CALP, therefore, concluded that the respondent had to pay the appellant 90 percent of his net salary or wages for each day or part of a day on which he would normally have worked according to his usual work schedule, regardless of the plant closure.

manifestement déraisonnable, cette cour doit la juger clairement irrationnelle.

B. *L'interprétation de la CALP est-elle manifestement déraisonnable?*

Tout en étant d'accord avec l'interprétation retenue par la Cour d'appel, Domtar soutient que celle-ci aurait dû conclure que la décision de la CALP était, en l'espèce, manifestement déraisonnable. La CALP a interprété l'art. 60 *L.A.T.M.P.*, que j'ai déjà reproduit ci-avant, de la façon suivante (à la p. 118):

Cet article impose à l'employeur, au service duquel se trouve le travailleur lorsqu'il est victime d'une lésion professionnelle, l'obligation de lui verser, à titre d'indemnité de remplacement du revenu en raison de sa lésion professionnelle, 90 % de son salaire net pour chaque jour ou partie de jour où ce travailleur aurait normalement travaillé n'eût été de son incapacité d'exercer son emploi en raison de sa lésion, pendant les 14 premiers jours suivant le début de son incapacité.

La Commission d'appel considère à cet égard que les termes «aurait normalement travaillé», utilisés à l'article 60, ne doivent pas être dissociés des termes «n'eût été de son incapacité» qui les suivent immédiatement, de sorte qu'on ne doit pas tenir compte de facteurs ni de circonstances extrinsèques à l'incapacité du travailleur de travailler en raison de sa lésion professionnelle pour déterminer à quelle période il aurait travaillé, de façon habituelle et n'eût été de son incapacité, durant les 14 premiers jours suivant le début de son incapacité.

La Commission d'appel considère donc qu'aux termes de l'article 60 de la *Loi sur les accidents du travail et les maladies professionnelles* l'employeur doit verser au travailleur 90 % de son salaire net pour chaque jour ou partie de jour où il aurait habituellement travaillé n'eût été de son incapacité en raison de sa lésion, sans égard à quelque cause extrinsèque, une fermeture d'usine, à titre d'exemple, n'ayant aucune relation avec l'incapacité du travailleur d'exercer son emploi en raison de sa lésion professionnelle. [Je souligne.]

La CALP a donc conclu que l'intimée devait verser à l'appelant 90 p. 100 de son salaire net pour chaque jour ou partie de jour où il aurait normalement travaillé selon son horaire habituel de travail et ce, sans égard à la fermeture de l'usine.

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In my opinion, this decision cannot be said to be patently unreasonable. This is also the conclusion reached by the Superior Court and the Court of Appeal. It is one thing to argue, as Domtar does, that the CALP's interpretation unduly favours workers who suffer occupational injuries over employees who receive no salary or wages during a strike, lockout or layoff; it is quite another to conclude that this decision is clearly irrational. In order to show that the CALP's interpretation is unreasonable, Domtar in its factum emphasized the difficulty of determining the frequency of the services provided by the worker prior to an injury for purposes of the phrase "would normally have worked":

[TRANSLATION] Thus, what does this "habit" signify for a worker who suffers an employment injury after working for the same employer for 10 years? Is the habit to be assessed on the basis of the entire period or only part of it? Should we only take into account the last year, the last month or the last week? If a collective agreement was signed on the day a worker suffers an employment injury and that collective agreement increases a worker's work week from four to five days a week, what happens according to the interpretation proposed by the C.A.L.P.? And if a worker suffers an employment injury on the day he is hired, can the employer successfully contend that he owes the worker no income replacement indemnity under s. 60 of the A.I.A.O.D.?

Without ruling on the merits of these hypotheses, I am of the view that, even if these problems arose in connection with the compensation system created by the Act, it would be for the CALP, and not a court of law, to dispose of them in a final fashion under its jurisdiction *stricto sensu* for the purposes of the *A.I.A.O.D.* This jurisdiction necessarily includes some room to manoeuvre, avoiding the need to anticipate all the legal consequences that may result from a given decision. In the case at bar the CALP did not go beyond the limits laid down by the legislature. The purpose of the *A.I.A.O.D.* is summarized in s. 1, which reads as follows:

Cette décision ne saurait, à mon avis, être qualifiée de manifestement déraisonnable. C'est la conclusion, d'ailleurs, à laquelle sont parvenues et la Cour supérieure et la Cour d'appel. En effet, c'est une chose que de soutenir, comme le fait Domtar, que l'interprétation de la CALP favorise indûment les travailleurs victimes de lésions professionnelles par rapport aux employés qui ne reçoivent pas de salaire à l'occasion d'une grève, d'un lock-out, ou d'une mise à pied, c'en est une autre que de conclure que cette décision est clairement irrationnelle. Pour démontrer le caractère déraisonnable de l'interprétation de la CALP, Domtar a insisté, dans son mémoire, sur la difficulté de circonscrire la fréquence de la prestation de travail fournie par le travailleur avant une lésion aux fins de l'expression «aurait normalement travaillé»:

Ainsi, à quoi rattache-t-on cette «habitude» pour un travailleur victime d'une lésion professionnelle qui travaille pour un même employeur depuis 10 ans? Évaluera-t-on l'habitude en tenant compte de toute cette période ou d'une partie de celle-ci? Devrions-nous ne tenir compte que de la dernière année, du dernier mois ou de la dernière semaine? Si une convention collective a été signée le jour où un travailleur subit une lésion professionnelle et que cette convention collective augmente la semaine de travail d'un travailleur de 4 à 5 jours par semaine: que fera-t-on suivant l'interprétation proposée par la C.A.L.P.? Et si un travailleur subit une lésion professionnelle le jour de son embauche, l'employeur pourra-t-il prétendre avec succès qu'il ne lui doit aucune indemnité de remplacement du revenu en vertu de l'article 60 de la L.A.T.M.P.?

Sans me prononcer sur le bien-fondé de ces hypothèses, je suis d'avis que, même si ces difficultés venaient à surgir dans le cadre du régime d'indemnisation prévu par la Loi, il appartiendrait à la CALP, et non à une cour de justice, d'en disposer en vertu de sa compétence *stricto sensu* aux fins de la *L.A.T.M.P.* et ce, de façon finale. Cette compétence comprend, nécessairement, une marge de manœuvre qui permet de ne pas entrevoir toutes les conséquences juridiques qui sont susceptibles de découler d'une décision donnée. En l'espèce, la CALP ne s'est pas écartée des jalons posés par le législateur. L'objet de la *L.A.T.M.P.* est résumé à l'art. 1, qui se lit ainsi:

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**1.** The object of this Act is to provide compensation for employment injuries and the consequences they entail for beneficiaries.

The process of compensation for employment injuries includes provision of the necessary care for the consolidation of an injury, the physical, social and vocational rehabilitation of a worker who has suffered an injury, the payment of income replacement indemnities, compensation for bodily injury and, as the case may be, death benefits.

This Act, within the limits laid down in Chapter VII, also entitles a worker who has suffered an employment injury to return to work.

The entitlement of a worker who has suffered an employment injury to an income replacement indemnity is further dealt with in s. 44. This provision reads as follows:

**44.** A worker who suffers an employment injury is entitled to an income replacement indemnity if he becomes unable to carry on his employment by reason of the injury.

A worker who is no longer employed when his employment injury appears is entitled to the income replacement indemnity if he becomes unable to carry on the employment he usually held.

In concluding that the effect of the application of s. 60 was not to deprive the worker who suffers an employment injury of the right conferred on him by s. 44, the CALP did not render a patently unreasonable decision. The argument put forward by Domtar that the CALP's conclusion overlooks several important aspects which are peculiar to the general system of compensation may well be correct. This is not, however, a basis for judicial intervention as, in my view, this would simply be an error of law within jurisdiction. Since the evidence that the appellant suffered an employment injury on the relevant dates has never been disputed, the CALP's decision can be rationally defended both on the facts and on the law.

In principle, this conclusion should suffice to dispose of this appeal. This was not a case in which the CALP was deciding a general point of

**1.** La présente loi a pour objet la réparation des lésions professionnelles et des conséquences qu'elles entraînent pour les bénéficiaires.

Le processus de réparation des lésions professionnelles comprend la fourniture des soins nécessaires à la consolidation d'une lésion, la réadaptation physique, sociale et professionnelle du travailleur victime d'une lésion, le paiement d'indemnités de remplacement du revenu, d'indemnités pour dommages corporels et, le cas échéant, d'indemnité de décès.

La présente loi confère en outre, dans les limites prévues au chapitre VII, le droit au retour au travail du travailleur victime d'une lésion professionnelle.

Par ailleurs, le droit du travailleur victime d'une lésion professionnelle à l'indemnité de remplacement de revenu est prévu à l'art. 44. Cette disposition est à l'effet suivant:

**44.** Le travailleur victime d'une lésion professionnelle a droit à une indemnité de remplacement du revenu s'il devient incapable d'exercer son emploi en raison de cette lésion.

Le travailleur qui n'a plus d'emploi lorsque se manifeste sa lésion professionnelle a droit à cette indemnité s'il devient incapable d'exercer l'emploi qu'il occupait habituellement.

En concluant que l'application de l'art. 60 n'avait pas pour effet de retirer au travailleur victime d'une lésion professionnelle le droit que lui confère l'art. 44, la CALP n'a pas rendu une décision manifestement déraisonnable. L'argument avancé par Domtar à l'effet que la conclusion de la CALP omet plusieurs nuances importantes qui sont propres au régime global d'indemnisation est, peut-être, fondé. Cela ne constitue pas, pour autant, un motif d'intervention judiciaire car, à mes yeux, il ne s'agirait là que d'une simple erreur de droit commise dans le cadre de sa compétence. La preuve que l'appelant fut victime d'une lésion professionnelle aux dates pertinentes n'ayant jamais été contestée, la décision de la CALP est rationnellement défendable tant sous l'angle des faits que du droit.

Cette conclusion devrait suffire, en principe, pour disposer du présent pourvoi. Il ne s'agissait pas, en effet, pour la CALP de décider d'une ques-

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law, to which, in the absence of a privative clause, this Court has held that there is no reason to show deference (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, *supra*; *Dayco (Canada) Ltd. v. CAW-Canada*, *supra*; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554). Similarly, since the interpretation of s. 60 *A.I.A.O.D.* does not raise constitutional questions here, the rule of curial deference clearly cannot be excluded on this ground (*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22). Finally, as I pointed out earlier, the intention of the legislature to confer on the CALP the power to make a final ruling on the meaning and scope of s. 60 *A.I.A.O.D.* is not open to question. As the interpretation of this provision is at the core of its specialized jurisdiction, the rule of curial deference should in principle apply.

C. *Court of Appeal's Intervention*

Against this background, the intervention of the Court of Appeal may now be considered. Though it properly concluded that the CALP's decision was not patently unreasonable, the court was of the view that to apply this standard of review would not satisfactorily resolve the issue. According to Mailhot J.A. (at p. 2443):

[TRANSLATION] In fact, it is clear that if this Court dismissed the appeal based on a finding that the C.A.L.P.'s interpretation was not unreasonable, the difficulties would not be resolved. This is well illustrated by a recent judgment of the Labour Court filed by the appellant. In *Commission de la santé et de la sécurité du travail du Québec v. BG Chéco International ltée*, *supra*, the C.S.S.T. brought penal proceedings against an employer which refused to pay a worker 90% of his net salary or wages for seven days, and the employer gave as its defence the fact that four days before suffering an employment injury the worker had been given a layoff notice for a temporary lack of work, a layoff which took

tion générale de droit ne relevant pas de son expertise où, en l'absence de clause privative, notre Cour a jugé qu'il n'y avait pas lieu de faire preuve de retenue (*Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, précité; *Dayco (Canada) Ltd. c. TCA-Canada*, précité; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554). De même, puisque l'interprétation de l'art. 60 *L.A.T.M.P.* ne soulève pas, en l'espèce, de questions constitutionnelles, la règle de la retenue judiciaire ne saurait être écartée pour ce motif (*Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, et *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22). Enfin, comme je l'ai souligné précédemment, l'intention du législateur de confier à la CALP le pouvoir de se prononcer de manière définitive sur le sens et la portée de l'art. 60 *L.A.T.M.P.* ne souffre aucune ambiguïté. L'interprétation de cette disposition étant au cœur de sa compétence spécialisée, la règle de la retenue judiciaire doit, en principe, trouver application.

C. *L'intervention de la Cour d'appel*

Ces jalons posés, il convient maintenant de se pencher sur l'intervention de la Cour d'appel. Bien qu'elle ait, à bon droit, conclu que la décision de la CALP n'était pas manifestement déraisonnable, la cour a estimé que l'application de cette norme de contrôle ne réglerait pas le litige de manière satisfaisante. Selon le juge Mailhot (à la p. 2443):

De fait, l'on sait que, si notre Cour rejetait l'appel à la suite d'une conclusion que l'interprétation de la C.A.L.P. n'était pas déraisonnable, les difficultés ne seraient pas réglées. En effet, l'appelante a déposé un jugement récent du Tribunal du travail qui illustre bien cet énoncé. Dans l'affaire *Commission de la santé et de la sécurité du travail du Québec c. B.G. Chéco International ltée*, précitée, la C.S.S.T. a intenté une poursuite de nature pénale contre un employeur qui refusait de verser à un travailleur 90 % de son salaire net pendant sept jours, l'employeur invoquant pour sa défense que le travailleur avait reçu, quatre jours avant qu'il ne soit victime d'une lésion professionnelle, un avis de mise à

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effect three days after the injury. After a carefully reasoned analysis, the Labour Court judge acquitted the employer. [Emphasis added.]

In the case referred to above by the Court of Appeal, the Labour Court was of the view (at p. 411) that:

[TRANSLATION] Though we are dealing here with remedial legislation the aim and purpose of which are to compensate workers who suffer industrial accidents and occupational diseases, the Court must necessarily ask itself whether, despite recourse to this rule of interpretation, there is nevertheless a reasonable doubt as to the meaning or scope of the text, in which case it must acquit the defendant.

After undertaking its own analysis of several provisions of the *A.I.A.O.D.*, the Labour Court held that s. 60 raised [TRANSLATION] "a reasonable, significant and insurmountable doubt" as to the obligation on an employer in the event of a layoff occurring during the 14-day period mentioned in that provision (p. 412). The Labour Court therefore concluded that, in such circumstances, the employer should be acquitted (at p. 412):

[TRANSLATION] In such a case, the Court has no choice but to give the defendant the benefit of the statutory interpretation most favourable to it, as in the circumstances such an interpretation is at least equally justifiable. As pointed out in Maxwell [*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 239]:

> "If there is a reasonable interpretation which will avoid the penalty in any particular case", said Lord Esher M.R., "we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections".

Citing its precedent in *Produits Pétro-Canada Inc. v. Moalli*, *supra*, the Court of Appeal held that it was in the interest of justice to resolve the conflict at once, abandoning the curial deference which would otherwise be required here. Mailhot J.A. concluded that she was faced with [TRANSLATION] "two . . . possibilities that could be rationally defended" and summed up the situation

pied pour manque temporaire de travail, mise à pied qui a pris effet trois jours après la lésion. Le juge du Tribunal du travail, après une analyse serrée, acquitte l'employeur. [Je souligne.]

Dans l'affaire à laquelle la Cour d'appel réfère, le Tribunal du travail a estimé que (à la p. 411):

> Même si nous sommes ici en présence d'une loi remédiatrice dont le but et l'objet visent l'indemnisation des travailleurs victimes d'accidents du travail et de maladies professionnelles, le Tribunal doit cependant nécessairement se demander si, malgré le recours à cette règle d'interprétation, il subsiste malgré tout un doute raisonnable quant au sens ou à la portée du texte, auquel cas il devra acquitter la défenderesse.

Après avoir procédé à sa propre analyse de plusieurs dispositions de la *L.A.T.M.P.*, le Tribunal du travail a jugé que l'art. 60 laissait subsister «un doute raisonnable, sérieux et insurmontable» quant à l'obligation d'un employeur dans le cas d'une mise à pied survenant pendant la période de 14 jours prévue à cette disposition (p. 412). Le Tribunal du travail a donc conclu, en l'espèce, à l'acquittement de l'employeur (à la p. 412):

> Dans un tel cas, le Tribunal n'a pas d'autre choix que de faire bénéficier la défenderesse de l'interprétation de la loi qui lui est la plus favorable, une telle interprétation étant dans les circonstances au moins tout aussi justifiable. Comme l'affirme Maxwell [*Maxwell on the Interpretation of Statutes* (12e éd. 1969), à la p. 239]:
>
> > [TRADUCTION] «S'il existe une interprétation raisonnable qui permet de pas infliger de peine dans un cas particulier» dit le maître des rôles lord Esher «c'est l'interprétation qu'il faut adopter. S'il existe deux interprétations raisonnables, nous devons choisir la plus indulgente des deux. C'est la règle d'interprétation établie en matière pénale».

Citant son précédent dans l'affaire *Produits Pétro-Canada Inc. c. Moalli*, précitée, la Cour d'appel a jugé qu'il était dans l'intérêt de la justice de trancher immédiatement le conflit, laissant de côté la réserve judiciaire qui autrement s'imposait ici. Estimant qu'elle était en présence de «deux thèses rationnellement défendables» le juge Mailhot a résumé la situation créée par l'interprétation

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created by the interpretation of the CALP, on the one hand, and that of the Labour Court, on the other (at p. 2444):

[TRANSLATION] It is true that in the instant case the fate of the parties does not depend on the identity of a member of the administrative tribunal. However, the uncertainty will remain and the outcome of the proceedings will not be satisfactorily resolved since the C.S.S.T., which has adopted the interpretation of s. 60 imposed by the C.A.L.P., is obliged to take action against employers who refuse to accept the C.A.L.P.'s interpretation and who, ultimately, benefit from acquittals as a result of the (probably justified) application of the theory of reasonable doubt "in view of two conflicting possibilities that could be rationally defended", whether in an administrative proceeding or a penal proceeding. The interpretation adopted by the C.A.L.P. thus leads to a dead end. The ideal of justice, which promotes the rule of law, is not really served. It is certainly desirable that the intention of the legislature should prevail. What therefore is that intent? Despite the fact that the wording used may be open to two not unreasonable interpretations, can it be determined?

To rectify this situation, the Court of Appeal decided to intervene to impose its own interpretation of s. 60. Again according to Mailhot J.A. (at p. 2445):

[TRANSLATION] With respect for the contrary view, I am of the view that the intention of the legislature in this matter was not to treat injured workers differently from other workers as regards the first 14 days mentioned in s. 60. In my opinion, if the legislature intended that the entire first 14 days following the beginning of the disability be paid for by the employer, it would not have added the words "*for each day or part of a day the worker would normally have worked*". These words are intended to ensure that the injured person is treated like other workers, in other words that he is entitled to a salary or wages as he would be if the employer had work to give him and could do so, if these days were part of his regular schedule or if his contract was still in effect, and so on—in short, if he had worked as usual, had he not been disabled.

This interpretation is fairer to everyone and consistent with the other provisions of the A.I.A.O.D. Even if it is accepted that the statute is remedial and seeks to compensate the victim of an employment injury, it is still general legislation and is not intended, in my opinion, to

de la CALP d'une part, et celle du Tribunal du travail, de l'autre (à la p. 2444):

Il est vrai que, dans le cas présent, le sort des plaideurs ne dépend pas de l'identité du membre du tribunal administratif. Mais l'incertitude demeurera, et le sort des poursuites ne sera pas réglé de façon satisfaisante puisque la C.S.S.T., qui s'est rangée à l'interprétation de l'article 60 imposée par la C.A.L.P., se voit obligée de poursuivre des employeurs qui refusent d'accepter l'interprétation de la C.A.L.P. et qui, en fin de compte, bénéficient d'acquittements suite à l'application (probablement à juste titre) de la théorie du doute raisonnable «devant deux thèses rationnellement défendables qui s'affrontent» que ce soit à l'occasion du recours administratif ou du recours pénal. Ainsi, l'interprétation soutenue par la C.A.L.P. aboutit à un cul-de-sac. L'idéal de justice qui veut que triomphe la règle de droit n'y trouve pas vraiment son compte. Il est certainement souhaitable que ce soit l'intention du législateur qui l'emporte. Quelle est donc celle-ci? En dépit du fait que les termes utilisés puissent prêter à deux interprétations non déraisonnables, peut-on la préciser.

Afin de remédier à cette situation, la Cour d'appel a décidé d'intervenir pour imposer sa propre interprétation de l'art. 60. Toujours selon le juge Mailhot (à la p. 2445):

Avec égards pour l'avis contraire, je suis d'avis que l'intention du législateur en cette matière n'est pas de traiter les travailleurs accidentés de façon différente des autres travailleurs en ce qui concerne les 14 premiers jours visés par l'article 60. À mon avis, si le législateur voulait que tous les 14 premiers jours qui suivent le début de l'incapacité soient payés par l'employeur, il n'avait pas à ajouter les mots «*pour chaque jour ou partie de jour où ce travailleur aurait normalement travaillé*». Ces mots visent à assurer que la personne accidentée soit traitée comme les autres personnes qui travaillent, c'est-à-dire qu'elle ait droit à un salaire comme elle y aurait droit si l'employeur avait du travail à confier et pouvait le faire ou si ces journées faisaient partie de son horaire habituel, ou si son contrat était toujours en vigueur, etc.—en somme, si elle avait normalement travaillé, n'eût été de son incapacité.

Cette interprétation est plus équitable pour tous et s'harmonise avec les autres dispositions de la L.A.T.M.P. Car, même si l'on accepte que cette loi est remédiatrice et cherche à indemniser une personne victime d'une lésion professionnelle, elle demeure une loi

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make more favourable provision for such a victim compared with other employees, who may be subject to the ups and downs of the labour market, including the choice to go on strike or the obligation to be subject to a lockout. [Emphasis in original.]

She came to the following conclusion, concurred in by her colleagues (at p. 2446):

[TRANSLATION] I therefore conclude that when in s. 60 the legislature requires the employer to pay a victim of an employment injury 90% of his net salary or wages, it means payment of the salary or wages to which the victim would logically have been entitled if he had worked as usual. As generally there is no obligation to pay a salary or wages when there is a plant closure, strike, lockout, layoff, unpaid leave and so on, there can be no obligation to pay 90% of the net salary or wages during these periods.

I therefore propose that the appeal be allowed with costs, the application for evocation be granted with costs, the C.A.L.P.'s decision be quashed and the court declare that the appellant has paid Mr. Roland Lapointe the indemnity to which he was entitled under s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*.

There are thus two aspects to the Court of Appeal's intervention. First, it concluded that there was a jurisprudential conflict between two administrative jurisdictions as to the same legislative provision. Second, the Court of Appeal relied on an independent ground for judicial review, namely that where there is a conflict of this kind, curial deference should yield to review based on the correctness of the administrative interpretation. I shall examine the two aspects of this intervention in turn.

1. The Conflict

The Court of Appeal relied on a single judgment of the Labour Court in a penal matter, *Commission de la santé et de la sécurité du travail v. BG Chéco International Ltée*, *supra*, in concluding that there were conflicting decisions. This conclusion calls for two observations.

d'application générale et elle ne vise pas, à mon avis, à créer un régime plus favorable pour celle-ci par rapport aux autres employés, lesquels peuvent être soumis aux aléas du marché du travail, incluant le choix de faire la grève ou l'obligation de subir un lock-out. [En italique dans l'original.]

Elle arrive à la conclusion suivante, à laquelle ses collègues concourent (à la p. 2446):

Je conclus donc que, lorsque le législateur, à l'article 60, oblige l'employeur à verser à une victime d'une lésion professionnelle 90 % de son salaire net, il vise le paiement du salaire auquel elle aurait logiquement eu droit si elle avait travaillé normalement. Comme, généralement, il n'y a pas d'obligation de payer un salaire lorsqu'il y a fermeture d'établissement, grève, lock-out, mise à pied, congé non rémunéré etc., il ne peut en découler d'obligation de payer 90 % du salaire net pendant ces périodes.

Je propose en conséquence d'accueillir le pourvoi avec dépens, de faire droit à la demande d'évocation avec dépens, de casser la décision de la C.A.L.P. et de déclarer que l'appelante a payé à M. Roland Lapointe l'indemnité à laquelle il avait droit en vertu de l'article 60 de la *Loi sur les accidents du travail et les maladies professionnelles*.

Ainsi, l'intervention de la Cour d'appel comporte deux volets. En premier lieu, elle a conclu à l'existence d'un conflit jurisprudentiel entre deux instances administratives au regard d'un même texte législatif. En second lieu, la Cour d'appel s'est appuyée sur un motif autonome de contrôle judiciaire, soit qu'en présence d'un conflit de cette nature, la retenue judiciaire doit céder le pas à un contrôle fondé sur la justesse de l'interprétation administrative. J'examinerai, tour à tour, les deux volets de cette intervention.

1. Le conflit

La Cour d'appel s'est autorisée d'une seule décision du Tribunal du travail en matière pénale, soit l'affaire *Commission de la santé et de la sécurité du travail c. BG Chéco International Ltée*, précitée, pour conclure à l'existence d'un conflit jurisprudentiel. Cette conclusion appelle deux remarques.

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First, as counsel for the appellant pointed out, this conclusion fails to take into account the large number of decisions rendered by the CALP since the *A.I.A.O.D.* came into force on August 19, 1985. With reference to s. 60, that tribunal has always adopted the same interpretation (see, *inter alia*, *Tousignant et Hawker Siddeley Canada Inc.*, *supra*; *Desmeules et Entreprises B.L.H. Inc.*, [1986] C.A.L.P. 66; *Béland et Mines Wabush*, C.A.L.P., No. 00138-09-8604, November 27, 1986; *Collins & Aikman Inc. et Dansereau*, [1986] C.A.L.P. 134; *Lambert et Vic Métal Corp.*, [1986] C.A.L.P. 147, and *Létourneau et Électricité Kingston Inc.*, [1986] C.A.L.P. 241). The Labour Court, for its part, had apparently never had occasion to rule on the scope of s. 60 before *BG Chéco*. As I see it, the situation created by an isolated decision at variance with a consistent line of authority cannot a priori be characterized as a true "jurisprudential conflict". Moreover, counsel for the CSST noted that the Court of Appeal had taken the *Domtar* case under advisement on February 14, 1991. The decision of the Labour Court in *BG Chéco* was not rendered until March 18, 1991. Besides being doubtful in strictly quantitative terms, the "controversy" at issue here therefore also seems to be premature.

Furthermore, apart from this quantitative and temporal aspect, the Court of Appeal was concerned here with two bodies interpreting the same legislative provision, but in the particular context of each one's jurisdiction, in the one case a penal one and, in the other, an administrative one. Before concluding that a jurisprudential conflict existed, some consideration should, therefore, have been given to the distinction between the duty of a tribunal sitting in a penal proceeding to give an accused the benefit of a reasonable doubt and that of an appellate administrative tribunal responsible for making a final ruling on its enabling legislation so as to give effect to that legislation. Can it be said that these two jurisdictions, in deciding on matters where the ground rules are completely different, have created a conflict in the jurisprudence? I am far from sharing the categorical assertion of the Court of Appeal on this point. It should be

D'une part, comme l'a souligné le procureur de l'appelant, ce constat omet de tenir compte du nombre considérable de décisions rendues par la CALP depuis l'entrée en vigueur, le 19 août 1985, de la *L.A.T.M.P.* Dans le cadre de l'art. 60, celle-ci a toujours adopté la même interprétation (voir, entre autres, *Tousignant et Hawker Siddeley Canada Inc.*, précité; *Desmeules et Entreprises B.L.H. Inc.*, [1986] C.A.L.P. 66; *Béland et Mines Wabush*, C.A.L.P., nº 00138-09-8604, le 27 novembre 1986; *Collins & Aikman Inc. et Dansereau*, [1986] C.A.L.P. 134; *Lambert et Vic Métal Corp.*, [1986] C.A.L.P. 147, et *Létourneau et Électricité Kingston Inc.*, [1986] C.A.L.P. 241). Le Tribunal du travail n'avait, pour sa part, apparemment jamais eu l'occasion de se prononcer sur la portée de l'art. 60 avant l'affaire *BG Chéco*. À mes yeux, la situation créée par une décision isolée à l'encontre d'une jurisprudence constante ne saurait, à priori, être qualifiée de véritable «conflit jurisprudentiel». Par ailleurs, le procureur de la CSST a souligné que la Cour d'appel avait pris en délibéré l'affaire *Domtar* le 14 février 1991. Or, la décision du Tribunal du travail dans l'affaire *BG Chéco* n'a été rendue que le 18 mars 1991. Tout en étant douteuse sous l'angle strictement quantitatif, la «controverse» dont il est ici question semble donc, au surplus, prématurée.

D'autre part, au-delà de cet aspect quantitatif et temporel, la Cour d'appel était ici devant deux organismes interprétant un même texte législatif, mais dans le contexte particulier de la compétence de chacun, l'un en matière pénale, l'autre en matière administrative. Avant de conclure à l'existence d'un conflit jurisprudentiel, il y avait donc lieu de s'interroger sur la distinction entre le devoir d'un tribunal siégeant en matière pénale de faire bénéficier un inculpé du doute raisonnable, et celui d'un tribunal administratif d'appel chargé d'interpréter sa loi constitutive de façon finale et ce, dans le but qu'il produise ses effets. Statuant dans des matières dont les règles de base sont totalement différentes, peut-on affirmer que ces deux instances se retrouvent en situation de conflit jurisprudentiel? Je suis loin de partager l'avis catégorique de la Cour d'appel à ce sujet. Il convient de noter, à cet égard, que les décisions de la CALP

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noted, in this connection, that the CALP decisions can be filed in the office of the prothonotary of the Superior Court for the district in which the appeal was brought, in order to make them executory as if they were final civil judgments of the Superior Court not subject to appeal (s. 429 *A.I.A.O.D.*). The Court of Appeal's conclusion that the CALP's interpretation leads to a "dead end" does not take into account the existence of this civil remedy, parallel to the penal remedy, which is in keeping with the twofold nature of the *A.I.A.O.D.* Furthermore, the fact that the Labour Court's judgment, unlike decisions of the CALP, can be appealed to the Superior Court under the *Code of Penal Procedure* further mitigates the allegedly irreconcilable "conflict" between these two tribunals.

For discussion purposes, however, I am prepared to assume, without deciding the point, that the interpretation of s. 60 *A.I.A.O.D.* by the CALP on the one hand and the Labour Court on the other creates a conflict in the jurisprudence. This leads me to discuss the standard of judicial review applicable to such a situation.

2. Consistency of Precedent and Judicial Review

The ground of judicial review referred to by the Court of Appeal should be seen in its proper academic and judicial context. This background will clarify the issues and indicate the relevance of the guiding principles outlined earlier.

While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:

Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their

peuvent être déposées au bureau du protonotaire de la Cour supérieure du district où l'appel a été formé et ce, afin de les rendre exécutoires comme n'importe quel jugement civil final et sans appel de la Cour supérieure (art. 429 *L.A.T.M.P.*). La conclusion de la Cour d'appel voulant que l'interprétation de la CALP conduise à un «cul-de-sac» ne tient pas compte de l'existence de ce recours civil qui, parallèle au recours pénal, s'inscrit dans une dualité propre à la *L.A.T.M.P.* De surcroît, le fait que le jugement du Tribunal du travail soit, contrairement aux décisions de la CALP, appelable devant la Cour supérieure en vertu du *Code de procédure pénale* vient tempérer davantage le caractère prétendument irréductible du «conflit» entre ces deux tribunaux.

Pour les fins de la discussion, toutefois, je suis prête à assumer, sans pour autant en décider, que l'interprétation de l'art. 60 *L.A.T.M.P.* par la CALP d'une part, et le Tribunal du travail de l'autre, crée un conflit jurisprudentiel. Ceci m'amène à discuter du contrôle judiciaire applicable à une telle situation.

2. La cohérence décisionnelle et le contrôle judiciaire

Il convient de replacer le motif de contrôle judiciaire auquel s'est référée la Cour d'appel dans le contexte doctrinal et jurisprudentiel qui lui est propre. Ce recul éclairera les enjeux ici en cause ainsi que la pertinence des principes directeurs exposés précédemment.

Si l'analyse de la norme de contrôle applicable en l'espèce a permis de mettre en lumière la valeur que représente l'autonomie décisionnelle d'un tribunal administratif, l'impératif de cohérence constitue, également, une finalité importante. Notre système juridique se voulant aux antipodes de l'arbitraire, il se doit de reposer sur une certaine cohérence, égalité et prévisibilité dans l'application de la loi. Le professeur MacLauchlan note que le droit administratif ne saurait, à cet égard, faire exception à la règle:

[TRADUCTION] La cohérence est un aspect souhaitable de la prise de décision en matière administrative. Elle per-

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affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".

(H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 *Dalhousie L.J.* 435, at p. 446.)

In the same vein Professor Comtois writes:

[TRANSLATION] . . . [consistency] helps to build public confidence in the integrity of the administrative justice system and leaves an impression of common sense and good administration. It might be added, as regards administrative tribunals exercising quasi-judicial functions, that the specialized nature of their jurisdiction makes inconsistencies more apparent and tends to harm their credibility.

(Suzanne Comtois, "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs" (1990), 21 *R.D.U.S.* 77, at pp. 77-78.)

This consistency requirement has led some writers to defend the idea of judicial review of administrative inconsistency. Thus, Dean Morissette has dealt with the problem of jurisprudential conflicts within administrative jurisdictions as they affect curial deference: "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986), 16 *R.D.U.S.* 591. At page 631, he asks the following question:

[TRANSLATION] But is an irrational or unreasonable interpretation the only possible form of excess of jurisdiction after *C.U.P.E. v. N.B.L.C.*?

After giving the example of an administrative tribunal that rules on a constitutional question or misinterprets a provision conferring jurisdiction, Dean Morissette adds (at pp. 632-33):

[TRANSLATION] Finally, the theory of reasonable interpretation leaves room for intervention by the superior courts when several well-reasoned and apparently rational interpretations are given by the same administrative jurisdiction and their consequences are inconsis-

met aux administrés de planifier leurs affaires dans un climat de stabilité et de prévisibilité. Elle fait comprendre aux responsables l'importance de l'objectivité et empêche la prise de décisions arbitraires ou irrationnelles. Elle favorise la confiance du public dans l'intégrité du processus de réglementation. Elle laisse une impression «de bon sens et de bonne administration».

(H. Wade MacLauchlan, «Some Problems with Judicial Review of Administrative Inconsistency» (1984), 8 *Dalhousie L.J.* 435, à la p. 446.)

Dans le même esprit, le professeur Comtois écrit:

. . . [la cohérence] contribue à bâtir la confiance du public dans l'intégrité du système de justice administrative et laisse une impression de bon sens et de bonne administration. L'on pourrait ajouter, en ce qui concerne les tribunaux administratifs exerçant des fonctions quasi-judiciaires, que le caractère spécialisé de leur juridiction rend les incohérences plus visibles et a tendance à nuire à leur crédibilité.

(Suzanne Comtois, «Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs» (1990), 21 *R.D.U.S.* 77, aux pp. 77 et 78.)

Cet impératif de cohérence a conduit certains auteurs à défendre l'idée d'un contrôle judiciaire de l'incohérence administrative. Ainsi, le doyen Morissette s'est penché sur le problème des conflits jurisprudentiels au sein de juridictions administratives face à la retenue judiciaire: «Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse» (1986), 16 *R.D.U.S.* 591. À la p. 631, il pose la question suivante:

Mais l'interprétation irrationnelle ou déraisonnable est-elle la seule forme possible d'excès de juridiction après l'arrêt *S.C.F.P. c. S.A.N.B.*?

Après avoir fourni l'exemple du tribunal administratif qui tranche une question constitutionnelle ou qui interprète erronément une disposition attributive de compétence, le doyen Morissette poursuit (aux pp. 632 et 633):

Enfin, la théorie de l'interprétation raisonnable laisse place à l'intervention des tribunaux supérieurs lorsque plusieurs interprétations motivées et en apparence rationnelles proviennent d'une même juridiction administrative et sont incompatibles dans leurs effets. On

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tent. The matter can be illustrated by the example of an arbitrator sitting pursuant to s. 124 of the *Act respecting Labour Standards*. Two arbitrators sitting in different cases may well decide the same legal problem arising on similar facts in opposite ways, which are nevertheless rational and well-reasoned. The fate of the complainant, when discrepancies of this type occur, depends on the identity of the arbitrator hearing the complaint. This result is difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one. Where discrepancies of this type exist, whether within the same administrative jurisdiction, between different jurisdictions on the same level or between different levels of jurisdiction in the same specialized field, the superior courts will intervene to standardize the law even though each of the diverse interpretations seems to be reasonable. [Emphasis added.]

peut illustrer la chose en utilisant l'exemple d'un arbitre siègeant en vertu de l'article 124 de la *Loi sur les normes du travail*. Deux arbitres siègeant dans des affaires différentes peuvent fort bien trancher de façon contradictoire, mais néanmoins rationnelle et motivée, une même difficulté juridique soulevée par des faits semblables. Le sort du plaignant, lorsque des divergences de ce type perdurent, dépend de l'identité de l'arbitre qui entend sa plainte. Ce résultat est difficile à concilier avec la notion d'égalité devant la loi, l'un des principaux corollaires de la primauté du droit, et peut-être aussi le plus intelligible. En présence de divergences de ce type, que ce soit au sein de la même juridiction administrative, entre juridictions différentes de même degré ou entre juridictions de degrés différents dans un même domaine d'attribution, les tribunaux supérieurs interviendront pour uniformiser le droit, même si chacune des diverses interprétations paraît raisonnable. [Je souligne.]

Dean Morissette considers that these objectives of equality, security and uniformity in implementing the law are consistent with the ultimate purpose of judicial review (at p. 634):

[TRANSLATION] On reflection, however, this is undoubtedly a basic form of rationality. As the primary purpose of judicial review is to prevent arbitrariness, what objection can there be to a principle which requires the superior courts to intervene, not in the name of meticulous legalism but in the interests of rationality? Imposing an interpretation one believes to be "correct" because, owing to its consequences or for some similar reason, one does not share some other otherwise rational interpretation is difficult to justify in terms of judicial review, unless of course one assumes that appeals and judicial review are one and the same thing. Imposing the interpretation one believes to be "correct" (or "the most rational") when one is confronted with contradictory but rational interpretations on the same point is fully justified in light of the rule of law, as this is the very kind of arbitrariness that principle is designed to prevent. [Emphasis added.]

Le doyen Morissette estime que ces objectifs d'égalité, de sécurité et d'uniformité dans l'application de la loi sont compatibles avec la finalité même du contrôle judiciaire (à la p. 634):

Mais à bien y penser, il s'agit là, sans doute, d'une forme fondamentale de rationalité. Le contrôle judiciaire servant avant tout à combattre l'arbitraire, qu'y a-t-il à redire d'une doctrine qui commande aux tribunaux supérieurs d'intervenir, non plus au nom d'un légalisme minutieux, mais par souci de rationalité? Imposer l'interprétation qu'on croit être «correcte» parce qu'on ne partage pas, à cause de son effet ou pour quelque raison semblable, une autre interprétation par ailleurs rationnelle, ne se justifie que difficilement dans le cadre du contrôle judiciaire, à moins bien sûr de postuler que l'appel et le contrôle judiciaire sont une seule et même chose. Imposer l'interprétation qu'on croit être «correcte» (ou «la plus rationnelle») lorsqu'on est en présence d'interprétations contradictoires mais rationnelles sur une même question se justifie pleinement en regard de la primauté du droit, car c'est bien là le genre d'arbitraire que vise à empêcher ce principe. [Je souligne.]

In an article published in 1982 Professor Mullan also defends the idea of some form of judicial review of inconsistent decision-making (David J. Mullan, "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982), 27 *McGill L.J.* 250). Rather than concentrating on the situation created by inconsistency

Dans un article paru en 1982, le professeur Mullan a également défendu l'idée d'une certaine forme de contrôle judiciaire de l'incohérence décisionnelle (David J. Mullan, «Natural Justice and Fairness—Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?» (1982), 27 *R.D. McGill* 250). Plutôt que de se concentrer sur la situation créée par

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between two well-reasoned and rational interpretations, Professor Mullan emphasizes the principle that similar cases should be given similar treatment. In the interests of justice, fairness and equality in the application of the law, administrative inconsistency would thus require intervention by the courts (at pp. 285-86):

> Given the prevalence of this principle of consistency of treatment in the development of most legal systems as well as within the various substrata of legal systems, there is a strong case for branding as reviewable those cases where statutory authorities inexplicably fail to act consistently. To do so without reason or without thinking would seem to be the height of arbitrary behaviour. It is also worth remembering that judicial review of administrative action has from its earliest days been concerned with the appearance of the proper administration of justice. If the law is prepared to countenance a rule to the effect that a reasonable apprehension of bias will affect the validity of a decision in order to safeguard the reputation of the law, there is also clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions from which the law's reputation will suffer as much. [Emphasis added.]

Finally, Professor Comtois, *supra*, at p. 88, discusses the same constraints as the preceding writers, emphasizing the emergence of a "flexible" rule of consistency in administrative law:

> [TRANSLATION] A flexible rule, in the sense that it should not be interpreted as an obligation to follow precedents or amount to a strict application of the *stare decisis* rule, but one which may nevertheless receive judicial sanction when the court finds that fairness or respect for the rule of law requires its intervention to put an end to the uncertainty created by contradictory decisions rendered by different tribunals on the same point. [Emphasis added.]

The requirement of consistency in the application of the law is unquestionably a valid objective and so a persuasive argument. For litigants to receive diametrically opposite answers to the same question, depending on the identity of the members of administrative tribunals, may seem unacceptable to some and even difficult to reconcile with several objectives, including the rule of law. Yet, as the courts have held, consistency in decision-

l'incompatibilité entre deux interprétations motivées et rationnelles, le professeur Mullan a insisté sur le principe voulant que des causes similaires soient traitées de façon analogue. Par souci de justice, d'équité et d'égalité dans l'application de la loi, l'incohérence administrative exigerait, ainsi, l'intervention des cours de justice (aux pp. 285 et 286):

> [TRADUCTION] Puisque ce principe de la cohérence dans le traitement joue un rôle de premier plan dans l'élaboration de la plupart des systèmes juridiques et à l'intérieur des divers substrats des systèmes juridiques, on devrait considérer comme révisables les décisions prises par des autorités légales qui omettent inexplicablement d'agir avec cohérence. Agir ainsi sans raison ou réflexion semble constituer l'apogée du comportement arbitraire. Il importe aussi de se rappeler que le contrôle judiciaire des décisions administratives a toujours visé l'apparence de bonne administration de la justice. Si la loi permet, pour garantir sa réputation, d'admettre une règle établissant qu'une crainte raisonnable de partialité influera sur la validité d'une décision, il est de toute évidence possible de décrier les incohérences inexpliquées ou inexplicables dans l'administration des pouvoirs discrétionnaires légaux qui porteront atteinte à la réputation de la loi.

Enfin, le professeur Comtois, *loc. cit.*, à la p. 88, fait état des mêmes impératifs que les auteurs précédents en insistant sur l'émergence d'un principe «flexible» de cohérence en droit administratif:

> Un principe flexible dans le sens où il ne doit pas être interprété comme une obligation de suivre les précédents, ou équivaloir à une application stricte de la règle du *stare decisis*, mais un principe qui peut néanmoins être sanctionné judiciairement lorsque la cour juge que l'équité ou le respect de la primauté du droit requièrent qu'elle intervienne pour mettre fin à l'incertitude créée par les décisions contradictoires rendues par des bancs différents sur une même question. [Je souligne.]

L'impératif de cohérence dans l'application de la loi constitue, indéniablement, un objectif valable, donc un argument de poids. Que des justiciables reçoivent, relativement à la même question, des réponses diamétralement opposées selon l'identité des membres de tribunaux administratifs peut apparaître inacceptable à certains et même difficilement compatible avec plusieurs objectifs, parmi lesquels la primauté du droit. Or, comme

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making and the rule of law cannot be absolute in nature regardless of the context. So far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals.

Courts have had the opportunity to consider the advisability of intervening to resolve conflicting decisions by administrative tribunals. In *Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225 (C.A.), faced with two inconsistent interpretations of s. 13(*b*) of the *Inflation Restraint Act, 1982*, S.O. 1982, c. 55, by the Labour Relations Board on the one hand and the Education Relations Commission on the other, the Ontario Court of Appeal (at pp. 237-38) adopted the comments of Galligan J. of the Divisional Court (now of the Court of Appeal):

> I cannot for one moment suggest that either's interpretation of the Act was patently unreasonable. The decisions of the two tribunals are careful, thoughtful, well-reasoned and persuasive. One of my many problems with this case is that as I read each decision I am persuaded by it. The extension of curial deference to each of them would lead to unacceptable results.
>
> It seems to me that the curial deference demanded by authority ought only be extended to a tribunal when it is interpreting its Constitution or home statute. By that I mean curial deference need only be granted to the Labour Relations Board when it interprets the *Labour Relations Act*, and to the Education Relations Commission when it interprets the Boards and Teachers Negotiations Act. The Act is a statute that applies not only to workers and employers who are governed by the *Labour Relations Act* and the Boards and Teachers Negotiations Act but to many others. While it is legislation that applies only to what can loosely be called the public sector of Ontario, and not to the population of Ontario at large, I think the Act is more akin to a "general public enactment" as that term was used by Laskin C.J.C. in *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517 ...

l'indique la jurisprudence, la cohérence décisionnelle et la primauté du droit ne sauraient avoir un caractère absolu, dénué de tout contexte. Dans le cadre du contrôle judiciaire, le problème de l'incohérence décisionnelle au sein d'instances administratives est indissociable de l'autonomie décisionnelle, l'expertise et l'efficacité de ces mêmes tribunaux.

Les cours de justice ont eu, en effet, l'occasion de se pencher sur l'opportunité d'intervenir afin de régler un conflit jurisprudentiel entre des instances administratives. Dans l'affaire *Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225 (C.A.), confrontée à deux interprétations incompatibles de l'al. 13*b*) de l'*Inflation Restraint Act, 1982*, S.O. 1982, ch. 55, par la Commission des relations de travail d'une part, et la Commission des relations de travail en éducation de l'autre, la Cour d'appel de l'Ontario a repris à son compte aux pp. 237 et 238 les propos du juge Galligan de la Cour divisionnaire (maintenant de la Cour d'appel):

> [TRADUCTION] Je ne peux supposer pour un instant que l'une des deux interprétations était manifestement déraisonnable. Les décisions des deux tribunaux sont rédigées en termes soignés, réfléchis, raisonnés et convaincants. Un des nombreux problèmes que me pose la présente affaire est que chacune des décisions me convainc. Faire preuve de retenue judiciaire à l'égard de chacune d'elles donnerait lieu à des résultats inacceptables.
>
> Il me semble qu'il y a lieu, selon la jurisprudence, de faire preuve de retenue judiciaire à l'égard d'un tribunal seulement lorsque celui-ci interprète sa loi constitutive ou sa loi interne. Ainsi, il n' y a lieu de faire preuve de retenue judiciaire à l'égard de la Commission des relations de travail que lorsqu'elle interprète la *Loi sur les relations de travail*, et à l'égard de la Commission des relations de travail en éducation, que lorsqu'elle interprète la Boards and Teachers Negotiations Act. La Loi est un texte qui s'applique non seulement aux travailleurs et aux employeurs régis par la *Loi sur les relations de travail* et la Boards and Teachers Negotiations Act, mais à bien d'autres. Bien qu'il s'agisse d'une loi qui vise seulement ce qui correspond vaguement au secteur public de l'Ontario et non l'ensemble de la population de l'Ontario, je crois que cette loi ressemble davantage à

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than it is to the specialized and particular *Labour Relations Act* and Boards and Teachers Negotiations Act. [Emphasis added.]

It concluded (at p. 239):

We agree with the decision of Galligan J. in this regard. The theory underlining the concept of curial deference has no application here. The Act is, in every sense, a general public enactment. It is not one with which either the Ontario Labour Relations Board or the Education Relations Commission was integrally or closely involved nor over which they could be said to profess any particular expertise. [Emphasis added.]

Domtar referred to *Broadway Manor Nursing Home* in support of its position. That case cannot be interpreted as adopting the existence of conflicting decisions as an independent basis for judicial review. The Ontario Court of Appeal was actually concerned with the nature of the statute which was the subject of the conflict in question. By characterizing the *Inflation Restraint Act, 1982* as a general public enactment which neither the Labour Relations Board nor the Education Relations Commission had the function of interpreting as part of their particular expertise, it simply held that, owing to this lack of expertise, the principle of curial deference did not apply. Since the Act, the interpretation of which was at issue, was not at the core of the specialized jurisdiction of either of the administrative tribunals, any error of law was immediately subject to strict judicial review and not to the patently unreasonable interpretation test.

This reading of *Broadway Manor Nursing Home* seems to be confirmed by a later judgment, *United Steelworkers of America, Local 14097 v. Franks* (1990), 75 O.R. (2d) 382. In that case, the Ontario Divisional Court was confronted with two inconsistent interpretations of s. 40a of the *Employment Standards Act*, R.S.O. 1980, c. 137. Reid J. first

«un texte législatif général d'intérêt public», au sens donné à cette expression par le juge en chef Laskin dans l'arrêt *McLeod et al. c. Egan et al.*, [1975] 1 R.C.S. 517, [. . .] qu'au texte spécialisé et particulier de la *Loi sur les relations de travail* et de la Boards and Teachers Negotiations Act. [Je souligne.]

Pour conclure (à la p. 239):

[TRADUCTION] Nous sommes d'accord avec la décision du juge Galligan sur ce point. La théorie sous-jacente au concept de retenue judiciaire n'est pas applicable en l'espèce. La Loi est, à tous points de vue, un texte législatif général d'intérêt public. Il ne s'agit pas d'une loi que la Commission des relations de travail de l'Ontario ou la Commission des relations de travail en éducation a pour mission d'interpréter intégralement ou étroitement ni d'une loi relativement à laquelle elles possèdent une compétence particulière. [Je souligne.]

Domtar s'est référée à l'arrêt *Broadway Manor Nursing Home* pour appuyer sa position. Or, ce dernier ne saurait s'interpréter comme adoptant l'existence d'un conflit jurisprudentiel comme motif autonome de contrôle judiciaire. La Cour d'appel de l'Ontario s'est plutôt penchée sur la nature de la loi faisant l'objet du conflit en question. En qualifiant l'*Inflation Restraint Act, 1982* de loi d'intérêt public que ni la Commission des relations de travail et ni la Commission des relations de travail en éducation n'avaient pour mission d'interpréter dans le cadre de leur compétence particulière, elle a simplement jugé qu'en raison de cette absence d'expertise, le principe de la retenue judiciaire n'avait pas d'application. Puisque la loi dont l'interprétation était en jeu n'était au cœur de la compétence spécialisée ni de l'une ni de l'autre des instances administratives, toute erreur de droit était, dès le départ, sujette au contrôle judiciaire strict et non au test de l'interprétation manifestement déraisonnable.

Cette lecture de l'arrêt *Broadway Manor Nursing Home* semble confirmée par un arrêt subséquent, *United Steelworkers of America, Local 14097 c. Franks* (1990), 75 O.R. (2d) 382. Dans cette affaire, la Cour divisionnaire de l'Ontario était confrontée à deux interprétations incompatibles de l'art. 40a de la *Loi sur les normes d'em-*

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noted the crucial importance of determining the applicable standard of review (at pp. 385-86):

> We have two reasonable, but conflicting, interpretations. (I use the term "reasonable" as a more convenient expression than the traditional but awkward phrase "not patently unreasonable".) It follows that, if the standard of review on this application is reasonableness, the application should be dismissed. If, on the other hand, the standard is correctness, only one may stand and we must choose between them. Two conflicting interpretations of the same statutory provision might be reasonable, but they cannot both be correct. This issue of standard of review is thus critical. [Emphasis added.]

Reid J. distinguished *Broadway Manor Nursing Home*, noting that, in that case, the administrative tribunal was not interpreting its enabling Act, unlike in the case before him (p. 386). After underlining the existence of a privative clause, he concluded as follows (at pp. 387-88):

> The dismissal of this application will leave in place two conflicting interpretations of equal legal stature of a statutory provision. We are informed that it has since been amended, but even if that were not so there does not appear to be any basis on which the court may intervene to resolve the conflict. The doctrine of *stare decisis* which prevails in the courts tends to the avoidance of conflict in their decisions and such conflict as does occur may be resolved by the mechanism of appeal. But the doctrine of *stare decisis* does not apply to referees, or arbitrators, or, for that matter, to administrative tribunals generally, nor are referees, or arbitrators, or administrative tribunals generally (there are exceptions) subject to appeal. These are characteristics of tribunals which legislators have created to provide what they believe to be for certain purposes more appropriate forums for decision-making than the courts. The references I have made above confirm that the courts' supervisory role on judicial review is very limited. There is no authority for extending that supervision in the way proposed nor any rationale for doing so. [Emphasis added.]

The Quebec Court of Appeal in turn considered conflicting decisions in *Produits Pétro-Canada*

*ploi*, L.R.O. 1980, ch. 137. Le juge Reid a d'abord noté l'importance primordiale de déterminer la norme de contrôle applicable (aux pp. 385 et 386):

> [TRADUCTION] Nous avons deux interprétations raisonnables, mais contradictoires. (J'utilise le terme «raisonnable» que j'estime plus utile que l'expression traditionnelle mais maladroite «non manifestement déraisonnable».) Il s'ensuit que, si la norme de contrôle qui s'y applique est le caractère raisonnable, la demande devrait être rejetée. Par contre, si la norme est la justesse de la décision, une seule peut être retenue et il nous faut faire un choix entre les deux. Deux interprétations contradictoires de la même disposition législative peuvent être raisonnables, mais elles ne peuvent être toutes deux correctes. La question de la norme de contrôle est donc critique. [Je souligne.]

Or, le juge Reid a distingué l'affaire *Broadway Manor Nursing Home* pour noter que là, le tribunal administratif n'interprétait pas sa loi constitutive, ce qui n'était pas le cas dans l'affaire dont il était saisi (p. 386). Après avoir souligné l'existence d'une clause privative, il a conclu dans les termes suivants (aux pp. 387 et 388):

> [TRADUCTION] Le rejet de la demande aura pour effet de maintenir, relativement à une même disposition législative, deux interprétations contradictoires de même importance juridique. On nous a informés que cette disposition a depuis été modifiée; toutefois, même si ce n'était pas le cas, il ne paraît pas exister de fondement qui justifierait l'intervention de la cour en vue de régler le conflit. La règle du *stare decisis* qui existe devant les tribunaux vise à éviter les contradictions entre leurs décisions, et les contradictions qui existent peuvent être réglées par voie d'appel. Toutefois, la règle du *stare decisis* ne s'applique pas aux arbitres, ni d'ailleurs aux tribunaux administratifs en général, et la décision d'un arbitre ou d'un tribunal administratif en général ne peut faire l'objet d'un appel (il existe des exceptions). Ce sont les caractéristiques des tribunaux que les législateurs ont créés afin d'offrir ce qu'ils considèrent, à certaines fins, comme des mécanismes décisionnels plus appropriés que les cours de justice. Les arrêts cités ci-dessus confirment que le rôle de supervision des cours de justice en matière de contrôle judiciaire est fort limité. Il n'y a pas de jurisprudence permettant d'élargir cette supervision de la façon proposée ni aucune raison de le faire. [Je souligne.]

La Cour d'appel du Québec s'est penchée, à son tour, sur un conflit jurisprudentiel dans l'affaire

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*Inc. v. Moalli*, *supra*. Noting that there was a serious and unquestionable conflict in interpreting ss. 97 and 124 of the *Act respecting Labour Standards*, R.S.Q., c. N-1.1, it observed that this resulted in an unacceptable situation (at p. 267):

[TRANSLATION] For many years the fate of litigants has depended largely on the identity of the arbitrator hearing the dismissal complaint. Positions have hardened. Two separate and inconsistent rules of law are definitely being applied. Does this situation justify intervention by the Superior Court?

The court considered that [TRANSLATION] "in view of the seriousness of the conflict of interpretation that has resulted, however, this is a case in which sooner or later the superior courts will have to intervene" (p. 268). Accordingly (at p. 268):

[TRANSLATION] The instant appeal clearly raises this problem of interpretation, as to which there are "diametrically opposed" opinions. Its importance for legal practice in this area of labour relations cannot be denied. At this point, it appears that *we are confronted with one of those exceptional situations in which, contrary to the general rule of curial deference, the superior courts must intervene to arrive at an interpretation of the law and avoid having litigants subject to two different legal rules, and possibly even the unpredictable appointment of arbitrators* . . . [Emphasis in original.]

The Court of Appeal thus pointed to the existence of an extremely serious case law conflict which had not been [TRANSLATION] "solved since the *Act respecting Labour Standards* came into force" (p. 267), and went on to develop its own interpretation of the provisions in question. Since the Court of Appeal and Domtar both referred to *Moalli* in arguing in favour of an independent basis for judicial review of decision-making inconsistency by administrative tribunals, it becomes necessary to consider the scope of that decision.

To begin with, it appears that, from the outset, the standard of review applicable in that case was the correctness of the arbitrator's interpretation, not whether his decision was patently unreasonable. The Court of Appeal held that the question of

*Produits Pétro-Canada Inc. c. Moalli*, précitée. Ayant constaté un conflit grave et incontestable d'interprétation des art. 97 et 124 de la *Loi sur les normes du travail*, L.R.Q., c. N-1.1, elle a noté que ce conflit donnait lieu à une situation inacceptable (à la p. 267):

Le sort des plaideurs, depuis plusieurs années, dépend largement de l'identité de l'arbitre saisi de la plainte de congédiement. Les positions se sont cristallisées. En définitive, l'on applique deux règles de droit distinctes et incompatibles. Cette situation justifierait-elle l'intervention de la Cour supérieure?

La cour a considéré qu'«[e]n tenant compte cependant de la gravité du conflit d'interprétation qui est survenu, il s'agit d'un cas où tôt ou tard, les tribunaux supérieurs doivent intervenir» (p. 268). Ainsi (à la p. 268):

Le présent appel pose clairement ce problème d'interprétation, au sujet duquel s'affrontent des opinions «diamétralement opposées». L'on ne saurait nier son importance pour la pratique juridique de ce secteur des relations de travail. À ce moment, il apparaît que *nous nous trouvons devant une de ces situations exceptionnelles où, par dérogation à la règle générale d'abstention judiciaire, il faut que les tribunaux supérieurs interviennent pour dégager une interprétation de la loi et éviter que les intéressés ne soient soumis à deux règles de droit différentes, sinon aux simples aléas de la désignation des arbitres* . . . [En italique dans l'original.]

La Cour d'appel a donc invoqué l'existence d'un conflit jurisprudentiel extrêmement sérieux, n'ayant pas connu «de solution depuis l'entrée en vigueur de la *Loi sur les normes du travail*» (p. 267), avant de dégager sa propre interprétation des dispositions en cause. Puisque la Cour d'appel et Domtar se sont toutes deux référées à l'arrêt *Moalli* afin de justifier l'existence d'un motif autonome de contrôle judiciaire de l'incohérence décisionnelle au sein d'instances administratives, il convient de s'interroger sur la portée de cette décision.

En premier lieu, il semble que la norme de contrôle applicable dans cette affaire était, dès le départ, la justesse de l'interprétation de l'arbitre et non le caractère manifestement déraisonnable de sa décision. La Cour d'appel a, en effet, jugé que la

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the applicability of s. 97 of the *Act respecting Labour Standards* to s. 124 of that Act was a question of jurisdiction. Thus, in the view of LeBel J.A. (at p. 266):

[TRANSLATION] Section 124 requires that certain conditions be met for the arbitrator to hear the dismissal proceeding. One of these is continuous service for the same employer for five years. From this standpoint, the application and interpretation of s. 97 raise a jurisdictional question properly speaking, within the meaning given to that term by Beetz J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*. The arbitrator would certainly have the right and even an obligation to deal with this question. However, his error, even a reasonable error, would be subject to judicial review. [Emphasis added.]

In her comment on *Moalli* Ms. Ouimet expands on this initial description:

[TRANSLATION] In any case, we have to admit that by characterizing this question as within jurisdiction, the *Pétro-Canada* decision would have been completely different and LeBel J.A. would only have had to rule on the reasonability of the two schools of thought without at the same time settling the matter. Accordingly, it may be thought that he "chose" to characterize this question as jurisdictional in order to rule on the correctness of the interpretation of the arbitrator Moalli, rather than on his reasonableness, in which case we are back at square one.

(Hélène Ouimet, "Commentaires sur l'affaire Produits Pétro-Canada c. Moalli" (1987), 47 *R. du B.* 852, at p. 858.)

Another writer is of the view that this characterization did not disappear in favour of an independent ground of judicial review:

[TRANSLATION] . . . in the view of LeBel J.A., who wrote the reasons, the question before the arbitrator in that case was "properly jurisdictional". Specifically, the applicability of s. 97 of the *Act respecting Labour Standards* to s. 124 of that Act, which requires continuous service for the same employer for five years for there to be a complaint of dismissal, was a jurisdictional question on which the arbitrator could not err. In other words, the question was from the outset, and always has been, a question of jurisdiction in the strict sense, not a

question de l'applicabilité de l'art. 97 de la *Loi sur les normes du travail* à l'art. 124 de la même loi était juridictionnelle. Ainsi, selon le juge LeBel (à la p. 266):

L'article 124 exige la réalisation de certaines conditions pour que l'arbitre puisse se saisir du congédiement. L'une de celles-ci est la continuité du service pendant cinq ans pour le même employeur. Dans cette optique, l'application et l'interprétation de l'article 97 poseraient alors une question proprement juridictionnelle au sens donné à ce terme par monsieur le juge Beetz, dans l'arrêt *Syndicat des employés de production du Québec et de l'Acadie c. Conseil canadien des relations du travail*. L'arbitre aurait certes le droit et même l'obligation de statuer à son sujet. Cependant, son erreur, même raisonnable, serait sujette à révision judiciaire. [Je souligne.]

Dans son commentaire de l'arrêt *Moalli*, Me Ouimet élabore sur cette qualification initiale:

En tout état de cause, force nous est d'admettre cependant qu'en qualifiant d'intra-juridictionnelle cette question, la décision *Pétro-Canada* aurait été tout autre et le juge LeBel n'aurait eu qu'à conclure à la raisonnabilité des deux écoles de pensée sans pour autant régler le litige. Dès lors, il est possible de croire qu'il ait «choisi» de qualifier cette question de juridictionnelle, de façon à statuer sur l'exactitude de l'interprétation de l'arbitre Moalli plutôt que sur sa raisonnabilité, auquel cas nous retournions à la case départ.

(Hélène Ouimet, «Commentaires sur l'affaire Produits Pétro-Canada c. Moalli» (1987), 47 *R. du B.* 852, à la p. 858.)

Par ailleurs, un autre auteur est d'avis que cette qualification ne s'est pas effacée au profit d'un motif autonome de contrôle judiciaire:

. . . de l'avis du juge LeBel qui a rédigé les motifs, la question soumise à l'arbitre était, dans ce cas-là, «proprement juridictionnelle». Plus précisément, l'applicabilité de l'article 97 de la *Loi sur les normes du travail* à l'article 124 de la même loi, qui exige la continuité du service pendant cinq ans chez un même employeur pour donner lieu à une plainte de congédiement, était une question attributive de compétence sur laquelle l'arbitre ne pouvait se tromper. Autrement dit, la question était dès le départ et a toujours été une question de compé-

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question within jurisdiction which lost that characterization because of a dispute. [Emphasis added.]

(Jean-François Jobin, "Le contrôle judiciaire des erreurs de compétence ou dites proprement juridictionnelles: où en sommes-nous?" (1990), 50 *R. du B.* 731, at pp. 748-49.)

Similarly, in *Moalli* the Court of Appeal referred to *Broadway Manor Nursing Home*, *supra*. After citing the reasons of Galligan J. which I reproduced above, LeBel J.A. continued (at pp. 267-68):

[TRANSLATION] I would hesitate to apply this aspect of the reasoning without qualification in the case at bar . . . In some cases the interpretation of the wording of general legislation is a necessary function of the arbitrator or lower court. It is part of what they do and is protected by the usual attitude of curial deference. In any case, the problem does not seem to arise here on account of the jurisdictional characterization which I apply to the problem of interpreting and applying ss. 124 and 97 A.L.S. [Emphasis added.]

In the present case, on the contrary, there could be no question that the CALP was acting within its jurisdiction. The Court of Appeal does not seem to have made this distinction in referring to *Moalli*.

Furthermore, since *Moalli*, apart from the case at bar, the Quebec Court of Appeal has not to my knowledge thought it proper to intervene on the ground that there were conflicting decisions between administrative tribunals: *Hydro-Québec v. Conseil des services essentiels* (1991), 41 Q.A.C. 292; *Syndicat canadien de la Fonction publique v. Commission des écoles catholiques de Québec*, C.A. Québec, No. 200-09-000463-866, December 20, 1989, J.E. 90-176, and *Syndicat des communications graphiques, local 509M v. Auclair*, [1990] R.J.Q. 334. In this last case, Tourigny J.A. further clarified the meaning of *Moalli* as follows (at p. 340):

[TRANSLATION] It might be argued that *Produits Pétro-Canada Inc. v. Moalli* created an exception to the generally accepted rule that courts intervene only where there are patently unreasonable errors. In that case, LeBel J.A. came to the conclusion that the Superior

tence au sens strict; et non pas une question intrajuridictionnelle qui aurait perdu ce qualificatif à cause d'une controverse. [Je souligne.]

(Jean-François Jobin, «Le contrôle judiciaire des erreurs de compétence ou dites proprement juridictionnelles: où en sommes-nous?» (1990), 50 *R. du B.* 731, aux pp. 748 et 749.)

De même, la Cour d'appel s'est référée, dans l'arrêt *Moalli*, à l'affaire *Broadway Manor Nursing Home*, précitée. Or, après avoir cité les motifs du juge Galligan que j'ai reproduits ci-avant, le juge LeBel a poursuivi (aux pp. 267-68):

J'hésiterais à appliquer intégralement cet aspect de la motivation dans la présente espèce. [. . .] En certains cas, l'interprétation des textes des lois générales est une fonction nécessaire de l'arbitre ou du tribunal inférieur. Elle constitue une part de leur activité que protège l'attitude normale de réserve judiciaire. Quoi qu'il en soit, le problème ne se poserait pas ici, en raison de la qualification juridictionnelle que je retiens à l'égard du problème d'interprétation et d'application des articles 124 et 97 L.N.T. [Je souligne.]

Ici, au contraire, il ne saurait être mis en doute que la CALP agissait à l'intérieur de sa compétence. La Cour d'appel ne semble pas avoir fait cette distinction en se référant à l'arrêt *Moalli*.

D'autre part, depuis l'arrêt *Moalli* et exception faite de la présente affaire, la Cour d'appel du Québec n'a pas jugé opportun, à ma connaissance, d'intervenir au motif qu'il existait un conflit jurisprudentiel au sein d'instances administratives: *Hydro-Québec c. Conseil des services essentiels* (1991), 41 Q.A.C. 292; *Syndicat canadien de la Fonction publique c. Commission des écoles catholiques de Québec*, C.A. Québec, nº 200-09-000463-866, le 20 décembre 1989, J.E. 90-176, et *Syndicat des communications graphiques, local 509M c. Auclair*, [1990] R.J.Q. 334. Dans ce dernier arrêt, le juge Tourigny nuançait la portée de l'affaire *Moalli* dans les termes suivants (à la p. 340):

On pourrait soutenir que *Produits Pétro-Canada Inc. c. Moalli* a créé une exception à la règle généralement acceptée à l'effet que les cours n'interviennent que dans les cas d'erreurs manifestement déraisonnables. Dans cette affaire, le juge LeBel en venait à la conclusion que

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Court could have been justified in intervening in cases where, despite the reasonableness of the error of law, it was in the public interest to put an end to divergent opinions among lower tribunals. However, the wording used in that case should be examined more closely. LeBel J.A. speaks of ". . . the reality and seriousness of a case law conflict which has not been solved since the Act . . . came into force" and of ". . . two separate and inconsistent rules of law". This language suggests that review in such circumstances should be reserved for cases in which there are significant conflicts in the decisions of the lower tribunals.

That is not the case here.

In *Syndicat canadien de la Fonction publique v. Commission des écoles catholiques de Québec*, Dussault J.A. rejected as follows the argument that the existence of two diverging lines of arbitral decisions justified intervention by the courts (at pp. 12-13):

[TRANSLATION] In my view, the judgment of this Court in *Produits Pétro Canada Inc. v. Moalli* . . . must be considered with the greatest circumspection. It was rendered in response to the entirely exceptional circumstances of that case, when the differing interpretations related to the Act itself. It seems to me to be misguided if not dangerous to apply the rule of intervention by the courts every time one arbitrator takes a different approach from the others in interpreting a provision of a collective agreement and so to provide an automatic right of appeal disguised in the form of evocation.

In short, although, strictly speaking, *Moalli* can be interpreted as saying that the existence of a significant conflict in decisions is an independent basis for judicial review, it must be noted that its impact is both ambiguous and limited. While its scope has been qualified by subsequent decisions of the Quebec Court of Appeal, this restrictive interpretation does not of itself resolve the questions that remain regarding judicial review. The problem presented by the standard of review applicable to an arbitrator's decision seems to me to be unavoidable. If the question before the arbitrator in *Moalli* was jurisdictional in nature, he could not err without being subject to judicial review. If, on the other hand, the question was within jurisdiction, only a patently unreasonable interpretation

la Cour supérieure pouvait être justifiée d'intervenir dans des cas où, malgré le caractère raisonnable de l'erreur de droit, il était dans l'intérêt public de mettre fin à des opinions divergentes au sein des tribunaux inférieurs. On doit cependant regarder de plus près les termes utilisés dans cette affaire. Le juge LeBel parle de «(. . .) la réalité et la gravité d'un conflit jurisprudentiel qui ne connaît pas de solution depuis l'entrée en vigueur de la Loi (. . .)» et de «(. . .) deux règles de droit distinctes et incompatibles». Ces termes suggèrent que la révision en pareilles circonstances doit être réservée aux cas où il y a, dans la jurisprudence des tribunaux inférieurs, des conflits sérieux.

Ce n'est pas le cas ici.

Dans l'affaire *Syndicat canadien de la Fonction publique c. Commission des écoles catholiques de Québec*, le juge Dussault a rejeté, comme suit, l'argument voulant que l'existence de deux courants de jurisprudence arbitrale justifie l'intervention des cours de justice (aux pp. 12 et 13):

À mon avis, le jugement de notre Cour dans *Produits Pétro Canada Inc. c. Moalli* [. . .] doit être considéré avec la plus grande circonspection. Il a été prononcé en raison des circonstances tout à fait exceptionnelles de l'espèce et alors que les divergences d'interprétation visaient la loi elle-même. Il me paraîtrait abusif sinon dangereux de consacrer le principe de l'intervention des tribunaux à chaque fois qu'un arbitre n'aurait pas le même pas que les autres dans l'interprétation d'une disposition d'une convention collective et d'accorder ainsi, déguisé sous la forme de l'évocation, un droit d'appel automatique.

En résumé, même si l'arrêt *Moalli* peut, à la rigueur, s'interpréter comme s'autorisant de l'existence d'un conflit jurisprudentiel sérieux comme motif autonome de contrôle judiciaire, force est de constater que sa portée est à la fois ambiguë et limitée. Quoique les arrêts subséquents de la Cour d'appel du Québec aient nuancé sa portée, cette interprétation restrictive ne résout pas, pour autant, les interrogations qui subsistent en matière de contrôle judiciaire. Le problème posé par la norme de contrôle applicable à la décision de l'arbitre m'apparaît, à cet égard, incontournable. Si la question dont était saisi l'arbitre dans *Moalli* en était une de nature juridictionnelle, il ne pouvait commettre d'erreur sans s'exposer au contrôle judiciaire. Si, par ailleurs, la question était intrajuridictionnelle,

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would call for judicial review. The fact that, in that case, the Court of Appeal held that it was departing from the rule of curial deference does not, strictly speaking, in any way alter the following observation: an initial conclusion that, for judicial review purposes, the legislature itself admits several possible and rational constructions of the same legislative provision is the guiding principle without which, in theory, there can be no judicial review in the event of conflicting decisions.

This guiding principle was well delineated by Reid J. in *Franks*, *supra*: like the standard of review applicable to the impugned decision, the context in which several contending values conflict, here as there, is crucial. The issue is between the expertise and effectiveness of administrative tribunals and curial deference, on the one hand, and consistency and predictability in the application of the law, on the other. The advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot, in these circumstances, be determined solely by the "triumph" of the rule of law. Where decisions made within jurisdiction are not patently unreasonable, the issue instead turns on whether the principles underlying curial deference should give way to other imperatives. In my opinion, the answer is no.

First, dealing with a case of administrative inconsistency and solving it means altering the already delicate institutional relationship between administrative tribunals and courts with reference to the impugned decision. As Professor MacLauchlan notes, *supra*, at p. 441:

> It is a matter of applying rules, or principles, to facts. The essence of the matter is not to determine in some scientific fashion whether a decision is consistent with a claimed precedent but to determine *who should decide*. [Emphasis in original.]

At page 445, the author adds: "[r]eview for inconsistency, so far from being neutral or disengaged, invites full judicial reconsideration of the

seule une interprétation manifestement déraisonnable appelait le contrôle judiciaire. Le fait que la Cour d'appel ait jugé, dans cette affaire, qu'elle dérogeait au principe de la retenue judiciaire ne change strictement rien au constat suivant: une conclusion initiale à l'effet que le législateur admet lui-même, aux fins du contrôle judiciaire, plusieurs lectures possibles et rationnelles d'une même disposition législative constitue le fil directeur sans lequel l'opportunité d'un contrôle judiciaire en cas de conflit jurisprudentiel ne saurait, en principe, se poser.

Le juge Reid a bien cerné ce fil directeur dans l'affaire *Franks*, précitée: tout comme la norme de contrôle applicable à la décision contestée, le contexte dans lequel s'affrontaient, là comme ici, plusieurs valeurs, est déterminant. Il s'agit de l'expertise et de l'efficacité des tribunaux administratifs et la retenue judiciaire d'une part, contre la cohérence et la prévisibilité dans l'application de la loi, de l'autre. L'opportunité d'une intervention judiciaire en cas de conflit jurisprudentiel au sein de tribunaux administratifs, même grave et incontestable, ne saurait, dans ces conditions, s'inspirer uniquement du «triomphe» de la primauté du droit. Dans le cas de décisions intrajuridictionnelles non manifestement déraisonnables, le débat se résume, plutôt, à se demander si les principes sous-jacents à la retenue judiciaire doivent céder le pas à d'autres impératifs. À mon avis, la réponse est non.

En premier lieu, se pencher sur un cas d'incohérence administrative et le solutionner, c'est modifier le rapport institutionnel, déjà délicat, entre les tribunaux administratifs et les cours de justice sous l'angle de la décision contestée. Comme le souligne le professeur MacLauchlan, *loc. cit.*, à la p. 441:

> [TRADUCTION] Il s'agit d'appliquer les règles ou les principes aux faits. Le fond de la question n'est pas de déterminer d'une manière scientifique si une décision est cohérente par rapport à un précédent invoqué mais bien de déterminer *qui doit décider*. [En italique dans l'original.]

À la p. 445, l'auteur ajoute: [TRADUCTION] «L'examen de l'incohérence, loin d'être neutre ou libre, donne lieu à une révision judiciaire complète

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administrative decision". A jurisprudential conflict must necessarily be found. In order to solve it, courts must proceed to examine the merits of the decisions in question. As Professor Mullan himself points out, *supra*, at p. 282:

> The determination of whether there has been inconsistency will seldom, if ever, come down to a case of different treatment of two persons in precisely the same situation. Rather, it will generally involve the court in making judgments as to whether A's situation was sufficiently dissimilar to B's to make their differential treatment justifiable. "Is refusing induction qualitatively the same as the situations previously dealt with by the Commission?" As soon as the determination of such questions becomes the court's function, the judge will be involved in substantially the same assessment task as the statute has confided to the Commission. [Emphasis added.]

In my opinion, there is a real risk that superior courts, by exercising review for inconsistency, may be transformed into genuine appellate jurisdictions. Far from being neutral, the concept of consistency is an elusive parameter which, varying depending on the objective sought, may distort the very nature of judicial review. The arbitrariness which the judicial sanction is designed to remedy may, thus, become the result. In *Bibeault*, *supra*, Beetz J. commented as follows on the use of the theory of preliminary or collateral questions as a means of arriving at judicial review (at p. 1087):

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" [Emphasis added.]

In my opinion, questions as to the advisability of resolving a jurisprudential conflict avoid the main issue, namely, who is in the best position to rule on the impugned decision. Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy

de la décision administrative». Un conflit jurisprudentiel doit, nécessairement, être constaté. Afin de le solutionner, les cours de justice doivent procéder à un examen du bien-fondé des décisions concernées. Comme le souligne le professeur Mullan lui-même, *loc. cit.*, à la p. 282:

> [TRADUCTION] L'examen de la question de savoir s'il y a eu incohérence aboutira rarement, sinon jamais, à un cas où deux personnes exactement dans la même situation auront été traitées différemment. La cour de justice devra généralement décider plutôt si la situation de A diffère suffisamment de celle de B pour justifier un traitement différent. «Le refus d'enrôlement correspond-il qualitativement aux situations déjà examinées par la Commission?» Dès que la cour de justice doit trancher ce genre de questions, le juge jouera substantiellement le même rôle d'évaluation que celui que la loi a conféré à la Commission. [Je souligne.]

Le risque que les tribunaux supérieurs se transforment, par le biais d'un contrôle de l'incohérence, en de véritables juridictions d'appel est, à mes yeux, véritable. Loin d'être neutre, la notion de cohérence constitue un paramètre fuyant qui, malléable en fonction de la finalité recherchée, peut dénaturer l'essence même du contrôle judiciaire. L'arbitraire dont la sanction judiciaire se voudrait le remède peut, ainsi, en devenir la conséquence. Dans l'arrêt *Bibeault*, précité, le juge Beetz a critiqué, comme suit, l'utilisation de la théorie des conditions préalables comme moyen d'aborder le contrôle judiciaire (à la p. 1087):

> La notion de condition préalable détourne les tribunaux du véritable problème du contrôle judiciaire: elle substitue la question «S'agit-il d'une condition préalable à l'exercice du pouvoir du tribunal?» à la seule question qu'il faut se poser, «Le législateur a-t-il voulu qu'une telle matière relève de la compétence conférée au tribunal?» [Je souligne.]

À mes yeux, s'interroger sur l'opportunité de trancher un conflit jurisprudentiel, c'est se détourner, de même, de la question première, soit celle de savoir qui est le mieux placé pour se prononcer sur la décision contestée. Substituer son opinion à celle d'un tribunal administratif afin de dégager sa propre interprétation d'une disposition législative,

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and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. Any inquiry into decision-making inconsistency where there is no patently unreasonable error thus diverts courts of law from the fundamental question which the legislature has in any case already answered.

Moreover, limiting this type of review to serious and unquestionable jurisprudential conflicts would not, by itself, remove all difficulty. There are undoubtedly clear cases of inconsistency where the dictates of equality and consistency in the application of the law will have full effect. I am far from certain, however, that only those cases will come before the courts. The case at bar is a striking demonstration of this: is the fact that two bodies interpret the same legislative provision differently, but in the particular context of the jurisdiction of each, one in a penal and the other in an administrative matter, a "conflict in decisions"? What about an isolated decision conflicting with a consistent line of authority? Must a jurisprudential conflict "continue" before being brought to the attention of the courts? If so, how is the quantitative and temporal threshold to be determined? Professor Ouellette has voiced these concerns:

[TRANSLATION] Now we know at least that the concept of "serious or significant conflict of decisions" must be strictly interpreted, but it remains a source of confusion and difficult to apply. How many differing opinions or persons affected, assuming that they can be quantified, must there be to justify review on evocation of a decision not otherwise patently unreasonable?

(Yves Ouellette, "Le contrôle judiciaire des conflits jurisprudentiels au sein des organismes administratifs: une jurisprudence inconstante" (1990), 50 *R. du B.* 753, at p. 757.)

c'est réduire à néant son autonomie décisionnelle et l'expertise qui lui est propre. Puisqu'une telle intervention surgit dans un contexte où le législateur a déterminé que le tribunal administratif est celui qui est le mieux placé pour se prononcer sur la décision contestée, elle risque de contrecarrer, par la même occasion, son intention première. Toute enquête sur l'incohérence décisionnelle en l'absence d'erreur manifestement déraisonnable détourne donc les cours de justice de l'interrogation fondamentale à laquelle le législateur a, au surplus, déjà répondu.

D'autre part, le fait de limiter cette forme de contrôle aux cas de conflits jurisprudentiels graves et incontestables n'évacuerait pas, en soi, les difficultés. Il existe, certes, des cas d'incohérence clairs où les impératifs d'égalité et de cohérence dans l'application de la loi prennent tout leur sens. Cependant, je suis loin d'être certaine que seuls ces cas seront portés à l'attention des cours de justice. La présente affaire en constitue l'éclatante démonstration: le fait que deux organismes interprètent différemment un même texte législatif, mais dans le contexte particulier de la compétence de chacun, l'un en matière pénale, l'autre en matière administrative, constitue-t-il un «conflit jurisprudentiel»? Qu'en-est-il d'une décision isolée à l'encontre d'une jurisprudence constante? Un conflit jurisprudentiel doit-il «perdurer» avant qu'il ne soit porté à l'attention des cours de justice? Dans l'affirmative, comment en fixer le seuil quantitatif et temporel? Le professeur Ouellette s'est fait l'écho de ces interrogations:

On sait au moins maintenant que le concept de «conflit jurisprudentiel grave ou sérieux» doit s'interpréter restrictivement, mais il demeure source de confusion et difficile d'application. Combien faut-il d'opinions divergentes ou combien faut-il de personnes affectées, à supposer que l'on puisse les quantifier, pour justifier la révision sur évocation d'une décision par ailleurs non manifestement déraisonnable?

(Yves Ouellette, «Le contrôle judiciaire des conflits jurisprudentiels au sein des organismes administratifs: une jurisprudence inconstante?» (1990), 50 *R. du B.* 753, à la p. 757.)

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The principle that decisions of administrative tribunals remain effective is accordingly decisive. While answers diametrically opposed according to the identity of the members of an administrative tribunal certainly would seem to be unacceptable, what is the position of the litigant in whose favour the same administrative tribunal has ruled but who sees this decision challenged (with all the costs, delays and so on involved), perhaps needlessly, on the ground of an alleged inconsistency? The first situation is relatively rare and can be resolved outside the judicial arena. The legislature is in that category. Similarly, the administrative body can play a role of primary importance. As Professor MacLauchlan noted, *supra*, at p. 437:

> The proper response to administrative action which is ostensibly inconsistent but which falls short of traditional jurisdictional grounds of review is not judicial oversight, but the exertion of pressure in the political dynamic, of which the administrative decision-maker forms a vital element.

Similarly, it is important to note the internal mechanisms developed by administrative tribunals to ensure the consistency of their own decisions: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, and *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952. In *Tremblay*, Gonthier J. noted that "the objective of consistency responds to litigants' need for stability but also to the dictates of justice" (p. 968). In *Consolidated-Bathurst*, Gonthier J. spoke of the importance for an administrative tribunal to maintain a high level of quality and consistency in its decisions (at pp. 327-28):

> It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse* (1986), 16 *R.D.U.S.* 591, at p. 632. Given the large number of decisions rendered in

Le principe voulant que les décisions des tribunaux administratifs demeurent efficaces est, dès lors, déterminant. Si des réponses diamétralement opposées selon l'identité des membres d'un tribunal administratif paraît, certes, inacceptable, qu'en est-il du justiciable à qui le même tribunal administratif a donné raison, mais qui voit cette décision contestée (avec tous les frais, délais, etc. que cela comporte), de façon peut-être futile, au motif d'une incohérence présumée? La première situation est relativement rare et peut se régler à l'extérieur de l'arène judiciaire. Le législateur est de ceux-là. De même, l'organisme administratif peut jouer un rôle de tout premier ordre. Comme l'a noté le professeur MacLauchlan, *loc. cit.*, à la p. 437:

> [TRADUCTION] La façon de réagir à une décision administrative manifestement incohérente, mais qui ne soulève pas de motifs traditionnels d'examen de la compétence n'est pas l'inaction judiciaire, mais plutôt l'exercice de pressions dans la sphère politique, dont le décideur administratif est un élément essentiel.

Dans le même esprit, il convient de souligner l'importance des mécanismes internes mis en œuvre par les tribunaux administratifs afin d'assurer la cohérence de leur propre jurisprudence: *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, et *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952. Dans l'affaire *Tremblay*, le juge Gonthier a ainsi souligné que «[l']objectif de cohérence répond à un besoin de sécurité des justiciables, mais également à un impératif de justice» (p. 968). Dans l'arrêt *Consolidated Bathurst*, le juge Gonthier a fait état de l'importance, pour un tribunal administratif, de maintenir un niveau élevé de qualité et de cohérence dans le cadre de ses décisions (aux pp. 327 et 328):

> Il est évident qu'il faut favoriser la cohérence des décisions rendues en matière administrative. L'issue des litiges ne devrait pas dépendre de l'identité des personnes qui composent le banc puisque ce résultat serait «difficile à concilier avec la notion d'égalité devant la loi, l'un des principaux corollaires de la primauté du droit, et peut-être aussi le plus intelligible»: Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse* (1986), 16 *R.D.U.S.* 591, à la p. 632. Vu le grand nombre de décisions rendues en matière de

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the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. [Emphasis added.]

This Court has also recognized that the search for consistency is not an absolute one. Thus, in the foregoing case it was held that the members of an administrative tribunal were not bound by any *stare decisis* rule (p. 333). Similarly, as Gonthier J. pointed out in *Tremblay*, the consistency objective must be pursued in keeping with the decision-making autonomy and independence of members of the administrative body (at p. 971):

We have seen that the justification for institutionalizing decisions lies primarily in the need to ensure consistency in decisions rendered by administrative tribunals. Whether the latter make decisions with a high policy component or not, those decisions must be consistent with the requirements of justice. A consultation process by plenary meeting designed to promote adjudicative coherence may thus prove acceptable and even desirable for a body like the Commission, provided this process does not involve an interference with the freedom of decision makers to decide according to their consciences and opinions. [Emphasis added.]

Finally, in the same case, the Court noted that administrative tribunals could render contradictory decisions (at p. 974):

Ordinarily, precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise. Bearing this in mind, I consider it is particularly important for the persons responsible for hearing a case to be the ones to decide it. [Emphasis added.]

Though they were part of a discussion centering on the rules of natural justice, these remarks indicate that certainty of the law and decision-making consistency are chiefly notable for their relativity. Like the rules of natural justice, these objectives cannot be absolute in nature regardless of the context. The value represented by the decision-making

droit du travail, la Commission est justifiée de prendre les mesures nécessaires pour éviter d'arriver, par inadvertance, à des solutions différentes dans des affaires semblables. [Je souligne.]

Notre Cour a également reconnu que la recherche de la cohérence n'avait pas un caractère absolu. Ainsi, dans l'arrêt précité, on a décidé que les membres d'un tribunal administratif n'étaient liés par aucune règle de *stare decisis* (p. 333). De même, comme l'a souligné le juge Gonthier dans l'arrêt *Tremblay*, l'objectif de cohérence doit se poursuivre dans le respect de l'autonomie et l'indépendance décisionnelle des membres de l'organisme administratif (à la p. 971):

Nous avons vu que la justification de l'institutionnalisation des décisions réside principalement dans l'impératif de cohérence des décisions rendues par les tribunaux administratifs. Que ceux-ci rendent des décisions à haut coefficient politique ou non, ces décisions doivent être compatibles par souci de justice. Le processus de consultation par réunion plénière visant à favoriser la cohérence de la jurisprudence pourrait donc s'avérer acceptable et même désirable pour un organisme comme la Commission, à condition que ce processus ne constitue pas une entrave à la liberté des décideurs de trancher selon leurs conscience et opinions. [Je souligne.]

Enfin, dans le même arrêt, la Cour a précisé que les tribunaux administratifs pouvaient rendre des décisions contradictoires (à la p. 974):

Normalement, l'élaboration d'un courant jurisprudentiel se fait par les décideurs effectifs suite à un ensemble de décisions. Le tribunal saisi d'une question nouvelle peut ainsi rendre un certain nombre de jugements contradictoires avant qu'un consensus ne se dégage naturellement. Il s'agit évidemment d'un processus plus long; rien n'indique cependant que le législateur ait voulu qu'il en soit ici autrement. Dans cette optique, je suis d'avis qu'il est particulièrement important que les personnes saisies d'une affaire soient celles qui décident. [Je souligne.]

Bien qu'elles s'inscrivent dans le cadre d'un débat axé sur les principes de justice naturelle, ces remarques démontrent que la sécurité juridique et la cohérence décisionnelle se démarquent, avant tout, par leur relativité. Tout comme les principes de justice naturelle, ces objectifs ne sauraient avoir un caractère absolu, dénué de tout contexte. La

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independence and autonomy of the members of administrative tribunals goes hand in hand here with the principle that their decisions should be effective. In light of these considerations we must conclude that, for purposes of judicial review, the principle of the rule of law must be qualified. This is consistent with the continuing evolution of administrative law itself. The process by which curial deference has progressively become established in courts of law was analyzed by Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, *supra* (at p. 1336):

> Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. [Emphasis added.]

This process has led to the development of the patently unreasonable error test. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a

valeur que représente l'indépendance et l'autonomie décisionnelle des membres des tribunaux administratifs se conjugue, ici, au principe de l'efficacité de leurs décisions. Soupeser ces considérations, c'est constater que le principe de la primauté du droit doit, aux fins du contrôle judiciaire, être nuancé. Ceci participe à la dimension évolutive du droit administratif lui-même. Le processus par lequel la retenue judiciaire a progressivement trouvé droit de cité chez les cours de justice a été analysé par le juge Wilson dans l'arrêt *National Corn Growers Assn. c. Canada (Tribunal des importations)*, précité, à la p. 1336:

> Les tribunaux judiciaires canadiens se sont efforcés au fil des ans de se détacher du point de vue de Dicey pour en arriver à une compréhension plus subtile du rôle des tribunaux administratifs dans l'État canadien moderne. C'est là un processus qui s'est traduit notamment par une reconnaissance accrue de la part des cours de justice qu'il se peut qu'elles soient simplement moins en mesure que les tribunaux ou organismes administratifs de statuer dans des domaines que le Parlement a choisi de réglementer par l'intermédiaire d'organismes exerçant un pouvoir délégué, comme, par exemple, les relations de travail, les télécommunications, les marchés financiers et les relations économiques internationales. Une gestion prudente de ces secteurs nécessite souvent le recours à des experts ayant à leur actif des années d'expérience et une connaissance spécialisée des activités qu'ils sont chargés de surveiller.
>
> Les cours de justice ont également fini par se faire à l'idée qu'elles ne sont peut-être pas aussi bien qualifiées qu'un organisme administratif déterminé pour donner à la loi constitutive de cet organisme des interprétations qui ont du sens compte tenu du contexte des politiques générales dans lequel doit fonctionner cet organisme. [Je souligne.]

Ce processus a conduit à l'élaboration du critère de l'erreur manifestement déraisonnable. Si le droit administratif canadien a pu évoluer au point de reconnaître que les tribunaux administratifs ont la compétence de se tromper dans le cadre de leur expertise, je crois que l'absence d'unanimité est, de même, le prix à payer pour la liberté et l'indépendance décisionnelle accordées aux membres de ces mêmes tribunaux. Reconnaître l'existence d'un conflit jurisprudentiel comme motif autonome de contrôle judiciaire constituerait, à mes yeux, une

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serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.

VI—Conclusion

For all these reasons, I would allow the appeal and dismiss the motion in evocation, the whole with costs throughout.

*Appeal allowed with costs.*

*Solicitors for the appellant: Trudel, Nadeau, Lesage, Clearly, Larivière & Associés, Montréal.*

*Solicitors for the respondent: Desjardins, Ducharme, Stein, Monast, Québec.*

*Solicitors for the mis en cause CALP: Levasseur, Delisle, Morel, Québec.*

*Solicitors for the mis en cause CSST: Chayer, Panneton, Lessard, Québec.*

grave entorse à ces principes. Ceci m'apparaît d'autant plus vrai que les tribunaux administratifs, tout comme le législateur, ont le pouvoir de régler eux-mêmes ces conflits. La solution qu'appellent les conflits jurisprudentiels au sein de tribunaux administratifs demeure donc un choix politique qui ne saurait, en dernière analyse, être l'apanage des cours de justice.

VI—Conclusion

Pour toutes ces raisons, je suis d'avis d'accueillir le pourvoi et de rejeter la requête en évocation, le tout avec dépens dans toutes les cours.

*Pourvoi accueilli avec dépens.*

*Procureurs de l'appelant: Trudel, Nadeau, Lesage, Clearly, Larivière & Associés, Montréal.*

*Procureurs de l'intimée: Desjardins, Ducharme, Stein, Monast, Québec.*

*Procureurs de la mise en cause CALP: Levasseur, Delisle, Morel, Québec.*

*Procureurs de la mise en cause CSST: Chayer, Panneton, Lessard, Québec.*

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