FILE NO.: EB-2017-0336

ONTARIO ENERGY BOARD

IN THE MATTER OF a cost of service application made by Hydro One Networks Inc. 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 Decision and Order dated September 28, 2017 in this proceeding;

AND IN THE MATTER OF the Decision and Order dated November 9, 2017 in this proceeding; and

AND IN THE MATTER OF Rules 40 and 42 of the Ontario Energy Board's *Rules of Practice and Procedure.*

BOOK OF AUTHORITIES OF THE MOVING PARTY,
HYDRO ONE NETWORKS INC.
(motion for review and variance)

VOLUME 2 OF 2

Date: January 15, 2018

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VOLUME 2 OF 2

INDEX

Tab	Authority
	Volume 1
	Statutes
1	Extract of *Electricity Act 1998*, S.O. 1998, c. 15
2	Extract of *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
3	Extract of *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B)
4	*Payments in Lieu of Corporate Taxes*, O. Reg. 207/99
5	Extract of *Taxation Act, 2007*, S.O. 2007, c. 11, (Schedule A)

	Cases and Regulatory Decisions
6	*Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON SCDC)
7	*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140
8	*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559
9	*Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 SCR 865
10	*Canadian Union of Public Employees v. Ontario (Premier)*, 2017 ONSC 4874
11	*Coachman Insurance Company v. Lombard Canada*, 2009 ONCA 80
12	*Dam Investments Inc. v. Ontario*, 2007 ONCA 527
13	*Decision with Reasons*, EB-2006-0322/0338/0340, dated May 22, 2007
14	*Decision with Reasons*, EB-2007-0905, dated November 3, 2008
15	*Decision with Reasons*, EB-2009-0408, dated July 21, 2010
16	*Erickson v. Ontario*, [2011] O.E.R.T.D. No. 29
	Volume 2
17	*Greater Toronto Airports Authority v. International Lease Finance Corp.* (2004), 69 O.R. (3d) 1 (C.A.)
18	*Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd.*, 2009 ABCA 240
19	*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 SCR 591
20	*Lindsay v. Manitoba (Motor Transport Board)*, 62 D.L.R. (4th) 615 (Man CA)
21	*Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 SCR 147
22	*R. v. J.M.H.*, [2011] 3 SCR 197
23	*R. v. Ulybel Enterprises Ltd.*, [2001] 2 SCR 867
24	*R. v. Stucky*, 2009 ONCA 151
25	*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68
26	*Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284

	Secondary Sources
27	Extract of Ontario Energy Board, *Filing Requirements for Electricity Transmission Applications*, Chapter 2, "Revenue Requirement Applications," dated February 11, 2016
28	Extract of Ontario Energy Board, *Reference respecting Ontario Hydro*, Chapter 11, H.R. 16, Report of the Board, Volume I, dated September 15, 1987
29	Extract of *Report of the Board*, RP-2004-0188, dated May 11, 2005
30	*Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, EB-2009-0084, dated December 11, 2009

Tab 17

Greater Toronto Airports Authority et al. v. International Lease Finance Corporation et al.*

[Indexed as: Greater Toronto Airports Authority v. International Lease Finance Corp.]

69 O.R. (3d) 1
[2004] O.J. No. 141
Docket Nos. C38228, C38229, C38241, C37427, C37425, C37426, C37429 and C37444

Court of Appeal for Ontario
Abella and Cronk JJ.A. and Juriansz J. (ad hoc)
January 20, 2004

*Application for leave to appeal to the Supreme Court of Canada was granted with costs in any event of the cause May 19, 2005 (Bastarache, Lebel and Deschamps JJ.)

Bankruptcy and insolvency -- Priorities -- Airline leasing fleet of aircraft under true leases -- NAV Canada, operator of Canada's civil air navigation unpaid for civil air navigation services -- NAV Canada applying under s. 56 of Civil Air Navigation Services Commercialization Act to seize aircraft in possession of airline -- Airport Authorities unpaid for airport charges -- Airport Authorities applying to seize aircraft pursuant to s. 9(1) of Air Transfer (Miscellaneous Matters) Act -- Lessors entitled to declarations that NAV Canada and Airport Authorities not entitled to seize aircraft -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Aeronautics Act, R.S.C. 1985, c. A-2 -- Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, s. 55 -- Air Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5, s. 9 -- Canadian Aviation Regulations, SOR/96-433.

2004 CanLII 32169 (ON CA)

Statutes -- Interpretation -- Canons of construction -- Meaning of "owner" in legislative scheme for regulation of aeronautics -- Legislative history and context -- Use of dictionary definition -- Implication of words "includes" and "means" -- Shared meaning rule for interpretation of statutes -- Implications of the use of the word "s'entend" -- Ejusdem generis principle -- Airline leasing fleet of aircraft under true leases -- NAV Canada, operator of Canada's civil air navigation unpaid for civil air navigation services -- NAV Canada applying under s. 56 of Civil Air Navigation Services Commercialization Act to seize aircraft in possession of airline -- Airport Authorities unpaid for airport charges -- Airport Authorities applying to seize aircraft pursuant to s. 9(1) of Air Transfer (Miscellaneous Matters) Act -- Lessors entitled to declarations that NAV Canada and Airport Authorities not entitled to seize aircraft -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Aeronautics Act, R.S.C. 1985, c. A-2 -- Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, s. 55 -- Air Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5, s. 9 -- Canadian Aviation Regulations, SOR/96-433.

Canada 3000 Airlines Limited/Lignes Ariennes Canada 3000 Limite ("Canada 3000") and Royal Aviation Inc. ("Royal") (with their parent company, collectively the "Canada 3000 Companies") operated a fleet of 38 aircraft (the "Aircraft"), 36 of which were provided under leases under which various of the [page2 r] espondents (the "Lessors") retained legal title to the aircraft. RRPF Engine Leasing Limited and Flight Logistics (the "Engine Lessors") leased engines attached to two of the aircraft. By order dated November 8, 2001, the Canada 3000 Companies obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). The following day, NAV Canada, the operator of Canada's civil air navigation system, which was owed approximately $7.4 million in unpaid charges for civil air navigation services, applied under s. 56 of the Civil Air Navigation Services Commercialization Act ("CANSCA") to seize certain aircraft in the possession of Canada 3000 and Royal. On November 10, 2001, the directors of the Canada 3000 Companies resigned and, on November 11, 2001, Deloitte & Touche Inc.,

2004 CanLII 32169 (ON CA)

which had been appointed monitor under the CCAA, was appointed the trustee in bankruptcy and was authorized to file assignments in bankruptcy under the Bankruptcy and Insolvency Act ("BIA").

As a result of the various insolvency proceedings, the Lessors were entitled under their leases to repossess the aircraft. However, during November, pursuant to s. 9(1) of the Air Transfer (Miscellaneous Matters) Act (the "Airports Act"), the Greater Toronto Airports Authority ("GTAA"), which operated Lester B. Pearson International Airport in Toronto, and other Canadian airport authorities (the "Authorities"), which together were owed approximately $21 million for various airport charges, applied for an order authorizing the seizure and retention of the aircraft. The Lessors initiated cross-motions seeking, among other relief, declarations that the Authorities were not entitled to seize the aircraft.

By order dated December 3, 2001, Ground J. approved protocols for the interim release of the aircraft to the Lessors on condition that they post security for 110 per cent of the amounts allegedly owed to the Authorities. Ground J. ordered that each party bear its own costs of compliance with the release protocols regardless of the ultimate disposition of the seizure motions. The Lessors posted the security, and the aircraft were released to them.

On May 7, 2002, Ground J. dismissed the seizure applications of the Authorities and NAV Canada. In reaching his judgment, he ruled that, with certain redactions, affidavits sworn by Donald G. Gray for the Lessors about the legislative history of CANSCA and related statutes were admissible. Ground J. also: (i) determined that the Authorities' seizure and detention claims were either not affected by the automatic bankruptcy stay provisions of s. 69.3 of the BIA, or that the stay should be lifted to the extent necessary to permit the seizure and detention motions to proceed; (ii) subject to certain conditions, held that the outstanding charges in respect of which the Authorities could advance seizure and detention claims include interest on amounts owed up to the date of payment in full or the date of the posting of security

2004 CanLII 32169 (ON CA)

therefor; (iii) concluded that the exemption provisions of the Airports Act and the CANSCA do not apply to the Aircraft; (iv) held that any seizure and detention rights of the Authorities concerning the Aircraft do not rank in priority to the interests of the Lessors and secured creditors in the Aircraft; (v) held that even if any seizure and detention rights of the Authorities rank in priority to the interests of the Lessors in the Aircraft, they are ineffective concerning the interests of the Engine Lessors in the engines attached to the Aircraft; (vi) declared that none of the Lessors is liable to the Authorities for any outstanding airport or navigation charges; (vii) ordered the Authorities to reimburse the Lessors for the Lessors' costs concerning the detention of the Aircraft and the posting of security (collectively, the "Detention Costs"); and (viii), by reasons dated July 24, 2002, declined to award any costs in the proceedings. [page3]

The Authorities appealed and some of the Lessors appealed or cross-appealed. The Lessors sought leave to cross-appeal Ground J.'s decision denying them costs of the proceedings.

Held, save with respect to requiring the Authorities to reimburse the Lessors for their detention costs, the appeals by the Airport Authorities from the May 7, 2002 Order should be dismissed; that part of the Authorities' appeals concerning reimbursement of the Lessors' Detention Costs and the Lessors' appeals from the Release Protocols Order in connection with the same issue should be allowed; the Lessors should be granted leave to cross-appeal from the disposition of costs; and the cross-appeals should be dismissed.

Per Cronk J.A. (Abella J.A. concurring): In considering the interpretive issues raised in the appeals, it was useful to consider the legislative framework for the regulation of aeronautics in Canada, which included the central pillar of the Aeronautics Act, under which the applicable Minister of the Crown was charged with the development and regulation of all matters connected to aeronautics, CANSCA, which privatized and commercialized civil air navigation services, and the Airports Act, which privatized various airports. These statutes formed part of a broad governmental scheme for the modernization of

2004 CanLII 32169 (ON CA)

Canada's transportation system and were best understood as forming the parts of the framework for the regulation of aeronautics in Canada. Under CANSCA, it was envisaged that NAV Canada would develop, operate and maintain Canada's civil air navigation system while Transport Canada, under the Aeronautics Act, would perform a regulatory and oversight function to ensure the safety of air navigation services. Under the Airports Act, certain former federal airports were transferred to local airport authorities.

Notwithstanding the argument of NAV Canada, Ground J. did not err in interpreting the legislative context and history of CANSCA nor did he give insufficient emphasis on the commercialization purpose of the Act. He was correct in holding that the meaning of "owner" in s. 55 of CANSCA is restricted "to persons who are operating the aircraft and/or are the registered owners of the aircraft and have custody and control of the aircraft" and in concluding that the legal titleholders to the Aircraft and persons having a security interest in the Aircraft are not "owners" of the Aircraft for the purpose of s. 55(1). That conclusion was based on the following: the navigation charges scheme under CANSCA; the terms of s. 55(2) of CANSCA; s. 3(1) of the Aeronautics Act; and the definitions of "operator" and "owner" set out in the Canadian Aviation Regulations (the "CARS").

On the appeal, NAV Canada submitted that under ss. 55 and 56 of CANSCA, the Lessors were an "owner" and thus directly liable for unpaid navigation charges. It argued that the definition of "owner" was expansive rather than restrictive or exhaustive. In support of its argument: (1) it relied on a dictionary meaning of "owner"; (2) it submitted that the use of the word "includes" in the English language version of s. 55(2) was a strong indicator of Parliament's intention that the definition of "owner" be expansive; (3) it asserted that the "shared meaning" rule of statutory interpretation for bilingual statutes did not apply in the instance of CANSCA, where the English version of the statute used the word "includes" and the French version used the word "s'entend", translated in English as "means"; and (4) it submitted that the motions judge erred in interpreting s. 55(2) as if it were subject to the ejusdem

2004 CanLII 32169 (ON CA)

generis principle of statutory construction.

NAV Canada's arguments did not succeed. The word owner was susceptible to various meaning, depending on context. The ordinary dictionary meaning encompassed either the legal titleholder or the person having the right to use and possess [page4 p]roperty or both. The ordinary meaning of owner could, but did not, necessarily extend to legal titleholders. The word "includes" can be used in either an extended or restricted sense depending on the associated words used and the context. The shared meaning rule, under which, where two versions of a bilingual statute appear to express different things, the meaning that is shared by both versions ought to be adopted, was not determinative, although it yielded a restrictive meaning for "owner" that had to be tested against the purpose, context and intent of s. 55 as a whole. A contextual and purposive analysis of s. 55 confirmed that the definition of "owner" was intended to be restrictive. Finally, Ground J. did not apply the ejusdem generis principle in his analysis of s. 55(2).

Given the legislative framework and the purpose of CANSCA, the language of s. 55, the fact that the meaning of the word "owner" was context-specific and the legislative context and history of s. 55, the purpose of s. 55(1) was to provide a form of statutory protection to NAV Canada for the collection of those civil air navigation charges from time to time owed to it. It was not intended to assure or guarantee payment of those charges by extending liability for payment of them to the legal title-holders to aircraft, such as the Lessors. Rather, s. 55 identified two broad categories of persons who would attract status as "owners" under s. 55(1) for the purpose of liability for navigation charges: persons having legal custody and control and persons otherwise in possession of aircraft. Restricting liability under s. 55(1) to those persons was consistent with the legislative context, legislative history and objects of s. 55, the charges scheme under Part III of the CANSCA, and the meaning of "owner" in the aviation context. Accordingly, NAV Canada's appeal concerning s. 55 of CANSCA should be dismissed.

2004 CanLII 32169 (ON CA)

Turning to the seizure and detention claims, the central issue was whether, by virtue of s. 9 of the Airports Act and s. 56 of CANSCA, the Authorities had seizure and detention rights concerning the Aircraft ranking in priority to the pre-existing property rights of the Lessors, the legal titleholders to the Aircraft, entitling the Authorities to seize and detain the Aircraft in the face of claims for repossession and recovery of the Aircraft by the Lessors. On the facts of this case at bar, the competing claims fell to be determined outside the bankruptcy regime. Ground J. was correct in holding that the Authorities did not have detention rights ranking in priority to the claims of the Lessors for repossession and recovery of the aircraft.

An interpretation of the Detention Provisions that emphasized their plain language, as urged by the Authorities, was incomplete and paid insufficient attention to the overall scheme of the Airports Act and CANSCA, the objects of the legislation, the legislative evolution and context of the Detention Provisions and the intention of Parliament. The use of legislative history as a tool for determining the intention of Parliament was appropriate. The legislative history indicated that the Detention Provisions were intended to replicate the remedies that existed under the Aeronautics Act. On undertaking a contextual and purposive analysis of the Detention Provisions, their meaning was clear and unambiguous, and they did not bear the construction urged by the Authorities. The legislative context of s. 9 of the Airports Act, which is linked to the Aeronautics Act, compelled the conclusion that the words "owned or operated by the person liable to pay" in s. 9 merely ensure that both persons with legal custody and control of aircraft (the "owners") and persons otherwise in possession of the aircraft (the "operators") fall within the ambit of s. 9. Those persons are the parties who actually use airport facilities and airport services, thereby incurring charges for those services. The conclusion was the same for the meaning of the words "owned or operated by the person liable to pay" in s. 56 of CANSCA. The Detention Provisions, if granted, did not confer a right ranking in priority to the Lessors. The same conclusion [page5 a]pplied to the Authorities' seizure and detention claims

2004 CanLII 32169 (ON CA)

against the Engine Lessors. The Detention Provisions were intended to provide protection for the collection of unpaid airport and navigation charges. However, they were not intended to immunize the Authorities from the financial losses attendant upon the inability to recover outstanding charges in full. The Authorities were unsecured creditors.

Turning to other issues: (1) in light of the conclusion about the Authorities' claims under the Detention Provisions and NAV Canada's claim under s. 55 of CANSCA, the issues concerning entitlement to interest and the accrual period for such interest did not need to be determined; (2) despite the submissions to the contrary, Ground J. had jurisdiction to order the Authorities to reimburse the Lessors for Detention Costs; the release protocols order was an interim relief order and did not finally determine the issues in dispute; (3) in the circumstances, Ground J. did not err in his admission or use of the redacted Grey affidavits; and (4) there was no basis on which to interfere with the costs disposition.

Per Juriansz J. (ad hoc) (dissenting in part): The reasons of Cronk J.A. were correct, except for her interpretation of the Detention Provisions. Since the Detention Provisions made operation by a lessee a sufficient basis for an application to seize and detain aircraft, they unquestionably contemplated seizure and detention of aircraft that are leased from lessors who hold legal title to the aircraft. The wording of the Detention Provisions made apparent that aircraft may be seized and detained without regard to the property interests of persons who are neither the registered owners nor the operators of the aircraft under the legislation. As long as the aircraft is owned or operated by a person liable to pay the outstanding charges, it may be the subject of an application to seize and detain it. The fact that there may be other persons who are not liable to pay the outstanding charges but have property interests in the aircraft is of no consequence. The Authorities who properly seized and detained aircraft under the Detention Provisions did not have to release the aircraft, unless otherwise directed by the court, until their outstanding charges were paid or satisfactory security was deposited notwithstanding the property interests in the aircraft. The

2004 CanLII 32169 (ON CA)

remedy was "in addition to any other remedy available for the collection" of the outstanding charges. The remedy was not confined to collection of outstanding charges from persons liable for the charges. The remedy was not directed to persons at all, but rather to "aircraft", and permitted the Authorities, under court supervision, to seize, detain and refuse to release the aircraft until the outstanding charges were satisfied.

2004 CanLII 32169 (ON CA)

Cases referred to

Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, 39 C.B.R. (4th) 5, [2003] O.J. No. 71 (QL) (C.A.), revg in part (2001), 30 C.B.R. (4th) 163 (Ont. S.C.J.); Bell Canada v. Olympia & York Developments Ltd. (1994), 17 O.R. (3d) 135, 111 D.L.R. (4th) 589, 26 C.P.C. (3d) 368 (C.A.); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 93 C.R.R. (2d) 189, 18 C.P.R. (4th) 289, [2002] S.C.J. No. 43 (QL); Bristol Airport plc v. Powdrill, [1990] Ch. 744 (C.A.); British Columbia (Board of Industrial Relations) v. Avco Financial Services Realty Ltd., [1979] 2 S.C.R. 699, 18 B.C.L.R. 23, 98 D.L.R. (3d) 695, 28 N.R. 140, 32 C.B.R. (N.S.) 34, 9 R.P.R. 231; Campbell Soup Co. Ltd. v. Farm Products Marketing Board (1977), 16 O.R. (2d) 256, 77 D.L.R. (3d) 725 (C.A.), affg (1977), 10 O.R. (2d) 405, 63 D.L.R. (3d) 401 (H.C.J.); Canadian Pacific Ltd. v. Matsqui Indian Band Council, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, 177 N.R. 325, 85 F.T.R. 79n; Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 193, 304 N.R. 76, 2003 SCC 29, [2003] S.C.J. No. 28 (QL); [page6 []cf2]Crupi v. Canada Employment and Immigration Commission, [1986] 3 F.C. 3, 66 N.R. 93, 10 C.C.E.L. 286, [1986] F.C.J. No. 204 (QL), 10 C.C.E.L. 286 (C.A.); Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182, 3 Man. R. (2d) 283, 108 D.L.R. (3d) 257, 31 N.R. 301, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, 80 D.T.C. 6123; Dilworth v. Commissioner of Stamps, [1899] A.C. 99, 68 L.J.P.C. 1, 47 W.R. 337, 79 L.T. 473, 15 T.L.R. 61 (P.C.); Dor v. Verdun (City), [1997] 2

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2004 CanLII 32169 (ON CA)

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2004 CanLII 32169 (ON CA)

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2004 CanLII 32169 (ON CA)

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2004 CanLII 32169 (ON CA)

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2004 CanLII 32169 (ON CA)

APPEAL from the orders of Ground J. in proceedings in the matter of the bankruptcies of Canada 3000 Inc., Canada 3000 Airlines Limited/Lignes Ariennes Canada 3000 Limite and Royal Aviation Inc.

Lyndon A.J. Barnes and Donald D. Hanna, for appellant (respondent and respondent by cross-appeal), Greater Toronto Airports Authority.

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Richard A. Conway and Linda M. Plumpton, for respondents (appellants and appellants by cross-appeal), International Lease Finance Corporation et al., listed in Schedule "B" hereto.

David P. Chernos, for respondent (appellant and appellant by cross-appeal), U.S. Airways, Inc.

Christopher W. Besant and Joseph J. Bellisimo, for

respondents (appellants and appellants by cross-appeal), G.E. Capital Aviation [page9 S]ervices, Inc. as agent and manager for Polaris Holding Company and AFT Trust-Sub I, Pegasus Aviation, Inc., and PALS I, Inc.

Barbara L. Grossman, for respondents (appellants and appellants by cross-appeal), Ansett Worldwide Aviation, U.S.A. and MSA V.

Pamela J. Huff and Jill M. Lawrie, for respondents (appellants by cross-appeal), C.I.T. Leasing Corporation and NBB-Royal Lease Partnership One.

Craig J. Hill, for respondent (appellant by cross-appeal), GATX/CL Air Leasing Cooperative Association.

Kenneth D. Kraft, for respondent, RRPF Engine Leasing Limited.

V. Ross Morrison, for respondent, Flight Logistics Inc.

Steven J. Weisz, for Canadian Imperial Bank of Commerce.

[1] CRONK J.A. (ABELLA J.A. concurring): -- These appeals and cross-appeals arise out of the November 2001 collapse of Canada 3000 Airlines Limited/Lignes Ariennes Canada 3000 Limite ("Canada 3000") and Royal Aviation Inc. ("Royal"), which together operated Canada's second largest airline, and their parent company, Canada 3000 Inc. (collectively, the "Canada 3000 Companies").

[2] These proceedings raise two primary issues. The first issue concerns the interpretation of the joint and several liability provision contained in s. 55 of the Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20 (the "CANSCA"). The second issue relates to the interpretation of the seizure and detention remedies concerning aircraft established under s. 9 of the Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 (the "Airports Act") and s. 56 of the CANSCA. Several subsidiary issues also

2004 CanLII 32169 (ON CA)

arise in these proceedings, as discussed later in these reasons.

I. BACKGROUND

A. CCAA and Bankruptcy Proceedings

[3] By order of Ground J. of the Superior Court of Justice (the "motions judge") dated November 8, 2001, the Canada 3000 Companies obtained protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA") and Deloitte & Touche Inc. was appointed monitor in the ensuing CCAA proceedings (the "CCAA Order"). At that time, the Canada 3000 Companies were indebted to Greater Toronto Airports Authority ("GTAA"), which operates Lester B. Pearson International Airport in Toronto, in the approximate amount of $13 million and to other Canadian airport authorities, identified in Schedule "A" to [page10]these reasons, in the approximate amount of $8.35 million for various airport charges. As well, they owed NAV Canada, the operator of Canada's civil air navigation system, approximately $7.4 million in unpaid charges for civil air navigation services [See Note 1 at end of document].

[4] Although the CCAA Order contemplated the continuation of their operations during restructuring efforts, Canada 3000 and Royal ceased operations during the evening of November 8, 2001. On the following day, NAV Canada applied under s. 56(1) of the CANSCA for court authorization to seize and detain certain aircraft in the possession of Canada 3000 and Royal. GTAA also applied on the same day for various relief against Canada 3000; it did not seek leave of the court at that time, however, to seize or detain any aircraft.

[5] By order dated November 9, 2001, the motions judge directed that the aircraft operated by Canada 3000 and Royal remain in Canada and not be flown pending further court order. He also ordered that Canada 3000 and Royal take reasonable steps to return any aircraft situated outside of the country to airports in Canada.

2004 CanLII 32169 (ON CA)

[6] On November 10, 2001, the directors and officers of the Canada 3000 Companies suddenly resigned en masse. The next day, the motions judge authorized Deloitte & Touche Inc. to file assignments in bankruptcy under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") on behalf of the Canada 3000 Companies and to serve as trustee in bankruptcy of their estates [See Note 2 at end of document].

[7] Prior to their bankruptcies, Canada 3000 and Royal operated a fleet of about 38 aircraft, having a total value of approximately US$1.1 billion (the "Aircraft"), 36 of which were provided under aircraft leasing agreements between various of the respondents (collectively, the "Lessors") and Canada 3000. For the purpose of the proceedings before the motions judge and this court, the parties agreed that the Aircraft leasing agreements were to be treated as "true" leases under which the Lessors retained legal title to the Aircraft. As well, two of the respondents, RRPF Engine Leasing Limited and Flight Logistics Inc. (the "Engine Lessors"), leased to Canada 3000 the engines attached to two of the Aircraft.

[8] Some of the Aircraft were used by Canada 3000; others were used by Royal. It does not appear that Canada 3000 entered [page11]into written subleases with Royal in that regard. All of the Aircraft were registered solely in the name of Canada 3000 under the Aeronautics Act, R.S.C. 1985, c. A-2 (the "Aeronautics Act") and regulations made under that Act.

[9] On the date of the bankruptcies, rental payments under various of the Aircraft leases were significantly in arrears. In addition, the granting of the CCAA Order, the bankruptcy filings and the cessation of operations by Canada 3000 and Royal triggered the automatic termination, or the termination on notice, of the Aircraft leases. As a result, the Lessors were entitled under the terms of the leases to repossess and recover the Aircraft.

[10] Throughout November 2001, the trustee in bankruptcy of the Canada 3000 Companies took possession of the Aircraft, pending its review of ownership and security claims. The Lessors filed claims under the BIA concerning the Aircraft, in

2004 CanLII 32169 (ON CA)

which they requested the immediate return of the Aircraft on the basis that they did not form part of the estates of the bankrupts.

[11] On November 12, 2001, GTAA moved for an order authorizing it under s. 9(1) of the Airports Act to seize and detain the Aircraft. On November 23, 2001, the other airport authorities applied for similar relief. Ultimately, all of the seizure and detention motions, including NAV Canada's, were heard by the motions judge in December 2001 and January 2002.

[12] The Lessors resisted those motions on the grounds, in part, that the seizure and detention claims were ineffective as against third parties who had legal title to or a security interest in the Aircraft, and that any rights of the Authorities to seize and detain the Aircraft crystallized upon the bankruptcies of the Canada 3000 Companies. The Lessors also initiated cross-motions seeking, among other relief, interim release of the Aircraft and declarations that the Authorities were not entitled to seize or detain them.

B. Release Protocols Order

[13] By order dated December 3, 2001, the motions judge approved protocols for the interim release of the Aircraft, which had been grounded under his earlier order of November 9, 2001 and retained by the trustee in bankruptcy, to the Lessors on condition that they post security for 110 per cent of the amounts allegedly owing to the Authorities pending the determination of the seizure and detention motions and the Lessors' cross-motions (the "Release Protocols Order"). In his reasons for the Release Protocols Order, the motions judge directed that each party bear its own costs of compliance with the release protocols "regardless of the ultimate disposition of the seizure motions". [page12]

[14] The record before this court indicates that the trustee in bankruptcy of the Canada 3000 Companies determined that the Lessors were the legal owners of the Aircraft, or authorized to claim the Aircraft on behalf of their legal owners, and that the Aircraft could be released to the Lessors on condition that

2004 CanLII 32169 (ON CA)

the applicable Lessors first complied with the security posting requirement of the Release Protocols Order. When the requisite security was posted, the Aircraft were released to the claiming Lessors.

[15] On December 7, 2001, the CCAA proceedings involving the Canada 3000 Companies were terminated. The administration of their bankruptcies continued.

C. Challenged Affidavit Evidence

[16] In response to the seizure and detention motions and in support of their cross-motions, several Lessors [See Note 3 at end of document] filed affidavits sworn by Donald G. Gray on December 5, 2001 and December 17, 2001 (the "Gray Affidavits"). The motions judge dismissed NAV Canada's objection to the admissibility of the Gray Affidavits, required that certain parts of the Gray Affidavits be excised, and ruled that the redacted versions of the Gray Affidavits were admissible. In the redacted Gray Affidavits, Mr. Gray, a partner of the law firm representing the Lessors that filed his affidavits, provided evidence concerning part of the legislative history of the CANSCA and of related legislation. The admissibility of the redacted Gray Affidavits is challenged by NAV Canada in these proceedings.

D. May 7, 2002 Order

[17] By order dated May 7, 2002, the motions judge dismissed the appellants' seizure and detention motions and granted the declaratory relief sought by the Lessors in their cross-motions. As relevant to the issues raised in these proceedings, the motions judge:

(i) determined that the Authorities' seizure and detention claims are either not affected by the automatic bankruptcy stay provisions of s. 69.3 of the BIA, or that the stay should be lifted to the extent necessary to permit the seizure and detention motions to proceed; [page13]

(ii) subject to certain conditions, held that the outstanding

2004 CanLII 32169 (ON CA)

charges in respect of which the Authorities could advance seizure and detention claims include interest on amounts owed up to the date of payment in full or the date of the posting of security therefor;

(iii) concluded that the exemption provisions of the Airports Act and the CANSCA do not apply to the Aircraft;

(iv) held that any seizure and detention rights of the Authorities concerning the Aircraft do not rank in priority to the interests of the Lessors and secured creditors in the Aircraft;

(v) held that even if any seizure and detention rights of the Authorities rank in priority to the interests of the Lessors in the Aircraft, they are ineffective concerning the interests of the Engine Lessors in the engines attached to the Aircraft;

(vi) declared that none of the Lessors is liable to the Authorities for any outstanding airport or navigation charges; and

(vii) ordered the Authorities to reimburse the Lessors for the Lessors' costs concerning the detention of the Aircraft and the posting of security in accordance with the Release Protocols Order (collectively, the "Detention Costs")

(The "May 7, 2002 Order")

As well, by reasons dated July 24, 2002, the motions judge declined to award any costs in the proceedings before him.

E. Appeals and Cross-Appeals

[18] These proceedings involve three main appeals brought by the Authorities from the May 7, 2002 Order. Cross-appeals have also been brought from the May 7, 2002 Order by some of the Lessors [See Note 4 at end of document]. In addition, five appeals have been brought by some of [page14]the Lessors [See Note 5 at end of document] from that part of the Release

2004 CanLII 32169 (ON CA)

Protocols Order described in para. 21 of these reasons. The Authorities are respondents to the Lessors' cross-appeals and appeals. The Engine Lessors are respondents to the main appeals only.

[19] In the main appeals from the May 7, 2002 Order, the Authorities appeal the dismissal of their seizure and detention motions and the motions judge's ruling requiring them to reimburse the Lessors for their Detention Costs. NAV Canada and the GTAA also appeal the motions judge's ruling that even if any seizure and detention rights rank in priority to the Lessors' interests in the Aircraft, they are ineffective concerning the Engine Lessors' interests in the engines attached to the Aircraft. In addition, NAV Canada appeals the motions judge's ruling that the Lessors are not liable for outstanding civil air navigation charges owed by the Canada 3000 Companies. It also appeals his admission of the redacted versions of the Gray Affidavits.

[20] The Airport Authorities further appeal the motions judge's determination that interest on outstanding airport charges ceased accruing on the date of full payment of the charges or on the date of the posting of security therefor. Certain of the Lessors cross-appeal from the motions judge's holding that the Authorities could claim interest on the outstanding charges. The Lessors also seek leave to cross-appeal and, if leave be granted, cross-appeal from the motions judge's decision denying them their costs of the proceedings before him.

[21] Finally, certain of the Lessors appeal from the motions judge's ruling, in his reasons for the Release Protocols Order, that each party should bear its own costs of compliance with the release protocols regardless of the ultimate disposition of the seizure and detention motions. In that regard, they submit that the motions judge correctly determined in the May 7, 2002 Order that the Lessors were entitled to be reimbursed by the Authorities for their Detention Costs.

[22] For the reasons that follow, save with respect to that part of the May 7, 2002 Order requiring the Authorities to

2004 CanLII 32169 (ON CA)

reimburse the Lessors for their Detention Costs, I would dismiss the appeals by the Authorities from the May 7, 2002 Order. I would [page15]allow that part of the Authorities' appeals concerning reimbursement of the Lessors' Detention Costs and the Lessors' appeals from the Release Protocols Order in connection with the same issue and direct a new hearing before the motions judge on the issue of reimbursement of the Detention Costs. Finally, I would allow the Lessors leave to cross-appeal from the motions judge's disposition of costs in the proceedings before him, and would dismiss the entirety of the cross-appeals.

2004 CanLII 32169 (ON CA)

II. ISSUES

[23] The issues raised in these proceedings may be grouped as follows:

(i) are the Lessors liable to NAV Canada under s. 55 of the CANSCA for outstanding civil air navigation charges owed by the Canada 3000 Companies?

(ii) given the bankruptcies of the Canada 3000 Companies, do the Authorities have seizure and detention rights under s. 9 of the Airports Act and s. 56 of the CANSCA concerning the Aircraft and, where applicable, the engines attached to the Aircraft, ranking in priority to the interests of the legal titleholders to the Aircraft and the engines entitling the Authorities to seize and detain the Aircraft and the engines in the face of claims by the legal titleholders for their repossession and recovery?

(iii) are the Authorities entitled to advance seizure and detention claims concerning interest on amounts owing to them and, if so, when does such interest cease to accrue?

(iv) are the Authorities liable to reimburse the Lessors for their Detention Costs?

(v) did the motions judge err in admitting the redacted Gray Affidavits or, in the alternative, in his assignment of weight to them?

(vi) are the Lessors entitled to their costs of the proceedings before the motions judge which resulted in the May 7, 2002 Order?

III. RELEVANT STATUTORY PROVISIONS

[24] Determination of the issues in these proceedings requires consideration of several provisions of the Airports Act, the CANSCA, the Aeronautics Act, and regulations made under the [page16]Aeronautics Act. I will refer in these reasons to the relevant provisions of those enactments in the course of discussing the issues in respect of which they are engaged.

IV. ANALYSIS

[25] Elmer A. Driedger described the "modern principle" of statutory interpretation almost 30 years ago in the first edition of his text, The Construction of Statutes (Toronto: Butterworths, 1974), at p. 67:

> [Today] there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[26] Driedger's formulation has been endorsed repeatedly by the Supreme Court of Canada as the preferred interpretive approach in civil cases: Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, at paras. 21-23; R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56, at paras. 28-29; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 106; and Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, 2003 SCC 42, 230 D.L.R. (4th) 257, at para. 41. That contextual and purposive approach controls analysis of the statutory provisions at issue

2004 CanLII 32169 (ON CA)

in this case.

[27] In considering the interpretive issues raised in these proceedings, it is useful to consider first the legislative framework and the purposes of the CANSCA and the Airports Act.

A. Legislative Framework and Purposes of the CANSCA and the Airports Act

[28] Statutory enactments sometimes form part of a larger, inter-related legislative framework. For example, in Bell ExpressVu, the Supreme Court of Canada characterized the Radiocommunication Act, R.S.C. 1985, c. R-2 and the Broadcasting Act, S.C. 1991, c. 11 as two of the legislative pillars of Canada's broadcasting framework. As described by Iacobucci J. at para. 10 of Bell ExpressVu, both statutes provided important context for determination of the interpretive issues considered in that case.

[29] A similar approach, in my view, is apposite in the case at bar. The Aeronautics Act is the central foundational pillar of Canada's legislative framework for the regulation of aeronautics. [page17]Prior to the introduction of the CANSCA and the Airports Act, air navigation and airport services in Canada were provided by the federal government under the Aeronautics Act. That Act imposes on the applicable Minister of the Crown, in expansive terms, responsibility "for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics" in Canada. It also confers on the Governor in Council broad regulation-making powers and, on the Minister of Transport, broad regulatory and supervisory powers in relation to civil aeronautics (ss. 4.2 and 4.9 of the Aeronautics Act).

[30] In 1992, the Government of Canada elected to privatize various airports formerly owned and operated by the federal government. This was accomplished under the Airports Act, which permits designated local airport authorities to operate and manage airports transferred to them by the federal government. The privatization of Canada's civil air navigation services followed four years later, in 1996, with introduction of the

2004 CanLII 32169 (ON CA)

CANSCA. The role of the Government of Canada in the provision of navigation and airport services and the management and operation of national airports continues under the Aeronautics Act in respect of matters not falling within the CANSCA or the Airports Act. In addition, as I will mention later in these reasons, the Government of Canada continues to have central authority concerning such matters as aviation safety and regulation.

[31] Thus, since their introduction, both the CANSCA and the Airports Act have served as important pillars, together with the Aeronautics Act, of Canada's overall legislative framework for the regulation of aeronautics.

(1) NAV Canada and the CANSCA

[32] The creation of NAV Canada and the introduction of the CANSCA flowed from the decision of the federal government in about 1995 to commercialize Canada's civil air navigation system. In introducing Bill C-20, the legislative bill which led to the CANSCA, for second reading in the House of Commons, the then Minister of Transport stated:

> The government announced its decision to proceed with commercialization of air navigation in the 1995 budget. . . .
>
> NAV Canada was incorporated in May 1995 under part II of the Canada Corporations Act for the purpose of developing, operating and maintaining the air navigation system. . . .
>
> . . . . .
>
> NAV Canada will be responsible for providing all of the air navigation services currently provided by Transport Canada. [page18]
>
> Transport Canada will be responsible for ensuring the continued safe provision of these services. The new safety regulations developed specifically to address the commercialization of the air navigation system will be in place before the transfer happens. Transport Canada will

2004 CanLII 32169 (ON CA)

monitor and enforce these regulations in much the same way it now does with the air carrier industry.

NAV Canada will be required to have an internal safety management program. In addition, the corporation will not be permitted to reduce the service it provides where it would jeopardize safety. Furthermore, the Aeronautics Act which establishes the regulatory framework to maintain safety in the aviation industry will always take precedence over the commercialization legislation.

. . . . .

The commercialization of the air navigation system is a key part in the government's efforts to modernize the Canadian transportation system. It complements our other transportation initiatives including the commercialization of federal airports, seaports and harbours, the privatization of Canadian National Railways, the commercialization of ferry services and the conversion of Transport Canada's motor vehicle test centre to a government owned but contractor operated facility.

(Emphasis added) (House of Commons Debates (25 March 1996) at 1153-54 (Hon. David Anderson))

[33] On May 15, 1996, the parliamentary secretary to the Minister of Transport further commented in the House of Commons:

Bill C-20 is intended to deal only with the transfer of Transport Canada's air navigation services to a single not for profit company and with the commercial and economic regulatory arrangements for the continued operation of those services.

(Emphasis added) (House of Commons Debates (15 May 1996) at 2821 (Hon. Stanley Keyes))

[34] Subsequently, when moving second reading of Bill C-20 in the Senate, the Honourable Raymond J. Perrault said:

2004 CanLII 32169 (ON CA)

> NAV CANADA will be the sole provider of air navigation services in Canada, with the exception, as I noted previously, of the Department of National Defence.
>
> NAV CANADA will be responsible for providing all of the air navigation services that Transport Canada currently provides. . . . As a regulator, Transport Canada will ensure the safe provision of these services. New safety regulations have been developed for this purpose. These regulations have been drawn up specifically for the commercialization of the air navigation system and will be in place before the transfer date. The emphasis is again on safety.
>
> . . . . .
>
> What role will Transport Canada play in the future? Transport Canada will provide oversight to the air navigation system ensuring NAV CANADA's regulatory compliance. This role will provide Transport Canada with the [page19]ability to ensure the maintenance of service levels in the interests of safety. Again, the emphasis is on safety.

(Emphasis added) (Senate Debates (10 June 1996) at 588-89 (Hon. Raymond J. Perrault))

See also Senate Debates (19 June 1996) at 762 (Hon. Jean-Louis Roux).

[35] These comments regarding Bill C-20 indicate that under the CANSCA, it was envisaged that NAV Canada would develop, operate and maintain Canada's civil air navigation system while Transport Canada, under the Aeronautics Act, would perform a regulatory and oversight function to ensure the safe provision of air navigation services. As well, the Aeronautics Act was described as "always tak[ing] precedence over [the CANSCA]". The theme of the "supremacy" of the Aeronautics Act over the CANSCA was emphasized in the House of Commons and the Senate on numerous occasions during debates concerning Bill C-20. See for example, House of Commons Debates (15 May 1996) at 2821 and 2834 (Hon. Stanley Keyes); (29 May 1996) at 3143-44 (Hon.

2004 CanLII 32169 (ON CA)

Stanley Keyes); (4 June 1996) at 3394, 3410 and 3413 (Hon. Stanley Keyes); and Senate Debates (10 June 1996) at 588-89 (Hon. Raymond J. Perrault).

[36] Thus, the intent of the CANSCA is to achieve the separation from government of the operational and regulatory responsibilities for Canada's civil air navigation system, by placing day-to-day management responsibilities for the system in the hands of a dedicated services provider, while maintaining Crown regulatory control over the quality and safety of the entire system. The "commercialization" of the system under the CANSCA was accomplished by the Crown's divestiture of designated assets of the system to a non-governmental organization, whose mandate was to operate the system on a not-for-profit basis. This initiative, in turn, was described as a key part of a broader governmental scheme designed to modernize Canada's transportation system. These aspects of the legislative history of the CANSCA support the conclusion that its objects and those of the Aeronautics Act are linked, and form part of a larger, inter-connected legislative framework for the regulation of aeronautics in Canada.

[37] In addition, review of the CANSCA as a whole indicates an express relationship between the two enactments. Several provisions of the CANSCA establish direct links to the Aeronautics Act, including s. 2(2), which provides that words and expressions used in the CANSCA have the same meaning as in s. 3(1) of the Aeronautics Act, "[u]nless a contrary intention appears", and s. 5, [page20]which reads: "Nothing in this Act affects the application of the Aeronautics Act." [See Note 6 at end of document]

[38] Similarly, the relationship between the Aeronautics Act and the CANSCA is confirmed by several provisions of the Aeronautics Act [See Note 7 at end of document]. In addition, and more generally, the overall scheme of the Aeronautics Act confirms the regulatory oversight of the civil air navigation system by the Crown and the powers of the Crown over NAV Canada in that connection.

2004 CanLII 32169 (ON CA)

(2) The Airports Act

[39] The Airports Act, introduced in 1992, also formed part of a broad governmental scheme for the modernization of Canada's transportation system. This Act derived from the Government of Canada's announcement in 1985 that it intended to establish a new management structure for the federal airport system in Canada, so as to provide for the direct assumption of management responsibilities for certain federal airports by designated local airport authorities.

[40] The objects of that policy, as identified by the parliamentary secretary to the then Minister of Transport during debate of Bill C-15, one of the legislative bills that led to the Airports Act, were described as follows: [page21]

> [T]he government's objectives from the beginning were to allow the airports to better serve local community interests, to enhance regional economic development potential, and to permit the national airport system to operate in a more cost effective and commercial manner.
>
> This policy aims to enhance the efficient commercial operation of federal airports through a more locally responsive management structure.

(House of Commons Debates (3 June 1991) at 942 (Hon. Lee Richardson))

[41] The preamble to the Airports Act indicates that it is an enactment "to provide for certain matters in connection with the transfer of certain airports". Section 2(2) of the Airports Act authorizes the Governor in Council to designate by order those entities to which the Minister of Transport is to transfer an airport by sale, lease or other means, and to designate the transfer date. The balance of the Airports Act contains provisions designed to ensure that certain requirements applicable to federally-managed airports, in relation to such matters as language rights, employee wages, pension benefits and labour relations, continue to govern airports transferred under that Act to local airport

2004 CanLII 32169 (ON CA)

authorities. As well, as in issue in these proceedings, s. 9 of the Airports Act establishes a seizure and detention remedy in relation to aircraft.

[42] Nothing in the Airports Act exempts the application of the Aeronautics Act to airport authorities to which airports are transferred under the Airports Act, or otherwise displaces the application of the Aeronautics Act in relation to the regulation of aeronautics.

[43] Moreover, as in the case of the CANSCA, the Airports Act expressly establishes a relationship to the Aeronautics Act in connection with the seizure and detention remedy under s. 9 of the Airports Act. As I will discuss later in these reasons, s. 9(5) of the Airports Act directs that words and expressions used in ss. 9 and 10 of the Airports Act "have the same meaning as in the Aeronautics Act".

[44] As I have described, the purpose of the CANSCA concerns the day-to-day operation and management of Canada's civil air navigation system by a non-governmental entity, while the Airports Act addresses aspects of the day-to-day operation and management of certain former federal airports by local airport authorities. Both enactments, in my view, are best understood as forming integral parts, together with the Aeronautics Act, of a larger, inter-related legislative framework for the regulation of aeronautics in Canada.

[45] NAV Canada argues that the seizure and detention remedy under s. 56 of the CANSCA is similar, but not identical, to the seizure and detention remedy under s. 9 of the Airports Act. It submits that ss. 55 and 56 of the CANSCA must be read together, and that the meaning of the word "owner" under s. 55 [page22]informs the meaning and scope of the seizure and detention remedy under s. 56. I agree. Accordingly, I will deal first with NAV Canada's claim that the Lessors are directly liable under s. 55 of the CANSCA for unpaid navigation charges owed to NAV Canada by the Canada 3000 Companies.

B. Liability Under Section 55 of the CANSCA

2004 CanLII 32169 (ON CA)

[46] The English and French language versions of s. 55 of the CANSCA read:

55(1) The owner and operator of an aircraft are jointly and severally liable for the payment of any charge for air navigation services imposed by the Corporation in respect of the aircraft.

(2) In subsection (1), "owner", in respect of an aircraft, includes

(a) the person in whose name the aircraft is registered;

(b) a person in possession of an aircraft as purchaser under a conditional sale or hire-purchase agreement that reserves to the vendor the title of the aircraft until payment of the purchase price or the performance of certain conditions;

(c) a person in possession of the aircraft as chattel mortgagor under a chattel mortgage; and

(d) a person in possession of the aircraft under a bona fide lease or agreement of hire.

55(1) Le propritaire et l'usager d'un aronef sont solidaires du paiement des redevances imposes par la socit pour les services de navigation arienne l'gard de l'aronef.

(2) Pour l'application du paragraphe (1), "propritaire", relativement un aronef, s'entend:

a) de la personne au nom de laquelle l'aronef est immatricul;

b) d'une personne qui est en possession de l'aronef titre d'acheteur en vertu d'un acte de vente conditionnelle ou d'un acte de location-vente qui laisse au vendeur le titre de proprit de l'aronef jusqu'au paiement du prix d'achat ou jusqu' l'accomplissement de certaines conditions;

2004 CanLII 32169 (ON CA)

c) d'une personne qui est en possession de l'aronef titre de dbiteur hypothcaire en vertu d'une hypothque sur biens meubles;

d) d'une personne qui est en possession de l'aroneuf en vertu d'un bail ou d'un contrat de louage conclu de bonne foi.

[page23]

(1) Overview of the positions of the parties

[47] NAV Canada argues that s. 55(1) of the CANSCA is intended to provide it with broad rights to ensure the collection of air navigation charges. For that reason, it asserts, s. 55(1) imposes joint and several liability for such charges on the owners and operators of aircraft. NAV Canada maintains that the plain and ordinary meaning of the word "owner" in s. 55(1) extends to the holders of legal title to aircraft, therefore including the Lessors. It also contends that the definition of "owner" in s. 55(2) of the CANSCA is an expansive, rather than a restrictive, definition.

[48] The Lessors submit that the word "owner" as used in the CANSCA generally has the meaning given to it in the Aeronautics Act and the regulations made under that Act. They argue that in the Canadian aviation context, an "owner" of an aircraft is not the holder of legal title but, rather, is the person who has legal custody and control of the aircraft and that an "operator" of an aircraft is the person who has possession of the aircraft in the sense of using the aircraft. Consequently, they maintain that the words "owner" and "operator", as employed in the CANSCA, are unrelated to legal title. They further assert that, on a plain reading of its words, s. 55(2) simply particularizes four specific categories of "owners" who fall within the generally applicable concept of "owner" under the CANSCA, that is, persons with legal custody and control or who are otherwise in possession of aircraft. As the Lessors did not have possession or legal custody and control of the Aircraft at the time of the CCAA Order and the bankruptcies of the Canada 3000 Companies, they have no liability to NAV Canada under s. 55(1).

2004 CanLII 32169 (ON CA)

[49] The motions judge accepted the Lessors' interpretation of the meaning of "owner" in s. 55 of the CANSCA, holding, at para. 56 of his reasons, that "owner" as used in that section is restricted "to persons who are operating the aircraft and/or are the registered owners of the aircraft and have custody and control of the aircraft". Thus, he concluded that the legal titleholders to the Aircraft, and persons having a security interest in the Aircraft, are not "owners" of the Aircraft for the purpose of s. 55(1).

[50] Before this court, NAV Canada argues that in interpreting s. 55 of the CANSCA, the motions judge: (i) misconstrued and failed to give effect to the purpose of the CANSCA; (ii) ignored the usual and ordinary meaning of the word "owner", and instead adopted a strained and implausible interpretation of that word; and (iii) misinterpreted the legislative context and history of s. 55, including by improperly considering the provisions of the Canadian [page24]Aviation Regulations, SOR/96-433 (the "CARs"), regulations made under the Aeronautics Act, and provisions of the CANSCA addressed to "users" of the civil air navigation system.

(2) Alleged misconstruction error

[51] In support of its argument that the motions judge misconstrued and failed to give effect to the purpose of the CANSCA, NAV Canada submits that the motions judge erred in confusing the purposes of NAV Canada and the CANSCA and in placing insufficient emphasis on the commercialization purpose of the CANSCA. NAV Canada further contends that the motions judge erred in confusing the purposes of the CANSCA and the Aeronautics Act. It maintains that the following passage from the motions judge's reasons for the May 7, 2002 Order, especially the underlined part, indicates that he misconstrued the purpose of the CANSCA (at para. 56):

> It appears to me that the determination of the use of the [specified words employed in s. 55(2) of the CANSCA] must be made by looking at the purposes and intent of the legislation. NAV Canada is established to provide navigation

2004 CanLII 32169 (ON CA)

> services for aircraft within Canada and such services are obviously used by the operators of the aircraft and/or persons having custody and control of the aircraft and not by the financiers of the aircraft who do not make use of the navigation services provided by NAV Canada, are unknown to NAV Canada and receive no notice of the imposition of proposed charges and no right to appeal with respect to proposed charges. The proposed charges are billed only to the operators of the aircraft. The specifically listed categories in the definition of "owner" in subsection 55(2) of the [CANSCA] also indicate that the definition is intended to be restricted to persons who are operating the aircraft and/or are the registered owners of the aircraft and have custody and control of the aircraft and not to include persons who have legal title to the aircraft or a security interest in the aircraft but have no custody and control, do not operate the aircraft and do not receive the benefit of the air navigation services provided by NAV Canada.

(Emphasis added)

[52] The motions judge prefaced his comments by reference to "the purposes and intent of the legislation". He then addressed NAV Canada's role under the CANSCA and the nature and the use of the services provided by it. Thereafter, he commented on the meaning of the enumerated categories of persons in s. 55(2) of the CANSCA.

[53] The motions judge did not misstate the reason for the creation of NAV Canada and its intended role under the CANSCA when he said that NAV Canada was established "to provide [civil] navigation services for aircraft within Canada". Legal facilitation of that role is a fundamental purpose of the CANSCA.

[54] In the balance of his challenged comments, the motions judge set out his conclusions that the legal titleholders to the [page25]Aircraft do not use, have no statutory rights concerning, and derive no benefit from the services provided by NAV Canada. These conclusions, in my view, do not indicate that the motions judge confused the purpose of NAV Canada with that

2004 CanLII 32169 (ON CA)

of the CANSCA. Rather, they reflect his assessment of the nature and the use of the services provided by NAV Canada, as authorized by the CANSCA.

[55] Accordingly, while the preface to the motions judge's comments might more accurately have referred to the purposes of both NAV Canada and the CANSCA, rather than only to the purpose and intent of the CANSCA, I believe that the preface is of no moment. Viewed as a whole, the motions judge's quoted comments do not indicate that he confused the purpose of NAV Canada with that of the CANSCA.

[56] I also do not agree that the motions judge's quoted comments indicate that he was unaware of, or placed insufficient emphasis on, the commercialization aspects of the CANSCA, or that he confused the purposes of the CANSCA and the Aeronautics Act. The motions judge was clearly alive to the commercialization aspects of the CANSCA. In summarizing NAV Canada's submissions before him, the motions judge stated, at para. 50:

> NAV Canada submits that the more extended definition of the word "owner" should be preferred as it gives effect to what NAV Canada submits is the object and purpose of the [CANSCA] to enable NAV Canada to operate on a non-profit, cost recovery basis and in order to do so, to have the option of proceeding against either the operator or owner of an aircraft to collect fees for navigation services.

[57] In my view, the motions judge was not required to further detail his understanding of the commercialization aspects of the CANSCA. His failure to do so does not indicate that he misunderstood those features of the CANSCA, or the purpose of that Act in contrast to the inter-related purposes of the Aeronautics Act.

[58] At its core, NAV Canada's real objection to the quoted comments by the motions judge concerns his conclusion that the services provided by NAV Canada are used by the operators of the aircraft "and/or persons having custody and control of the aircraft and not by the financiers of the aircraft". That

2004 CanLII 32169 (ON CA)

conclusion, with which I agree, was based on the motions judge's consideration of the navigation charges scheme under the CANSCA, the terms of s. 55(2) of the CANSCA, s. 3(1) of the Aeronautics Act, and the definitions of "operator" and "owner" set out in the CARs. I will address each of these factors later in these reasons. [page26]

(3) Ordinary meaning of "owner" in section 55

[59] There is no dispute that the unpaid charges owed to NAV Canada are for "air navigation services" within the meaning of that term under s. 55 of the CANSCA, and that Canada 3000 and Royal were the "operators" of the Aircraft. The issue, therefore, is whether the Lessors are "owners" within the meaning of s. 55 so as to attract direct liability for these unpaid charges.

(a) Legislative definitions

[60] The words "owner" and "operator" are not defined in s. 55(1) of the CANSCA or in s. 2(1), the general definition section of that Act. The term "user", however, is defined in s. 2(1) as meaning "an aircraft operator". In addition, and importantly, s. 2(2) of the CANSCA provides: "Unless a contrary intention appears, words and expressions used in this Act have the same meaning as in subsection 3(1) of the Aeronautics Act" (emphasis added).

[61] Section 3(1) of the Aeronautics Act does not contain a definition of "owner" or "operator". However, it defines "registered owner", in respect of an aircraft, as: "the person to whom a certificate of registration for the aircraft has been issued by the Minister under Part I or in respect of whom the aircraft has been registered by the Minister under that Part".

[62] As well, s. 101.01(1) of the CARs defines the words "operator", in respect of an aircraft, and "owner" as:

101.01(1) In these Regulations,

. . . . .

2004 CanLII 32169 (ON CA)

"operator", in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise;

. . . . .

"owner", in respect of an aircraft, means the person who has legal custody and control of the aircraft.

(Emphasis added)

It is common ground that, by virtue of ss. 202.15, 202.16 and 202.17 of the CARs, an aircraft may only be registered in the Canadian Civil Aircraft Register by the "owner" of the aircraft as that term is defined under s. 101.01(1) of the CARs, that is, by the person having legal custody and control of the aircraft.

[63] Finally, s. 55(2) of the CANSCA provides a specific definition of "owner" for the purpose of s. 55(1) of that Act. That section provides that the word "owner", "includes" four categories of persons. None of those categories explicitly mentions the holders of legal title, lessors or secured parties. Subparagraphs (b) to (d) of [page27]s. 55(2) concern persons "in possession" of an aircraft under a conditional sale or hire-purchase agreement (subparagraph (b)), as a chattel mortgagor under a chattel mortgage (subparagraph (c)), or under a bona fide lease or agreement of hire (subparagraph (d)). There is no suggestion that the Lessors fit within any of those categories. As well, in connection with the first category set out in subparagraph s. 55(2)(a), which concerns persons "in whose name the aircraft is registered", the parties agree that the Aircraft were registered solely in the name of Canada 3000 under the Aeronautics Act and the regulations made thereunder. The word "registered" is not defined under the CANSCA.

[64] Against that backdrop of legislative definitions, NAV Canada argues that the ordinary meaning of "owner" includes legal titleholders such as the Lessors. It further asserts that the s. 55(2) definition of "owner" does not displace or diminish the ordinary meaning of "owner" but, instead, extends it to those categories of persons enumerated in s. 55(2). Thus,

2004 CanLII 32169 (ON CA)

NAV Canada maintains that the s. 55(2) definition of "owner" is expansive rather than restrictive or exhaustive.

[65] NAV Canada makes several submissions in support of that argument. First, it relies on a dictionary meaning of "owner" to suggest that the ordinary meaning of that word contemplates legal titleholders. Second, it submits that the use of the word "includes" in the English language version of s. 55(2) is a strong indicator of Parliamentary intention that the definition of "owner" in s. 55 is to be interpreted expansively. Third, it asserts that the "shared meaning" rule of statutory interpretation for bilingual statutes does not apply in this case to establish the intended meaning of "owner" in s. 55. Fourth, it submits that the motions judge erred in interpreting s. 55(2) as if it were subject to the ejusdem generis principle of statutory construction.

(b) Dictionary definitions of "owner"

[66] The Shorter Oxford English Dictionary on Historical Principles, 3rd ed. (London: Clarendon Press, 1973), Vol. II, defines "owner" as "one who owns or holds something; one who has the rightful claim or title to a thing". According to NAV Canada, that definition establishes that the ordinary meaning of "owner" is a legal titleholder. I do not agree that this is the only, or even the preferred, ordinary meaning of "owner". The word "owner" is susceptible to various meanings, depending on the context in which it is used.

[67] The dictionary definition of "owner" relied upon by NAV Canada itself recognizes that something less than or different from legal title may give rise to ownership status: one of the [page28]specified meanings of "owner" under the definition is "one who . . . holds something; one who has the rightful claim . . . to a thing". Black's Law Dictionary, 7th ed. defines "owner" as "[o]ne who has the right to possess, use, and convey something; a proprietor" and the verb "own" as "[t]o have or possess as property; to have legal title to". In the same text, the word "ownership" is defined as: "The collection of rights allowing one to use and enjoy property; including the right to convey it to others. Ownership implies the right to

2004 CanLII 32169 (ON CA)

possess a thing, regardless of any actual or constructive control." Thus, the ordinary dictionary meaning of "owner" encompasses either the legal titleholder or the person having the right to use and possess property, or both.

[68] Statutory interpretation is not based only on the wording of a challenged statutory provision. Context is a controlling factor in the search for legislative meaning: Rizzo, at paras. 40-41 and Bell ExpressVu, at para. 27. Moreover, the courts have recognized that the legislative context in which the word "owner" appears in a statute may signify an intention to give the word a meaning larger, or different, than its ordinary meaning. See for example, Town of Springhill v. McLeod (1928), [1929] 1 D.L.R. 882, 60 N.S.R. 272 (S.C.), at p. 886 D.L.R., p. 278 N.S.R. and Royal Bank v. Port Royal Pulp and Paper Co., [1937] 4 D.L.R. 254, 12 M.P.R. 219 (N.B.C.A.), at p. 257 D.L.R.

[69] I conclude, therefore, that the ordinary meaning of "owner" can, but need not, extend to legal titleholders. The meaning of "owner" as employed in a statutory provision is context-specific.

(c) Implications of use of the word "includes"

[70] As I have said, NAV Canada does not contend that the Lessors fit within any of the enumerated categories set out in the s. 55(2) definition of "owner". Instead, it argues that the use of the word "includes" in the English language version of s. 55(2) signifies that the categories of "owner[s]" enumerated in s. 55(2) are not exhaustive. See for example, O. & O. Contractors Ltd. v. Bank of Nova Scotia (1965), 56 D.L.R. (2d) 90, 55 W.W.R. 103 (B.C.C.A.) and Ford Credit Canada Ltd. v. Solis (2003), 226 D.L.R. (4th) 744, 2003 ABCA 137 (C.A.).

[71] The motions judge concluded that the word "includes" can be used in either an extended or restrictive sense. I agree. As noted by the motions judge, support for that conclusion may be found in Dilworth v. Commissioner of Stamps, [1899] A.C. 99, 68 L.J.P.C. 1 (P.C.) and R. v. Loblaw Groceterias Co. (Manitoba) Ltd., [1961] S.C.R. 138, 26 D.L.R. (2d) 485. [page29]

2004 CanLII 32169 (ON CA)

[72] NAV Canada argues that those cases did not turn on the meaning ascribed to the word "includes". In Dilworth, the statutory definition under review contained language in addition to the word "includes", which suggested that the contested definition was intended to be read exhaustively and, in Loblaw Groceterias, the predecessor section to the applicable statutory definition contained expansive language, the deletion of which by Parliament suggested that the revised definition was intended to have an exhaustive meaning. I agree that those features of the statutory provisions at issue in Dilworth and Loblaw Groceterias influenced the resulting judicial interpretations of the provisions. Nonetheless, both cases recognize that the word "includes" may form part of either an exhaustive or a restrictive statutory definition depending on the associated words used in the provision and the context of the provision.

[73] NAV Canada also submits that Laidlaw v. Toronto (Metropolitan), [1978] 2 S.C.R. 736, 87 D.L.R. (3d) 161 and Nova, An Alberta Corp. v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437, 128 D.L.R. (3d) 1 evidence a more recent and consistent judicial trend to adopt an expansive meaning for a word defined by reference to "includes". Those cases suggest that the use of the word "includes" in a statutory definition is generally intended to enlarge the ordinary meaning of the defined word, and that the use of the word "means" generally signifies an intention to restrict the scope of the defined word to that meaning identified in the statutory definition.

[74] In both Laidlaw and Nova, however, the Supreme Court of Canada also confirmed that regard must be had to the context of a challenged word or expression to ascertain whether a particular or preferred interpretation of the word or expression is intended: Laidlaw, at pp. 742-43 S.C.R.; Nova, at p. 460 S.C.R. The Dilworth and Loblaw Groceterias cases were not referenced in the Laidlaw and Nova cases. Moreover, in National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, 74 D.L.R. (4th) 197, also relied upon by NAV Canada, a majority of the Supreme Court, at paras. 14-16 regarded the use of the word "including" in a standard mortgage

2004 CanLII 32169 (ON CA)

coverage clause in a fire insurance policy as an indicator of an intention that the clause be interpreted expansively. In that case, however, the court also had regard to the history of the clause as an aid to ascertaining its meaning. These cases illustrate that in the search for legislative meaning, a contextual and purposive analysis of the provision in which a challenged word appears "trumps" the application of other interpretive rules and principles. See also, R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. [page30](Markham: Butterworths, 2002), at pp. 51-55. In my view, therefore, Laidlaw and Nova should not be read as standing for the proposition that the use of the word "includes" in a statutory provision invariably signals an intention to expand the meaning of the defined word or expression.

[75] NAV Canada further submits that it is inappropriate to read into s. 55(2) the word "means" when Parliament elected to use only the word "includes" and not the word "means" or the phrase "means and includes". It correctly points out that in Campbell Soup Co. Ltd. v. Farm Products Marketing Board (1977), 10 O.R. (2d) 405, 63 D.L.R. (3d) 401 (H.C.J.), affd (1977), 16 O.R. (2d) 256, 77 D.L.R. (3d) 725 (C.A.), Morden J., as he then was, observed that statutory definitions using both "means" and "includes" should be avoided because use of that drafting technique raises doubt as to whether the defined term is intended to be restrictive or expansive.

[76] Morden J.'s cautionary words in Campbell Soup were not heeded in the instance of the CANSCA. The English language version of the general definition section of the Act (s. 2(1)), contains numerous instances of words and phrases defined to "mean" enumerated things. [See Note 8 at end of document.] It also contains terms defined by use of both "means" and "includes". [See Note 9 at end of document.] With one exception, which is irrelevant to the interpretation of s. 55, all definitions in the English language version of s. 2(1) use the word "means" and no term is defined solely in connection with use of the word "includes". The same approach is reflected in s. 73(1) of the CANSCA, the definition section which concerns services to humanitarian or emergency flights.

2004 CanLII 32169 (ON CA)

[77] Thus, it can be argued that the use of the word "includes" in the English language version of s. 55(2) of the CANSCA is atypical of the drafting approach to other interpretation provisions found in the Act, with the result that the choice of the word "includes", instead of "means" or "means and includes", is purposive, signalling a deliberate choice by Parliament to avoid an exhaustive interpretation of "owner" for the purpose of s. 55(1). This factor militates in favour of the interpretation of s. 55(2) urged by NAV Canada. However, significantly, the court in [page31]Campbell Soup stressed that the context in which a word appears in a statute may displace the basic meaning of the word in the enactment and common parlance regardless of the use of the phrase "means and includes". As well, regard must be had to the words employed in the French language version of the provision in issue.

(d) Implications of use of the word "s'entend"

[78] The French language version of s. 55(2) uses the word "s'entend" in place of the word "includes". The Lessors argue that the English translation of the word "s'entend" is "means" and, given the use of "s'entend" in the French language version of s. 55(2), it is clear from that version that the definition of "owner" in s. 55(2) is exhaustive: Harrap's New Standard French and English Dictionary (London: Harrap, 1972) s.v. entendre. See also Collins Unabridged French-English, English-French Dictionary, 6th ed. (New York: Harper Collins, 2002) s.v. entendre. They also rely for the meaning of "s'entend" on the recent decision of the Superior Court of Quebec in NAV Canada v. Wilmington Trust Co., [2000] J.Q. no. 5007 (S.C.) ("Inter-Canadien"), [See Note 10 at end of document] in which many of the matters at issue in these proceedings were considered.

[79] In Inter-Canadien, Tremblay J. noted, at paras. 128-29 that the French language version of s. 55(2) of the CANSCA uses the word "propritaire" for the word "owner" and the word "l'usager" for the word "operator", and stated:

2004 CanLII 32169 (ON CA)

> In French, the word "propritaire" [owner] is defined as a word that "means" a list which then follows, while in English, the word "owner" is defined as a word that "includes" such and such; therefore, the English definition is a much broader definition, such that the definition refers not only to the "ordinary" meaning of the word "owner", but also to the list which follows the word "includes".
>
> If one keeps to the French definition of the word "owner" which "means" such and such a thing, the word owner is therefore limited to the registered owner.

(Translated)

[80] Justice Tremblay thus accepted that the word "s'entend" translates in English as "means", that the French language version of s. 55(2) of the CANSCA defines "owner" restrictively and, consequently, that the two official language versions of s. 55(2) are capable of different interpretations. However, he rejected the restrictive interpretation of s. 55(2) suggested by the French language version in favour of the expansive inter-pretation which, [page32]he concluded, is suggested by the terminology of the English language version.

[81] I agree with the Lessors' submission that the word "s'entend" as employed in s. 55(2) of the CANSCA translates in English as "means". That interpretation conforms with the ordinary meaning of "s'entend" according to dictionary definitions and the decision in Inter-Canadien. It is also consistent with the French language version of s. 2(1) of the CANSCA, which defines several words or phrases by use of the term "s'entend" while the corresponding definitions of the same words or phrases in the English language version of that provision employ the word "means".[See Note 11 at end of document.] It is also clear, however, that the purpose and intent of the statutory provision in which "s'entend" is used must be examined before determining whether an expansive interpretation of the provision may nonetheless be appropriate.

(e) Shared meaning rule for the interpretation of

2004 CanLII 32169 (ON CA)

bilingual statutes

[82] The motions judge rejected the Lessors' submission that the application of the "shared meaning" rule for the interpretation of bilingual statutes is determinative of the meaning of s. 55(2) of the CANSCA. In my view, he was correct to do so. Application of the shared meaning rule does not conclusively establish the meaning of s. 55(2). It does yield, however, a presumptive meaning of s. 55(2) that must be tested against the purpose, context and intent of s. 55 as a whole.

[83] Where two versions of a bilingual statute appear to express different things, the shared meaning rule for the interpretation of bilingual statutes requires that the meaning that is shared by both versions ought to be adopted: Sullivan, supra, at p. 80. There are many examples of judicial reliance on the shared meaning rule to resolve ambiguities in bilingual statutes. See for example, Schreiber v. Canada (Attorney General), [2002] 3 S.C.R. 269, 2002 SCC 62, at para. 56, and R. v. Mac, [2002] 1 S.C.R. 856, 2002 SCC 24, at paras. 5-6. See also Sullivan at p. 81-86. The rule is not absolute, however, and can be rejected if the meaning shared between the two statutory versions is contrary to Parliament's intention or the purpose or objects of the enactment: Dor v. Verdun (City), [1997] 2 S.C.R. 862, 150 D.L.R. (4th) 385, at para. 25; [page33]Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, at paras. 73-76, Lamer J., dissenting in part; R. v. Collins, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508, at para. 43; R. v. Compagnie Immobilire BCN Lte, [1979] 1 S.C.R. 865, 97 D.L.R. (3d) 238, at pp. 871-72, 874-75 S.C.R.; Flota Cubana de Pesca v. Canada (Minister of Citizenship and Immigration), [1998] 2 F.C. 303, 154 D.L.R. (4th) 577 (C.A.), at paras. 40-41; P.-A. Ct in The Interpretation of Legislation in Canada, 3rd ed. (Toronto: Carswell, 2000), at pp. 328-29; and Sullivan, at p. 87.

[84] In this case, in my view, "s'entend" in the French language version of s. 55(2) translates in English as "means" and is used in a restrictive sense, whereas the English language version of s. 55(2) connotes either an expansive or a restrictive meaning. Thus, the English and French language

2004 CanLII 32169 (ON CA)

versions of s. 55(2) could give rise to different interpretations. As the word "includes" can be used in either a restrictive or extended sense, the shared meaning between the English and French language versions of s. 55(2) is a restrictive meaning. That restrictive meaning must be tested against the context and purpose of s. 55 and the intention of Parliament to determine if it contradicts or under-mines the purpose of s. 55. In my view, for the reasons given below, a contextual and purposive analysis of s. 55 confirms that the s. 55(2) definition of "owner" is intended to be restrictive.

2004 CanLII 32169 (ON CA)

(f) Ejusdem generis principle

[85] NAV Canada also asserts that in interpreting "owner" restrictively, the motions judge erred by treating the definition of "owner" in s. 55(2) as if it were subject to the principle of ejusdem generis. According to that principle, when interpreting a clause that sets out a list of specific words followed by a general term, the general term should be limited to the genus of the narrow enumeration that precedes it. For the principle to apply, the general words must follow, rather than precede, the enumeration of specific words: National Bank of Greece, supra, at para. 11.

[86] I do not agree that the motions judge applied the principle of ejusdem generis in his analysis of s. 55(2). The motions judge sought to ascertain the intended meaning of "owner" by considering the entire context of s. 55(2), including the terminology of both the English and French language versions of the provision. His purpose was to determine the meaning of the words used to introduce the categories of "owner[s]" enumerated in s. 55(2), as well as the relationship between the categories so enumerated and the general words which preceded them. That is exactly [page34]what he should have done. As emphasized by Sullivan at p. 181, the important factor is not word order, but the meaning of the words used to introduce the list of specific terms and to link them to the general category, and the relationship between the specifics listed and the general category. In any event, even if the ejusdem generis principle had been applied by the motions judge, it is merely the application of a contextual

principle and is not determinative of the intention of Parliament: Sullivan, at pp. 181-82. It is apparent from the motions judge's reasons for the May 7, 2002 Order that his analysis of s. 55 of the CANSCA was not limited to consideration of the structure and ordering of the words used in s. 55(2).

(4) Legislative context and history of section 55

[87] NAV Canada asserts that the motions judge erred in the following ways in interpreting s. 55: (i) in considering provisions of the CANSCA concerned with "users" of the civil air navigation system; (ii) in considering provisions of the CARs, subordinate legislation passed under the Aeronautics Act; (iii) in failing to assign a purposive legislative intention to a difference in language between s. 55(1) of the CANSCA and s. 4.4(5) of the Aeronautics Act; and (iv) in failing to accord a meaning to s. 55 consistent with the commercial expectations of the parties. In considering these submissions, it is useful to first address the navigation charges schemes under the CANSCA and the Aeronautics Act.

(a) Charges scheme under the CANSCA

[88] Section 55 of the CANSCA is contained in Part III of that Act, which is concerned with charges for air navigation services. Subject to certain restrictions set out in ss. 32(2) and (5) of the CANSCA, NAV Canada is authorized under Part III to impose charges on a "user" for the availability or provision of air navigation services (s. 32(1)). As I have mentioned, the word "user" is defined in s. 2(1) of the CANSCA as "an aircraft operator". Thus, NAV Canada's authority to impose charges for its services extends only to aircraft operators, in this case, the Canada 3000 Companies. Further, a charge imposed by NAV Canada on a user under s. 32(1) is deemed by s. 32(4) of the CANSCA to be "in respect of aircraft operated by that user".

[89] Section 34(1) of the CANSCA authorizes NAV Canada to establish new or revised charges for air navigation services. That power, however, is subject to several important constraints: [page35]

2004 CanLII 32169 (ON CA)

(i) in establishing new or revised charges, NAV Canada must adhere to a series of statutory charging principles set out in s. 35(1) of the CANSCA;

(ii) NAV Canada is required to operate on a cost recovery basis (ss. 35(5) and (6));

(iii) notice of any proposal by NAV Canada to establish new or revised charges must be provided to specific representative organizations of users and every user and "other person[s]" as notify NAV Canada of their desire to receive such notices (s. 36);

(iv) similarly, with the exception of new or revised charges proposed by NAV Canada and approved under s. 39 by the Minister of Transport within two years of the date of the transfer to NAV Canada of the Crown's civil air navigation assets (as contemplated under s. 7 of the CANSCA), NAV Canada is obliged under s. 37 of the CANSCA to announce any proposed new or revised charges prior to implementing same. Copies of such announcements must be furnished by NAV Canada to the same persons who are entitled, and every user and other person who seek, to receive notices or announcements under the Act. Such announcements must also be posted on the Internet (s. 37(4));

(v) s. 42 provides a right of appeal to the Canadian Transportation Agency, on specific grounds and within a fixed time, concerning charges imposed by NAV Canada, unless the charges have been approved earlier by the Minister of Transport under s. 39 of the CANSCA. [See Note 12 at end of document.] The appeal right afforded by s. 42 is available only to users, groups of users or representative organizations of users; other interested persons who receive notice or an announcement from NAV Canada concerning a proposal to establish new or revised charges have no statutory standing to appeal under s. 42 (s. 44); [page36]

(vi) the Canadian Transportation Agency is authorized, in specific circumstances, to order the cancellation of new or

2004 CanLII 32169 (ON CA)

> revised charges that are the subject of an appeal and to direct a refund of the charges, or the amount in excess of the charges allowed on appeal, to each user who paid them (s. 51); and

(vii) no appeal lies from the decision of the Canadian Transportation Agency on a charges appeal (s. 53).

[90] In the context of this charges scheme, s. 55(1) of the CANSCA imposes joint and several liability on the "owner and operator of an aircraft" for the payment of any navigation charges imposed by NAV Canada.

(b) Charges scheme under the Aeronautics Act

[91] Section 4.4 of the Aeronautics Act authorizes the Governor in Council or, in specific circumstances, the applicable Minister of the Crown with the authority of the Governor in Council, to make regulations imposing navigation charges. Section 4.4 does not expressly restrict the imposition of charges to "users" of aircraft. Section 4.4(5) provides:

> 4.4(5) If a charge is imposed in respect of an aircraft under this section, both the registered owner and the operator of the aircraft are jointly and severally, or solidarily, liable for payment of the charge.

(Emphasis added)

Thus, the joint and several liability provision of the Aeronautics Act extends to "registered owner[s]" and "operator[s]" of the aircraft in respect of which a navigation charge is imposed.

[92] In contrast, s. 55(1) of the CANSCA imposes joint and several liability upon the "owner and operator" of an aircraft and s. 55(2) provides a specific definition of "owner". Subparagraph 55(2)(a) establishes that "the person in whose name the aircraft is registered" is an "owner" for the purpose of s. 55(1).

2004 CanLII 32169 (ON CA)

[93] The Aeronautics Act also provides for the recovery of charges imposed under s. 4.4 of that Act. Section 4.4(4) reads:

> 4.4(4) All charges imposed under this section and interest payable thereon constitute a debt due to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction. [See Note 13 at end of document.]

[page37]

[94] As well, under s. 155(1) of the Financial Administration Act, R.S.C. 1985, c. F-11, where any person is indebted to the Crown, the appropriate Minister of the Crown responsible for the recovery or collection of the debt may "authorize the retention of the amount of the indebtedness by way of deduction from or set-off against any sum of money that may be due or payable" by the Crown to the person or the estate of the person indebted to the Crown.

[95] In view of those provisions, NAV Canada argues in its factum in these proceedings:

> In contrast to s. 4.4(5) of the Aeronautics Act, s. 55 of [the] CANSCA does not refer merely to "registered owner" but adopts [an] expansive definition of owner . . . incorporating the usual and ordinary meaning of owner in the sense of the person holding legal title.
>
> . . . . .
>
> [T]he change in wording of the provisions imposing liability to pay air navigation charges as reflected in s. 55, was intended to broaden NAV Canada's collection rights to offset the loss of the collection power previously enjoyed by the Minister of [Transport] by virtue of the set-off provisions of the Financial Administration Act.

(c) Provisions of the CANSCA concerning "users"

[96] NAV Canada's argument that the motions judge erred in considering provisions of the CANSCA concerning "users" must be placed in context. The motions judge recognized that legislative history, although not determinative of Parliament's

2004 CanLII 32169 (ON CA)

intention regarding a statutory enactment, is a proper and useful aid to ascertaining the purpose and meaning of an enactment: C.U.P.E., supra, at para. 54 and Ulybel Enterprises, supra, at paras. 33-35. In that context, the motions judge said at para. 52 of his reasons for the May 7, 2002 Order:

> To the extent that the legislative history is of assistance to the court, it is significant in my view that the joint and several liability for navigation charges under the Aeronautics Act was imposed only upon the registered owner and operators of the aircraft. There is nothing in the material before this court or in the [CANSCA] itself to support any intention on the part of Parliament to expand the liability for navigation charges to persons who are not either registered owners or operators of the aircraft. It is also significant that section 101.01(1) of the [CARs] defines "owner" in respect of an aircraft as "the person who has legal custody and control of the aircraft". I am accordingly of the view that consideration of the legislative history of the [CANSCA] and a consideration of the provisions of related legislation, on balance, supports the view that the word "owner" in the [CANSCA] should not be interpreted to include persons who do not have custody or control of the aircraft, do not operate the aircraft, and do not make use of the air navigation services in respect of which the navigation charges are levied. [page38]

[97] After next reviewing part of the Lessors' submissions concerning the meaning of s. 55(2) and the charges scheme set out in the CANSCA, the motions judge stated that NAV Canada's navigation services "are obviously used by the operators of the aircraft and/or persons having custody and control of the aircraft". The financiers of aircraft, he concluded, do not use or benefit from such navigation services and do not enjoy notice and appeal rights concerning navigation charges.

[98] I do not accept NAV Canada's argument that the motions judge erred in considering provisions of the CANSCA concerned with "users" of the services provided by NAV Canada. The charges scheme in the CANSCA is a user-pay scheme. Charges for the availability or provision of air navigation services may be

2004 CanLII 32169 (ON CA)

imposed by NAV Canada under s. 32 of the CANSCA only on "users", that is, on aircraft operators. The Lessors did not operate the Aircraft and, therefore, were not "users" under the CANSCA. The concept of "users" of navigation services permeates the entire charges scheme under the CANSCA. To place s. 55 in its proper context within that scheme, the underlying nature and focus of the scheme is an important consideration.

[99] Moreover, in my view, the motions judge's findings that the Lessors do not use and do not receive the benefit of the services provided by NAV Canada were amply supported by the record before him. That record established that NAV Canada's services were provided and invoiced in the normal course of business to the operators of aircraft, in this case, the Canada 3000 Companies. Although the Lessors derived a stream of rental income from the commercial use of the Aircraft prior to the termination of the Aircraft leases and the leases contemplated the use of the Aircraft by Canada 3000, the obligation under the leases to make rental payments was not dependent on the actual use of the Aircraft. In addition, the Lessors did not contract with NAV Canada for the provision of navigation services and, in the normal course, the Lessors did not receive notice of invoices and were not billed for navigation charges. [See Note 14 at end of document.] In that context, in my view, the motions judge was correct to conclude that the Lessors do not make use of and do not derive benefit from navigation services furnished by NAV Canada.

[100] As well, and importantly, the Lessors are not the beneficiaries of many of the statutory protections under the CANSCA's charges scheme. The notice, announcement and appeal provisions [page39]of the CANSCA are designed to protect against the imposition of improper or arbitrary charges by NAV Canada. These provisions are predominately user-oriented. Persons other than users, such as the Lessors, are not automatically entitled to receipt of notices and announcements concerning proposed new or revised navigation charges and they have no statutory standing to appeal such changes in charges to the Canadian Transportation Agency. There is also no statutory requirement under the CANSCA for representation on NAV Canada's board of directors of aircraft lessors or financiers. See in

2004 CanLII 32169 (ON CA)

that connection, Senate Debates (10 June 1996) at 590 (Hon. Raymond J. Perrault).

[101] As a result of these factors, lessors of aircraft, in contrast to aircraft operators, have no direct legal ability to check or to challenge the exercise by NAV Canada of its monopolistic powers. In my view, the charges scheme of the CANSCA does not protect aircraft lessors and secured creditors from the possible imposition by NAV Canada of improper or arbitrary navigation charges precisely because it is not envisaged that such persons will have any liability for such charges. Were it otherwise, I believe that the interests of such lessors and secured creditors would be enveloped under the same protective statutory umbrella that benefits users of NAV Canada's services.

(d) Provisions of the CARs

[102] In the circumstances of this case, I believe that it was both appropriate and necessary for the motions judge to have regard to regulations under the Aeronautics Act when interpreting s. 55 of the CANSCA. Although such regulations are subordinate legislation promulgated under the Aeronautics Act rather than under the CANSCA, as I have said, the CANSCA and the Aeronautics Act are inter-related parts of a broader regulatory framework. The contextual and purposive approach to statutory interpretation allows, and in some cases may require, reference to regulations as an aid to interpreting a statutory enactment. In my view, this is such a case.

[103] As Sullivan observes at p. 282, the conventional view is that: "Because regulations are a subordinate form of legislation, usually made after the enabling Act has been passed, they have limited value in interpreting provisions of the Act." The CARs were promulgated under the Aeronautics Act on October 10, 1996, shortly after the CANSCA became effective on June 20, 1996. The anticipated role of the CARs was repeatedly emphasized in the debates in the House of Commons and the Senate concerning Bill C-20 as an intended and important link between the Aeronautics Act and the CANSCA. In this case, consideration of the CARs is [page40]not undertaken

2004 CanLII 32169 (ON CA)

for guidance on the meaning of words in the enactment under which the CARs were made but, rather, for guidance on the meaning of words in an associated statute, which Parliament determined should be linked to, and promulgated almost contemporaneously with, the CARs. Accordingly, the case at bar is distinguishable from cases where the words of a statutory enactment are sought to be construed by reference to regulations made under the powers contained in the same enactment.

[104] This court has recognized that where regulations are closely intertwined with a statute, or were enacted contemporaneously with a statute under review by the court, the regulations may be useful interpretive tools: Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2002), 62 O.R. (3d) 305, 220 D.L.R. (4th) 385 (C.A.), at paras. 62-64, leave to appeal to the Supreme Court of Canada granted [2003] S.C.C.A. No. 42. See also Hanlon v. The Law Society, [1980] 2 All E.R. 199, [1981] A.C. 124 (H.L.); Garland v. Canada (Employment and Immigration Commission), [1985] 2 F.C. 508, 23 D.L.R. (4th) 393 (C.A.); and Crupi v. Canada (Employment and Immigration Commission), [1986] 3 F.C. 3, [1986] F.C.J. No. 204 (QL) (C.A.).

[105] A review of the CARs and their predecessor regulations, the Air Regulations, 1978, C.R.C., c. 2 (the "Air Regulations") confirms that s. 55(2) of the CANSCA derived from the definition of "owner" set out in s. 101 of the Air Regulations. That genesis of s. 55(2) is not disputed by NAV Canada. Section 101 of the Air Regulations also defined "ownership" as "having legal custody and control of an aircraft".

[106] The Air Regulations were in force at the time that NAV Canada was established. Section 55(2) of the CANSCA imported the s. 101 definition of "owner" under the Air Regulations in verbatim language. Thereafter, the CARs came into force and the Air Regulations were repealed. Under the CARs, the definition of "owner" imports the language of "legal custody and control" used in the s. 101 definition of "ownership" under the Air Regulations. In my view, it was unnecessary to directly import the "ownership" definition from the Air Regulations into s. 55

2004 CanLII 32169 (ON CA)

of the CANSCA, because that "ownership" definition was already reflected in the CARs, which implicitly are linked to the CANSCA.

[107] Consequently, it was appropriate for the motions judge to examine the CARs and their predecessor regulations as part of the legislative evolution and context of s. 55(2) when determining the meaning of that provision. That examination establishes that the categories of "owner[s]" enumerated in s. 55(2) are concerned with persons having legal custody and control or who are otherwise in possession of an aircraft. [page41]

2004 CanLII 32169 (ON CA)

(e) Comparison of the language of section 4.4(5) of the Aeronautics Act and section 55(1) of the CANSCA

[108] I agree with NAV Canada that a comparison of the language of s. 55(1) of the CANSCA and s. 4.4(5) of the Aeronautics Act is also relevant to the interpretation of the word "owner" in s. 55 of the former Act. The key difference between the liability sections in the two enactments is the absence in s. 55(1) of the CANSCA and the presence in s. 4.4(5) of the Aeronautics Act of the adjective "registered" before the word "owner". Given that difference in language, NAV Canada argues that Parliament sought to remove the concept of "registered owner" from the CANSCA and to introduce in its stead a concept of "owner" which encompasses persons in addition to those persons having legal custody and control or who are otherwise in possession of an aircraft. I disagree.

[109] The legislative history of the term "registered owner" under the Aeronautics Act is especially relevant in this connection. Canadian aeronautics legislation underwent comprehensive reform in 1985 consequent upon the recommendations of the Dubin Commission of Inquiry on Aviation Safety (Ottawa: Supply and Services Canada, 1981). Bill C-36, the legislative bill which led to the current Aeronautics Act, was the product of extensive consultations with the aviation community, the public, and special interest groups concerning a new legislative framework for the safety of aviation in Canada and the growth of the aviation sector: House of Commons Debates

(15 April 1985) at 3728-30 (Hon. Donald Mazankowski).

[110] The s. 3(1) definition of "registered owner" under the Aeronautics Act was introduced by amendment to Bill C-36 during second reading of that Bill in the House of Commons. Prior to that, when Bill C-36 was considered by the Standing Senate Committee on Transport, various industry and pilots organizations urged amendment of the concept of "owner" under the Bill expressly to restrict its application to those persons in whose name aircraft were registered and, thus, to exclude from the term "owner" legal titleholders to aircraft and financiers of aircraft where those persons were not also the registered owners of the aircraft. See for example, Proceedings of the Standing Senate Committee on Transport (7 May 1985) at 1045 and Appendix TRPT-3 thereto at 9A:3 and 9A:8. On second reading of Bill C-36 in the House of Commons, a more expansive definition of "owner" was deleted from the Bill and the restricted definition of "registered owner" was substituted in its place. The purpose of those amendments was described by the parliamentary secretary to the then Minister of Transport: [page42]

> [W]ith the same aim of first meeting the Air Transport Association's concerns with regard to the definition of "owner", and to meet the intent of [the Standing Committee on Transport], we have put forward a basic amendment and amendments that give effect as in other parts of the Bill.
>
> The use of the term "registered owner" would have the effect of limiting the provisions to those who actually have control of the aircraft. Prior to the amendment it might have extended to those who have a security or other financial interest . . . I can only repeat that it was an attempt to meet the intent of the committee and the intent of the Act itself.

(Emphasis added) (House of Commons Debates (20 June 1985) at 6065-66 (Hon. J.M. Forrestall))

[111] The intention to so limit the scope of the concept of "owner" was carried forward in s. 4.4(5), the joint and several liability provision of the Aeronautics Act, by the

2004 CanLII 32169 (ON CA)

reference in that section to "the registered owner and the operator of the aircraft" (emphasis added). That language confirms that liability under s. 4.4(5) of the Aeronautics Act does not extend to legal titleholders to aircraft or to persons having a security interest in aircraft. The issue, then, is whether the absence of the word "registered" in s. 55(1) of the CANSCA evidences a clear Parliamentary intention that the scope of liability under that provision be enlarged from the scope of the liability provision set out in s. 4.4(5) of the Aeronautics Act. I conclude that it does not.

[112] Section 55(1) must be read together with s. 55(2). Subparagraph 55(2)(a) incorporates the concept of aircraft registration into the definition of "owner". I believe that the inclusion of this concept in subparagraph 55(2)(a) infuses the interpretation of s. 55 with the meaning assigned to "registered owner" under the Aeronautics Act and the term "owner" under the CARs. Stated simply, it was unnecessary for Parliament to repeat the word "registered" in s. 55(1) when the registration concept was expressly included in s. 55(2) and when the CARs were designed as important related, albeit subordinate, legislation. In that sense, the change in wording was deliberate and purposive and the meaning of "owner" under the scheme of the Aeronautics Act was imported into the CANSCA. In my view, Parliament clearly intended that the meaning of s. 55(1) be determined with reference to the Aeronautics Act and the aircraft registration regime effected by that Act. The legislative draftsman's choice to achieve that objective by structuring s. 55 in two parts and including a reference to the concept of aircraft registration in only the second part of the provision (s. 55(2)(a)), does not disprove that intention but simply reflects one method of realizing it.

[113] In addition, as observed by Iacobucci J. in Bell ExpressVu, at para. 27: [page43]

> [W]here the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R.

2004 CanLII 32169 (ON CA)

> v. Ulybel Enterprises Ltd. . . . at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".
>
> (Citations omitted and emphasis added)

[114] The CANSCA contains no express statutory indication that Parliament intended, by the language of s. 55(1), to effect a fundamental change to the scope of the joint and several liability provision contained in s. 4.4(5) of the Aeronautics Act. To the contrary, I think that the combined effect of ss. 55(1) and (2) of the CANSCA is to preserve the concepts of "owner" and "ownership" articulated under the Aeronautics Act and the regulations made thereunder. I therefore agree with the motions judge's conclusion that the word "owner" in s. 55 of the CANSCA is concerned with persons who have legal custody and control, or who are otherwise in possession, of aircraft.

[115] I would also reject NAV Canada's argument that, in contrast to the Crown's collection rights for navigation charges under the Aeronautics Act, the absence in the CANSCA of a right of set-off to aid collection efforts signifies a Parliamentary intention that s. 55(1) be interpreted expansively.

[116] I agree with the Lessors' submission that NAV Canada enjoys a panoply of remedies if an aircraft operator, such as a major airline, fails to pay navigation charges when due. As I will discuss next in these reasons, it is entitled to apply to the court under s. 56 of the CANSCA to seize and detain the aircraft used by a defaulting airline until charges owed are fully paid or security is posted therefor. It is also entitled to seek recovery of the debt owed pursuant to civil proceedings in the courts. As well, as a matter of standard commercial practice, it is free to demand security from the users of its services as a condition of the provision of services, or to introduce and enforce rigorous credit policies. Given NAV Canada's monopoly on the provision of civil air navigation services, the impact of the threat or the implementation of

2004 CanLII 32169 (ON CA)

such measures should not be underestimated. As a result, the fact that NAV Canada does not also enjoy a statutory set-off right similar to the right conferred on the Crown under the Financial Administration Act cannot control the interpretation of the reach of s. 55(1) of the CANSCA.

(f) Commercial expectations of the parties

[117] Finally, NAV Canada argues that the motions judge failed to accord ss. 55 and 56 of the CANSCA a meaning consistent with [page44]the commercial expectations of the parties. It points to provisions of the Aircraft leases which obliged Canada 3000 to pay airport and navigation charges, to provide security deposits therefor, and to indemnify the Lessors in the event of the non-payment of such charges or the seizure of the Aircraft consequent upon such non-payment, and argues that those provisions evidence an acknowledgement or expectation by the Lessors of potential liability for navigation charges. This argument can be dealt with summarily. The parties' respective understanding of the import of ss. 55 and 56 of the CANSCA does not establish Parliamentary intention concerning the meaning of those provisions or the scope of the remedies actually provided thereunder. Even if proven, the fact that the Lessors may have envisaged potential liability under ss. 55 or 56 of the CANSCA does not control legislative meaning.

(5) Conclusion concerning purpose and meaning of section 55

[118] Given the legislative framework and the purpose of the CANSCA, the language of s. 55, the fact that the meaning of the word "owner" is context-specific, and the legislative context and history of s. 55 itself, I conclude that the purpose of s. 55(1) is to provide a form of statutory protection to NAV Canada for the collection of those civil air navigation charges from time to time owed to it. It is not intended to assure or guarantee payment of those charges by extending liability for payment of them to the legal titleholders to aircraft, such as the Lessors. Rather, s. 55 identifies two broad categories of persons who will attract status as "owners" under s. 55(1) for the purpose of liability for navigation charges: persons having

2004 CanLII 32169 (ON CA)

legal custody and control and persons otherwise in possession of aircraft. Restricting liability under s. 55(1) to those persons is consistent with the legislative context, legislative history and objects of s. 55, the charges scheme under Part III of the CANSCA, and the meaning of "owner" in the aviation context. Accordingly, I would dismiss NAV Canada's appeal concerning s. 55 of the CANSCA.

(6) Position of the sub-lessors

[119] Mention should also be made of one additional issue concerning NAV Canada's claims under s. 55 of the CANSCA. The respondents Ansett Worldwide Aviation, U.S.A. and MSA V leased three Aircraft to Canada 3000, two of which, in turn, had been leased by those respondents from other persons under head leases. One of the issues raised concerns whether these respondents are directly liable for unpaid navigation charges under s. 55 of the CANSCA. The motions judge held that the [page45]liability of these respondents need not be determined by him based on his conclusion that the Lessors of the Aircraft are not "owner[s]" of the Aircraft for the purpose of s. 55 of the CANSCA. That conclusion, with which I agree for the reasons given, is dispositive of NAV Canada's claim under s. 55 of the CANSCA against the two sub-lessor respondents.

C. Seizure and Detention Claims

(1) Statutory provisions

[120] The following statutory provisions are relevant to the Authorities' seizure and detention claims:

(i) The Airports Act, ss. 9 and 10:

9(1) Where the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon, set by a designated airport authority in respect of an airport operated by the authority has not been paid, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the

2004 CanLII 32169 (ON CA)

province in which any aircraft owned or operated by the person liable to pay the amount is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.

(2) Where the amount of any fees, charges and interest referred to in subsection (1) has not been paid and the designated airport authority has reason to believe that the person liable to pay the amount is about to leave Canada or take from Canada any aircraft owned or operated by the person, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on ex parte application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.

(3) Subject to subsection (4), except where otherwise directed by an order of a court, a designated airport authority is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.

(4) A designated airport authority shall release from detention an aircraft seized under subsection (1) or (2) if a bond, suretyship or other security in a form satisfactory to the authority for the amount in respect of which the aircraft was seized is deposited with the authority.

(5) Words and expressions used in this section and section 10 have the same meaning as in the Aeronautics Act.

10(1) Any aircraft of a person referred to in subsection 9(1) or (2) that would be exempt from seizure under a writ of execution issued by the superior court of the province in which the aircraft is situated is exempt from seizure and detention under that subsection. [page46]

2004 CanLII 32169 (ON CA)

(2) The Governor in Council may, by regulation, exempt any aircraft from seizure and detention under section 9.

(ii) The CANSCA, ss. 56 and 57:

56(1) In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

(2) An application for an order referred to in subsection (1) may be made ex parte if the Corporation has reason to believe that the person liable to pay the charge is about to leave Canada or take from Canada any aircraft owned or operated by the person.

(3) The Corporation shall release from detention an aircraft seized under this section if

(a) the amount in respect of which the seizure was made is paid;

(b) a bond or other security in a form satisfactory to the Corporation for the amount in respect of which the seizure was made is deposited with the Corporation; or

(c) an order of a court directs the Corporation to do so.

57(1) An order under section 56 does not apply if the aircraft is exempt from seizure under the laws of the province in which the court that issued the order is

2004 CanLII 32169 (ON CA)

situated.

(2) State aircraft are exempt from seizure and detention under an order issued under section 56.

(iii) The Aeronautics Act, s. 4.5(1):

4.5(1) Where the amount of any charge and interest thereon due by a person that has been imposed under section 4.4 has not been paid, the Minister may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court deems necessary, authorizing the Minister to seize and detain the aircraft.

(2) Overview of the positions of the parties

[121] The central issue concerning the seizure and detention claims is whether, by virtue of s. 9 of the Airports Act and s. 56 of the CANSCA (the "Detention Provisions"), the Authorities have seizure and detention rights concerning the Aircraft ranking in priority to the pre-existing property rights in the Aircraft of the Lessors, the legal titleholders to the Aircraft, entitling the [page47]Authorities to seize and detain the Aircraft in the face of claims for repossession and recovery of the Aircraft by the Lessors.

[122] The Airport Authorities submit that s. 9 of the Airports Act creates an in rem right, or a right in the nature of a lien, that entitles them to seize and detain the Aircraft until outstanding airport charges owed to them are paid, and that this right is enforceable in priority to the Lessors' interests in the Aircraft. NAV Canada asserts that s. 56 of the CANSCA creates a statutory possessory lien that entitles it to seize and detain the Aircraft pending payment of unpaid navigation charges owed to it. In the alternative, NAV Canada argues that it is entitled to a lien arising at common law, which ranks in priority to the interests of the Lessors in the

2004 CanLII 32169 (ON CA)

Aircraft and which is analogous to a right of distress granted by statute, upon the grant of an order under s. 56 of the CANSCA and upon the lien being exercised.

[123] The Lessors contend that the motions judge correctly held that the Authorities do not enjoy a lien, or a right in the nature of a lien, arising by statute or at common law concerning the Aircraft. They also argue that the motions judge was right to hold that any seizure and detention rights of the Authorities do not rank in priority to the rights of the Lessors to repossess and recover the Aircraft.

[124] The motions judge held, at para. 42 of his reasons for the May 7, 2002 Order that the Detention Provisions create "rights in favour of the [Authorities] analogous to rights granted to a creditor who is successful in obtaining a Mareva injunction" in the sense that, "as between the creditor and the debtor, the creditor can insist that the property remain in place within the jurisdiction until the creditor is paid or the right to payment finally determined." In connection with the priority of the Authorities' asserted seizure and detention rights, the motions judge concluded (at para. 43):

> I am not persuaded, however, that the legislation granting such detention rights should be interpreted as creating rights against third parties having ownership or perfected security interests in the aircraft such that they, in effect, become liable for the debts of third parties and must extinguish those debts before they can enforce their contractual rights to repossess the aircraft or enter into possession of the aircraft to realize on their security. There is nothing in the statutes to support such an interpretation so as to defeat, or create priority over, the valid ownership and contractual rights of such third parties.[See Note 15 at end of document]

[125] The Authorities submit that the motions judge made five principal errors in his interpretation of the Detention Provisions: [page48]

(i) in his approach to the construction of the Detention

2004 CanLII 32169 (ON CA)

Provisions;

(ii) in failing to find that the Detention Provisions create a lien, or a right in the nature of a lien, concerning the Aircraft and by analogizing the nature of the Authorities' detention rights to the rights afforded by a Mareva injunction;

(iii) in declining to follow the Inter-Canadien case, supra;

(iv) in holding that the Authorities' seizure and detention rights do not rank in priority to the pre-existing property rights of third parties, including the Lessors, in the Aircraft; and

(v) in failing to have regard to policy considerations which the Authorities assert support a liberal interpretation of the Detention Provisions.

[126] In my view, for the reasons that follow, the motions judge was correct to conclude that the remedies afforded to the Authorities under the Detention Provisions concerning the Aircraft, if granted by court order, do not create rights having priority over the pre-existing interests in the Aircraft of the Lessors, the legal titleholders to the Aircraft, entitling the Authorities to detain the Aircraft in the face of claims for repossession and recovery of the Aircraft by the Lessors.

(3) Preliminary observations

[127] Several preliminary points should be made. First, the Airport Authorities do not assert that the Lessors are directly liable for unpaid airport charges. Rather, their claim against the Lessors depends on recognition of a statutory or common law lien, or a right in the nature of a lien, concerning the Aircraft that ranks in priority to the interests of the Lessors in the Aircraft.

[128] In contrast, NAV Canada argues that it is in a different position than the Airport Authorities because ss. 55

2004 CanLII 32169 (ON CA)

and 56 of the CANSCA, in combination, support a clear inference of a Parliamentary intention to confer priority on NAV Canada's interest in the Aircraft over the interests of the Lessors in the Aircraft. NAV Canada submits that since the Lessors are directly liable under s. 55 for the payment of navigation charges, s. 56 simply permits the seizure and detention of the debtor's property, in contrast to the property of a third party, in potential satisfaction of the debt owed. Since I have already rejected NAV Canada's argument concerning s. 55 of the CANSCA, NAV Canada's seizure and detention claim rests on the same legal footing as the seizure and detention claims of the Airport Authorities. [page49]

[129] Second, in this case, the Airport Authorities were not granted remedies under the Detention Provisions prior to the CCAA Order and the bankruptcies of the Canada 3000 Companies. As well, although NAV Canada applied under s. 56(1) of the CANSCA on November 9, 2001 for an order authorizing the seizure and detention of the Aircraft, no order was granted in its favour prior to the bankruptcies of the Canada 3000 Companies on November 11, 2001. Ultimately, about six months later, the seizure and detention claims of the Authorities were dismissed by the motions judge. The motions judge held that no steps had been taken by the Authorities to seize the Aircraft prior to the date of the bankruptcies. Consequently, none of the Authorities has exercised a remedy under the Detention Provisions, nor taken possession of the Aircraft.

[130] The motions judge ruled that the Aircraft were not the property of the Canada 3000 Companies and, therefore, were not subject to the proceedings under the BIA involving the Canada 3000 Companies. He further held that the leasehold interests of the Canada 3000 Companies in the Aircraft were of no value in the circumstances and did not form part of the estates in bankruptcy of the Canada 3000 Companies. Consequently, he concluded that the Authorities' seizure and detention claims were not affected by the automatic stay provisions of s. 69.3(1) of the BIA and that no lifting of such a stay was required to permit the court to authorize the seizure and detention of the Aircraft or to permit the Lessors to proceed with their claims for repossession and recovery of the

2004 CanLII 32169 (ON CA)

Aircraft.

[131] These rulings are not challenged by the Lessors on their cross-appeals from the May 7, 2002 Order. Accordingly, on the facts of the case at bar, the competing claims of the parties concerning the Aircraft fall to be determined outside the bankruptcy regime.

[132] Third, several statutory prerequisites apply to the remedies under the Detention Provisions. The only prerequisite at issue here is the requirement under s. 9(1) of the Airports Act and s. 56(1) of the CANSCA that the aircraft sought to be seized and detained is aircraft "owned or operated by the person liable to pay the amount" [s. 9(1)] in issue. See Edmonton Regional Airports Authority v. Alta Flights (Charters) Inc., 2003 ABQB 791, [2003] A.J. No. 1164 (QL) (Q.B.), at para. 46.

[133] Fourth, a remedy under either of the Detention Provisions is subject to several constraints: (i) the remedy is not automatic and requires prior court authorization; (ii) the remedy is discretionary and may be subject to such terms as the court considers necessary; (iii) under s. 9(3) of the Airports Act and s. 56(3)(c) of the CANSCA, the court also has a discretion to limit the duration [page50]of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made; (iv) in any event, an authority that obtains an order under the Detention Provisions is required to release a detained aircraft upon payment of the outstanding amount or charges in respect of which the seizure was made, or upon the provision of acceptable security therefor (ss. 9(3) and (4) of the Airports Act and ss. 56(1) and (3) of the CANSCA); and (v) an order is not available under the Detention Provisions if the aircraft in respect of which the order is sought is exempt from seizure and detention under provincial law (s. 10(1) of the Airports Act and s. 57(1) of the CANSCA) or, in the case of the Airports Act, under regulation made by the Governor in Council (s. 10(2)).

[134] Finally, it is useful at the outset to distinguish

2004 CanLII 32169 (ON CA)

between an established statutory right and a potential statutory remedy. The Authorities' seizure and detention claims proceed on the premise that the Detention Provisions create seizure and detention rights. In fact, the Detention Provisions do not create any rights unless, and until, a court order is made authorizing the seizure and detention of an aircraft. Instead, they create potential remedies, available at the discretion of the court and subject to such conditions as the court considers necessary. Thus, both Detention Provisions provide that recourse against aircraft may be had thereunder "in addition to any other remedy available" for the collection of the unpaid charges in issue (emphasis added). The remedial and discretionary nature of the Detention Provisions informs the analysis of them.

(4) Approach to construction

[135] The Authorities argue that the motions judge erred by applying principles of strict construction in his interpretation of the Detention Provisions, thereby contravening the approach to statutory interpretation mandated by the Supreme Court of Canada in Bell ExpressVu, supra, and related cases to which I have previously referred. According to the Authorities, the motions judge's use of a strict construction approach led him to wrongly conclude that the Detention Provisions do not confer a lien, or a right in the nature of a lien, in respect of the Aircraft.

[136] In his reasons for the May 7, 2002 Order, the motions judge said (at para. 34):

> I am of the view . . . that the general rule of law as stated in [Phoenix Assurance Co. of Canada v. Toronto (City of) (1981), 35 O.R. (2d) 16 (H.C.J.), affd (1982), 39 O.R. (2d) 680 (C.A.) and Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411], that the court should not consider a lien to be [page51]imposed without a plain declaration of the intention of the legislature to impose it shown by clear and unambiguous language is the law of Ontario.

2004 CanLII 32169 (ON CA)

[137] Although considerable jurisprudential support exists for applying principles of strict construction to the interpretation of a statutory provision that is alleged to impose a charge or a duty, or to derogate from pre-existing property or security rights, those principles are not engaged unless the meaning of the applicable statutory provision is ambiguous. As stated by the Supreme Court of Canada in Morguard Properties Ltd. v. Winnipeg (City of), [1983] 2 S.C.R. 493, 3 D.L.R. (4th) 1, at p. 510 S.C.R.: "[T]he construction difficulty does not arise unless there is some ambiguity to start with." Only if the words of the Detention Provisions are truly ambiguous, in the sense that two or more interpretations of the words of those provisions arise, each equally consistent with Parliamentary intent, is it permissible to resort to other principles of interpretation. In that connection, Bell ExpressVu does not preclude the application of principles of strict construction in a proper case; it merely limits the application of such principles to instances of genuine ambiguity: Bell ExpressVu, at paras. 28-30.

[138] It is important to underscore the requisite approach to the construction of the Detention Provisions. As I stated earlier in these reasons, statutory interpretation is not based solely on the wording of a challenged statutory provision. This is especially significant in connection with the interpretation of the Detention Provisions because the parties, all sophisticated and experienced participants in the aviation industry, advance materially different interpretations of the Detention Provisions which would lead to significantly different legal and commercial results. The fact that scrutiny of the Detention Provisions may yield two disparate interpretive readings, however, does not mean that the Detention Provisions are ambiguous.

[139] In my view, an interpretation of the Detention Provisions which emphasizes their plain language, as urged by the Authorities, is incomplete and pays insufficient attention to the overall scheme of the Airports Act and the CANSCA, the objects of the legislation, the legislative evolution and context of the Detention Provisions, and the intention of Parliament. In Rizzo, supra, at paras. 21 and 23, the Supreme

2004 CanLII 32169 (ON CA)

Court of Canada indicated that statutory interpretation requires consideration of the scheme and objects of the legislation at issue, the intention of Parliament and the full context of the challenged words. In that connection, the use of legislative history as a tool for determining the intention of Parliament was held to be an entirely appropriate exercise: Rizzo, at para. 31. Finally, as Sullivan confirms, at p. 10, the modern approach to statutory interpretation "calls for the [page52]words of the text to be read in their entire context in every case, not just in cases where the words seem ambiguous" (emphasis in original).

[140] For the reasons that follow, on undertaking such a contextual and purposive analysis of the Detention Provisions, I conclude that their meaning is clear and unambiguous and that, properly read, they do not bear the construction urged by the Authorities.

(5) The claim of a lien

[141] Much of the parties' submissions before this court focused on the issue whether the remedies under the Detention Provisions, if granted, create lien rights, or rights in the nature of a lien, in favour of the Authorities. In my view, in the end, determination of the Authorities' seizure and detention claims does not turn on this issue. Rather, the critical question is whether the remedies under the Detention Provisions, if granted, create rights in the Aircraft ranking in priority to the claims of the Lessors for repossession and recovery of the Aircraft. Nonetheless, because the claim of a lien right, or a right in the nature of a lien, was addressed by the parties at considerable length in these proceedings, I will comment on this issue briefly.

[142] The motions judge correctly noted that the Detention Provisions make no express mention of a lien; nor do they contain many of the traditional indicia of a lien, such as a right to sell a seized aircraft if the charges with respect to which the aircraft was seized remain unpaid. The Detention Provisions, therefore, are distinguishable from other legislation in Canada that expressly confers both a lien and a

2004 CanLII 32169 (ON CA)

right of sale, or a lien and priority to the lienholder over other claimants. See for example, the Canada Marine Act, S.C. 1998, c. 10, s. 122(1); the Canada Petroleum Resources Act, R.S.C. 1985, c. 36 (2nd Supp.), s. 94(5); the repealed Canada Ports Corporation Act, R.S.C. 1985, c. C-9, ss. 43 and 45; the Municipal Act, 2001, S.O. 2001, c. 25, s. 349(3); and the Repair and Storage Liens Act, R.S.O. 1990, c. R.25, ss. 7 and 10.

[143] While it is true, as the Authorities argue, that aircraft detention remedies are available in other jurisdictions, many of these remedies are distinguishable from the Detention Provisions. For example, legislation in England provides for the detention and sale of aircraft for unpaid airport or navigation charges. Section 88(1)(b) of the Civil Aviation Act 1982 (U.K.), 1982, c. 16 permits the sale of detained aircraft by an airport authority if airport charges remain unpaid for 56 days from the date when the [page53]detention began, and s. 83(1) of the Transport Act 2000 (U.K.), 2000, c. 38, in combination with associated regulations, permits the detention and sale of aircraft for the non-payment of charges relating to the supply of air traffic services.

[144] The statutory detention remedy under England's Civil Aviation Act (1982) has been characterized as analogous to an ordinary possessory lien. In Bristol Airport plc v. Powdrill, [1990] Ch. 744 (C.A.), the English Court of Appeal considered the right of an airport authority to detain for unpaid airport charges aircraft leased by an insolvent charter airline. At issue, among other matters, was whether s. 88 of the English statute confers a lien or other security over the aircraft within the meaning of the Insolvency Act 1986 (U.K.), 1986, c. 45, the legislation governing the administration of insolvent estates. The court held that the statutory detention provision creates a "lien or other security" in the aircraft. In his judgment, Sir Nicolas Browne-Wilkinson V.-C. elaborated, at pp. 759-60 Ch. as follows:

> There was some discussion in the course of argument whether the statutory right of detention is strictly to be described

2004 CanLII 32169 (ON CA)

as a 'lien'. It has many of the features of a lien. It is a right of retention of chattels enjoyed by a creditor against the payment of his charges for services rendered in relation to those chattels, similar to the rights enjoyed by, for example, repairers of goods. The fact that the right is conferred by statute is not inconsistent with it being a lien . . . However, it is not a possessory lien of the classic type, since (as will appear hereafter) in my judgment the statutory right of detention conferred by section 88 does not give the airport legal possession of the aircraft whilst it is being detained. But there are many species of lien which do not depend on possession, for example certain equitable liens.

(Citations omitted and emphasis added)

[145] He later stated, at p. 765 Ch.:

> Moreover, although statutes have created statutory rights of distress, counsel could find no case in which a statutory provision had been held to be a right of distraint in the absence of clear words describing the right as a right to distrain. Distress is an ancient remedy and to a degree obsolescent. In my judgment in the absence of clear words in section 88 describing the right to detain as being a right of distress, it would be wrong to treat it as such.

(Emphasis added)

[146] By analogy to Bristol Airport, the Authorities argue that the remedies under the Detention Provisions confer a possessory right to retain property, that is, aircraft, until a debt due to the person detaining the property is satisfied. The motions judge rejected that notion of a "lien", on the basis that it lacked judicial recognition in Canada. In fact, some support for that notion of a lien may be found in Royal Trust Co. v. Molsons Bank (1912), 27 O.L.R. 441, [1912] O.J. No. 52 (QL) (H.C.J.); Prete v. Lauzon and Fensom (1922), 52 O.L.R. 334, [1922] O.J. No. 148 (QL) (S.C. (App. Div.)); [page54]and Montreal Lithographing Ltd. v. Deputy Minister of National Revenue for Customs and Excise, [1984] 2 F.C. 22, 8 C.R.R. 299

2004 CanLII 32169 (ON CA)

(T.D.). See also in England, in the maritime law context, Hay & Others v. Mersey Docks & Harbour Board ("The Countess") (1923), 14 L1. L. Rep. 441 (H.L.) at p. 444 L.1.L.Rep., per Lord Birkenhead.

[147] The legislative scheme in England concerning aircraft detention is materially different than the legislative scheme in Canada under the Detention Provisions. Accordingly, in my view, the decision in Bristol Airport is of limited value as a precedent in this case. It is useful to make several observations in that connection. First, as I have said, the enactment at issue in Bristol Airport expressly provides for a right to detain and sell aircraft. In contrast, the Detention Provisions provide for the seizure and the detention of aircraft, but do not expressly grant a right to sell a seized and detained aircraft. The remedy under each of the Detention Provisions contemplates, upon grant of a court order, that the claiming authority may take possession of the aircraft, thereby enforcing its court-approved remedy. As observed by the court in Bristol Airport, however, some species of lien do not depend on possession.

[148] Second, and importantly, the Civil Aviation Act 1982 in England specifically addresses the interests in aircraft of persons whose interests will be divested by reason of the sale of a detained aircraft, including persons having legal and equitable title to the aircraft. As observed by the court in Bristol Airport, at p. 760 Ch., s. 88(6) of that enactment itself "establishes its own order of priorities in the application of proceeds of sale of the aircraft." The statutory right to sell and the statutory priorities scheme have the effect of divesting all interests in a sold aircraft, so as to vest full legal and equitable title to the aircraft in the purchaser, leaving the original legal owners of the aircraft to claim compensation from the surplus proceeds of sale. The Detention Provisions, in contrast, do not expressly address priorities amongst competing claimants to a detained aircraft.

[149] Given the international aviation example afforded by the English legislation, it is telling that the legislative drafters of the Airports Act and the CANSCA, both of which were

2004 CanLII 32169 (ON CA)

introduced after the English statute, did not include priorities language, a priorities scheme or a right to sell detained aircraft in the Detention Provisions. That factor militates against the conclusion that the Detention Provisions are intended to create a right having priority over the interests of the legal titleholder to a detained aircraft.

[150] Third, notwithstanding the right of sale provided by the English statute, the court in Bristol Airport held, at p. 764 Ch. [page55]that, absent an overt act of detention, the claiming airport authorities had no security in respect of the aircraft and merely enjoyed a statutory right to create the security by an overt act of detention. Under the English legislation, unlike the Detention Provisions in this case, detention of an aircraft can be achieved without prior court authorization; the sale of a detained aircraft, or other steps to enforce the detention remedy, requires court approval.

[151] Finally, the trial judge in Bristol Airport, in the exercise of his discretion, refused to grant the airport authorities leave to enforce their detention rights on the basis that they were not secured creditors and, therefore, they should not be allowed to gain priority over the other unsecured creditors of the insolvent airline by detaining the aircraft. That ruling was upheld on appeal.

[152] The decision in Bristol Airport confirms that even if a statutory aircraft detention remedy is regarded as creating a right or interest in a detained aircraft in the nature of, or similar to, a lien or other security interest in the aircraft, that right or interest is merely a legal possibility absent actual detention. More importantly, Bristol Airport indicates that a statutory aircraft detention remedy does not automatically confer priority on the claiming creditor over other unsecured creditors.

[153] Liens recognized at common law are particular to the property for which a service has been rendered: B. Ziff, Principles of Property Law, 3rd ed. (Toronto: Carswell, 2000) at p. 408. In this case, the Authorities' claims concern outstanding charges incurred for services relating to the very

2004 CanLII 32169 (ON CA)

property sought to be seized and detained, that is, the Aircraft. That factor supports the assertion that the remedies under the Detention Provisions, if granted, create a possessory lien or a right in the nature of a possessory lien concerning aircraft. At common law, such possessory liens are regarded as mere passive rights of retention which confer no right to sell or otherwise deal with the retained property. The grant of such a lien may, but need not, confer priority on that lien over pre-existing property and security interests in the property subject to the lien. In that sense, such liens are a means of coercing payment, rather than a security against payment not being made: C. Harpum, M. Grant and S. Bridge, Megarry and Wade: The Law of Real Property, 6th ed. (London: Sweet & Maxwell Ltd., 2000) at para. 19-002. See also Bristol Airport at pp. 759-60 Ch., per Sir Nicolas Browne-Wilkinson V.-C.

[154] The Authorities cite the decision of this court in Leavere v. Port Colborne (City) (1995), 22 O.R. (3d) 44, 122 D.L.R. (4th) 200 as an example of circumstances in which a possessory lien was held to confer priority in respect of the property subject to the lien. In [page56]my view, however, Leavere does not assist the Authorities. In that case, it was held that the claimed liens arose by operation of law when the lien claimants took possession of the chattels in the exercise of a statutory power to distrain. Once that occurred, the lien that arose upon the exercise of the distraint right took priority over pre-existing security interests. In contrast, in this case, even if the Detention Provisions create or contemplate a lien or a right in the nature of a right of distress, that right has not been recognized by the court or exercised by the Authorities. As NAV Canada acknowledged in its factum in the context of its assertion that it is entitled to a common law lien concerning the Aircraft, that alleged entitlement is contingent "upon an order being granted recognizing its seizure and detention ["rights"] and upon those rights being exercised" (emphasis added).

[155] As I have said, however, the Authorities have no "rights" concerning the Aircraft unless, and until, a seizure and detention order is granted by the court. The critical issue is whether, if remedies under the Detention

2004 CanLII 32169 (ON CA)

Provisions are granted, the rights thereby created rank in priority to the claims of the Lessors for repossession and recovery of the Aircraft.

[156] For the purpose of the disposition of this case, I am prepared to assume that the grant of a court order under the Detention Provisions and the exercise of the remedy thereby granted, brings into existence a possessory right to detain the Aircraft pending payment, that is, a possessory lien or a right in the nature of a possessory lien. In this case, no court order under the Detention Provisions was granted prior to the bankruptcies of the Canada 3000 Companies. Therefore, no possessory right in respect of the Aircraft was ever created. However, even if such a possessory right is created by the granting of a court order, it does not automatically follow that this right enjoys priority in the face of a claim for repossession and recovery of the Aircraft by the Lessors. See for example, British Columbia (Board of Industrial Relations) v. Avco Financial Services Realty Ltd., [1979] 2 S.C.R. 699, 98 D.L.R. (3d) 695 and Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182, 108 D.L.R. (3d) 257.

[157] In other words, even if the remedy envisaged by the Detention Provisions is granted by court order, thereby entitling the applicable authority to seize and detain aircraft that are the subject of the order, a claim by the legal titleholders to the detained aircraft may bring that detention right to an end. I believe that the contextual and purposive considerations applicable to the Detention Provisions establish that the seizure and detention remedies, if granted and exercised, do not create a right concerning the Aircraft ranking in priority to the interests [page57]of the Lessors in the Aircraft in the face of a claim by them for repossession and recovery of the Aircraft. Accordingly, I turn now to these contextual and purposive considerations.

(6) Contextual and purposive considerations

(a) Structure of the detention provisions

[158] The Detention Provisions clearly stipulate that

2004 CanLII 32169 (ON CA)

aircraft may be subject to a seizure and detention order. In that sense, the focus of the Detention Provisions is on aircraft, not on persons, and the remedies afforded thereunder are in rem remedies applicable to specific property. However, the Detention Provisions also provide that only certain types of aircraft may be subject to such an order, that is, aircraft "owned or operated by the person liable to pay the amount" claimed to be owing. In my view, the phrase "owned or operated", as it appears in the Detention Provisions, is integrally connected to the phrase "by the person liable to pay the amount" and both phrases must be read together in ascertaining the intended meaning and scope of the Detention Provisions. As well, some meaning must be attributed to each of the words or expressions used by Parliament. In addition, the entire scheme of the Detention Provisions must be examined. With respect to the Airports Act, ss. 9(1), (3) and (4) must be considered and, with respect to the CANSCA, ss. 56(1) and (3) must be understood in the context of s. 55.

[159] The Airport Authorities argue that ss. 9(1), (3) and (4) of the Airports Act, in combination, confer priority on the seizure and detention right of an authority that obtains an order under s. 9(1). They argue, in effect, that because ss. 9(3) and (4) authorize an authority that has seized an aircraft under s. 9(1) to detain that aircraft "unless the amount in respect of which the seizure was made is paid" or satisfactory security therefor is deposited with the authority and because s. 9(3) contains no language exempting the legal titleholder to a detained aircraft from the ambit of s. 9(3), the authority afforded under ss. 9(1), (3) and (4) implies the grant of priority over the interests of such legal titleholders. The same argument is open to NAV Canada based on the wording of ss. 56(1) and (3) of the CANSCA. The former provision states, in part, that a seizure and detention order granted under that provision permits NAV Canada to detain a seized aircraft "until the charge is paid" or satisfactory security therefor is deposited with NAV Canada. The provisions of s. 56(3)(a) and (b) of the CANSCA require the release of a detained aircraft, absent a court order to the contrary under s. 56(3)(c), only under those conditions. [page58]

2004 CanLII 32169 (ON CA)

[160] I am unable to accept this construction of the Detention Provisions. To accede to that submission would be to allow ss. 9(3) and (4), in the case of the Airports Act, to overtake the limitations applicable to a s. 9(1) order, arising from the language of s. 9(1) itself. Sections 9(3) and (4) are concerned with the release of detained aircraft, that is, the duration of the remedy under s. 9(1), not with the nature or priority of the remedy. Similarly, to accept this submission concerning s. 56(1) of the CANSCA would accord to the words "until the charge is paid" -- words importing a temporal element -- an override on the limitations applicable to a seizure and detention order arising from the words "owned or operated by the person liable to pay" the charge, as set out in s. 56(1). Sections 9(3) and (4) of the Airports Act and s. 56(3) of the CANSCA do not enlarge the meaning of s. 9(1) of the Airports Act and s. 56(1) of the CANSCA. Rather, the meaning and scope of the seizure and detention remedies derives from the language used to actually create the remedies, in contrast to the language which defines the duration of the remedies by providing for the release of detained aircraft on certain conditions.

(b) Decision in Inter-Canadien

[161] As I have said, the Detention Provisions contain no language regarding priorities among competing claimants to a detained aircraft; nor do they expressly reference third parties who hold legal title to, or a perfected security interest in, a detained aircraft. The Authorities submit that the absence of such language indicates Parliament's intention that the remedies under the Detention Provisions be interpreted so as to apply to such third parties. That submission is supported by the decision in Inter-Canadien, supra. The Authorities argue that the motions judge wrongly distinguished Inter-Canadien on the basis that it reflects the law of Quebec, as distinct from the law of Canada as established by federal legislation. I am not persuaded that Inter-Canadien is instructive in connection with the Detention Provisions or that the motions judge erred in declining to adopt its reasoning. I reach these conclusions for several reasons.

2004 CanLII 32169 (ON CA)

[162] First, while I agree with the Authorities that the legal character of the seizure and detention remedies under the Detention Provisions, which are created by federal legislation, cannot vary from province to province in Canada, the manner of their enforcement may vary according to provincial laws. In other words, in the exercise of seizure and detention remedies provided for under federal legislation, the Authorities are not exempt from [page59]the requirement to conform with provincial legislation governing the enforcement of creditors' rights.

[163] Second, in Inter-Canadien, the airport authorities argued that the Detention Provisions provide for a lien comparable to a common law right of distress. Justice Tremblay held, at para. 155 that "[T]he "right of detention exercised by the [airport authorities] . . . created a quasi-security on the aircraft . . . which resembles the 'right of distress' and is valid until the claims are paid" (translated). It seems to me, however, that security concerning indebtedness, or a security interest in property, either exists or it does not. The priority and enforceability of security are distinct from the existence of security.

[164] Third, the quoted holding in Inter-Canadien was grounded on the fact that the airport authorities in that case obtained court orders granting the remedies under the Detention Provisions and exercised those court-sanctioned remedies almost three and one-half months before the insolvency of the affected airline, thereby obtaining actual possession and control of the aircraft. After reviewing certain authorities concerning the nature of rights of distress, Tremblay J. commented in Inter-Canadien, at paras. 152-53:

> In the case at bar, the exercise of the right of detention was effected in December of 1999 when the plaintiffs applied to the Superior Court of the District of Montreal to obtain orders to seize and detain the aircraft.
>
> These judgments have the force of law and cannot be attacked indirectly.

(Translated and emphasis added)

2004 CanLII 32169 (ON CA)

[165] In addition, Tremblay J.'s analysis in Inter-Canadien of the lien claims of the applicable airport authorities was detailed under the heading: "Does the exercise of the right of detention create a lien?" (emphasis added). See also Tremblay J.'s comments, at paras. 50 and 61-63 concerning the exercise by the airport authorities of the detention remedies granted to them by the court.

[166] Accordingly, the key aspect of the Inter-Canadien case is the fact that the airport authorities in that case had successfully obtained and exercised court-sanctioned remedies under the Detention Provisions well in advance of the bankruptcy of the airline. They had created security in the aircraft, in fact and in law, prior to the bankruptcy events. Those facts stand in stark contrast to the facts of the case at bar.

[167] Fourth, in Quebec, Articles 1592 and 1593 of the Civil Code of Quebec, S.Q. 1991, c. 64 provide enforcement rights in favour of those persons who have a right of retention concerning property. As detailed in Inter-Canadien, under Article 1593, the [page60]right of retention in Quebec "may be set up against anyone" in respect of a retention right under Article 1592. Article 1592 is premised on the exercise of the retention right. It reads as follows:

> A party who, with the consent of the other party, has detention of property belonging to the latter has a right to retain it pending full payment of his claim against him, if the claim is exigible and is directly related to the property of which he has detention.

(Emphasis added)

As observed by Tremblay J., at para. 109 of Inter-Canadien, the right of retention under the Civil Code of Quebec is thus related to possession of the object itself. Thus, Inter-Canadien supports the conclusion that the rights created by the Detention Provisions do not transcend mere possibility until a court authorizes the exercise of the right and the

2004 CanLII 32169 (ON CA)

right in fact has been exercised.

[168] Finally, in Inter-Canadien, the court held, at paras. 124 and 126 in connection with the Detention Provisions, that the Airports Act and the CANSCA do not make "any distinction regarding ownership; the right relates to the aircraft which the defaulting party operates or operated" and that "the section ignores the concept of ownership of the aircraft and applies the right of detention to the item of property" (translated).

[169] The remedies under the Detention Provisions clearly apply to aircraft "owned" or "operated" by the person liable to pay outstanding airport or navigation charges. For that reason, as Canada 3000 and Royal operated the Aircraft and are liable for such outstanding charges, the seizure and detention remedies, if granted, are enforceable against them. I do not agree, however, that the Detention Provisions ignore the concept of ownership of aircraft, or fail to distinguish between owners and operators so as to confer priority on the interests of the Authorities in the Aircraft in the face of repossession and recovery claims by the legal titleholders to the Aircraft. The legislative history of the Detention Provisions, which I will consider next, is instructive in that regard.

(c) Legislative history of the detention provisions

[170] Sections 9 and 10 of the Airports Act were introduced by amendment to that Act several months after its original passage.16 Bill S-11, the legislative bill containing those amendments, was described in the House of Commons by the parliamentary secretary to the then Minister of Transport as a "fine-tuning bill": House of Commons Debates (18 June 1992) at [page61]12429 (Hon. Lee Richardson). The purpose of the amendments was described as being "to extend to airport authorities the same powers, procedure and detention of aircraft as currently exists in relation to major non-payment of fees": House of Commons Debates (18 June 1992) at 12431 (Hon. Lyle Kristiansen).

2004 CanLII 32169 (ON CA)

[171] As well, during review of Bill S-11 by the Standing Senate Committee on Transport and Communications, ss. 9 and 10 were said to be amendments to the Act negotiated with local airport authorities "to give [such authorities] substantially the same powers that subsections [4.5 and 4.6] of the Aeronautics Act give to the Minister of Transport in connection with the seizure and detention of aircraft" with the objective of providing such authorities with "leverage that they could exercise against the airlines in the event they had some difficulties collecting fees" (emphasis added): Proceedings of Standing Senate Committee on Transport and Communications (15 June 1992) at 23:41.

[172] A similar intent for s. 56(1) of the CANSCA is suggested by the legislative history of that Act. The record before this court indicates that the clause-by-clause analysis of the CANSCA presented to the Standing Senate Committee on Transport and Communications during its review of the CANSCA provided the following rationale for the s. 56 seizure and detention remedy:

> These powers of seizure are no greater than those enjoyed by the Minister under the Aeronautics Act, or those given to airport operators under the [Airports Act].

(Emphasis added)

[173] Thus, the legislative history of s. 9 of the Airports Act and of s. 56(1) of the CANSCA indicates that the drafters of the Detention Provisions intended to replicate in those provisions the same seizure and detention remedy which existed under the Aeronautics Act. Examination of the Detention Provisions in the context of the seizure and detention remedy under the Aeronautics Act favours the conclusion of the motions judge that the remedies under the Detention Provisions, if granted, do not confer a right ranking in priority to the interests of the Lessors in the Aircraft.

(d) Legislative context of the detention provisions

[174] The language of the Detention Provisions is

2004 CanLII 32169 (ON CA)

substantially identical to the language of s. 4.5(1) of the Aeronautics Act. Section 4.5(1) of the Aeronautics Act applies to "any aircraft owned or operated by the person" who owes the amount of any charge, and interest thereon, imposed under s. 4.4 of that Act (emphasis added). [page62]The corresponding language of the Detention Provisions refers to "any aircraft owned or operated by the person liable to pay" the unpaid amount or charges in respect of which the seizure and detention order is sought (emphasis added).

[175] The words "owned", "owner", "ownership", "operator" and "operated" are not defined under the Airports Act. Section 9(5) of the Airports Act, however, provides that words used in ss. 9 and 10 of that Act have the same meaning as in the Aeronautics Act. I have previously indicated in these reasons, in connection with s. 55 of the CANSCA, that the word "owner[s]" has a special and settled meaning in the aviation context, namely, persons having legal custody and control or who are otherwise in possession of an aircraft. That meaning is confirmed in the instance of s. 9 of the Airports Act by the combined effect of s. 9(5), which incorporates by reference into the Airports Act the interpretation provisions of the Aeronautics Act, and s. 3(1) of the Aeronautics Act, which confines the term "registered owner" to persons having legal custody and control of an aircraft. As I have said, that definition of "registered owner" was introduced to the Aeronautics Act expressly to avoid an interpretation of "owner" which would extend to the legal owners of aircraft, and to limit liability under that Act to those persons who actually have control of aircraft.

[176] The legislative history of the s. 3(1) definition of "registered owner" and of s. 4.4(5) of the Aeronautics Act, as previously described in these reasons, confirms that Parliament expressly considered, and rejected, the possible application of the concept of "owner" under the Aeronautics Act to the financiers of aircraft. There is nothing in the legislative history of s. 4.5(1) of the Aeronautics Act that suggests that the concept of "owner" under that provision was intended to have a different, or larger, meaning. In addition, on the record before this court, there is no suggestion that

2004 CanLII 32169 (ON CA)

the seizure and detention remedy under s. 4.5(1) of the Aeronautics Act was ever exercised, or sought to be exercised, against the legal titleholders to aircraft as opposed to airlines who defaulted in payment of outstanding airport charges.

[177] The legislative context of s. 9 of the Airports Act, which is linked to the Aeronautics Act, therefore compels the conclusion urged by the Lessors, that is, that the words "owned or operated by the person liable to pay" in s. 9 merely ensure that both persons with legal custody and control of aircraft (the "owners") and persons otherwise in possession of the aircraft (the "operators") fall within the ambit of s. 9. Those persons are the parties who actually use airport facilities and airport services, thereby incurring charges for those services. [page63]

[178] I reach the same conclusion concerning the meaning of the words "owned or operated by the person liable to pay", in s. 56 of the CANSCA. I have earlier concluded that the word "owner[s]" under s. 55 of the CANSCA refers to those persons in possession of aircraft and persons having legal custody and control of aircraft. Words appearing in the same enactment bear the same meaning throughout the enactment unless a contrary intention is clearly expressed: the Interpretation Act, R.S.C. 1985, c. I-21, s. 15. See also Sullivan, supra, at pp. 162-63. No such contrary intention appears in the CANSCA in relation to s. 56.

[179] Moreover, as argued by NAV Canada, ss. 55 and 56 of the CANSCA must be read together and the meaning of "owner" under s. 55 informs the meaning and scope of s. 56. I have concluded that Parliament did not intend to fix liability under s. 55 of the CANSCA for unpaid navigation charges on the legal titleholders to aircraft. If, therefore, legal titleholders are not directly liable under s. 55 for unpaid navigation charges, in my view it cannot reasonably be said that Parliament intended to impose such liability indirectly, under s. 56, by effectively requiring the legal titleholders to aircraft to pay outstanding navigation charges or to post satisfactory security therefor as a prerequisite to enforcing their rights to

2004 CanLII 32169 (ON CA)

repossess and recover an aircraft. I agree with the motions judge that s. 56 is not intended to have that result.

[180] Finally, I have also concluded that Parliament did not intend to effect, under s. 55(1) of the CANSCA, a fundamental change to the scope of the joint and several liability provision contained in s. 4.4(5) of the Aeronautics Act. Similar reasoning applies concerning the scope of the Detention Provisions. There is no indication in the Airports Act or the CANSCA that Parliament intended, under the Detention Provisions, to enlarge the scope of the seizure and detention remedy contained in s. 4.5(1) of the Aeronautics Act. Indeed, the legislative history and context of the Detention Provisions suggests precisely the opposite.

(e) Purposes of the detention provisions, the Airports Act and the CANSCA

[181] In his reasons for the May 7, 2002 Order, the motions judge indicated, at para. 73 that the Detention Provisions are "intended to provide protection to the [Authorities] for collection of amounts owing to them". I would express the purpose of the Detention Provisions this way: they are intended to facilitate the collection of unpaid airport and navigation charges by providing a pre- and post-judgment means of preventing the removal of aircraft from the jurisdiction by the persons who are capable of [page64]effecting their prompt removal and who are liable to pay those outstanding charges.

[182] The remedies under the Detention Provisions are expressed to be "in addition to" any other remedy "available for the collection of the amount" in issue. They are available both before and after any judgment has been obtained "for the collection of the amount" owed. Thus, the remedies under the Detention Provisions, if granted, entitle the Authorities, as the detaining creditors, to restrain the use and operation of aircraft and, hence, the removal of aircraft from the jurisdiction, prior to demonstration of entitlement to the debt alleged to be owing. This is a powerful and extraordinary collection tool. I agree with the motions judge that, in these respects, the Detention Provisions enjoy some, although not

2004 CanLII 32169 (ON CA)

all, of the attributes of a Mareva injunction.

[183] Aircraft are highly mobile assets. As observed in Bristol Airport, supra, at p. 764 Ch., once an aircraft leaves an airport, it may "have left the jurisdiction, never to return and be beyond the reach of any order of the court". Alternatively, if the aircraft does return, it may not return to the same airport. See also Edmonton Regional Airports Authority, supra, at paras. 56 and 107. The Detention Provisions are directed to that mischief.

[184] In that context, I agree with the motions judge that the Detention Provisions are intended "to provide protection" for the collection of unpaid airport and navigation charges. However, they are not intended to immunize the Authorities from the financial losses attendant upon the inability to recover outstanding charges in full. The Authorities are unsecured creditors. Upon the grant of a court order under the Detention Provisions, they enjoy a collection remedy not available to other ordinary unsecured creditors. That remedy is in addition to, rather than in substitution for, usual collection remedies. It is not a guarantee of the payment of unpaid charges. Accordingly, it cannot be concluded that achievement of the purpose of the Detention Provisions requires the assignment of priority to the seizure and detention claims of the Authorities over the interests of the legal titleholders to the Aircraft when a claim for repossession and recovery of the Aircraft is advanced by the titleholders.

[185] I have previously discussed in these reasons the purposes of both the Airports Act and the CANSCA. The purpose of the Airports Act, as I have said, is to provide for the transfer of certain airports previously operated by the federal government to designated local airport authorities, with the object of effecting a transfer of responsibility for the management and operation of those facilities to those authorities. Similarly, the purpose of the CANSCA is to effect the transfer of responsibility for the day-to-day operation [page65]and management of Canada's civil air navigation system from the Government of Canada to NAV Canada. The overall purposes of the Airports Act and the CANSCA are not centred on

2004 CanLII 32169 (ON CA)

the collection of charges for services rendered. The right to impose charges and the authority to collect them form only part of the schemes of the Airports Act and the CANSCA. The purposes of those enactments are not undermined by an interpretation of the Detention Provisions which permits enforcement of the remedies thereunder against those persons who are directly liable for unpaid charges as, for example, a defaulting airline, but which precludes such enforcement in priority to the interests of the legal titleholders to aircraft.

(f) Commercial efficacy

[186] The Authorities argue that an interpretation of the Detention Provisions that denies priority to their interests in the Aircraft over the interests of the Lessors renders the seizure and detention remedies "useless" or "meaningless" and devoid of commercial sense, because it fails to accord meaning both to the word "owner" and the word "operator". They submit that, under this interpretation, all that airlines need do to defeat the seizure and detention remedies is to lease their aircraft from third parties, as occurred in this case. They assert, therefore, that to give meaning to the word "operator" in the Detention Provisions, priority must be recognized for the seizure and detention right created upon grant by the court of the seizure and detention remedy.

[187] Contrary to this submission, it is my view that the remedies under the Detention Provisions are efficacious under the interpretation of those provisions which I have outlined. In this case, all of the Aircraft were registered in Canada 3000's name. Canada 3000 leased the Aircraft from the Lessors. It used some of the Aircraft, and made available other Aircraft to Royal for its use. Consequently, with respect to the Aircraft used by Royal, Canada 3000 was the "owner" and Royal was the "operator" of the Aircraft. In respect of the Aircraft used by Canada 3000, it was both the "owner" and the "operator" of the Aircraft. In those circumstances, the remedies under the Detention Provisions are potentially available as against both the "owner" and the "operator" of the Aircraft. Thus, the remedies are enforceable against the persons liable to pay the outstanding airport or navigation charges, that is, the persons

2004 CanLII 32169 (ON CA)

having legal custody and control or who are otherwise in actual possession of the Aircraft.

[188] If seizure and detention orders are granted, enforcement of the remedies permits the Authorities to ground aircraft, thereby preventing their removal from the jurisdiction prior to [page66]the determination of a claim for payment of the debt alleged to be owing; to prevent airlines from earning revenue, thereby potentially triggering airline operating losses; to disrupt air travel; and, potentially, to cause airlines to go into default under their leasing arrangements with third party lessors, thus raising the risk of the permanent loss to them of use of the aircraft. Those realities give considerable commercial vitality to the seizure and detention remedies, through which the Authorities can compel payment of charges owed from the parties who incurred them and who are liable to pay them.

[189] Finally, the outlined interpretation of the reach of the Detention Provisions ensures that a harmonious, coherent and consistent interpretation of the concepts of "owner" and "operator" is afforded to each of the Airports Act, the CANSCA and the Aeronautics Act, in accordance with the principles outlined in Bell ExpressVu, supra, and Ulybel Enterprises, supra. That result recognizes the inter-related relationship of those statutes and their associated positions in Canada's wider legislative framework for the regulation of aeronautics.

(7) Conclusion concerning the seizure and detention claims

[190] I conclude that the remedies under the Detention Provisions, if granted, do not create rights in the Aircraft that rank in priority to the interests in the Aircraft of the Lessors, the legal titleholders to the Aircraft, in the face of a claim for repossession and recovery of the Aircraft by the Lessors. Consequently, they do not preclude the exercise by the Lessors of their contractual rights to repossess and recover the Aircraft consequent upon the termination of the Aircraft leases. The Detention Provisions are intended to apply to aircraft of persons having legal custody and control or who are

2004 CanLII 32169 (ON CA)

otherwise in possession of the aircraft. They do not confer priority over the interests in detained aircraft of the legal titleholders to such aircraft. That intended meaning is unambiguously established by the language, legislative history, legislative context and purpose of the Detention Provisions.

[191] I reach the same conclusion regarding the Authorities' seizure and detention claims against the Engine Lessors, RRPF Engine Leasing Limited and Flight Logistics Inc. Those respondents leased to Canada 3000 the engines attached to two of the Aircraft. The motions judge held that even if the Authorities enjoy seizure and detention rights that rank in priority to the interests of the Lessors in the Aircraft, those rights do not have priority over the interests of the Engine Lessors in the leased engines. He held that the Engine Lessors are not the owners or [page67]the operators of the Aircraft; nor are they persons liable to pay the unpaid airport or navigation charges claimed by the Authorities. I agree.

(8) Other issues concerning the seizure and detention claims

[192] Something should also be said briefly about four other matters concerning the seizure and detention claims. First, in view of my conclusion regarding the Authorities' claim to priority over the interests of the Lessors in the Aircraft, the motions judge's use of principles of strict construction in his analysis of the Detention Provisions does not affect the result in this case. However, if I am wrong in my conclusion that the meaning of the Detention Provisions is not ambiguous, the principles of strict construction relied upon by the motions judge are engaged. As argued by the Lessors, those principles establish a presumption against interference with or limitation of private property rights absent a clear and unambiguous declaration of Parliamentary intention to do so: see Phoenix Assurance Co. of Canada v. Bird Construction Co. Ltd., [1984] 2 S.C.R. 199, 11 D.L.R. (4th) 1, at pp. 225-28 S.C.R., pp. 20-21 D.L.R.; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385, at para. 39; Morguard Properties, supra, at pp. 508-09 S.C.R.; Avco Financial Services Realty Ltd., supra, at p. 706 S.C.R.; Pacific National

2004 CanLII 32169 (ON CA)

Investments Ltd. v. Victoria (City), [2000] 2 S.C.R. 919, 193 D.L.R. (4th) 385, at para. 26; First Vancouver Finance v. Canada (Minister of National Revenue), [2002] 2 S.C.R. 720, 212 D.L.R. (4th) 615, at paras. 32-35; and Sullivan, supra, at pp. 400-03. The Detention Provisions do not evidence such an intention.

[193] Second, the Authorities argue that the motions judge erred in his interpretation of the Airports Act and the CANSCA by failing to have regard to policy considerations supportive of a liberal interpretation of the Detention Provisions. They maintained before the motions judge that they are involuntary creditors of the Canada 3000 Companies and that, having regard to their statutory mandates, their interests should be preferred to those of the Lessors, sophisticated private sector financial institutions. The motions judge declined to consider such factors in interpreting the Detention Provisions. I do not think that he was wrong to take that view.

[194] In oral argument before this court, the Authorities did not press their assertion of this alleged error by the motions judge. The motions judge recognized that the Authorities may be prevented by the bankruptcies of the Canada 3000 Companies from collecting in full the unpaid navigation and airport charges owed to them. His task, however, was to interpret the statutory [page68]provisions at issue in accordance with the contextual and purposive considerations applicable to their analysis. Policy considerations concerning the respective economic positions of the parties cannot control the meaning of the words which Parliament elected to use. Any enlargement of the meaning or reach of the relevant sections of the Airports Act and the CANSCA is a function for Parliament.

[195] Third, in my view, the motions judge was right to reject the submission by some of the Lessors that the Aircraft are exempt from an order under the Detention Provisions by virtue of s. 10 of the Airports Act and s. 57 of the CANSCA. As held by the motions judge, execution does not apply, in the first instance, to the property of a third party. Execution by a creditor is only available concerning property that belongs to the debtor. In this case, after the granting of the CCAA

2004 CanLII 32169 (ON CA)

Order and the occurrence of the bankruptcies, the Aircraft leases terminated and the Canada 3000 Companies ceased to have any interest in the Aircraft susceptible to execution. Accordingly, no "exemption" from execution is necessary and the statutory exemption provisions have no application.

[196] Finally, it is important to observe that, of course, it is open to Parliament to provide, by clear and explicit statutory language, that the aircraft seizure and detention remedies under the Airports Act and the CANSCA are available notwithstanding, and in priority to, pre-existing property rights, including those of persons who hold legal title to aircraft.

D. Subsidiary Issues

(1) Interest claims

[197] The issue of interest claims only arises if the Authorities are successful in the main appeals, that is, if it is determined that they enjoy rights under the Detention Provisions or, in the case of NAV Canada, under s. 55 of the CANSCA, that are enforceable against the Lessors. Accordingly, on the view that I hold of the Authorities' claims under the Detention Provisions and of NAV Canada's claim under s. 55 of the CANSCA, the issues concerning entitlement to interest and the accrual period for such interest need not be determined.

(2) Detention costs

[198] As I have stated previously, in the Release Protocols Order, the motions judge directed the parties to bear their own costs of compliance with the release protocols regardless of the ultimate disposition of the seizure and detention motions. The [page69]Lessors appeal that aspect of the Release Protocols Order, claiming that the Authorities are liable for the Lessors' costs in connection with "the detention, care, maintenance, storage and/or preservation of aircraft . . . including costs of posting security", and consequential damages. Although a second group of Lessors, in their Notice of Appeal, appealed the Release Protocols Order in connection with

2004 CanLII 32169 (ON CA)

the costs of posting security and the form of security, that issue was not advanced in their written or oral submissions before this court.

[199] In his May 7, 2002 Order, however, the motions judge ordered the Authorities to reimburse the Lessors for their Detention Costs. The Authorities challenge that reimbursement order on three main grounds. First, they assert that the motions judge lacked jurisdiction to order such reimbursement because he had already adjudicated on the issue in his reasons for the Release Protocols Order and, in addition, he failed to receive further submissions on the issue during the proceedings which led to the May 7, 2002 Order. Second, the Authorities submit that the reimbursement order cannot stand because the motions judge failed to provide any reasons therefor. Third, the Authorities maintain that if the reimbursement order is upheld, certain Lessors will realize an unanticipated and improper windfall.

[200] I do not agree that the motions judge lacked jurisdiction to order reimbursement by the Authorities of the Lessors' Detention Costs. The purpose of the release protocols, as approved under the Release Protocols Order, was to facilitate the release of the Aircraft to the Lessors upon provision of security for the charges allegedly owing to the Authorities, prior to the final determination of the seizure and detention motions and the Lessors' cross-motions. The Release Protocols Order was an interim relief order pending final determination of the various and competing claims of the parties. It was not intended to, nor did it, finally determine the issues in dispute.

[201] That the Release Protocols Order was not a final adjudication of the issues in dispute is established by the terms of the release protocols themselves. Each release protocol specifically provided that:

> The release of the Aircraft, and the posting of the Security by the Lessors and the acceptance thereof by the [Authorities] shall be without prejudice to any point of fact or law or any position that any of the Lessors or the

2004 CanLII 32169 (ON CA)

[Authorities] may wish to bring forward in the Seizure Motions and any subsequent appeals.

This clause was broadly cast. On its face, it preserved the right of the Lessors to advance claims for reimbursement of their Detention Costs and the Authorities' right to contest such claims. [page70]

[202] As well, the motions judge referred to the Release Protocols Order as a "compromise procedure". He rejected a proposal by the Lessors that the release protocols include a term holding the Authorities liable for the costs of posting security in the event that the Authorities ultimately were unsuccessful on their seizure and detention motions. In addition, he declined to accept the Lessors' submission, in the proceedings leading to the Release Protocols Order, that the Authorities be required to provide an undertaking in damages as a condition of proceeding with their seizure and detention motions.

[203] In those circumstances, the motions judge's direction in the Release Protocols Order that each party bear its own costs of compliance with the release protocols regardless of the ultimate disposition of the seizure motions is difficult to reconcile with the overall interim nature of the release protocols and the Release Protocols Order, and with the preservation of rights clause contained in each release protocol.

[204] In any event, the motions judge had jurisdiction, in his discretion, to revisit the issue of reimbursement of the Detention Costs, as fairness and the circumstances of the BIA proceedings might require. As the Authorities acknowledge, the exercise of a judge's discretion in such proceedings does not easily attract appellate interference: Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, 39 C.B.R. (4th) 5 (C.A.).

[205] Several other factors are also relevant to the motions judge's rulings concerning reimbursement of the Detention Costs. First, although the Lessors' specifically claimed

2004 CanLII 32169 (ON CA)

reimbursement of the Detention Costs in their cross-motions before the motions judge, after the motions judge's reasons for the Release Protocols Order were released certain of the major participants in this case entered into correspondence which contemplated that only "main issues of principle" would be dealt with on the hearing dates reserved for argument of the seizure and detention motions and the Lessors' cross-motions. Counsel intended that "subsidiary" issues would be addressed thereafter, as necessary. The Lessors did not suggest that reimbursement of the Detention Costs or the revisiting of the direction in the Release Protocols Order concerning the Detention Costs should be included as "main issue[s] of principle".

[206] Accordingly, in light of the direction in the Release Protocols Order regarding the reimbursement issue and the subsequent correspondence among counsel, the potential for misunderstanding existed. At a minimum, there is a basis to conclude that the parties were not "on the same page" concerning this issue. I also note that in his reasons for the May 7, 2002 [page71]Order, the motions judge did not include reimbursement of the Detention Costs in his list of the issues raised for determination, although he ultimately dealt with the matter in his reasons.

[207] Second, only parts of some of the facta filed with the motions judge on the seizure and detention motions and the Lessors' cross-motions form part of the record in these proceedings. As a result, this court is not in a position to determine whether the Lessors pressed their reimbursement claims before the motions judge in the proceedings after the date of the Release Protocols Order. The Authorities assert that no oral submissions were made on this issue during those proceedings.

[208] The Lessors' reimbursement claims are cast in the widest possible terms. For example, in the factum filed with this court by some of the Lessors on their appeal from the Release Protocols Order, these Lessors seek recovery in damages of "an amount equal to the costs of posting security and costs of interim maintenance, as well as all direct, indirect and

2004 CanLII 32169 (ON CA)

consequential damages caused to, or suffered by, the Lessors as a result of not being permitted to recover possession or control of its [sic] aircraft pending the determination of the [Authorities'] seizure and detention claims." It appears that substantially the same claim was advanced before the motions judge. In the face of such an open-ended claim of unspecified magnitude, it is difficult to conceive that no response would have been forthcoming from the Authorities before the motions judge had they clearly understood that the issue remained or was again in play.

[209] Finally, in the absence of reasons from the motions judge for the reimbursement ruling in the May 7, 2002 Order, this court cannot ascertain with certainty the nature or quantum of the amounts in issue or the basis for the motions judge's reconsideration of his earlier ruling concerning the Detention Costs.

[210] For those reasons, I conclude that fairness to the parties and the need to provide a proper basis for appellate review, if necessary, require a new hearing on this issue.

(3) Admissibility of the Gray affidavits

[211] In oral argument before this court, NAV Canada did not press its assertion that the redacted versions of the Gray Affidavits were inadmissible and that the motions judge erred in his assignment of weight to them. As some of the parties addressed these issues in their facta, however, I will comment on them briefly.

[212] The Gray Affidavits contained evidence concerning the legislative history of the CANSCA and the Airports Act. As argued by the Lessors, most statements originally set out in the [page72]Gray Affidavits concerning Canadian domestic law were deleted from the redacted versions admitted by the motions judge. In his reasons for the May 7, 2002 Order, the motions judge ruled, at para. 20, that the redacted Gray Affidavits were admissible "to the extent that they set forth the legislative history leading up to the enactment of the Airports Act and the [CANSCA]" (emphasis added). The motions judge

2004 CanLII 32169 (ON CA)

correctly recognized, and the Authorities concede, that legislative history is admissible as an aid to statutory interpretation. Indeed, in my view, the legislative history of the enactments in issue and of the challenged statutory provisions was admissible without the necessity of sworn affidavit evidence.

[213] The motions judge expressly indicated that he was assigning little weight to those parts of the redacted Gray Affidavits that contained references to the statements of various persons within government and the airlines industry concerning the intention of Parliament in enacting the legislation at issue. He also admitted an affidavit tendered by NAV Canada in response to the first Gray Affidavit.

[214] The use of the redacted Gray Affidavits by the motions judge was thus limited and confined to consideration of the legislative history of the Airports Act and the CANSCA. Further, the Authorities were provided with an opportunity to respond to the Gray Affidavits. The issue of Parliament's intention in enacting ss. 9 and 10 of the Airports Act and ss. 55 and 56 of the CANSCA was fully argued by the parties before the motions judge. In those circumstances, in my view, the motions judge did not err in his admission or use of the redacted Gray Affidavits.

(4) Costs of the proceedings before the motions judge

[215] The Lessors submit that the motions judge erred by failing to award them their costs of the proceedings before him. They rely on the general rule that costs follow the event absent special circumstances. They also assert that the matters considered by the motions judge did not raise novel issues of law, but that even if they did this was insufficient to warrant a departure from the general costs recovery rule. As well, the Lessors submit that any public interest justification for denying them their costs should not apply where a party is seeking to protect its commercial interests.

[216] The Lessors do not dispute that a judge has a wide discretion concerning the awarding of costs in civil

2004 CanLII 32169 (ON CA)

proceedings. Appellate courts are loathe to interfere with a judge's exercise of discretion concerning costs and will only do so in very limited circumstances: Bell Canada v. Olympia & York Developments Ltd. (1994), 17 O.R. (3d) 135, 111 D.L.R. (4th) 589 (C.A.), at pp. 141-42 O.R.; [page73]Canadian Pacific Ltd. v. Matsqui Indian Band Council, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, at p. 32 S.C.R.; and Mete v. Guardian Insurance Co. of Canada (1998), 165 D.L.R. (4th) 457, 37 M.V.R. (3d) 44 (Ont. C.A.), at paras. 15-16.

[217] The motions judge's reasons in support of his costs disposition were released on July 24, 2002. They indicate that he considered all of the circumstances of the proceedings before him, including the public interest, certain rulings made in favour of the Authorities as distinct from the Lessors, and the novelty of the issues raised. Contrary to the Lessors' submission before this court, a motion need not "forge a new legal principle" to raise a novel issue of law: Ortiz v. Dominion of Canada General Insurance Co. (2001), 52 O.R. (3d) 130, 196 D.L.R. (4th) 732 (C.A.), at para. 14.

[218] This case raised important issues of interpretation concerning the CANSCA and the Airports Act not previously considered by an Ontario court and, at the time of the proceedings before the motions judge, addressed in only one previously reported decision of another Canadian court. In addition, the demise of the Canada 3000 Companies gave rise to issues of broad public interest, as well as matters relating to the commercial rights of the parties. I agree with the motions judge's observation in his reasons concerning costs: "There is also . . . an element of public interest in having the seizure rights of the Authorities, which impact upon the traveling public and the travel industry in Canada, being judicially scrutinized." As well, the motions judge found that the Authorities acted reasonably in bringing their motions. The Lessors have not demonstrated that the motions judge's costs decision was unreasonable. Accordingly, in my view, there is no basis on which to interfere with his costs disposition.

V. DISPOSITION

2004 CanLII 32169 (ON CA)

[219] In summary, for the reasons given, I conclude that:

(i) the motions judge correctly held that the Lessors are not liable to NAV Canada under s. 55 of the CANSCA for unpaid navigation charges;

(ii) the motions judge also correctly held that the remedies under the Detention Provisions, if granted to the Authorities, do not create rights in the Aircraft which rank in priority to the Lessors' interests in the Aircraft, and to the Engine Lessors' interests in the engines attached to the Aircraft, in the face of claims by the Lessors and the Engine Lessors for repossession and recovery of the Aircraft and the engines; [page74]

(iii) that part of the Release Protocols Order concerning reimbursement of the Detention Costs and that part of the May 7, 2002 Order requiring the Authorities to reimburse the Lessors for their Detention Costs cannot stand and a new hearing is required on this issue;

(iv) the redacted versions of the Gray Affidavits were admissible and the motions judge did not err in his assignment of weight to them;

(v) there is no basis on which to interfere with the motions judge's costs disposition in the proceedings before him; and

(vi) it is unnecessary to determine the other subsidiary issues arising in these proceedings.

[220] Accordingly, I would allow that part of the Authorities' main appeals from the May 7, 2002 Order and the Lessors' appeals from the Release Protocols Order concerning reimbursement of the Lessors' Detention Costs, set aside para. 8 of the May 7, 2002 Order, and direct a new hearing before the motions judge on that issue. I would dismiss the Authorities' appeals from the May 7, 2002 Order in all other respects. I would also grant leave to the Lessors to cross-appeal from the motions judge's disposition of costs in the proceedings before

2004 CanLII 32169 (ON CA)

him and dismiss the entirety of their cross-appeals.

[221] As agreed by the Authorities and the Engine Lessor, RRPF Engine Leasing Limited, as between those parties, there shall be no award of costs in these proceedings. As between the Authorities, the Lessors and the remaining Engine Lessor, Flight Logistics Inc., the Lessors and that Engine Lessor shall deliver their written submissions concerning the costs of the proceedings before this court within two weeks from the date hereof, the Authorities shall deliver their responding costs submissions in writing within two weeks thereafter, and the Lessors and Flight Logistics Inc. shall deliver their written reply submissions concerning costs, if any, within one week from the date of their receipt of the Authorities' written submissions.

[222] JURIANSZ J. (ad hoc) (dissenting in part): -- I am in general agreement with the reasons of Cronk J.A., except for her interpretation of the Detention Provisions. Her comprehensive and thoughtful reasons enable me to state my own briefly. I adopt her review of the facts, the proceedings, and the positions of the parties and I employ the abbreviations and the nomenclature that she used. As she did, I will refer to the Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 [page75]as the "Airports Act", the Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20 as the "CANSCA", the seizure and detention provisions concerning aircraft under s. 9 of the Airports Act and s. 56 of the CANSCA as the "Detention Provisions", the Airport Authorities and NAV Canada collectively as the "Authorities", and the respondents to the main appeals as the "Lessors".

ANALYSIS

[223] The Lessors submitted that the Detention Provisions should be strictly construed as there is a presumption against interference with pre-existing property rights without express statutory language.

[224] The strict or liberal construction doctrine has been the subject of some criticism in recent years. Professor Ruth

2004 CanLII 32169 (ON CA)

Sullivan in Statutory Interpretation (Concord, Ontario: Irwin Law, 1997) observes, at pp. 168-69:

> Since most legislation both interferes with some persons and benefits others, there is often no basis for the distinction other than the preferences of the classifying court. If the court values the social policies served by the Legislature more than the rights interfered with, the legislation will attract a liberal construction; otherwise not.

[225] As a result, Prof. Sullivan says, on p. 169, strict construction tends to place the courts in an adversarial relationship with the legislature, diverting them from trying to implement the legislature's goals as fully as possible, as the courts focus "on reasons to limit the scope and impact of the legislation".

[226] Professor Sullivan goes on to point out that while s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21 effectively abolishes the strict construction doctrine in principle by deeming every enactment remedial and requiring that it be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", in practice it has had little impact on how courts interpret legislation.

[227] Professor Sullivan observes at p. 169 that in recent years the courts tend to give more weight to the "benevolent goals of legislation" and the strict construction doctrine is treated as a rule of last resort "used only for the purpose of resolving any doubt or ambiguity remaining after the court has explored all the other ways of establishing legislative intent".

[228] As Cronk J.A. points out, it is now accepted that the strict construction approach should be applied only where there is some ambiguity in the statutory provision being interpreted. I [page76]agree with her that the words of the Detention Provisions are clear and unambiguous. Consequently, they should not be strictly construed in order to avoid interference with pre-existing property interests.

2004 CanLII 32169 (ON CA)

[229] Even if there were ambiguity in the Detention Provisions, my view is that resort to strict construction would be inappropriate in this case. The Lessors' property rights in the aircraft should not be regarded as those of uninvolved third party strangers to the outstanding charges of the Authorities. They leased their aircraft to the Canada 3000 Companies to be flown using the air navigation services provided by NAV Canada, and to use the airport facilities and services provided by the Airport Authorities. The outstanding charges are not general debts of the Canada 3000 Companies, but those debts incurred by the use of the Lessors' aircraft just as the Lessors contemplated and expressly authorized. None of the strict construction authorities cited by the Lessors, on my reading, deals with the situation where the debts sought to be charged against private property were incurred by the use of that property as authorized by the owner.

[230] In argument, the Lessors suggested that Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385 was such a case. In Sparrow, the Royal Bank had a general security agreement covering all of Sparrow's present and after acquired property, and an assignment of inventory under the Bank Act. The outstanding amounts sought to be charged against the Bank's property interests were statutory deductions from the wages of Sparrow's employees. The Royal Bank had no connection to Sparrow's employees.

[231] This case is different because the Lessors are directly connected to the aircraft that were used to incur the charges. They are the legal owners and they authorized the use of their aircraft in the manner that incurred the outstanding charges.

[232] Many of the leases also provided for payment by the Canada 3000 Companies to the Lessors of substantial security deposits to secure performance under the leases, including redelivery of the aircraft, the obligation of Canada 3000 to pay navigation charges and airport fees, and to indemnify the Lessors in the event of the seizure of aircraft for nonpayment of navigation charges or airport fees. (Affidavits of Felice Zalcberg sworn December 14, 2001). This clearly shows the

2004 CanLII 32169 (ON CA)

Lessors appreciated that the use they authorized of their property would incur such charges, and that such charges, if left unpaid, could result in the seizure of their property.

[233] As I stated I consider the meaning of the Detention Provisions to be clear and unambiguous. The view I take leads to a [page77]different result than reached by Cronk J.A. I repeat the Detention Provisions for the convenience of the reader:

The Airports Act, s. 9:

> 9(1) Where the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon, set by a designated airport authority in respect of an airport operated by the authority has not been paid, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person liable to pay the amount is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.
>
> (2) Where the amount of any fees, charges and interest referred to in subsection (1) has not been paid and the designated airport authority has reason to believe that the person liable to pay the amount is about to leave Canada or take from Canada any aircraft owned or operated by the person, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on ex parte application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.
>
> (3) Subject to subsection (4), except where otherwise

2004 CanLII 32169 (ON CA)

directed by an order of a court, a designated airport authority is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.

(4) A designated airport authority shall release from detention an aircraft seized under subsection (1) or (2) if a bond, suretyship or other security in a form satisfactory to the authority for the amount in respect of which the aircraft was seized is deposited with the authority.

(5) Words and expressions used in this section and section 10 have the same meaning as in the Aeronautics Act.

The CANSCA, s. 56:

56(1) In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

(2) An application for an order referred to in subsection (1) may be made ex parte if the Corporation has reason to believe that the person liable to pay the charge is about to leave Canada or take from Canada any aircraft owned or operated by the person. [page78]

(3) The Corporation shall release from detention an aircraft seized under this section if

(a) the amount in respect of which the seizure was made is paid;

(b) a bond or other security in a form satisfactory to

2004 CanLII 32169 (ON CA)

the Corporation for the amount in respect of which the seizure was made is deposited with the Corporation; or

(c) an order of a court directs the Corporation to do so.

[234] Section 9(1) of the Airports Act and s. 56(1) of the CANSCA both allow an Authority to apply to the court to seize and detain "aircraft owned or operated by the person liable to pay". The phrase "owned or operated by the person liable to pay" serves to identify which aircraft may be seized and detained. The words "is situated" that follow the foregoing phrase refer back to "aircraft". Thus, the Detention Provisions focus on "aircraft" and not on "persons liable to pay". The remedy the Detention Provisions provide to the Authorities relates to aircraft, and not to the persons liable to pay the charges.

[235] Separate meaning must be attached to the word "seize" and the word "detain". The Concise Oxford Dictionary defines "seize" as "take possession of by warrant or legal right, confiscate, impound, attach". It defines "detain" as "keep in confinement or under restraint; keep waiting, delay".

[236] The Authorities (upon obtaining a court order) may take possession of aircraft and then keep the aircraft under restraint. The aircraft must be either "owned" or "operated" by a person who is liable to pay. Either is a sufficient basis for an application.

[237] I agree, for the reasons given by Cronk J.A., that the word "owned" refers to the person registered in the Canadian Civil Aircraft Register as the person having legal custody and control of the aircraft under the Aeronautics Act. I also agree with Cronk J.A. that the meaning of "operated" is traced back to the meaning of "operator" in the Canadian Aviation Regulations, SOR/96-433 made under the Aeronautics Act. There, "operator" is defined as "the person that has possession of the aircraft as owner, lessee or otherwise" (emphasis added).

2004 CanLII 32169 (ON CA)

[238] Since the Detention Provisions make operation by a lessee a sufficient basis for an application to seize and detain aircraft, they unquestionably contemplate seizure and detention of aircraft that are leased from lessors who hold legal title to the aircraft.

[239] Stated more broadly, the wording of the Detention Provisions makes apparent that aircraft may be seized and detained without regard to the property interests of persons who are neither the registered owners nor the operators of the [page79]aircraft under the legislation. As long as the aircraft is owned or operated by a person liable to pay the outstanding charges, it may be the subject of an application to seize and detain it. The fact that there may be other persons, who are not liable to pay the outstanding charges but have property interests in the aircraft, is of no consequence.

[240] Both the Airports Act and the CANSCA impose charges on persons who use the Authorities' services and the Authorities can resort to conventional remedies for the collection of those charges. Those remedies have no impact on the rights of persons who have property interests in the aircraft. However, the Detention Provisions are stated to provide remedies "in addition to any other remedy available for the collection" of the outstanding charges. The Detention Provisions clearly do have an impact on the rights of persons with property interests in the aircraft since they permit seizure and detention of aircraft operated by persons with bare possession. The question to be determined is the extent and duration of the interference with pre-existing property interests in the aircraft.

[241] The language that addresses the release of seized aircraft from detention is particularly telling. The only circumstances in which the Detention Provisions contemplate the release of aircraft seized from detention are that the outstanding charges are paid, security is deposited or the court so directs. Section 9(3) of the Airports Act states that, unless otherwise directed by a court, an airport authority "is not required to release from detention an aircraft . . . unless the amount in respect of which the seizure was made is paid". Section 56(1) of the CANSCA allows NAV Canada to detain seized

2004 CanLII 32169 (ON CA)

aircraft "until the charge is paid" or satisfactory security is deposited.

[242] Pointedly, there is no restriction on who might make the payment or deposit the security to obtain the release of the aircraft, and there is no exception or procedure provided to legal titleholders to claim and take possession of their aircraft.

[243] I see no basis upon which the property interests of lessors or other titleholders -- interests that are implicated by the words that provide for the seizure and detention of aircraft -- can be excluded from the purview of the words that provide for the release of the aircraft. In the CANSCA the words "until the charge is paid" are part of the very same sentence that provides for initial seizure and detention. The earlier words of the sentence fit together with the later words of the sentence to form one coherent whole. The words relating to seizure, to detention, and to the release of the aircraft share the same scope of application. Likewise, ss. 9(1) and 9(3) of the Airports Act are part of the same [page80]framework for the regulation of the seizure, detention, and release of aircraft and share the same scope of application. The CANSCA and the Airports Act, together with the Aeronautics Act, comprise a complete regulatory scheme of the aeronautics industry in Canada. This detailed comprehensive statutory framework does not initially engage the property interests of titleholders, and then wordlessly leave it to the courts to disengage those interests and release aircraft to titleholders in apparent conflict with the expressly stated statutory requirements for release.

[244] The Lessors point out that there are other federal statutes that provide the right to sell seized property and that the Detention Provisions do not. They also point out that similar British legislation, the Civil Aviation Act 1982 (U.K.), 1982, c. 16, affords United Kingdom airports the right to detain and sell detained aircraft if charges are not paid. The Lessors argue that in the absence of the right to sell the seized property, it cannot be concluded that the Detention Provisions create liens. The argument, if I

2004 CanLII 32169 (ON CA)

understand it correctly and may paraphrase it, is that since Parliament did not interfere with the titleholders' property rights by providing for the "detention and sale" of seized aircraft, it may be concluded that Parliament did not intend to interfere with their property rights by providing for the "detention" of seized aircraft.

[245] I do not regard other federal legislation as pertinent because the issue is not what Parliament might have provided, but what it in fact provided in these statutes. These are statutory remedies and I do not consider it necessary in construing them to attempt to fit them into a previously recognized class or category of property right. I see nothing in their terms to indicate an intention to assimilate pre-existing common law concepts. Their location in a detailed and complete regulatory scheme of inter-related statutes implies otherwise.

[246] While the Detention Provisions do not stipulate what occurs if outstanding charges are not paid after the seizure and detention of aircraft, they do endow the court with discretion to regulate the continued detention or release of the aircraft. In this case we are not presented with a fact situation where the court has made an order permitting seizure and detention, and a notable period of time has passed without payment of the outstanding charges. The applications before the motions judge did not seek the sale of the aircraft. In the case before this court, it is sufficient to say that the Detention Provisions permit the Authorities (on court order) to seize and detain and not release the aircraft until outstanding charges are paid or security provided.

[247] The British legislation highlights that interference with the property rights of financiers of aircraft is not exceptional in [page81]the international aviation industry. Section 88 of the Civil Aviation Act (1982) permits detention of aircraft, and failing payment of the outstanding charges within 56 days, the sale of the aircraft notwithstanding the property interests of titleholders who are not the persons who owe the outstanding charges. Like the Canadian provisions, s. 88 is silent on who might pay the outstanding charges. On a

2004 CanLII 32169 (ON CA)

practical level, Sir Nicolas Browne-Wilkinson V.-C. in Bristol Airport plc v. Powdrill, [1990] Ch. 744 (C.A.), at p. 756 Ch. observed that the "powers under the section provide a strong inducement to those ultimately interested in the aircraft to discharge the debts the airport charges, even though they have not incurred them". Facing the prospect of such "strong inducement" to pay the debts of others is a part of the commercial reality of financiers of aircraft that fly into the United Kingdom. Indeed, the British legislation applied to any aircraft of the Canada 3000 Companies that flew there.

[248] The Canadian Detention Provisions do not address any right to sell detained aircraft and hence have no reason to stipulate the priorities of distribution of the proceeds upon a sale. But the prospect that titleholders' aircraft in Canada may be seized, detained and not released until outstanding charges are paid is sufficient to furnish the titleholders with a strong inducement to pay the outstanding charges even though they have not incurred them.

[249] This reading of the Detention Provisions is entirely in keeping with their statutory context. Parliament took the day-to-day operation and management of civil air navigation services and of some airports "off the government books" by transferring them to self-funded, not-for-profit entities intended to be financially viable. These entities provide essential services of a public nature that are used for profit by those with business interests in the aviation industry. Consistent with the expectation that owners are ultimately responsible for the use of their property, Parliament supported the independent financial viability of the new entities by providing an additional remedy for the collection of unpaid charges, namely a "strong inducement" to titleholders of aircraft to pay or deposit security for outstanding charges incurred by the authorized use of their property.

[250] Given the high mobility and interchangeability of aircraft, it is understandable that the Detention Provisions do not connect a seized aircraft to the specific charges incurred in respect of that particular aircraft. However, the Detention Provisions vest the court with discretion to supervise the

2004 CanLII 32169 (ON CA)

detention and release of aircraft and thus ensure overall fairness.

[251] As I regard the words of the Detention Provisions to be unambiguous, I do not find resort to extrinsic evidence necessary [page82]in construing them. In any event, I do not regard Parliamentary proceedings as providing insight into the meaning of the Detention Provisions. As Cronk J.A. reviews, the Detention Provisions were presented to the House of Commons and to the Senate as replicating or being substantially the same as the powers of the Minister of Transport to seize and detain aircraft under the Aeronautics Act.

[252] I reproduce section 4.5 of the Aeronautics Act, R.S.C. 1985, c. A-2, in full, noting that we were not taken to it during the hearing of the appeal. Section 4.5 was in force at the time the Detention Provisions were before Parliament and remains in force:

> 4.5(1) Where the amount of any charge and interest thereon due by a person that has been imposed under section 4.4 has not been paid, the Minister may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court deems necessary, authorizing the Minister to seize and detain the aircraft.
>
> Idem
>
> (2) Where the amount of any charge and interest thereon due by a person that has been imposed under section 4.4 has not been paid and the Minister has reason to believe that the person is about to leave Canada or take from Canada any aircraft owned or operated by the person, the Minister may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on ex parte application to the superior court of the province in which

2004 CanLII 32169 (ON CA)

any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court deems necessary, authorizing the Minister to seize and detain the aircraft.

Release on payment

(3) Subject to subsection (4), except where otherwise directed by an order of a court, the Minister is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.

Release on security

(4) The Minister shall release from detention an aircraft seized under subsection (1) or (2) if a bond or other security in a form satisfactory to the Minister for the amount in respect of which the aircraft was seized is deposited with the Minister.

[253] As can be seen, the Minister may apply to the court for an order authorizing the seizure and detention of "any aircraft owned or operated" by a person who has not paid charges imposed under s. 4.4 of the Aeronautics Act. Unless the court directs otherwise, the Minister is not required to release from [page83]detention an aircraft that has been seized unless the amount in respect of which the seizure was made is paid.

[254] Certainly, the Detention Provisions are aptly described as substantially the same as the powers of the Minister under the Aeronautics Act. However, in the absence of any judicial interpretation of the Minister's powers under s. 4.5 of the Aeronautics Act, that description is of limited assistance in the construction of the Detention Provisions. It may be observed that the model for the Detention Provisions was designed as an additional remedy to assist the Crown to collect unpaid charges imposed for government provided services.

[255] For these reasons, I conclude that Authorities who have properly seized and detained aircraft under the Detention

2004 CanLII 32169 (ON CA)

Provisions do not have to release the aircraft, unless otherwise directed by the court, until their outstanding charges are paid or satisfactory security is deposited notwithstanding the property interests in the aircraft. The remedy is "in addition to any other remedy available for the collection" of the outstanding charges. The remedy is not confined to collection of outstanding charges from persons liable for the charges. The remedy is not directed to persons at all, but rather to "aircraft", and permits the Authorities, under court supervision, to seize, to detain and to refuse to release the aircraft until somebody has satisfied the outstanding charges.

[256] My conclusion that Authorities do not have to release seized aircraft until their outstanding charges are paid or satisfactory security is deposited, notwithstanding the property interests in the aircraft, applies to sublessors who have subleased aircraft to the registered owners or operators. The Ansett Lessors submitted in their factum that: "Canada 3000 was the undisputed operator and registered owner of all three aircraft it leased or subleased from the Ansett Lessors and those aircraft were in the exclusive possession and control of Canada 3000 at the time the charges were incurred and at the time Nav Canada brought its application". These admitted facts are sufficient to support an application to seize and detain the aircraft until all charges have been paid.

[257] The Engine Lessors submitted that an engine is a removable and identifiable object that does not form an integral part of the aircraft as it can be easily removed without damage to the aircraft. The Engine Lessors relied on s. 202.13 of the Canadian Aviation Regulations, SOR/96-433 ("CARS") that indicates a hang glider is considered to be an aircraft, to argue that an engine is not included within the meaning of "aircraft" in the statutory scheme. They argued that engines on aircraft are interchangeable like tires on a car. [page84]

[258] I do not find helpful the observation that a glider is an aircraft. Under the CARS a helicopter is also considered an aircraft, but one would not expect to hear the argument that

2004 CanLII 32169 (ON CA)

wings are not part of an aircraft. In point of fact, there are different classifications of aircraft under the CARS, one of which is "aeroplane". Section 101.01(1) of the CARS defines "aeroplane" as "a power-driven heavier-than-air aircraft that derives its lift in flight from aerodynamic reactions on surfaces that remain fixed during flight". It seems to me that the statutory scheme recognizes an engine as part of an aeroplane.

[259] The issue, as I see it, is whether the particular aircraft that is the subject of a seizure and detention application has engines. This case concerns aeroplanes, not gliders.

[260] I would find that a seizure and detention of aircraft authorized under the Detention Provisions would include any engines affixed to the airframes of such aircraft, and the Authorities would not have to release the engines until the outstanding charges were paid, unless so directed by the court.

[261] I would allow the appeals of NAV Canada and the Airport Authorities of the dismissal of their seizure and detention motions, and remit them to the motions judge to be dealt with according to the interpretation of the Detention Provisions set out in these reasons.

[262] I would also set aside the order of the motions judge that NAV Canada and the Airport Authorities reimburse the owner/Lessors for costs incurred in connection with the detention of the aircraft and the posting of security as it was premised on the dismissal of the applications of NAV Canada and the Airport Authorities based on what I regard as an incorrect interpretation of the Detention Provisions. I would remit this question to the motions judge to deal with when considering the applications afresh.

[263] I have not addressed argument of the Lessors, Gecas and Pegasus, that the Authorities' right to apply to the court for an order permitting them to seize and detain aircraft "owned or operated" by the Canada 3000 Companies terminated upon their bankruptcy, or the argument of the remaining Lessors that "As

2004 CanLII 32169 (ON CA)

of the Date of the Bankruptcy, all efforts to execute against or seize the property of Canada 3000 and Royal were superseded by the bankruptcy." These submissions presume that, as certain of the Lessors argued in their factum, the motions judge "erred in determining that the bankruptcy of Canada 3000 and Royal had no effect on the rights of NAV Canada and the Airport Authorities" and erred in determining that "the leases fell outside of the estate of the bankrupts." [page85]

[264] No appeal was taken, however, of these findings of the motions judge. The facts of the case before us are that the leases do not form part of the Bankrupts' estates, and that the Authorities' seizure and detention claims are not affected by the automatic stay provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Nor are the Authorities' applications affected by the stay order under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as that order was terminated on November 30, 2001 before the seizure and detention motions were argued.

[265] In this case the only statutory requirement for the Authorities' applications under the Detention Provisions is that the "aircraft" be "owned or operated by the person liable to pay" outstanding charges. None of the Lessors advanced an argument that the aircraft were not "owned or operated" by the Canada 3000 Companies. In fact, Canada 3000 was registered as the "owner" of all the aircraft. Counsel for the group of Lessors that filed a joint factum conceded in argument that the Canada 3000 Companies operated the aircraft and that the aircraft were subject to initial seizure by the Authorities, although he went on to argue that once seized, the aircraft had to be released to the Lessors when they asserted their pre-existing property rights.

[266] In summary:

1. I would dismiss the appeal of NAV Canada against the motion judge's ruling that the Lessors are not liable under s. 55 of the CANSCA for outstanding navigation charges owed by the Canada 3000 Companies for civil air navigation services for the reasons given by Cronk J.A.

2004 CanLII 32169 (ON CA)

2. I would allow the appeal of NAV Canada and the Airport Authorities of the dismissal of their seizure and detention applications and remit those applications to the motions judge to be dealt with in accordance with these reasons. I would also allow the appeal of NAV Canada and the Airport Authorities of the ruling requiring them to reimburse the Lessors/owners for their Detention Costs. The issue of any costs would be before the motions judge on the reconsideration of the motions to seize and detain.

3. I would allow the appeal of NAV Canada and the GTAA of the ruling that the Engine Lessors are entitled as a matter of right to repossess the leased engines. [page86]

4. Lastly, I would dismiss:

-- the appeal of certain of the Lessors from the motion judge's holding that the Authorities could claim interest on the outstanding charges;

-- the Airport Authorities' appeal of the motion judge's determination of when interest on outstanding airport charges ceases;

-- the cross-appeal of the Lessors from the motion judge's decision denying them their costs of the proceeding before him; and

-- the appeal of certain of the Lessors of the motion judge's ruling that each party should bear its own costs of compliance with the release protocols, regardless of the ultimate disposition of the seizure and detention motions.

-- These are all matters within the discretion of the motions judge to determine and he could reassess the manner in which he exercises his discretion in the context of his disposition of the remitted applications to seize and detain.

2004 CanLII 32169 (ON CA)

Order accordingly.

SCHEDULE "A"

Winnipeg Airports Authority Inc.

Halifax International Airport Authority

Edmonton Regional Airports Authority

The Calgary Airport Authority

Aroports de Montral

Ottawa MacDonald-Cartier International Airport Authority

Vancouver International Airport Authority

St. John's International Airport Authority [page87]

SCHEDULE "B"

International Lease Finance Corporation

Hyr Hr I Sverige Kommanditbolag

IAI X, Inc.

Triton Aviation International LLC

Sierra Leasing Limited

ACG Acquisition XXV LLC

ILFC International Lease Finance Canada, Ltd.

Notes

Note 1: In these reasons, I refer to the airport authorities collectively as the "Airport Authorities" and, together with NAV Canada, as the "Authorities".

2004 CanLII 32169 (ON CA)

Note 2: By order of the motions judge dated November 30, 2001, Pricewaterhouse Coopers Inc. replaced Deloitte & Touche Inc. as trustee in bankruptcy.

Note 3: The affidavits were filed on behalf of Wells Fargo Bank Northwest, National Association, Pegasus Aviation, Inc. PALS I, Inc. and G.E. Capital Aviation Services, Inc.

Note 4: Cross-appeals were filed by the parties listed in Schedule "B" hereto and by U.S. Airways, Inc. G.E. Capital Aviation Services, Inc. as agent and manager for Polaris Holding Company and AFT Trust-Sub I, Pegasus Aviation Inc. PALS I, Inc., Ansett Worldwide Aviation, U.S.A., MSA V, C.I.T. Leasing Corporation, NBB-Royal Lease Partnership One, and GATX/CL Air Leasing Cooperative Association. Appeals against and cross-appeals initiated by Amtec Corporation and Wells Fargo Bank Northwest, National Association were abandoned.

Note 5: Appeals were filed by the following Lessors: the parties listed in Schedule "B" hereto (with the exception of ACG Acquisition XXV LLC), U.S. Airways Inc., G.E. Capital Aviation Services, Inc. as agent and manager for Polaris Holding Company and AFT Trust-Sub I, Pegasus Aviation, Inc., PALS I, Inc., Ansett Worldwide Aviation, U.S.A., and MSA V. An appeal initiated by Wells Fargo Bank Northwest, National Association was abandoned.

Note 6: See also: (i) s. 2(1), which defines several words or expressions in the CAN-SCA by reference to the Aeronautics Act and regulations made thereunder; (ii) s. 12(1), which authorizes NAV Canada, in connection with aeronautical radio navigation services, to propose standards or liability insurance coverage amounts to the Minister of Transport for inclusion in regulations made under the Aeronautics Act; (iii) s. 12(2), which obliges the Minister of Transport, in specific circumstances, to recommend to the Governor in Council that such standards or insurance coverage amounts be incorporated by reference or specified in regulations made under the Aeronautics Act; (iv) s. 13, which makes NAV Canada's right to plan and manage Canadian airspace subject to certain rights of the

2004 CanLII 32169 (ON CA)

Governor in Council under the Aeronautics Act concerning airspace; and (v) s. 14, which authorizes NAV Canada to change civil air navigation services or facilities, subject to the provisions of the Aeronautics Act and of any regulations made under that Act concerning aviation or public safety.

Note 7: It provides, for example, in s. 3(1), that several words and expressions used in the Aeronautics Act have the same meaning as set out in the CANSCA.; AS well, s. 4.41 provides that no order or regulation may be made under the navigation charges scheme of the Aeronautics Act that has the effect of imposing charges for civil air navigation services or for air navigation services provided by or on behalf of the Minister for National Defence if the charges are for services similar in specific respects to services provided by NAV Canada. Section 4.91 provides that the Governor in Council may make regulations authorizing the responsible Minister of the Crown to direct changes in the level of civil air navigation services provided by NAV Canada if the applicable Minister is of the opinion that the order is necessary for aviation safety or the safety of the public.

Note 8: See for example, the s. 2(1) definitions of "aeronautical communication services", "Agency", "air navigation services", "apron", and "civil air navigation services".

Note 9: See for example, the s.2(1) definitions of "aeronautical radio navigation services", "airport air traffic control services" and "en route air traffic control services".

Note 10: Inter-Canadien is now under appeal to the Quebec Court of Appeal.

Note 11: See the French language definitions of "avis de vol" ("flight notification"), "fonction publique" ("Public Service") and "plan de vol" ("flight plan") in s. 2(1) of the CANSCA and their counterpart definitions in the English language version of s. 2(1).

Note 12: Sections 39 to 41 of the CANSCA authorize NAV Canada to submit proposed new or revised charges to the Minister of

2004 CanLII 32169 (ON CA)

Transport for the Minister's approval at any time during the two years immediately after the assets transfer contemplated by s. 7 of the CANSCA. Upon submission of such a proposal, the Minister is obliged to determine whether the proposed new or revised charges are consistent with the charging principles set out under s. 35 of the CANSCA. No appeal right concerning the Minister's decision is provided under the CANSCA.

Note 13: By S.C. 1991, c. 24, s. 51 (Sch. III, s. 1(1)(Act, s. 53), s. 4.4(4) of the Aeronautics Act is replaced by the following: "All charges imposed under this section constitute a debt due to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction." That amendment is not yet in force.

Note 14: I would add that the same comments apply to the airport charges imposed by the Airport Authorities.

Note 15: Several secured creditors of the Canada 3000 Companies were involved in the proceedings before the motions judge. Those creditors are not involved in these proceedings and none of the Lessors is a secured creditor.

Note 16: See S.C. 1992, c. 42.

WDPH

2004 CanLII 32169 (ON CA)

Tab 18

In the Court of Appeal of Alberta

Citation: Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd., 2009 ABCA 240

Date: 20090625
Docket: 0803-0135-AC
0803-0136-AC
Registry: Edmonton

2009 ABCA 240 (CanLII)

Appeal No. 0803-0135-AC

Between:

Kerr Interior Systems Ltd. and Composite Building Systems Inc.

Respondents
(Debtors)

- and -

Kenroc Building Materials Co. Ltd.

Appellant
(Creditor)

Appeal No. 0803-0136-AC

And Between:

Kerr Interior Systems Ltd. and Composite Building Systems Inc.

Respondents
(Debtors)

- and -

Superior Plus LP, and Winroc, a division of Superior Plus LP

Appellant
(Creditor)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Jack Watson

Reasons for Judgment Reserved of the Honourable Mr. Justice O'Brien
Concurred in by the Honourable Mr. Justice Berger

Reasons for Judgment Reserved of The Honourable Mr. Justice Watson
Dissenting in Part

Appeal from the Judgment by
The Honourable Madam Justice M.B. Bielby
Dated the 16th day of May, 2008
Filed on the 16th day of May, 2008
(2008 ABQB 286, Docket: 0703-14357)

2009 ABCA 240 (CanLII)

Reasons for Judgment Reserved of
The Honourable Mr. Justice O'Brien

2009 ABCA 240 (CanLII)

Introduction

[1] I have had the advantage of reading a draft of the judgment prepared by Watson J.A., which fairly sets out the factual context, and identifies the issues in this appeal. I agree that the appeal of Winroc should be allowed for the reasons given by him. However, I would also allow the appeal of Kenroc, on the ground that it also was a beneficiary of the statutory trust created by the Saskatchewan legislation.

Facts

[2] Briefly, the background of these two related appeals is as follows: Kenroc Building Materials Co. Ltd. (Kenroc) and Superior Plus LP and Winroc, a division of Superior Plus LP (collectively, Winroc) appeal the chambers judge's decision sanctioning a Plan of Arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), proposed by the respondents, Kerr Interior Systems Ltd. (Kerr) and Composite Building Systems Inc. (Composite).

[3] Kenroc and Winroc both supplied building materials to Kerr for a construction project in Saskatoon owned by 101051911 Saskatchewan Ltd. (101). Kerr and Composite encountered financial difficulties and initiated proceedings under the CCAA. On November 7, 2007, they were granted a Protection Order under the CCAA. At the time of that order, 101 owed Kerr money, while Kerr owed money to both Winroc and Kenroc for building materials, all in relation to Second Avenue Lofts, the Saskatoon construction project (the project).

[4] On November 6, 2007, the day before the Protection Order was granted, Winroc filed a builder's lien against the property owned by 101 in the amount of $46,425.26. On November 14, 2007, Kenroc filed a builder's lien against the property owned by 101 in the amount of $103,236.95. No other creditors filed liens. On January 18, 2008, 101 paid $150,000.00 into court in Saskatchewan as security for the builder's liens, which were discharged from title without prejudice to Kerr's legal position. The funds paid into court by 101 came out of the amount owing by 101 to Kerr for work performed on the project.

[5] The proposed Plan of Arrangement listed Kenroc and Winroc in the class of unsecured creditors with all other creditors.

[6] Kenroc and Winroc opposed court approval of the Plan on the basis that they were secured creditors based on their status as holders of valid builders' liens or trust claims. The chambers judge sanctioned the Plan, concluding that Kenroc and Winroc were not secured creditors under the CCAA because that status is only created when there is a lien against the debtor's property, and the liens filed by Kenroc and Winroc were against 101's property. Nor did Kenroc and Winroc's trust claims fall within the definition of secured creditor under the CCAA as they were merely statutory or

"deemed" trusts that did not attach to a traceable or existing asset belonging to the debtors at the time the original stay was granted.

2009 ABCA 240 (CanLII)

Legislation

[7] The definition of a secured creditor under section 2 of the CCAA includes the beneficiary of a trust in respect of all or any property of the debtor companies, in this case Kerr and Composite. Section 2 provides:

> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds

[8] The governing provisions of the Saskatchewan *Builders' Lien Act*, S.S. 1984-85, c. B-7.1 (S.B.L.A.), are as follows:

> 6(1) All amounts received by an owner, other than the Crown, that are to be used in the financing of an improvement, including the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.
>
> (2) Where the owner provides his own capital or where the owner is the Crown, and where amounts become payable under a contract to a contractor, the moneys in the hands of the owner or received by him for payment under the contract at any time thereafter constitute a trust fund for the benefit of the contractor.
>
> (3) Where the owner's interest in an improvement is sold by the owner, an amount equal to the positive difference between:
>
> > (a) the value of the consideration received by the owner as a result of the sale; and

> (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any encumbrances which are entitled to priority under this Act;
>
> constitutes a trust fund for the benefit of the contractor.
>
> (4) The owner is the trustee of the trust fund created by subsections (1) to (3), and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.
> ...
>
> 7(1) All amounts:
>
> (a) owing to a contractor, whether or not due or payable; or
>
> (b) received by a contractor;
>
> on account of the contract price of an improvement constitute a trust fund for the benefit of:
>
> (c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and
>
> (d) labourers who have been employed by the contractor for the purpose of performing the contract.
> ...
>
> 33 Every lien is a charge on the holdback required to be retained by section 34, and subject to subsection 28(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.

Analysis

[9] Kenroc's position must be assessed, of course, at the date of the stay, namely, November 7, 2007. Neither the subsequent filing of its lien, nor the payment into court, can improve its entitlement.

2009 ABCA 240 (CanLII)

2009 ABCA 240 (CanLII)

[10] As at November 7, 2007, 101 owed Kerr the amount of $302,922.09 for materials and services provided to the project. As of that date, Kerr owed Kenroc $103,236.95 for materials supplied to the project.

[11] I interpret section 6(2) of the S.B.L.A. to impose a trust for the benefit of Kerr, with respect to the amount of $302,022.09 owed by 101 to Kerr. Thus, Kerr had an equitable interest in this trust fund.

[12] I further interpret section 7(1) of the S.B.L.A. to mean that the amount of $302,022.09 owed to Kerr was impressed with a trust for the benefit of Kenroc, among others, as a subcontractor.

[13] Accordingly, there was what may be called a double trust. Kerr had a trust interest in the monies owed by 101, and Kenroc had a trust interest in the monies owed to it by Kerr, which interest was secured by the first trust.

[14] These trust interests were not dependent upon the filing of a lien and, survived, even if a lien was not registered within the appropriate time frame: *Arthur Anderson Inc. v. Merit Energy Ltd.*, 2004 SKCA 124, [2005] 4 W.W.R. 603, paras. 32-34. In that case, the Saskatchewan court concluded at para. 34:

> Section 20 codifies the law contained in *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Manufacturing Co.* [[1995] S.C.R. 694]. In that case, it was argued that a potential lien claimant lost not only the right of lien but the rights conferred upon him under the trust provisions, if he or she failed to register. The Supreme Court of Canada rejected this idea and held that the rights of the trust beneficiary are unimpaired by the lapse of the right to claim a lien.

[15] I do not think it necessary to rely in this case upon section 33 of the S.B.L.A., which creates a charge on the holdback; however, that section confirms the intent of the legislation to grant lien claimants a secured position.

[16] In short, Kenroc's equitable interest in the monies owed to it by Kerr constituted a trust in respect of the property of Kerr, being the latter's equitable interest in the monies owed to it by 101, such as to constitute Kenroc a secured creditor within the meaning of section 2 of the CCAA. The trust attached to the contractor's receivable, which is property of the contractor, and thereby falls within the CCAA definition of secured creditor.

[17] The filing of the lien was not necessary to perfect the trust obligation, which was independent of the lien. The amount owed to Kenroc was ascertainable as at November 7, 2007. It was the amount of $103,236.98, and that is the extent of the trust interest (subject to adjustments). The determination of the exact amount owing under a secured instrument on a given date is commonplace and does not create any uncertainty.

2009 ABCA 240 (CanLII)

[18] The trust fund obligation was "reasonably ascertainable" at the material date. In *British Columbia v. Henfrey Samson Belair Ltd*, [1989] 2 S.C.R. 24, McLachlin J., as she then was, speaking for the majority, stated at para. 19 that whether a statute created a trust depends on the facts of the particular case. She added that if the money collected is "identifiable or traceable", then a trust within the ordinary meaning of that term should be given effect. Here, pursuant to the Saskatchewan statute, the monies owed by 101 to Kerr, and in turn owed by Kerr to Kenroc, are impressed with a trust. All of these amounts were readily ascertainable or identifiable as at November 7, 2007.

[19] My colleague refers in his judgment to other subcontractors of Kerr who might have filed liens but did not so do. I question the relevance of this concern. In the first place, there was no evidence of any trusts with respect to the monies owed by 101 to Kerr, relative to the subject project, except for the claims of Kenroc and Winroc. While the Monitor had envisaged other potential liens against Kerr, he could not say whether those potential claims arose with respect to the subject Saskatchewan project, or other projects being supplied by Kerr. In any event, no other creditor advanced a trust claim. If another creditor could establish a trust claim, then it should have filed proof in accordance with the applicable Claims Procedure.

[20] I am reluctant to construe the CCAA to defeat the trust obligations imposed by the Saskatchewan legislation in favour of subcontractors. Nor is there any reason to interpret the Saskatchewan statute in a narrow and strict manner. This is not colorable legislation. The legislation gives these trusts a broad and early scope.

[21] The purpose of the Saskatchewan legislation is to ensure that subcontractors are secured, at least to a minimal extent, and that they obtain payment to that extent before general creditors. I resist any attempt to carve up the statute into little parts – it is all one scheme designed to protect subcontractors. As pointed out by Winroc, the suppliers rely upon the protections provided by the statute in their assessment of credit risk. While the definition of secured creditor in the federal statute must prevail, there is no need here to construe it in a fashion that strips the protections at a time when the suppliers most need it; i.e., in dealing with the insolvent contractors, such as Kerr.

Conclusion

[22] The appeals both of Winroc and Kenroc are allowed. Their secured claims are both directed to be dealt with in the manner outlined by Watson J.A., respecting the Winroc trust claim.

Appeal heard on April 1, 2009

Reasons filed at Edmonton, Alberta
this 25th day of June, 2009

O’Brien J.A.

I concur:

Berger J.A.

2009 ABCA 240 (CanLII)

2009 ABCA 240 (CanLII)

Watson J.A. (dissenting in part):

Introduction

[23] These appeals relate to the same essential question, namely whether a chambers judge erred in sanctioning a Plan of Arrangement under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") respecting the respondents ("Kerr" and "Composite"). That Plan did not (a) recognize a secured creditor status that the appellants ("Winroc" and "Kenroc") asserted for themselves, nor (b) give Winroc and Kenroc a separate voting class on the Plan, nor (c) give Winroc and Kenroc a priority claim to the money paid into court.

[24] The Plan put Winroc and Kenroc into a class with other unsecured creditors of Kerr and Composite. As such, they would receive less than 100% on their claims, like others in that creditor class. The chambers judge approved the Plan: (2008), 91 Alta. L.R. (4th) 202, [2008] A.J. No. 547 (QL), 2008 ABQB 286 (the "Reasons").

[25] Winroc and Kenroc say they had valid and effective builders' liens and / or trust claims against money which had been paid into court. That money had been paid into court by a third party, 101051911 Saskatchewan Ltd. ("10105"), in order to vacate builders' liens filed by Winroc and Kenroc against 10105's land improvement project in Saskatoon. Winroc and Kenroc had supplied materials to Kerr and Composite, which had in turn worked on 10105's project. Winroc and Kenroc read the Saskatchewan *Builders' Lien Act*, S.S. 1984-85-86, c. B- 7.1 ("SBLA") to say they had a secured claim against Kerr upon that money being paid into court.

[26] In addition to claiming priority to the money in court (which would only cover part of their claims against Kerr), Winroc and Kenroc also say that their special position put them into their own special creditor class and thus entitled them to separate voting rights under the Plan of Arrangement pursuant to sections 4, 5 and 6 of the CCAA. As their own special creditor class, Kenroc and Winroc could influence the Plan because the chambers judge held that, under s. 6 of the CCAA, she could only sanction the Plan with majority support from every class. The chambers judge did not find them entitled in priority to either the funds paid into court or as a separate creditor class. She agreed with Kerr, Composite and their CCAA Monitor that they belonged in the unsecured creditors' class where they were outvoted such that the Plan of Arrangement was accepted.

[27] Winroc and Kenroc alternatively submit that, even if they were not entitled to be in a special class, the Plan of Arrangement was not fair and reasonable as it did not ensure that they got paid 100% of their lien claims out of the money deposited in court. The chambers judge did not agree. Although I agree with aspects of the chambers judge's reasoning, I also agree in part with Winroc's position, and would allow the appeal but only to that extent. My colleagues go further and, for well expressed reasons, allow Kenroc's appeal also.

2009 ABCA 240 (CanLII)

Context

[28] Kenroc and Winroc supplied building materials to Kerr which were said to be part of Kerr's contribution to 10105's construction project called "2nd Avenue Lofts" in Saskatoon. Composite pre-fabricated special walls, while Kerr installed special walls, ceilings, floors and partitions. Composite and Kerr found themselves in financial difficulty in 2007 in part by having given fixed price bids on projects in an era of rapidly escalating labour and material costs. Realizing their predicament, Composite and Kerr sought support of their banker, the Royal Bank of Canada, and their major secured creditor, Co-operators Investment Counselling Ltd., in arranging a compromise of their debts so that they could complete their contracts (including that with 10105) and stay in business.

[29] On November 6, 2007, Winroc filed a builders' lien under the SBLA against 10105's Saskatoon project claiming $46,425.26. Winroc says that Kerr owed approximately $170,000.00 more to Winroc than was covered by the lien.

[30] On November 7, 2007, the chambers judge granted an order under the terms of the CCAA staying any "proceeding or enforcement process in any court or tribunal" as well as "the taking of any self-help or enforcement process in any court or tribunal" and "the taking of any self-help or seizure remedies" except with leave of the Court.

[31] On November 9, 2007, Winroc also sued Composite in Alberta Court of Queen's Bench for $138,749.27. On November 14, 2007, Kenroc filed a builders' lien against the 10105 project for $103,236.95. On January 28, 2008, 10105, which owed Kerr $302,022.09 at the time, paid $150,000.00 into the Saskatchewan Queen's Bench to discharge the liens filed by Winroc and Kenroc but without prejudice to Kerr's legal position.

[32] Kerr continued to work on their contracts on a cash flow basis that not expand their debts and indeed, reduced their debt. Kenroc continued to supply materials to Kerr for the 10105 project and had been paid $223,000.00 by Kerr since the stay order.

[33] The Plan of Arrangement placed before the chambers judge in April, 2008, would have seen 34 unsecured creditors receive 52% of the debt owed to them by Kerr and / or Composite, thus to settle approximately $5,000,000.00 of debt for about $2,600,000.00. Kenroc and Winroc were put in the unsecured creditors class under the Plan. The Monitor opined that six other members of that class also potentially had similar lien or trust claims. It calculated the total claims of eight such parties (including Winroc and Kenroc) was $574,536.51. Of the eight creditors the Monitor felt might be better off under a lien fund, six of them voted for the Plan. Of the unsecured creditors class, 92% in number and 91% in value voted in favour of the Plan of Arrangement.

Legislation

2009 ABCA 240 (CanLII)

[34] The chambers judge found it unnecessary to determine whether there was any conflict between the CCAA and SBLA in this case: Reasons, paras. 26 to 31. No party served a notice to challenge the reach of either statute on grounds of paramountcy or of inter-jurisdictional immunity. None of the Attorneys General of Canada, Saskatchewan or Alberta participated in the submissions before her nor before us. The CCAA has been recognized as an exercise of the federal insolvency power for decades: ***ATB Financial v. Metcalfe & Mansfield Alternative Investment II Corporation*** (2008), 92 O.R. (3d) 513, [2008] OJ. No. 3164 (QL), 2008 ONCA 587 at paras 102 - 104. The CCAA is not oblivious to provincial legislation but, as pointed out in ***R. v. Henfrey Samson Belair Ltd.,*** [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78 (QL) at para 21: "[t]he provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*" ([1985] 1 S.C.R. 785, [1985] S.C.J. No. 35 (QL)). We need not decide if there is any conflict between CCAA and SBLA.

[35] Kenroc and Winroc submit that the SBLA helps them claim the status of either a secured creditor or another special class of creditor through s. 2 of the CCAA. Kenroc and Winroc offer an alliance of the SBLA and CCAA, not an opposition. The CCAA definitions are at the heart of the case, since the court is evaluating a Plan of Arrangement involving corporations under the CCAA. The chambers judge did not read down the relevant terms of the SBLA when deciding that they did not put Kenroc and Winroc into a special class under s. 2 of the CCAA, nor will we.

[36] Section 2 of the CCAA defines a secured creditor as follows:

> "secured creditor" *means a holder of a* mortgage, hypothec, pledge, *charge, lien* or privilege on or against, or any assignment, cession or transfer of, all or *any property of a debtor company as security for indebtedness of the debtor company*, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, *or a trust in respect of, all or any property of the debtor company*, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; [emphasis added]

[37] Kenroc and Winroc assert that they are either lien holders or trust beneficiaries under this definition by operation of the SBLA. Section 7 of the SBLA provides:

> 7(1) All amounts
>
> (a) owing to a contractor, whether or not due or payable; or
>
> (b) received by a contractor;

> on account of the contract price of an improvement constitute a trust fund for the benefit of:
>
> (c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and
>
> (d) labours who have been employed by the contractor for the purpose of performing the contract.
>
> (2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor.

[38] Section 15 of the SBLA sets out a priority for the trust in the context of the SBLA. Section 20 of the SBLA says the trust exists even if a lien registration deadline is missed. Sections 22(1) and 33 of the SBLA also provide:

> 22(1) A person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.
>
> *****
>
> 33 Every lien is a charge on the holdback required to be retained by section 34, and subject to section 28(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.

[39] Various procedures respecting assertion of a lien are set out in the SBLA. Section 56(1) of the SBLA provides for payment into court by "any person" of the "full amount" owing "in any registered claim of lien" to vacate the lien.

[40] Kenroc and Winroc say the foregoing provisions establish their rights both as lien holders and as beneficiaries of a trust. Kenroc and Winroc also suggest the reference to a "charge" under s. 33 also applies to assist them.

2009 ABCA 240 (CanLII)

2009 ABCA 240 (CanLII)

[41] A claimant who is not a secured creditor is an "unsecured creditor" under s. 2 of the CCAA: Reasons, para. 36. Kenroc and Winroc's alternative position is that, even if they fell into an unsecured creditor class, they would still be distinct from the other unsecured creditors having regard to the factors set out in ***Re: Canadian Airlines Corporation*** (2000), 265 A.R. 201, [2000] A.J. No. 771 (QL), 2000 ABQB 442, at para. 96 and ***Resurgence Asset Management LLC v. Canadian Airlines Corporation*** (2000), 261 A.R. 120, [2000] A.J. No. 610 (QL), 2000 ABCA 149 at para. 27; see also ***Sovereign Life Assurance Company v. Dodd***, [1892] 2 Q.B. 573 (Eng. C.A.) and ***Re: Stelco Inc***. (2005), 15 C.B.R. (5th) 307, [2005] O.J. No. 4883 (QL), at paras. 23 - 36.

Standard of Review

[42] There are no material facts in dispute. Extricable questions of law as to interpretation of the CCAA and SBLA are reviewed for correctness. If correct on statutory construction principles, the chambers judge exercised judgment in deciding if Winroc and Kenroc be recognized as a special class in order to make the plan "fair and reasonable" or to reflect differences between them and other unsecured creditors in light of the factors in ***Canadian Airlines***, ***Resurgence*** and ***Stelco Inc***. On those latter questions, judgment and discretion is involved and a reasonableness standard should apply: see ***BCE Inc, et al. v. 6796508 Canada Inc., et al.***, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37 (QL), 2008 SCC 69 at para. 161; ***ATB Financial***, *supra* at paras. 106 - 120; ***New Skeena Forest Products Inc. v. Kitwanga Lumber Company*** (2005), 39 B.L.C.R. (4th) 338, [2005] B.C.J. No. 671 (QL), 2005 BCCA 192 at para. 20; ***Luscar Ltd. v. Smoky River Coal Ltd.*** (1999), 237 A.R. 326, [1999] A.J. No. 676 (QL), 1999 ABCA 179 at paras. 61 - 72; ***Re: Keddy Motor Inns Ltd.*** (1992), 90 D.L.R. (4th) 175, [1992] N.S.J. No. 98 (QL), at para. 44. As noted in ***BCE***, there is no such thing as a perfect Plan of Arrangement: para. 155.

Reasons of the Trial Judge

[43] The chambers judge was aware that compliance with the CCAA was necessary to justify approval of a Plan of Arrangement.

[44] As to the lien claims, she held that Kenroc's and Winroc's builders' liens were filed against 10105's project, and thus did not constitute a lien against Kerr's property. Kenroc and Winroc contest this finding by saying that inasmuch as 10105 paid $150,000.00 into court to get their liens discharged, the $150,000.00 paid into court was effectively paid by 10105 to Kerr (as money in excess of that was owed to Kerr). Since it was paid to discharge Kenroc's and Winroc's liens on 10105's project, they suggest that the lien fund was property which was controlled by Kerr as money owed to Kerr. They say it was therefore transfixed by their lien claims or by their trust claims for the purposes of giving them secured creditor status over it even if the amounts specified in the lien documents covered only what was paid into court and was only part of their overall claims against Kerr and Composite.

2009 ABCA 240 (CanLII)

[45] The chambers judge held that before the money was paid into court by 10105, it was 10105's property, albeit that 10105 owed money to Kerr. She noted that the money was paid into court under a Saskatchewan Court of Queen's Bench order dated January 18, 2008 that said Kerr's consent "shall not prejudice the legal position of Kerr" respecting the liens, their propriety or amounts owing. The order recited that those issues are "properly dealt with under Kerr's *Companies Creditors Arrangement Act* proceedings in Alberta": Reasons, para. 45.

[46] In other words, she held that the Saskatchewan order did not purport to recognize or grant any special attachment to the money paid into court merely because the order was to vacate builders' liens affecting 10105's project. Moreover, the money was paid in after the chambers judge's stay order was in place, so it could not be said that the Alberta Court of Queen's Bench had purported to approve an attachment of that money favouring any specific creditor. Further still, Kenroc's builders' lien was also filed after the stay order. Such "self-help" by Kenroc was, in her view, barred by the stay order and was conduct itself inconsistent with the philosophy and purposes of the CCAA: Reasons, paras. 50 - 53, citing ***Alternative Fuel Systems Inc. v. Remington Development Corporation*** (2004), 346 A.R. 28, [2004] A.J. No.60 (QL), 2004 ABCA 31, at paras. 54 - 55; ***Re: Scaffold Connection Corporation***, [2000] 7 W.W.R. 516, [2000] A.J. No. 115 (QL), 2000 ABQB 33 at para. 22.

[47] Orders aside, the chambers judge was satisfied that the CCAA process would have to decide how to dispose of that money in court. While in court and subject to court proceedings, she was not persuaded that the money was Kerr's property or had it been unconditionally transferred or paid to Kerr: ***D & K Horizontal (1998) Ltd. (Trustee Of) v. Alliance Properties Ltd.*** (2002), 216 Sask. R. 199, [2002] S.J. No. 152 (QL), 2002 SKQB 86 at para. 19; ***Climenhaga v. Canada***, [2008] A.J. No. 1180 (QL), 2008 ABQB 340 at para. 215; see also ***Stone Sapphire Ltd. v. Transglobal Communications Group Inc.***, [2009] A.J. No. 341 (QL), 2009 ABCA 125 from (2008) 96 Alta. L.R. (4th) 187, [2008] A.J. No. 1036 (QL), 2008 ABQB 575 (see paras. 11 - 39). The money was not paid into court by Kerr, nor were the original liens filed against Kerr's real property as in ***Deloitte & Touche Inc. v. Merit Energy Ltd.*** (2004), 254 Sask. R. 161, [2004] S.J. No. 585 (QL), 2004 SKCA 124.

[48] The chambers judge rejected a companion contention that s. 22(1) of the SBLA created a lien right against the money in court, because, by its terms, the lien only applied to "the estate or interest of the owner in the land". There was evidence before the chambers judge that 10105 was "the owner" of the land for this purpose at the time the liens were filed: Reasons, para. 54 to 55.

[49] The chambers judge held, in light of the order of January 18, 2008, that the statutory trust created by s. 7 of the SBLA was effective as of November 7, 2007: Reasons, para. 58. As of November 7, 2007, 10105 owed money to Kerr in excess of $150,000.00. Kenroc and Winroc say Kerr was a "contractor" within the meaning of s. 7(1)(a) of the SBLA as of November 7, 2007. As such, they say that Kerr was trustee of a trust fund that arose under s. 7(1) whether or not the liens had yet been filed and that Kerr was not entitled to "appropriate or convert any part of the trust fund

2009 ABCA 240 (CanLII)

to his own use or to any use inconsistent with the trust". The chambers judge, however, found that Kerr never received the $150,000.00 into its possession, nor did Kerr do anything with respect to its account receivable claim against 10105 or the $150,000.00 which was an appropriation or conversion of the trust fund. Kerr consented, without prejudice, to a Queen's Bench order whereby 10105 paid into court $150,000.00, recognizing that it, 10105, owed money to Kerr. By paying in, 10105 would obtain release of the liens and leave it to Kerr and the lienholders to deal with the validity of the lien claims.

[50] The chambers judge was apparently not persuaded that paying the money into court by 10105 constituted wrongful interference with the "goods of another" such as to constitute a "conversion" by Kerr of the $150,000.00: see ***373409 Alberta Ltd. (Receiver of) v. Bank of Montreal***, [2002] 4 S.C.R. 312, [2002] S.C.J. No. 82 (QL), 2002 SCC 81 at para. 8; ***Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce***, [1996] 3 S.C.R. 727, [1996] S.C.J. No. 111 (QL) at para. 31. She did not mention the term "appropriation" but, under her reasoning, Kerr did not appropriate since Kerr never received the money. I read her decision to be that Kerr did not take, use or destroy the $150,000.00 in a manner inconsistent with the "owner's right of possession" because Kerr did not receive the money and, once paid into court, Kerr did not control the money. The chambers judge found that no trust was impressed on that money: Reasons, para. 65.

[51] The chambers judge opined that in order for the statutory trust under s. 7(1) of the SBLA to function as a trust under s. 2 of the CCAA at the time of the Court's CCAA intervention, there had to be an "identifiable asset which forms the subject matter of the trust" relying *inter alia* on ***Henfrey Samson Belair***: Reasons, para. 65(b). In her view, by the time the specific fund of money arrived in court, it was not subject to an identifiable trust in favour of Winroc and Kenroc even if it was akin to a partial payment of a quantity of accounts receivable held by Kerr against 10105.

[52] Finally, the chambers judge rejected the submission that Winroc and Kenroc deserved their own special class even if not secured creditors: Reasons, para. 56 and paras. 80 - 88.

Analysis

[53] I would separate the topic of liens from the topic of statutory trusts and deal with trusts first.

Trust Claims

[54] On the premise accepted by the parties that Kerr was a contractor and that 10105 owed Kerr money within the meaning of s. 7(1) of the SBLA for work to which the appellants contributed as sub-contractors, the statutory trust under s. 7(1) of the SBLA might be impressed on the receivables to which Kerr is entitled "on account of the contract price of an improvement" whether or not the amount owing was "due and payable". By the terms of s. 7(1) of the SBLA, a court would have to decide if 10105 owed Kerr for work on the improvement and if what 10105 owed Kerr was for a contract price inclusive of "materials or services to the contractor" by the sub-contractor claiming

the trust. The policy behind this seems clear enough: it would encourage companies in the position of Kerr to be scrupulous about their accounts receivable and not to appropriate or convert them to the disadvantage of the sub-contractors with whom they have privity of contract for work on the specific contract.

[55] Winroc and Kenroc seek a finding that Kerr's receivables from 10105 were impressed with a trust in their favour in the amount of their liens, and that this trust continued to be attached to the $150,000.00 paid into court. Winroc and Kenroc would have to do more than identify what 10105 owed Kerr respecting the Saskatoon project in order to eventually prove that they were beneficiaries even of the statutory trust against Kerr's receivables from 10105. Winroc and Kenroc would have to quantify their contribution to Kerr's efforts on the Saskatoon project in order to identify a "trust fund" out of what Kerr was entitled to be paid by 10105 on that project. The SBLA facilitates this quantification of the trust fund by allowing sub-contractors to specify amounts owing by way of lien claims. This does not mean that the trust or lien does not exist in a legal sense prior to the specification of the quantum by the filing of the lien. However, the trust fund contemplated by s. 7(1) of the SBLA becomes identifiable for the purposes of s. 2 of the CCAA in favour of a specific claimant sub-contractor from out of the general world of receivables held by a contractor only when it has been particularized sufficiently to fit the language of s. 7(1) of the SBLA and the proper reading of s. 2 of the CCAA.

[56] If the Legislature of Saskatchewan intended that the statutory trust not require, for the purposes of an effective marriage with s. 2 of the CCAA, at least some measures of certainty contemplated by Donovan Waters, in *Waters' Law of Trusts in Canada*, 3rd Ed., [Toronto: Thomson Carswell, 2005] at p. 149, it did not say so expressly by the terms of s. 7 of the SBLA. On the other hand, the Legislature appears clearly to have intended to assist and protect sub-contractors by imposing a generalized trust obligation upon the general cash flow of contractors to prevent contractor mischief and to help guard the sub-contractors ability to recover their earnings in the relevant industrial context.

[57] For this appeal, however, the crucial enactment is s. 2 of the CCAA. I agree with the chambers judge that in order to constitute a "trust" for the purposes of s. 2 of the CCAA, the "trust fund" had to rise beyond a generalized statutory trust as defined in s. 7(1) of the SBLA. It had to reach the position of a trust at law, hence requiring it to be reasonably ascertainable as of the date the legal effect of the trust must exist: ***Henfrey Samson Belair***, *supra* at paras. 17 to 19. I also agree with the chambers judge that the effective date for the determination of the trust over property of Kerr in this case was November 7, 2007. That is the date that the CCAA proceedings were established and the stay by court order issued. However, I respectfully disagree with her in part. I find that, in Winroc's case, a trust framed by the amount of $46,425.26 was sufficiently ascertainable as of November 7, 2007, so as to make it effective for the purposes of s. 2 of the CCAA as of that date. Moreover, that trust carried forward its legal effect by the establishment of the lien fund in court out of Kerr's receivables which had been impressed with the trust as of that date.

2009 ABCA 240 (CanLII)

2009 ABCA 240 (CanLII)

[58] By comparison, the Kenroc lien had not been filed by November 7, 2007. Accordingly, while Kenroc might have had a generalized trust for the purposes contemplated by s. 7 of the SBLA over Kerr's receivables from 10105, Kenroc's trust claim was not specific as of that date in the same way that Winroc's was for the purposes of s. 2 of the CCAA. Moreover, as pointed out by the chambers judge, it would conflict with the policy of the CCAA for claimants to be able to ignore stay orders and take steps to *improve* their creditor positions after the orders come into effect. Kenroc suggests, however, that it did not need to "improve" its position as beneficiary of a sufficiently ascertainable trust effective as of November 7, 2007.

[59] Article 14 of the stay order of November 7, 2007 expressly suspended the running of any time limitation period that might otherwise run as to the ability to file a builders' lien against property "belonging to any customers of the Applicants for whom the Applicants are doing work" so the stay order itself did not erase the potential value of a lien. Moreover, Kenroc contends that this Court should find that its claim was as ascertainable under the CCAA process as was Winroc's claim as of November 7, 2007, even if not particularized by a filed lien. Accordingly, Kenroc says that because the CCAA contemplates a method for court ascertainment by a summary process of the nature of claims made, its statutory trust still must be found to have existed as of November 7, 2007. It follows that we must still consider Kenroc's position under this heading of trust. I would deal with Winroc first.

[60] The specific amount of Winroc's trust claim was identified by Winroc through its lien claim documents which had been filed before November 7, 2007. The possibility that Winroc may have had a larger but more ambiguous trust claim against Kerr's other receivables does not destroy the particularity of the specific claim set out in the lien documents. Moreover, in my view, the degree of precision of that specific claim against Kerr's receivables met the test in ***Henfrey Samson Belair*** even if Winroc might be called upon to substantiate its lien claim in court and even if Winroc faced the possibility of set off under s. 18.1 of the CCAA or faced some other potential diminution of the quantum of its entitlement. I say so for several reasons.

[61] First, by the specifics of the lien form, the trust property was identifiable not only in quantum and claimant but also identifiable as against specific property, namely a specified indebtedness owed by 10105 to Kerr. With the boost, as it were, of the statutory trust, that trust met the requirements under ***Henfrey Samson Belair***. Unlike the situation in ***Henfrey Samson Belair***, the trust funds did not become "commingled" or untraceable. Rather, they were eventually dis-aggregated from the indebtedness of 10105 to Kerr and were paid into court specifically to discharge Winroc's lien, albeit subject perhaps to adjustment later. Second, s. 12(2) of the CCAA does contemplate a process whereby a claim, whether secured or unsecured, may be resolved by the court on summary application by the company or by the creditor. It follows that the degree of precision of the Winroc claim as of November 7, 2007, was not destroyed by the existence of a possibility that a court may, on summary application, adjust the amount Winroc had claimed in a timely manner. Third, the original order of November 7, 2007 and the procedure order of January 24, 2008, predicted and then set out such a claims procedure under the CCAA. It is apparent from both orders that the court

provided for a process for acceptance or adjustment of trust claims that were sufficiently precise at common law as of November 7, 2007 within the meaning of ***Henfrey Samson Belair***. In light of these circumstances, the Winroc trust claim met the criteria of s. 2 of the CCAA as of November 7, 2007 at least to the extent of the amount set out in the filed lien documents, namely a trust framed by the amount of $46,425.26. The expression "framed by the amount" is stated to reflect the fact that the actual effective quantum of the Winroc claim may be subject to adjustment.

2009 ABCA 240 (CanLII)

[62] Before leaving Winroc's situation, I would add that we were treated by Kerr to an ingenious suggestion that Winroc's statutory trust prevented Kerr from having a property interest in the money paid into court. The suggestion is that because of the statutory trust, Kerr never had a legal right or control of the money paid into court, and hence it was not, after being paid into court, the "property of the debtor" to be subject of a trust under s. 2 of the CCAA. This argument is too clever by half. It amounts to saying that because the 10105 funds were impressed with a trust under s. 7 of the SBLA before being paid into court, they could not become Kerr's such as to further become property of Kerr impressed with a trust under s. 2 of the CCAA. This argument promotes a practical conflict between the application of the two statutes. General principles of statutory construction encourage courts to make co-ordinated legislation work together (if it is possible to do so consistently with proper interpretation principles) by assuming a harmony, coherence and consistency: see e.g. ***R. v. Ulybel Enterprises Ltd.***, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52; ***Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)***, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24 (QL), 2006 SCC 24 at para. 54; ***Pointe-Claire (City) v. Quebec (Labour Court)***, [1997] 1 S.C.R. 1015, [1997] S.C.J. No. 41 (QL), at para. 61; ***Food and Drug Administration et al v. Brown & Williamson Tobacco Corp. et al.***, (2000) 529 U.S. 120 (U.S.S.C.) per O'Connor J at p. 128. *A fortiori* we would do this when s. 2 of the CCAA clearly envisions trusts, liens and charges emanating from other statutes or law . As stated in ***Chatterjee v. Ontario***, [2009] S.C.J. No. 19 (QL), 2009 SCC 19 at para. 2: "It was held in *Canadian Western Bank* that, "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (para. 37; emphasis in original)." Accordingly, I would not convolute the concept of trust to find that the existence of a trust for one purpose defeats its existence for another purpose in otherwise companionable legislation.

[63] By comparison with Winroc, Kenroc's claim was not identified by way of a precise lien having been filed as of November 7, 2007. Kenroc, accordingly, bases its status as a trust claimant in the more generalized argument that Kerr's receivables in the amount of $302,022.00 owed by 10105 as of November 7, 2007, qualified as Kerr's property that was impressed with a trust in favour of Kenroc for whatever contribution Kenroc had made to the 10105 project by then.

[64] Kenroc, moreover, would distinguish itself for the purposes of the Plan of Arrangement from being inserted to a class with any other of Kerr's subcontractors who might conceivably also have filed builders' liens against the 10105 project in Saskatoon but did not do so. Kenroc would dismiss the idea that those other potential claimants are in the same creditor class with Kenroc on the basis that (a) the existence of such potential builders' lien claimants was still speculative at the time of the Plan of Arrangement hearing below, and (b) those claimants, if any, should be taken to have

elected to fall into the general unsecured creditor category under the Plan of Arrangement. Kenroc says it never made any concession that it was an unsecured creditor. Kenroc says that it pressed with specificity its trust claim prior to the Plan of Arrangement. Kenroc suggests that its ability to rope into court a specific sum of money out of Kerr's receivables by the lien against 10105 merely gave it a practical ability to enforce its existing trust rights, and did not improve its position in legal terms. Accordingly, Kenroc says that it should like Winroc be able to assert that it was a beneficiary of an enforceable trust at the time of the Plan of Arrangement at least in the specific amount that constituted its aliquot share of the $150,000 paid into court, namely $103,236.95.

[65] Kenroc further suggests there would be no unfairness to other creditor classes for lack of specificity of Kenroc's quantum as of November 7, 2007. Kenroc says that the quantum of other claims, secured or unsecured, would not have been known to other creditors as of that date. Kenroc says all creditors would be subject to the adjustment plans under the Claims Procedure Order of January 24, 2008, which itself did not exist until after the money was paid into court. Accordingly, Kenroc suggests that all creditors would have known by the date of the Plan of Arrangement precisely what the various claim classes were, including Kenroc's position. The purpose of the Plan was to organize division of the available assets. The other classes would be able to decide whether to vote to support the Plan or not under those circumstances.

[66] The difficulty with Kenroc's argument is that the parties here effectively conceded that, as a matter of law, the crucial date for distinguishing claims as secured or unsecured under s. 2 of the CCAA was November 7, 2007, not the later date when money was paid into court nor the further later date of the hearing on the Plan of Arrangement. To repeat, the crucial date for defining claims as secured was November 7, 2007. It may be that some existing secured claims might be identified after November 7, 2007, but their nature and quantum would have to have existed as of November 7, 2007, and not be created later. If Kenroc met the definition of a secured creditor on November 7, 2007 by its argument, then so were other potential builders' lien claimants, a potential circumstance noted by the Monitor. It would not matter for the larger purpose of the CCAA proceedings that other builders' lien claimants might have had trust claims against other projects than 10105 with which Kerr was involved. If they chose to claim secured status, they might, indeed, be collated into a secured creditor class of analogous secured creditors. Arguably, they would be candidates for a class that would be differentiated from the unsecured creditors' class.

[67] Kenroc seeks to fortify its position by a policy position that would answer the respondent's claims as to the legislative policy behind the CCAA. The respondent's submission which found considerable favour with the chambers judge was that the CCAA was a process intended to keep businesses in operation for the benefit of commerce and industry generally, and for the better recovery of creditors who might otherwise be left begging if bankruptcy occurred. The respondent and the chambers judge suggested that it was important, as a matter of policy, that there be a predictable and reliable system in place that would allow rapid distillation of creditor classes, swift available asset compilation and fair and equitable, though partial, distribution. The respondent and chambers judge did not appear to favour a system whereby late blooming trust claims could legally

2009 ABCA 240 (CanLII)

materialize well after the crucial stay order date, not only to the disadvantage of the debtor but also of other creditors. Against this policy of predictability and reliability, Kenroc says that one should not forget that the CCAA process empowers the debtor over creditors, in that the debtor decides when to seek the stay order, and the debtor already can discriminate amongst its creditors by the nature of specific trusts or liens or charges that it arranges with creditors.

[68] Kenroc's submission that it possessed an effective and ascertainable trust claim against Kerr's assets as of November 7, 2007, advances Kenroc beyond being the holder of a generalized statutory trust on an unspecified segment of Kerr's receivables. Recognition of a trust in the manner proposed by Kenroc could create through s. 2 of the CCAA something of a checkerboard of otherwise analogous rights and claimants in relation to CCAA proceedings because different provinces or jurisdictions might enact as to similar types of lien claims – e.g. builders' liens – differently. It might even encourage a competition amongst provinces to fortify their own versions of statutory trusts in an effort to priorize them against other province's statutory trusts for CCAA situations. Further, for some companies every significant creditor of the company could, by virtue of the company's business, claim a statutory trust of some sort. If all such trusts qualify under the CCAA regardless of the circumstances, there would be competition between statutory trusts, and feasibility problems as to achieving a consensus Plan of Arrangement.

[69] Kenroc was not the holder of a cognizable common law trust under ***Henfrey Samson Belair***. As the chambers judge noted, Kenroc was banned by Article 11 of the stay order from improving its position against Kerr's property. Indeed, that sort of preservation of a debtor's property is a key element of the aims of the CCAA. What Kenroc did was take action with a view to selecting out a portion of Kerr's receivables, i.e. effectively seizing a portion of Kerr's unsecured property subject at the time to supervision of the court, in order to install it in a special legal box where Kenroc could claim to be the only party entitled to have access to it. I am not persuaded that, in doing so, Kenroc's position can be characterized as an alliance of the SBLA and the CCAA which would have the effect of retroactively declaring Kenroc's general statutory trust against receivables to be a sufficiently precise trust at law as of November 7, 2007 against the fund paid into court later. Kenroc's trust simply did not reach the level required by s. 2 of the CCAA on November 7, 2007.

[70] I also am not persuaded that there was conversion of trust property by Kerr under s. 7(2) of the SBLA to the disadvantage of Kenroc by what happened after November 7, 2007. Conversion of trust property can occur in various ways: ***373409 Alberta Ltd.***; see also ***Ambrozic v. Burcevski*** (2008), 433 A.R. 25, [2008] A.J. No. 552 (QL), 2008 ABCA 194 at para. 48 - 56, leave denied [2008] S.C.C.A. No. 332 (QL). I am not persuaded that the sort of conversion discussed in those cases was done by Kerr when 10105 paid $150,000.00 into court and the liens were vacated. Accordingly, s. 7(2) of the SBLA would not assist Kenroc's position in the sense of retroactively providing precision to Kenroc's claim at the date of the payment in, and thereby to impress part of the $150,000.00 with a sufficiently specific trust in favour of Kenroc as of the date of the payment in and then also as to the date of hearing on the Plan of Arrangement.

2009 ABCA 240 (CanLII)

[71] It follows that while I agree with Winroc that as of November 7, 2007, it had an identifiable and effective trust claim for the amount of its lien and for the purposes of s. 2 of the CCAA, I do not agree that the same situation applies to Kenroc.

2009 ABCA 240 (CanLII)

Lien Claims

[72] It is not necessary to discuss extensively the questions relating to the rights of lien holders under the SBLA, a task more suitable to the Courts of Saskatchewan when the Saskatchewan statute differs in significant manners from the Alberta statute. In ***Merit Energy Ltd.***, the Saskatchewan Court of Appeal held that lien claimants have a lien as soon as materials are first provided to the debtor even if not yet registered, and that a judicial order as to payment into court merely substitutes the lien fund for the property against which the lien was filed. That case, however, was one where the debtor owned the land so it does not reach the present situation.

[73] In Winroc's case, as of November 7, 2007, the lien had been placed against 10105's land respecting a debt owed by 10105 to Kerr, which was not then under CCAA protection. In light of the view I have taken above as to Winroc's trust claim, it is not necessary for me to decide whether Winroc's timely lien attached to property of the debtor for the purposes of s. 2 of the CCAA. It would appear arguable that if ***Merit Energy Ltd.*** is adapted to the present situation, the payment in by 10105 converted the land interest of 10105 as attached by the lien into a moneys' worth attached by a substitute security favouring Winroc. I need not decide this question as there may be implications of doing so not presently before this Court. I can safely leave that task of statutory interpretation of the SBLA to the Saskatchewan courts.

[74] As to Kenroc's position, however, it is clear that its lien was not filed against Kerr's property such as to qualify under s. 2 of the CCAA as of November 7, 2007. Section 22 of the SBLA provides for a lien against "an estate or interest of the owner in the land". Section 33 of the SBLA assists the lien by also saying that the lien is a charge on the holdback funds and "additional amounts" as defined. On the face of those provisions, the charge is nourished by the lien.

[75] In that sense, the lien did not exist in a physical sense manifested by a lien document. Kenroc says, however, that ss. 22 and 33 of the SBLA recognize a lien and a charge on the identified property independent of the filing of the physical lien document. Kenroc says that, under Saskatchewan law, the lien document (and its filing deadline) may have some practical effect in the event of intervening interests, but the lien itself starts with the provision of work or supplies and continues thereafter until the work or supplies are paid for or some adjudication happens. Whether or not that is so, Kerr was not an owner of an estate or interest in the land against which the Kenroc lien was filed *after* November 7, 2007. Even assuming that, at the time of the liens, Kerr had a valid receivables claim against 10105, that was not a land property interest caught by the SBLA statutory lien. Accordingly, the s. 22 statutory lien was not then a lien against "property of the debtor" within the meaning of the statutes read together on November 7, 2007. What happened by reason of the

payment into court did not change Kerr into an owner of land covered by the lien backwards to November 7, 2007. Once again, the terms of s. 2 of the CCAA are crucial here.

2009 ABCA 240 (CanLII)

[76] The January 18, 2008 Saskatchewan order did not convert 10105's "land" interest, which Kenroc says was captured by its lien, into a security covered fund of money that was retroactively "property of the debtor" Kerr as of November 7, 2007. The situation is arguably different for Winroc as noted above. The Saskatchewan courts will decide what to make of the legal meaning and effect of the lien fund in court. It is arguable that Kerr had an interest in the lien fund. Kerr would presumably favour the lien fund being available to distribute to its creditors as per the Plan of Arrangement. Kerr would also presumably be able to make submissions in the summary process contemplated by the CCAA as against the validity or quantum of the lien or as to claim set-offs and defences to the lien claim. Those capacities, however, are not the same thing as Kerr being the owner of land on November 7, 2007.

[77] Kenroc invokes s. 33 of the SBLA to stretch the "lien" defined under s. 22 to include a "charge upon any additional amount owed in relation to the improvement by a payer to the contractor or any subcontractor". Kenroc cite no direct authority for the proposition that this "charge" should be treated as a charge on "property of the debtor company" for the purposes of s. 2 of the CCAA in relation to Kenroc's putative share of the $150,000.00 put into court. Whether the lien, when it existed and before it was vacated by the court order of January 18, 2008, was capable of constituting a "charge" upon a receivable of Kerr by reason of being a valid "lien" on land of 10105, is a moot point. It is also a complex one not discussed below. $150,000.00 was paid into court by 10105 but that did not happen until after November 7, 2007. It was not even required to happen on November 7, 2007, because Kenroc's lien had not been filed.

[78] Accordingly, as of November 7, 2007, there was no lien fund existing against which Kenroc had a legal claim as a lien holder. I repeat that I say nothing about Winroc in this respect. As of November 7, 2007, Kerr arguably had a receivables claim against 10105. By the SBLA, Kenroc and Winroc arguably had a lien as of November 7, 2007, but against land property of 10105. By s. 56 of the SBLA, the land owner can choose to pay the money claimed under liens into court so it can get out of the litigation. Indeed, an owner might conceivably pay into court even if it disputed the claim. Once the money is paid in, the lien is vacated, and, grammatically, so is the "charge". What is created in their place is something we can leave to the Saskatchewan courts to define. Kenroc did not challenge the order paying into court nor the discharge of their filed lien. If Kenroc would ordinarily have acquired a replacement interest in Kerr's property through the payment in process – a point the chambers judge disputed in light of the stay – it did not acquire that interest until the money was paid into court. That was well after November 7, 2007.

[79] The notional Kenroc share of the lien fund of $150,000 was treated as part of the Kerr assets for the Plan of Arrangement, but Kerr could not after November 7, 2007, just go to the Saskatchewan Court of Queen's Bench and take the money out as if it were Kerr's property. By then, Kerr's receivables, whether they were still owing to it by third parties or they were cobbled

2009 ABCA 240 (CanLII)

together in the Monitor's hands or elsewhere, were subject to court disposition in service of the aims of the CCAA. In my view, Kenroc's position boils down to a claim that it was entitled to create, after the vital date of November 7, 2007, a substitute claim against Kerr's property to replace a statutory lien against 10105's property. One can imagine various scenarios whereby creditors, notwithstanding a CCAA stay, engage in a scramble to convert their claims into something more effective, retroactively. In my view allowing creditors to do so would affront the objectives and terms of the CCAA. In the result, I reject Kenroc's position as to the lien claims.

Approval of the Plan

[80] Winroc and Kenroc submit that even if their claims were found to not meet the test for classification as a secured creditor class either by way of lien or trust, the policy indicated by the SBLA and the nature of their relationship with Kerr and Composite is such that the only fair and reasonable approach to the situation would have been to recognize them as a special class entitled to vote as a separate group. Further, they submit that it would only be fair and reasonable to give them full access to the money paid into court, as it was by their actions that the funds were paid in by 10105. To do otherwise, they say, would undermine the benefits and purposes of builders' lien legislation by (a) taking funds which are collected pursuant to such special legislation and making that money available for the benefit of others who are unsecured creditors with no special rights grounded in such legislation, and (b) using those funds ultimately to the benefit of the debtor company, whose overall arrangement offer for others would be improved by inclusion of funds which ought to have been earmarked for Winroc and Kenroc.

[81] In saying this, Winroc and Kenroc submit that the potential existence of lien claims (similar or not) by other parties who did not or could not take steps to particularize and enforce any such lien claims is irrelevant. Similarly they effectively say that the existence of any legislative limitations on lien claims under Alberta legislation is also irrelevant. Further, they effectively say that the process for referring arrangements to creditors for votes under the CCAA is irrelevant insofar as it relates to the type of special claim that they are making here. In their submission, this Court should amend the Plan of Arrangement to require that the $150,000.00 be used to pay their lien claims with interest in priority to any other distributions.

[82] Insofar as Kenroc is concerned, I cannot say that the chambers judge acted unreasonably in defining the classes and in approving the Plan of Arrangement as she did. Her decision was within the range of reasonable options that were available to her under the circumstances: see by analogy, ***Khosa v. Canada (Minister of Citizenship and Immigration)***, [2009] S.C.J. No. 12 (QL), 2009 SCC 12 at para. 59. Her decision on those questions deserves deference: ***Royal Bank of Canada v. Fracmaster Ltd.*** (1999), 244 A.R. 93, [1999] A.J. No. 675 (QL), 1999 ABCA 178 at paras. 3 - 4; ***Re: Gauntlet Energy Corporation***, (2004) 32 C.L.R. (3d) 68, [2004] A.J. No. (QL), 2004 ABCA 20, at para. 12. In my view, she reasonably weighed the factors in ***Canadian Airlines***, ***Resurgence*** and ***Stelco***.

2009 ABCA 240 (CanLII)

[83] She put Kenroc in a category of unsecured creditors which arguably included claimants of a similar nature who did not run rough-shod over the stay order of November 7, 2007. I reject Kenroc's suggestion that it ought to have been distinguished from other potentially similar creditors on the basis that those others had failed to be as proactive and self-identifying as Kenroc was. In light of the stay order, it was within the chambers judge's discretion, acting - as the CCAA contemplates - in a "summary" fashion, to decide if there were others in a situation similar to Kenroc. In light of the standard of review, I am unable to say that the chambers judge acted unfairly in putting Kenroc with other unsecured creditors. Had Kenroc been with the other six creditors in a class separate from other unsecured creditors, Kenroc would have been in the same position it is now, viz., with others who voted in favour of the Plan of Arrangement.

[84] Finally, I am not persuaded that the chambers judge ought to have, in service of fairness, amended the Plan to at least give Kenroc the money paid into court by 10105 to vacate its lien. To do so would have been a distortion of the Plan as an overall balanced effort to reflect the interests of unsecured creditors of which Kenroc was one. It might be said that there is some similarity between this aspect of Kenroc's argument and that of the dissatisfied claimants in ***BCE,*** in that Kenroc points to legislation which it says at least identifies them in a special manner. However, unlike Winroc, Kenroc did not deploy the SBLA in a timely way as regards the CCAA proceedings. The chambers judge did not act unreasonably or contrary to the CCAA in how it dealt with Kenroc.

[85] Winroc's position is separate from Kenroc. I would not regard the situation as one where it would be appropriate or just to upset the entire Plan of Arrangement in order to reflect the effective trust status of Winroc. On my reasoning, the chambers judge would have designated Winroc in a class of secured creditors for the purposes of the Plan, albeit framed by Winroc's lien-identified claim for $46,425.26. Winroc's other claims would fall into the general unsecured category and that situation is not affected by this judgment. I need not speculate whether the chambers judge might still have put Winroc in with other comparable secured creditors if at the time of the hearing as to the Plan she found others of that sort. I proceed on our present record.

Conclusion

[86] Winroc's appeal is allowed to the following extent. I would declare that Winroc's trust claim is a secured claim under s. 2 of the CCAA as framed by the amount of $46,425.26 out of the $150,000.00 paid into court. Upon proof satisfactory to the chambers judge that Winroc is, indeed, entitled to the $46,425.26 or some lesser figure as against Kerr for supplies to Kerr related to the 10105 project, that amount thus determined by the chambers judge can be disbursed to Winroc by court authority in a manner suitable to a secured claimant. The chambers judge can deal with that issue summarily under the CCAA. We would encourage the parties to settle the point by consent.

[87] Kenroc's appeal should in my view be dismissed.

Appeal heard on April 1, 2009

Reasons filed at Edmonton, Alberta
this 25th day of June, 2009

Watson J.A.

2009 ABCA 240 (CanLII)

Appearances:

J.S. Ehmann, Q.C.
for the Appellant Kenroc Building Materials Co. Ltd.

J.G. Hanley
for the Appellant Superior Plus LP

D.R. Bieganek
for the Respondents Kerr Interior Systems Ltd. and Composite Building Systems Inc.

J.H. Hockin
for the Monitor of the Respondent (not a party to the appeal)

Tab 19

2007 SCC 14 (CanLII)

City of Lévis *Appellant*

v.

Fraternité des policiers de Lévis Inc. and Danny Belleau *Respondents*

and

Association des policières et policiers provinciaux du Québec *Intervener*

Indexed as: Lévis (City) *v.* Fraternité des policiers de Lévis Inc.

Neutral citation: 2007 SCC 14.

File No.: 31103.

2006: November 7; 2007: March 22.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Legislation — Interpretation — Conflicting legislation — Whether s. 116(6) of Cities and Towns Act and s. 119, para. 2 of Police Act are incompatible where separate sanctions they provide for upon conviction for criminal offence apply to municipal police officer — If so, which provision has precedence over the other — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2 — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6).

Municipal law — Persons disqualified from municipal employment — Municipal police officer convicted of criminal offences — Cities and Towns Act providing for automatic five-year disqualification of municipal employee convicted of criminal offence — Whether that sanction applies to municipal police officer concurrently with disciplinary sanction of dismissal provided for in Police Act — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6) — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2.

Police — Persons excluded from profession — Disciplinary sanction — Municipal police officer dismissed after being convicted of criminal offences — Arbitrator

Ville de Lévis *Appelante*

c.

Fraternité des policiers de Lévis Inc. et Danny Belleau *Intimés*

et

Association des policières et policiers provinciaux du Québec *Intervenante*

Répertorié : Lévis (Ville) *c.* Fraternité des policiers de Lévis Inc.

Référence neutre : 2007 CSC 14.

N° du greffe : 31103.

2006 : 7 novembre; 2007 : 22 mars.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Législation — Interprétation — Conflit de lois — L'article 116(6) de la Loi sur les cités et villes et l'art. 119, al. 2 de la Loi sur la police sont-ils incompatibles lorsque les sanctions distinctes qu'ils prévoient comme conséquence d'une infraction criminelle s'appliquent à un policier municipal? — Dans l'affirmative, quelle disposition a préséance sur l'autre? — Loi sur la police, L.R.Q., ch. P-13.1, art. 119, al. 2 — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 116(6).

Droit municipal — Personnes inhabiles aux charges municipales — Policier municipal reconnu coupable d'infractions criminelles — Loi sur les cités et villes prévoyant la disqualification automatique de cinq ans d'un fonctionnaire municipal coupable d'une infraction criminelle — Cette sanction s'applique-t-elle à un policier municipal de façon concomitante à la sanction disciplinaire de destitution prévue par la Loi sur la police? — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 116(6) — Loi sur la police, L.R.Q., ch. P-13.1, art. 119, al. 2.

Police — Personnes exclues de la profession — Sanction disciplinaire — Policier municipal destitué après avoir été reconnu coupable d'infractions criminelles —

2007 SCC 14 (CanLII)

substituting another sanction for dismissal pursuant to specific circumstances exception provided for in s. 119, para. 2 of Police Act — Whether arbitrator wrong to conclude that s. 116(6) of Cities and Towns Act, which provides for automatic five-year disqualification of municipal employee convicted of criminal offence, was inapplicable — Whether arbitrator wrong to conclude that police officer had shown that there were specific circumstances that justified sanction other than dismissal — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2 — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6).

Administrative law — Judicial review — Standard of review — Standard applicable to decision of grievance arbitrator regarding conflict between s. 119, para. 2 of Police Act and s. 116(6) of Cities and Towns Act — Standard applicable to that arbitrator's decision regarding interpretation of s. 119, para. 2 and its application to facts — Whether arbitrator's decisions should be subject to different standards of review — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2 — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6).

A police officer employed by a municipality pleaded guilty to several criminal offences, and the separate sanctions provided for in s. 116(6) of the *Cities and Towns Act* ("*C.T.A.*") and s. 119, para. 2 of the *Police Act* ("*P.A.*") applied to all of them. Following an internal investigation, the municipality dismissed him. The union filed a grievance. The arbitrator held that the existence of a specific disciplinary sanction in the *P.A.*, which requires that a police officer convicted of a criminal offence be dismissed subject to the possible application of an exception limited to hybrid offences, meant that the automatic five-year disqualification provided for in the *C.T.A.*, which allows for no exceptions, was inapplicable. He then found that the officer's family troubles, psychological problems and alcohol abuse had led him to commit the offences and that they constituted "specific circumstances" that allowed for a sanction other than dismissal under the exception provided for in s. 119, para. 2 *P.A.* He ordered that the officer be reinstated. The Superior Court set aside the arbitration award, but the award was restored by the Court of Appeal.

Held: The appeal should be allowed and the sanction of dismissal restored.

Per McLachlin C.J. and Bastarache, Binnie and Charron JJ.: Two standards of review are needed. Multiple standards of review should be adopted only

Arbitre substituant une autre sanction à la destitution, en application de l'exception relative aux circonstances particulières que prévoit l'art. 119, al. 2 de la Loi sur la police — L'arbitre a-t-il eu tort de conclure que l'art. 116(6) de la Loi sur les cités et villes, qui prévoit la disqualification automatique pour une période de cinq ans d'un fonctionnaire municipal reconnu coupable d'une infraction criminelle, était inapplicable? — L'arbitre a-t-il eu tort de conclure que le policier avait démontré des circonstances particulières justifiant une sanction autre que la destitution? — Loi sur la police, L.R.Q., ch. P-13.1, art. 119, al. 2 — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 116(6).

Droit administratif — Contrôle judiciaire — Norme de contrôle — Norme applicable à la décision d'un arbitre de griefs en ce qui a trait à un conflit entre l'art. 119, al. 2 de la Loi sur la police et l'art. 116(6) de la Loi sur les cités et villes — Norme applicable à la décision de cet arbitre en ce qui a trait à l'interprétation de l'art. 119, al. 2 et son application aux faits — Faut-il assujettir les décisions de l'arbitre à des normes de contrôle différentes? — Loi sur la police, L.R.Q., ch. P-13.1, art. 119, al. 2 — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 116(6).

Un policier à l'emploi d'une municipalité plaide coupable à plusieurs infractions criminelles, toutes visées par les sanctions distinctes prévues par le par. 116(6) de la *Loi sur les cités et villes* (« *L.C.V.* ») et par l'art. 119, al. 2 de la *Loi sur la police* (« *L.P.* »). À l'issue de l'enquête interne qui suit, la municipalité le destitue. Le syndicat dépose un grief. L'arbitre statue que, en présence d'une sanction disciplinaire spécifique dans la *L.P.* qui impose la destitution du policier coupable d'une infraction criminelle sous réserve d'une possibilité d'exception limitée aux infractions mixtes, la disqualification automatique de cinq ans, sans exception, prévue par la *L.C.V.* ne s'applique pas. Il conclut ensuite que les drames familiaux, problèmes psychologiques et abus d'alcool du policier l'ont conduit à commettre les infractions et que cela constitue des « circonstances particulières » donnant ouverture à une sanction autre que la destitution, au sens de l'exception prévue par l'art. 119, al. 2 *L.P.* Il ordonne la réintégration. La Cour supérieure annule la sentence arbitrale, mais cette sentence est rétablie par la Cour d'appel.

Arrêt : Le pourvoi est accueilli et la sanction de destitution rétablie.

La juge en chef McLachlin et les juges Bastarache, Binnie et Charron : Deux normes de contrôle sont requises. Il convient d'adopter des normes de contrôle

2007 SCC 14 (CanLII)

when there are clearly defined questions that engage different concerns under the pragmatic and functional approach. The question whether s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are in conflict and, if so, which one should prevail, clearly raises separate concerns from the question whether the arbitrator properly interpreted and applied s. 119, para. 2. While there is a relatively strong privative clause in the *Labour Code*, the question of compatibility is a pure question of law that does not engage the arbitrator's special knowledge of labour and employment law. Moreover, this question is of general importance and has precedential value. As for the purpose of legislation, while the *Labour Code* clearly contemplates calling on arbitrators to interpret and apply legislation in order to settle grievances in a prompt, final and binding manner, it does not follow that the question of the compatibility of conflicting legislative provisions was intended to be within the exclusive purview of the grievance arbitrator, or that such a task is at the core of the object of grievance arbitration. On balance, the question of compatibility must be subject to the strictest standard of review, the standard of correctness. [19-23]

The question whether the arbitrator correctly interpreted and applied s. 119, para. 2 *P.A.* to the police officer's conduct is one of mixed fact and law. It requires an analysis more in line with the traditional function of a grievance arbitrator under s. 100.12(*f*) of the *Labour Code*. It also requires a balancing of the competing interests of the police officer facing dismissal, of the municipality, both as an employer and as a public body responsible for public security, and of the community as a whole in maintaining respect and confidence in its police officers. But not all factors point to the highest standard of deference. The question has some degree of precedential value, the arbitrator's discretion is narrower under s. 119, para. 2 *P.A.* than it would otherwise be under s. 100.12(*a*) and (*f*) of the *Labour Code*, and the *P.A.* is external to the collective agreement and to the Code. On balance, the reasonableness standard of review is suitable for this question. [24-28]

Municipal police officers are subject both to the *P.A.* and to the *C.T.A.* as municipal employees. While ss. 119 *P.A.* and 116(6) *C.T.A.* apply unproblematically both outside of the municipal police context and when a municipal police officer is convicted of an indictable offence, there is a clear zone where the statutes overlap

multiples uniquement lorsque des questions clairement définies font intervenir des intérêts différents dans le cadre de l'analyse pragmatique et fonctionnelle. La question de savoir s'il existe un conflit entre l'art. 119, al. 2 *L.P.* et le par. 116(6) *L.C.V.* et, le cas échéant, quelle disposition a préséance soulève manifestement des préoccupations autres que la question de savoir si l'arbitre a bien interprété et appliqué l'art. 119, al. 2. Bien que l'on trouve dans le *Code du travail* une clause privative relativement rigoureuse, la question de la compatibilité est une pure question de droit qui ne fait pas intervenir les connaissances spécialisées de l'arbitre en matière de droit du travail. En outre, il s'agit d'une question d'importance générale qui a valeur de précédent. Quant à l'objet de la loi, même si le *Code du travail* prévoit certainement que les arbitres sont appelés à interpréter et à appliquer la loi afin d'assurer le règlement rapide, définitif et exécutoire de griefs, il ne s'ensuit pas que la question de la conciliation de dispositions législatives incompatibles devrait relever de la compétence exclusive de l'arbitre de griefs ni que cette fonction soit fondamentale au sein de l'objet de l'arbitrage des griefs. Somme toute, la question de la compatibilité doit être assujettie à la norme de contrôle la plus rigoureuse, soit la norme de la décision correcte. [19-23]

La question de savoir si l'arbitre a correctement interprété l'art. 119, al. 2 *L.P.* et l'a correctement appliqué à la conduite du policier est une question mixte de droit et de fait. Elle requiert une analyse qui relève davantage des fonctions normalement exercées par un arbitre de griefs aux termes de l'al. 100.12*f*) du *Code du travail*. Elle doit aussi être résolue en tenant compte d'intérêts opposés : les intérêts du policier menacé de destitution, les intérêts de la municipalité, en sa qualité d'employeur autant que d'organisme public responsable de la sécurité du public, ainsi que les intérêts de l'ensemble de la collectivité, à qui les policiers doivent inspirer respect et confiance. Mais les facteurs à prendre en compte ne militent pas tous en faveur du degré le plus élevé de retenue. La question a, dans une certaine mesure, valeur de précédent; aux termes de l'art. 119, al. 2 *L.P.*, le pouvoir discrétionnaire de l'arbitre est plus restreint qu'il le serait par ailleurs aux termes des al. 100.12*a*) et *f*) du *Code du travail* et la *L.P.* ne fait partie ni de la convention collective ni du Code. Somme toute, la norme de la décision raisonnable est celle qu'il convient d'appliquer à cette question. [24-28]

Les policiers municipaux sont assujettis tant à la *L.P.* qu'à la *L.C.V.* en tant qu'employés de la municipalité. Alors que l'art. 119 *L.P.* et le par. 116(6) *L.C.V.* s'appliquent sans problème hors du contexte de la police municipale ou lorsqu'un policier municipal est reconnu coupable d'un acte criminel, il y a clairement

and come into conflict. Both provisions apply to the officer's conduct in the instant case. One statute provides for an exception to the rule of dismissal and would allow him to maintain his employment if he can show specific circumstances, but the other does not. The conflict is unavoidable, because one statute implicitly takes away what another statute has explicitly allowed. In case of conflict, s. 119, para. 2 *P.A.* should prevail over s. 116(6) *C.T.A.* Section 119 satisfies the requirements of the presumptions developed to aid in determining the legislature's intent in that it is both more recent and more specific in comparison to s. 116(6). Furthermore, the specific circumstances exception was intended to meet the concern expressed at the time it was adopted as to the severity of the rule of dismissal. If s. 116(6) were held to prevail over s. 119, para. 2, this would defeat a clearly stated legislative objective. Lastly, the fact that the legislature has not amended s. 116(6) since adopting the new *P.A.* could indicate an intention to preserve the legislative bargain that was struck when s. 119 was drafted without affecting the applicability of s. 116(6) to other municipal employees. [40] [48-49] [56-57] [61-63]

It was unreasonable for the arbitrator to conclude that the specific circumstances raised by the police officer were sufficient to satisfy the s. 119, para. 2 exception. The burden of proof was on the police officer. In deciding whether specific circumstances are proven or not, an arbitrator may take into account any circumstance surrounding the offence that could affect the police officer's ability to continue to serve the public effectively and credibly. The arbitrator equated his jurisdiction under s. 119, para. 2 *P.A.* to the jurisdiction he would normally enjoy under s. 100.12(*f*) of the *Labour Code* and failed to properly weigh the effect of the police officer's criminal conduct on his ability to carry out his duties; this affected the rationality of his decision. Referring to attenuating and aggravating circumstances in other employment law contexts may sometimes be useful, but this should have been done in this case having regard to the unique issues that are raised by the criminal conduct of police officers. The context here is one of domestic violence, and the officer pleaded guilty to a charge of assault on his wife; this is a very important consideration in light of the public's reliance on police intervention in such cases, and one that the arbitrator could not reasonably ignore. Furthermore, the firearm offences cannot be attributed to the officer's personal problems, nor can they be justified, as the arbitrator sought to do, merely on the ground that they are technical offences. More serious still is the officer's conscious defiance of

chevauchement et incompatibilité dans la zone d'application commune à ces deux dispositions législatives. Les deux dispositions s'appliquent à la conduite du policier en l'espèce. L'un des textes législatifs comporte un régime d'exception à la règle de la destitution et lui permet de conserver son emploi s'il peut démontrer l'existence de circonstances particulières, mais pas l'autre. Le conflit ne peut être évité parce qu'une loi retire implicitement ce que l'autre loi autorise explicitement. En présence d'un conflit, l'art. 119, al. 2 *L.P.* doit avoir préséance sur le par. 116(6) *L.C.V.* L'article 119 satisfait aux exigences des deux présomptions élaborées pour faciliter la tâche de cerner l'intention du législateur puisqu'il est à la fois plus récent et plus spécifique que le par. 116(6). De plus, le régime d'exception des circonstances particulières visait à tenir compte des observations, faites à l'époque de l'adoption de cette disposition, concernant la sévérité de la règle de la destitution. La conclusion voulant que le par. 116(6) doive avoir préséance sur l'art. 119, al. 2 irait à l'encontre d'un objectif clairement déclaré de la loi. Enfin, le fait que le législateur n'ait pas modifié le par. 116(6) depuis l'adoption de la nouvelle *L.P.* pourrait indiquer une intention de sauvegarder les intérêts pris en compte lors de la rédaction de l'art. 119 sans influer sur l'application du par. 116(6) aux autres employés municipaux. [40] [48-49] [56-57] [61-63]

Il n'était pas raisonnable que l'arbitre conclue que les circonstances particulières soulevées par le policier permettaient de satisfaire à l'exception prévue à l'art. 119, al. 2. Le policier avait le fardeau de la preuve. En décidant si la preuve de circonstances particulières a été faite ou non, un arbitre peut tenir compte de toute circonstance relative à l'infraction qui se rapporte à la capacité future du policier de servir le public avec efficacité et crédibilité. L'arbitre se croyait investi, aux termes de l'art. 119, al. 2 *L.P.*, du pouvoir qu'il exercerait normalement selon l'al. 100.12*f*) du *Code du travail* et il n'a pas apprécié adéquatement les répercussions de la conduite criminelle du policier sur la capacité de celui-ci d'exercer ses fonctions, ce qui a perturbé la rationalité de sa décision. S'il est parfois utile de soupeser les circonstances atténuantes ou aggravantes dans d'autres situations relevant du droit du travail, il aurait fallu en l'espèce tenir compte des questions uniques que soulève la conduite criminelle d'un policier. Il est question ici de violence conjugale, et le policier a reconnu sa culpabilité à une accusation de voies de fait contre sa conjointe. Il s'agit là d'une considération très importante puisque le public s'en remet aux interventions des policiers en de tels cas et l'arbitre ne pouvait raisonnablement pas écarter cet élément. De plus, on ne peut mettre les infractions relatives aux armes à feu sur le compte des problèmes personnels du policier, ni les justifier en les qualifiant d'infractions à caractère technique, comme l'arbitre a

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

his undertaking to the court not to communicate with his spouse. The breach of an undertaking by a police officer is especially serious given the role that police officers play in the administration of justice. It suggests a lack of respect for the judicial system of which he forms an integral part. Finally, public confidence was a factor to be considered. Media reports of criminal conduct by police officers have an effect on public confidence. But in treating the issue as one about properly informing the public of personal circumstances surrounding the offences committed, the arbitrator failed to take into account the gravity of these offences and the effect that they would have on public confidence. [68-80]

Per Deschamps and Fish JJ.: The sanction of dismissal should be restored. Section 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are not incompatible. The courts have interpreted the meaning of the word "conflict" as narrowly as possible. The fact that one provision is more restrictive or imposes different conditions than the other, or that both provisions apply to the same person and the same fact situation, is in itself insufficient to support the conclusion that one of the provisions is inapplicable. [82-83] [87]

In the instant case, it can be seen by reading the *P.A.* and the *C.T.A.* together that the incompatibility is merely apparent: the former governs the capacity to serve as a police officer and the sanctions attached to breaches of the conditions of eligibility for a position as a police officer, while the latter governs the conditions of eligibility for municipal employment. A person who is qualified to serve in both capacities must meet the conditions of both statutes. If a municipal police officer commits an indictable offence, he will, by virtue of s. 119, para. 1 *P.A.* and of the *C.T.A.*, be both excluded from serving as a police officer and, where there is a connection with the employment, disqualified from municipal employment for five years. The same will be true if an officer commits a hybrid offence punishable by imprisonment for one year or more and is unable to prove the existence of specific circumstances under the *P.A.* Where specific circumstances are proven, the officer will not be dismissed, but will nonetheless be disqualified for five years under municipal law. There is no conflict in the fact that, in this last situation, a concurrent application of the provisions will deprive the officer of his or her employment as a municipal employee for a period of five years even though he or she has not ceased to be eligible to serve as a police officer. [91-93] [98]

tenté de le faire. La décision consciente de l'agent de police de ne pas se conformer à l'engagement qu'il avait pris envers le tribunal de ne pas communiquer avec sa conjointe est encore plus sérieuse. Le manquement à un engagement judiciaire est particulièrement grave dans le cas d'un policier, étant donné le rôle de ce dernier dans l'administration de la justice. Un tel comportement dénote un manque de respect pour le système judiciaire dont le policier fait partie intégrante. Enfin, la confiance du public était un facteur qu'il fallait prendre en compte. Les reportages des médias sur la conduite criminelle des policiers ont des répercussions sur la confiance du public. Mais en limitant son examen de cette question à la justesse de l'information communiquée au public au sujet des circonstances personnelles entourant les infractions commises, l'arbitre a omis de tenir compte de la gravité de ces infractions et de leur incidence possible sur la confiance du public. [68-80]

Les juges Deschamps et Fish : La sanction de destitution doit être rétablie. L'article 119, al. 2 *L.P.* et le par. 116(6) *L.C.V.* ne sont pas incompatibles. Les tribunaux, dans la mesure du possible, restreignent le sens du mot « conflit » à sa portée la plus étroite. Le simple fait qu'une norme soit plus contraignante que l'autre, impose des conditions différentes, ou s'applique à la même personne et à la même situation de faits ne suffit pas pour conclure à l'inapplication de l'une d'elles. [82-83] [87]

En l'espèce, la lecture conjointe de la *L.P.* et de la *L.C.V.* fait voir que l'incompatibilité n'est qu'apparente : la première régit la capacité d'agir comme policier et les sanctions qui sont attachées aux manquements aux conditions d'admissibilité à cette fonction, tandis que la deuxième régit les conditions d'admissibilité à une fonction municipale. Dans le cas où une personne cumule les deux fonctions, elle doit satisfaire aux conditions prescrites par les deux lois. Si un policier municipal commet un acte criminel, il sera, par l'effet de l'art. 119, al. 1 *L.P.* et de la *L.C.V.*, à la fois exclu des rangs de la police et disqualifié pour cinq ans comme employé municipal, dans ce dernier cas sous réserve d'un lien avec l'emploi. Il en va de même s'il commet une infraction mixte punissable d'une peine d'emprisonnement d'un an ou plus et qu'il ne peut prouver de circonstances particulières selon la *L.P.* En présence d'une preuve de telles circonstances, il ne sera pas destitué mais sera pourtant disqualifié pour cinq ans en vertu du droit municipal. Le fait que, dans cette dernière situation, une application concomitante prive le policier de son emploi comme fonctionnaire municipal pour une période de cinq ans alors qu'il n'a pas perdu son habilité à être policier n'est pas source d'incompatibilité. [91-93] [98]

2007 SCC 14 (CanLII)

Nor does the proposed interpretation frustrate the purposes of the provisions in question. Although s. 119 *P.A.* is disciplinary in nature, an arbitrator is not entitled to review an employer's decision to terminate the employment of a police officer who has been convicted of an indictable offence, since, under both s. 115 *P.A.* and s. 119, the officer is no longer eligible to serve as a police officer. Where an officer has been convicted of a hybrid offence and has benefited from the exception under s. 119, on the other hand, he or she will be able to apply for employment in a police force other than a municipal force, because he or she has not ceased to be eligible under the *P.A.* Where an officer has benefited from the exception under s. 119, this must be reflected in an interpretation of s. 115 that is consistent with the clear objective of the exception, namely to allow the individual in question to continue his or her career as a police officer. [92-95]

Per Abella J.: The arbitrator's decision whether to apply s. 119, para. 2 *P.A.* should not be subjected to a different standard of review than his decision on how to apply it. The privative clause in s. 101 of the *Labour Code*, which states that the arbitrator's award is without appeal, protects the arbitrator's exclusive responsibility for deciding a grievance, and s. 100.12(*a*) of the Code clothes him with the authority to determine how any relevant statutory provision ought to apply to it. These provisions, combined with the expertise of the arbitrator in labour disputes and the legislative objective of having them resolved expeditiously and conclusively, favour an integrated standard for assessing the arbitrator's interpretation both of his jurisdictional mandate and of its application. For the reasons given by the majority, even on a single deferential standard of review, the arbitrator's decision as to the appropriate sanction is unsustainable and the sanction of dismissal should be restored. [107-109] [117]

Cases Cited

By Bastarache J.

Applied: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Massicotte v. Boutin*, [1969] S.C.R. 818; *Multiple Access*

L'interprétation proposée ne fait pas non plus obstacle à l'objet des dispositions en question. Bien que l'art. 119 *L.P.* s'inscrive dans un contexte disciplinaire, l'arbitre n'a pas le droit de réviser la décision d'un employeur de mettre fin à l'emploi du policier déclaré coupable d'un acte criminel puisque ce policier n'est plus éligible à la fonction de policier, ni selon l'art. 115 *L.P.* ni selon l'art. 119. Cependant, lorsque le policier est reconnu coupable d'une infraction mixte et qu'il bénéficie de l'exception de l'art. 119, il pourra postuler un emploi dans un corps de police autre que municipal parce qu'il n'aura pas perdu son habilité en vertu de la *L.P.* L'exception dont peut bénéficier le policier en vertu de l'art. 119 doit se refléter dans une interprétation de l'art. 115 qui respecte l'objectif manifeste de l'exception — c'est-à-dire permettre à l'intéressé de poursuivre sa carrière comme policier. [92-95]

La juge Abella : La décision de l'arbitre concernant l'opportunité d'appliquer l'art. 119, al. 2 *L.P.* ne doit pas être assujettie à une norme de contrôle différente de celle retenue pour la façon d'appliquer cet article. La clause privative de l'art. 101 du *Code du travail*, précisant que la sentence arbitrale est sans appel, protège la compétence exclusive de l'arbitre en matière d'arbitrage de griefs tandis que l'al. 100.12*a*) du Code lui confère le pouvoir de décider de quelle manière toute disposition législative pertinente devrait s'y appliquer. Compte tenu de l'expertise de l'arbitre en matière de conflits de travail et de l'objet de la loi qui est d'assurer un règlement rapide et définitif de ces différends, ces dispositions offrent un argument solide à l'appui d'une norme intégrée d'évaluation de l'interprétation par l'arbitre de sa compétence comme de la façon de l'exercer. Pour les motifs que donnent les juges majoritaires, même suivant une seule norme de contrôle, la décision de l'arbitre eu égard à la sanction à imposer est insoutenable et la sanction de la destitution doit être rétablie. [107-109] [117]

Jurisprudence

Citée par le juge Bastarache

Arrêts appliqués : *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Alberta Union of Provincial Employees c. Lethbridge Community College*, [2004] 1 R.C.S. 727, 2004 CSC 28; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488; *Massicotte c. Boutin*, [1969] R.C.S. 818;

2007 SCC 14 (CanLII)

Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; **referred to:** *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23; *Pelland v. St-Antoine (Ville de)*, J.E. 94-499, 1994 CarswellQue 1900; *Fraternité des policiers de la Communauté urbaine de Montréal Inc. v. Communauté urbaine de Montréal*, [1985] 2 S.C.R. 74; *Péloquin v. Syndicat des agents de la paix en services correctionnels du Québec*, [2000] R.J.Q. 2215; *Lévis (Ville de) v. Syndicat des policiers et pompiers de Lévis*, D.T.E. 89T-344; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, 2003 SCC 68; *Syndicat des employés municipaux de Beauce (C.S.D.) v. St-Georges (Ville de)*, J.E. 2000-540, SOQUIJ AZ-00019015; *Association des pompiers de Laval v. Ville de Laval*, [1985] T.A. 446; *Fraternité des policiers de Deux-Montagnes/Ste-Marthe-sur-le-Lac v. Deux-Montagnes (Ville de)*, J.E. 2001-524, SOQUIJ AZ-50083424; *L'Île-Perrot (Ville de) et Union des employés de service, section locale 800*, D.T.E. 2000T-619; *Duguay et Paspébiac (Ville de)*, D.T.E. 2003T-47, SOQUIJ AZ-50152875.

By Deschamps and Fish JJ.

Referred to: *Duval v. The King* (1938), 64 B.R. 270; *Daniels v. White*, [1968] S.C.R. 517; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Bell v. Attorney General for Prince Edward Island*, [1975] 1 S.C.R. 25; *Ricard v. Lord*, [1941] S.C.R. 1; *Beaudoin v. Roy*, [1984] R.L. 315; *Roy v. Mailloux*, [1966] B.R. 468.

By Abella J.

Referred to: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Toronto (City) Board of Education v. O.S.S.T.F.,*

Multiple Access Ltd. c. McCutcheon, [1982] 2 R.C.S. 161; **arrêts mentionnés :** *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63; *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157; *Newfoundland Association of Public Employees c. Terre-Neuve (Green Bay Health Care Centre)*, [1996] 2 R.C.S. 3; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, [2006] 1 R.C.S. 140, 2006 CSC 4; *Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42; *Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23; *Pelland c. St-Antoine (Ville de)*, J.E. 94-499, 1994 CarswellQue 1900; *Fraternité des policiers de la Communauté urbaine de Montréal Inc. c. Communauté urbaine de Montréal*, [1985] 2 R.C.S. 74; *Péloquin c. Syndicat des agents de la paix en services correctionnels du Québec*, [2000] R.J.Q. 2215; *Lévis (Ville de) c. Syndicat des policiers et pompiers de Lévis*, D.T.E. 89T-344; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Maksteel Québec Inc.*, [2003] 3 R.C.S. 228, 2003 CSC 68; *Syndicat des employés municipaux de Beauce (C.S.D.) c. St-Georges (Ville de)*, J.E. 2000-540, SOQUIJ AZ-00019015; *Association des pompiers de Laval c. Ville de Laval*, [1985] T.A. 446; *Fraternité des policiers de Deux-Montagnes/Ste-Marthe-sur-le-Lac c. Deux-Montagnes (Ville de)*, J.E. 2001-524, SOQUIJ AZ-50083424; *L'Île-Perrot (Ville de) et Union des employés de service, section locale 800*, D.T.E. 2000T-619; *Duguay et Paspébiac (Ville de)*, D.T.E. 2003T-47, SOQUIJ AZ-50152875.

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Loi sur le droit pour la sécurité des passagers du transport aérien, L.C. 2002, ch. 9, art. 62(2).
Loi sur les cités et villes, L.R.Q., ch. C-19, art. 71, 72, 116(6), (7).
Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.), art. 160.1.
Règlement numéro 756 relatif à l'éthique professionnelle et à la discipline interne des policiers-pompiers de la Ville de Lévis, 18 août 1997, art. 13.10, 13.11, 22.

Doctrine citée

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2007 SCC 14 (CanLII)

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Québec. Assemblée nationale. *Journal des débats de la Commission permanente des institutions*, 1re sess., 36e lég., 26 mai 2000, no 79.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Morin and Bich JJ.A.), [2005] Q.J. No. 8450 (QL), J.E. 2005-1271, 2005 QCCA 639, reversing a decision of Lemelin J., [2003] Q.J. No. 13008 (QL). Appeal allowed.

Richard Ramsay, *Sarto Veilleux* and *François LeBel*, for the appellant.

Serge Gagné and *Maude Gagné*, for the respondents.

Gino Castiglio and *André Fiset*, for the intervener.

The judgment of McLachlin C.J. and Bastarache, Binnie and Charron JJ. was delivered by

BASTARACHE J. — This appeal concerns the consequences of criminal conduct by municipal police officers in Quebec and whether that conduct should be sanctioned by the law governing police or by municipal law. Specifically, we are asked to determine whether s. 119, para. 2 of the *Police Act*, R.S.Q., c. P-13.1 ("*P.A.*"), and s. 116(6) of the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*"), can apply concurrently to a municipal police officer, and if not, which provision should take precedence. We are also asked to determine whether the arbitrator committed a reviewable error in his interpretation and application of the limited exception found in s. 119, para. 2 *P.A.* The latter provision provides for the mandatory dismissal of police officers who are convicted of serious criminal offences unless they can show specific circumstances justifying another sanction. In comparison, s. 116(6) *C.T.A.* disqualifies any person from municipal employment for similar types of offences but subject to no exception.

Halsbury's Laws of England, vol. 36, 3rd ed. London : Butterworth, 1961.
Québec. Assemblée nationale. *Journal des débats de la Commission permanente des institutions*, 1re sess., 36e lég., 26 mai 2000, no 79.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto : Butterworths, 1994.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Pelletier, Morin et Bich), [2005] J.Q. no 8450 (QL), J.E. 2005-1271, 2005 QCCA 639, qui a infirmé une décision du juge Lemelin, [2003] J.Q. no 13008 (QL). Pourvoi accueilli.

Richard Ramsay, *Sarto Veilleux* et *François LeBel*, pour l'appelante.

Serge Gagné et *Maude Gagné*, pour les intimés.

Gino Castiglio et *André Fiset*, pour l'intervenante.

Version française du jugement de la juge en chef McLachlin et des juges Bastarache, Binnie et Charron rendu par

LE JUGE BASTARACHE — Le présent pourvoi porte sur les conséquences qu'entraîne la conduite criminelle des policiers municipaux au Québec et sur les sanctions applicables en pareil cas, celles prévues par les textes législatifs régissant la police ou celles prévues par le droit municipal. Plus particulièrement, notre Cour est appelée à décider si l'art. 119, al. 2 de la *Loi sur la police*, L.R.Q., ch. P-13.1 (« *L.P.* »), et le par. 116(6) de la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »), peuvent s'appliquer concurremment à un policier municipal et, si tel n'est pas le cas, nous devons déterminer celle de ces dispositions qui prévaut. Notre Cour doit également déterminer si l'arbitre a commis une erreur donnant ouverture à la révision dans son interprétation et son application de l'exception limitée prévue à l'art. 119, al. 2 *L.P.* Cette disposition prévoit la destitution de tout policier reconnu coupable d'une infraction criminelle grave, à moins que ce dernier ne démontre que des circonstances particulières justifient une autre sanction. Par ailleurs, selon le par. 116(6) *L.C.V.*, toute personne déclarée coupable d'une infraction semblable est inhabile à une charge d'employé de la municipalité, sans exception.

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

2 The appellant municipality dismissed the respondent Danny Belleau ("Belleau") after he pleaded guilty to several criminal offences, all of which fell within the scope of both s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* The grievance arbitrator held that s. 119, para. 2 *P.A.* had rendered s. 116(6) *C.T.A.* inapplicable to municipal police officers. He also found that there were specific circumstances which justified another sanction under s. 119, para. 2 *P.A.*, and, as result, overturned the dismissal and ordered that Belleau's employment be restored. There is no question that had s. 116(6) *C.T.A.* applied alone, Belleau's challenge to his dismissal would have failed.

3 The arbitrator's decision was quashed by the Superior Court ([2003] Q.J. No. 13008 (QL)), but upheld by the Court of Appeal ([2005] Q.J. No. 8450 (QL), 2005 QCCA 639). Before this Court, the appellant argues that despite the enactment of s. 119, para. 2 *P.A.*, s. 116(6) *C.T.A.* is still applicable to Belleau and that on a proper application of either provision, its decision to dismiss Belleau should stand.

1. Background

4 Before he was dismissed, Belleau had been a member of the appellant's municipal police force for 15 years. The criminal conduct which led to the dismissal occurred on December 29 and 30, 2000. It would appear that on the evening of the 29th, Belleau, who was on leave at the time, had a heated argument with his spouse, Johanne Robitaille. He had been drinking heavily and he later admitted that he was intoxicated. The dispute worsened and Belleau became violent. When the police arrived, they found Robitaille wandering outside without a jacket, clutching her dog. They arrested Belleau and searched the house. In the basement they found three unsecured firearms. The next morning, Belleau was released on condition that he not communicate in any way with Robitaille. Less than two hours after his release, he breached that condition by appearing at the house of Robitaille's parents, where Robitaille was present. Belleau was arrested once more. On February 2, 2001, he pleaded guilty to threatening to cause death or bodily harm,

La municipalité appelante a destitué l'intimé, Danny Belleau (« M. Belleau »), après que celui-ci eut reconnu sa culpabilité à plusieurs infractions criminelles, toutes visées au par. 116(6) *L.C.V.* et à l'art. 119, al. 2 *L.P.* L'arbitre de griefs a statué que le par. 116(6) *L.C.V.* ne s'appliquait pas aux policiers municipaux du fait de l'art. 119, al. 2 *L.P.* En outre, il a conclu que des circonstances particulières justifiaient une autre sanction au titre de l'art. 119, al. 2 *L.P.* et, par conséquent, il a annulé la destitution et a ordonné la réintégration de M. Belleau. Il ne fait aucun doute qu'en cas d'application du par. 116(6) *L.C.V.* seulement, M. Belleau n'aurait pu contester avec succès sa destitution.

La sentence arbitrale a été annulée par la Cour supérieure ([2003] J.Q. n^{o} 13008 (QL)), mais rétablie par la Cour d'appel ([2005] J.Q. n^{o} 8450 (QL), 2005 QCCA 639). Devant notre Cour, l'appelante fait valoir que le par. 116(6) *L.C.V.* continue de s'appliquer à M. Belleau malgré l'adoption de l'art. 119, al. 2 *L.P.*, et que, selon l'application correcte de ces dispositions, sa décision de destituer M. Belleau doit être maintenue.

1. Contexte

Avant sa destitution, M. Belleau était membre du corps policier de la municipalité appelante depuis 15 ans. Les actes criminels qui ont entraîné sa destitution ont été commis les 29 et 30 décembre 2000. Il semble que le soir du 29 décembre, M. Belleau, qui était alors en congé, ait eu une violente dispute avec sa conjointe, Johanne Robitaille. Il avait consommé beaucoup d'alcool et a plus tard reconnu qu'il était en état d'ébriété. La dispute s'est envenimée et M. Belleau est devenu violent. À leur arrivée, les policiers ont trouvé M^{me} Robitaille errant dehors sans manteau, avec son chien dans ses bras. Ils ont arrêté M. Belleau et ont fouillé la maison. Au sous-sol, ils ont trouvé trois armes à feu qui n'étaient pas entreposées de manière sécuritaire. Le lendemain matin, M. Belleau a été remis en liberté à la condition qu'il n'entre pas en communication de quelque façon avec M^{me} Robitaille. Moins de deux heures après sa remise en liberté, il a violé cette condition en se présentant au domicile des parents de M^{me} Robitaille, où cette dernière se trouvait.

2007 SCC 14 (CanLII)

assault, three counts of storing a firearm in a careless manner or without reasonable safety precautions, and failing to comply with a condition of his undertaking. Significantly for the purposes of this appeal, all of the offences were hybrid offences, punishable on indictment or on summary conviction and to imprisonment for a term of more than one year.

Belleau's employment was terminated following a disciplinary investigation by the appellant's director of public security, Gilles Drolet ("the director"). In his report, the director concluded that Belleau had failed to demonstrate specific circumstances sufficient to justify another sanction under s. 119, para. 2 *P.A.* Although he made reference to s. 116(6) *C.T.A.* in his report, there was no mention of it in his analysis or in the form summarizing his final recommendation. The council of the appellant municipality accepted the recommendation and passed a resolution dismissing Belleau on June 18, 2001. The respondents contested this decision by way of a grievance filed on June 28, 2001.

It will be helpful to set out the relevant legislation before considering how the respondents' grievance was treated in the jurisdictions below.

2. Relevant Statutory Provisions

Police Act, R.S.Q., c. P-13.1

115. To be hired as a police officer a person must meet the following requirements:

(1) be a Canadian citizen;

(2) be of good moral character;

(3) not have been found guilty, in any place, of an act or omission defined in the Criminal Code (Revised

M. Belleau a été arrêté de nouveau. Le 2 février 2001, il a reconnu sa culpabilité relativement à des accusations de menace de causer la mort ou des lésions corporelles, de voies de fait, trois chefs d'accusation pour entreposage d'une arme à feu de manière négligente ou sans prendre suffisamment de précaution, et d'omission de se conformer à une condition d'un engagement. Il importe de noter dans le cadre du présent pourvoi que toutes les infractions étaient des infractions mixtes punissables, sur déclaration de culpabilité par voie de mise en accusation ou par procédure sommaire, d'un emprisonnement de plus d'un an.

5 M. Belleau a été destitué de ses fonctions à la suite d'une enquête disciplinaire menée par le directeur de la Sécurité publique de l'appelante, Gilles Drolet (« le directeur »). Dans son rapport, le directeur a conclu que M. Belleau n'avait pas fait la preuve de circonstances particulières justifiant une autre sanction au titre de l'art. 119, al. 2 *L.P.* Même si dans son rapport il a fait mention du par. 116(6) *L.C.V.*, le directeur n'en a pas parlé dans son analyse ni dans le formulaire résumant sa recommandation finale. Le conseil de la municipalité appelante a accepté la recommandation et a adopté la résolution prononçant la destitution de M. Belleau le 18 juin 2001. Les intimés ont contesté cette décision par voie de grief déposé le 28 juin 2001.

6 J'estime utile d'énoncer les dispositions législatives pertinentes avant d'examiner les décisions des tribunaux d'instance inférieure relatives au grief des intimés.

2. Dispositions législatives pertinentes

7 *Loi sur la police*, L.R.Q., ch. P-13.1

115. Les conditions minimales pour être embauché comme policier sont les suivantes :

1° être citoyen canadien;

2° être de bonnes mœurs;

3° ne pas avoir été reconnu coupable, en quelque lieu que ce soit, d'un acte ou d'une omission que le

Statutes of Canada, 1985, chapter C-46) as an offence, or of an offence referred to in section 183 of that Code under one of the Acts listed therein;

(4) hold a diploma awarded by the École nationale de police du Québec or meet the standards of equivalence established by by-law by the school.

. . .

The hiring requirements do not apply to the members of police forces when police services are integrated, amalgamated or otherwise merged.

. . .

119. Any police officer or special constable who is found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section 115 that is triable only on indictment, shall, once the judgment has become *res judicata*, be automatically dismissed.

A disciplinary sanction of dismissal must, once the judgment concerned has become *res judicata*, be imposed on any police officer or special constable who is found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the police officer or special constable shows that specific circumstances justify another sanction.

Cities and Towns Act, R.S.Q., c. C-19

116. The following persons shall not be appointed to or hold any office as an officer or employee of the municipality:

. . .

(6) Any person convicted of treason or of an act punishable under a law of the Parliament of Canada or of the Legislature of Québec, by imprisonment for one year or more.

Such disqualification shall continue for five years after the term of imprisonment fixed by the sentence, and, if only a fine was imposed or the sentence is suspended, for five years from the date of such condemnation, unless the person has obtained a pardon;

. . .

Code criminel (Lois révisées du Canada (1985), chapitre C-46) décrit comme une infraction, ni d'une des infractions visées à l'article 183 de ce Code, créées par l'une des lois qui y sont énumérées;

4° être diplômé de l'École nationale de police du Québec ou satisfaire aux normes d'équivalence établies par règlement de l'École.

. . .

Les conditions d'embauche ne s'appliquent pas dans le cas d'une intégration, d'une fusion ou de toute autre forme de regroupement de services policiers aux membres de ces services.

. . .

119. Est automatiquement destitué tout policier ou constable spécial qui a été reconnu coupable, en quelque lieu que ce soit et par suite d'un jugement passé en force de chose jugée, d'un acte ou d'une omission visé au paragraphe 3° de l'article 115, poursuivable uniquement par voie de mise en accusation.

Doit faire l'objet d'une sanction disciplinaire de destitution tout policier ou constable spécial qui a été reconnu coupable, en quelque lieu que ce soit et par suite d'un jugement passé en force de chose jugée, d'un tel acte ou d'une telle omission, poursuivable soit sur déclaration de culpabilité par procédure sommaire, soit par voie de mise en accusation, à moins qu'il ne démontre que des circonstances particulières justifient une autre sanction.

Loi sur les cités et villes, L.R.Q., ch. C-19

116. Les personnes suivantes ne peuvent être nommées à une charge de fonctionnaire ou d'employé de la municipalité, ni l'occuper :

. . .

6° Toute personne déclarée coupable de trahison ou d'un acte punissable en vertu d'une loi du Parlement du Canada ou de la Législature du Québec, d'un an d'emprisonnement ou plus.

Cette inhabilité subsiste durant cinq années après le terme d'emprisonnement fixé par la sentence, et, s'il y a condamnation à une amende seulement ou si la sentence est suspendue, durant cinq années de la date de cette condamnation, à moins que la personne ait obtenu un pardon;

. . .

2007 SCC 14 (CanLII)

Disqualification from municipal office or employment under subparagraph 6 or 7 of the first paragraph shall be incurred only if the offence is in connection with such an office or employment.

Labour Code, R.S.Q., c. C-27

100.12. In the exercise of his duties the arbitrator may

(*a*) interpret and apply any Act or regulation to the extent necessary to settle a grievance;

. . .

(*f*) in disciplinary matters, confirm, amend or set aside the decision of the employer and, if such is the case, substitute therefor the decision he deems fair and reasonable, taking into account the circumstances concerning the matter. However, where the collective agreement provides for a specific sanction for the fault alleged against the employee in the case submitted to arbitration, the arbitrator shall only confirm or set aside the decision of the employer, or, if such is the case, amend it to bring it into conformity with the sanction provided for in the collective agreement;

. . .

101. The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned. Section 129 applies, with the necessary modifications, to the arbitration award; however, the authorization of the Commission provided for in that section is not required.

3. Judicial and Arbitral History

3.1 *Arbitration Award (October 2, 2002)*

The arbitrator set aside the municipality's decision and ordered that Belleau be reinstated without compensation, which in effect amounted to a 16-month suspension without pay. He held that s. 119, para. 2 *P.A.* had rendered inapplicable s. 116(6) *C.T.A.* to municipal police officers charged with an offence punishable on indictment or summary conviction on the basis that the special law prevails over the general. He found that s. 119, para. 2 *P.A.* was equivalent to an arbitrator's jurisdiction in relation to disciplinary matters under s. 100.12(*f*) of

L'inhabilité à une charge de fonctionnaire ou d'employé prévue au paragraphe 6° ou 7° du premier alinéa n'existe que si l'infraction a un lien avec cette charge.

Code du travail, L.R.Q., ch. C-27

100.12. Dans l'exercice de ses fonctions l'arbitre peut :

a) interpréter et appliquer une loi ou un règlement dans la mesure où il est nécessaire de le faire pour décider d'un grief;

. . .

f) en matière disciplinaire, confirmer, modifier ou annuler la décision de l'employeur et, le cas échéant, y substituer la décision qui lui paraît juste et raisonnable, compte tenu de toutes les circonstances de l'affaire. Toutefois, lorsque la convention collective prévoit une sanction déterminée pour la faute reprochée au salarié dans le cas soumis à l'arbitrage, l'arbitre ne peut que confirmer ou annuler la décision de l'employeur ou, le cas échéant, la modifier pour la rendre conforme à la sanction prévue à la convention collective;

. . .

101. La sentence arbitrale est sans appel, lie les parties et, le cas échéant, tout salarié concerné. L'article 129 s'applique à la sentence arbitrale, compte tenu des adaptations nécessaires; l'autorisation de la Commission prévue à cet article n'est toutefois pas requise.

3. Historique des procédures judiciaires et arbitrales

3.1 *Sentence arbitrale (2 octobre 2002)*

L'arbitre a annulé la décision de la municipalité et a ordonné la réintégration de M. Belleau sans indemnisation, ce qui équivalait finalement à une suspension de 16 mois sans traitement. Il a conclu que l'art. 119, al. 2 *L.P.* avait rendu inapplicable le par. 116(6) *L.C.V.* à un policier municipal accusé d'une infraction punissable sur déclaration de culpabilité par voie de mise en accusation ou par procédure sommaire au motif que les dispositions législatives spéciales l'emportent sur les dispositions législatives générales. Il a conclu qu'en vertu de l'art. 119,

8

2007 SCC 14 (CanLII)

the Quebec *Labour Code*, R.S.Q., c. C-27 ("*L.C.*"). The arbitrator reasoned that under s. 119, para. 2 *P.A.*, he was entitled to consider the circumstances surrounding the criminal act(s) as well as the personal circumstances of the police officer.

9 With regard to the offences relating to the careless storage of firearms, the arbitrator was of the view that they were of a "technical" character. He considered the fact that Belleau had recently moved into the house and that it was undergoing extensive renovations. He concluded that there was no place in the house where the firearms could have been safely stored.

10 As for Belleau's violence toward his spouse and the breach of his undertaking not to communicate with her, the arbitrator was of the view that while the offences were serious, Belleau had demonstrated specific circumstances which justified a sanction other than dismissal. The arbitrator accepted the expert medical opinion put forward by Belleau that he was in a morbid mental state on December 29 and 30 due to family problems. The arbitrator also took into account Belleau's intoxication on the 29th as evidence that, along with his mental state, [TRANSLATION] "he was not entirely lucid". In addition, the arbitrator considered a number of attenuating factors: the length of Belleau's employment with the municipality; the lack of any previous disciplinary problems; testimony by his ex-spouses that he was not by nature a violent man; the fact that Belleau was off duty when the offences occurred; the fact that his victim had not suffered physical harm; and the fact that there was no evidence of physical violence.

11 Finally, the arbitrator dismissed objections to Belleau's reinstatement. He considered that Belleau had recovered from his family and alcohol problems and that there was little risk of him reoffending. As for public perception, the arbitrator concluded that the public had been misinformed

al. 2 *L.P.*, il disposait des mêmes pouvoirs en matière disciplinaire qu'aux termes de l'al. 100.12*f*) du *Code du travail* du Québec, L.R.Q., ch. C-27 (« *C.T.* »). À son avis, l'art. 119, al. 2 *L.P.* lui conférait le pouvoir de tenir compte des circonstances entourant la perpétration des infractions criminelles ainsi que de la situation personnelle du policier.

Quant aux infractions relatives à l'entreposage d'armes à feu de manière négligente, l'arbitre était d'avis que ces infractions revêtaient un caractère « technique ». Il a tenu compte du fait que M. Belleau venait tout juste d'emménager dans la maison et qu'il y faisait des rénovations importantes. Il a conclu qu'il n'y avait pas dans la maison d'endroit où les armes à feu auraient pu être entreposées de manière sécuritaire.

Pour ce qui est des voies de fait commises par M. Belleau contre sa conjointe et de la violation de son engagement de ne pas entrer en communication avec elle, l'arbitre a estimé qu'il s'agissait d'infractions graves, mais que M. Belleau avait démontré que des circonstances particulières justifiaient une sanction autre que la destitution. L'arbitre a accepté la preuve médicale présentée par M. Belleau, à savoir qu'il était dans un état psychologique morbide les 29 et 30 décembre en raison de ses problèmes familiaux. L'arbitre a également pris en compte l'état d'ébriété dans lequel se trouvait M. Belleau le 29 décembre, ce qui, combiné à son état psychologique, démontrait qu'il « n'avait pas toute sa tête ». En outre, l'arbitre a tenu compte d'un certain nombre de facteurs atténuants : M. Belleau avait de longs états de service à la municipalité, il n'avait pas d'antécédents en matière de discipline, ses ex-conjointes ont témoigné qu'il n'était pas un homme violent de nature, il n'était pas en devoir au moment de la perpétration des infractions, sa victime n'avait pas été blessée et il n'y avait pas de preuve de violence physique.

Enfin, l'arbitre a rejeté les objections à la réintégration de M. Belleau. Il a conclu que ce dernier s'était remis de ses problèmes familiaux, qu'il avait traité son alcoolisme et qu'il représentait un faible risque de récidive. Quant à la perception du public, l'arbitre a jugé que le public avait été mal informé

2007 SCC 14 (CanLII)

by the media about the specific circumstances of Belleau's case. The arbitrator was of the opinion that Belleau's supervisors and colleagues would regain confidence in him once they were reasonably informed of those circumstances.

3.2 *Superior Court of Quebec*, [2003] Q.J. No. 13008 (QL)

Lemelin J. was of the view that the dispute related essentially to the interpretation of the collective agreement with regard to disciplinary matters, and as such fell within the exclusive competence and expertise of the grievance arbitrator. He held that the arbitrator's decision should therefore not be interfered with unless it was patently unreasonable.

Nevertheless, Lemelin J. was of the opinion that the arbitrator's decision was patently unreasonable on two grounds. First, he concluded that the arbitrator had committed a reviewable error in holding that s. 116(6) *C.T.A.* was inapplicable to Belleau. According to Lemelin J., there was no indication that the legislature had intended to exclude the application of s. 116(6) *C.T.A.* to municipal police officers. In the absence of any specific legislative intent to the contrary, s. 116(6) applied to Belleau as a municipal employee and required his dismissal.

Lemelin J. further held that the arbitrator's decision as to the application of s. 119, para. 2 *P.A.* was also patently unreasonable. The expert opinion led by Belleau was not convincing on the issue of Belleau's alcoholism, and in Lemelin J.'s opinion should not have been accepted. Because the arbitrator's conclusion on this point was central, it rendered his whole decision patently unreasonable.

3.3 *Court of Appeal of Quebec*, [2005] Q.J. No. 8450 (QL), 2005 QCCA 639

The Court of Appeal held that since the arbitrator's decision raised separate questions, two

par les médias des circonstances se rapportant au cas de M. Belleau. Il a estimé que les supérieurs et les collègues de M. Belleau reprendraient confiance en lui après avoir été informés de ces circonstances.

3.2 *Cour supérieure du Québec*, [2003] J.Q. nº 13008 (QL)

12 De l'avis du juge Lemelin, le litige portait essentiellement sur l'interprétation de la convention collective eu égard aux questions de discipline et, de ce fait, relevait de la compétence spécialisée exclusive de l'arbitre de griefs. Il a conclu qu'il ne convenait pas de modifier la décision de l'arbitre à moins qu'elle ne soit manifestement déraisonnable.

13 Le juge Lemelin a néanmoins conclu que la décision de l'arbitre comportait deux erreurs manifestement déraisonnables. Premièrement, il a jugé que l'arbitre avait commis une erreur donnant ouverture à la révision lorsqu'il a décidé que le par. 116(6) *L.C.V.* était inapplicable à M. Belleau. Selon le juge Lemelin, rien n'indiquait que le législateur avait voulu exclure l'application du par. 116(6) *L.C.V.* à l'égard des policiers municipaux. En l'absence d'une indication précise de l'intention contraire du législateur, le par. 116(6) s'appliquait à M. Belleau en sa qualité d'employé municipal et commandait son congédiement.

14 Le juge Lemelin a également conclu que la décision de l'arbitre relativement à l'application de l'art. 119, al. 2 *L.P.* était elle aussi manifestement déraisonnable. La preuve d'expert présentée par M. Belleau relativement à son alcoolisme n'était pas convaincante et, de l'avis du juge Lemelin, elle n'aurait pas dû être acceptée. En raison du caractère déterminant de la conclusion de l'arbitre sur ce point, cette conclusion avait rendu l'ensemble de sa décision manifestement déraisonnable.

3.3 *Cour d'appel du Québec*, [2005] J.Q. nº 8450 (QL), 2005 QCCA 639

15 La Cour d'appel a jugé que la décision de l'arbitre soulevait des questions distinctes et que,

2007 SCC 14 (CanLII)

different standards of review should govern the judicial review. Bich J.A., speaking for the court, agreed with Lemelin J. that the arbitrator's decision on s. 119, para. 2 *P.A.* should be evaluated on the patent unreasonableness standard. However, she saw the question of the compatibility of s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* as separate and distinct for the purpose of the pragmatic and functional approach and concluded that the reasonableness *simpliciter* standard of review should be adopted.

16 On the compatibility question, Bich J.A. was of the view that the arbitrator had not committed an error. While s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* could coexist, there were situations where the two provisions were necessarily in conflict. Applying the presumptions that, in case of conflict, the legislator intended the new law to prevail over the old law and the special law to prevail over the general one, Bich J.A. concluded that s. 119, para. 2 *P.A.* should prevail.

17 On the application of s. 119, para. 2 *P.A.* to Belleau's conduct, Bich J.A. held that the arbitrator had not committed a patently unreasonable or even an unreasonable error. The arbitrator was entitled to consider the technical nature of the firearm offences and the family crisis that Belleau was living through when assessing whether there were specific circumstances. Furthermore, Bich J.A. disagreed with Lemelin J. that the arbitrator's conclusion regarding Belleau's alcoholism was patently unreasonable. Even if it was, it had not played a central role in the arbitrator's decision. For these reasons, the Court of Appeal restored the arbitrator's award.

4. Issues

18 There are three main issues to be decided in this appeal. First, what are the appropriate standards to apply in reviewing the arbitrator's decision? The second issue is whether the arbitrator erred in holding that s. 116(6) *C.T.A.* was inapplicable to

partant, deux normes de contrôle judiciaire devaient s'appliquer. S'exprimant au nom de la cour, la juge Bich a accepté la décision du juge Lemelin selon laquelle la norme de la décision manifestement déraisonnable devait servir au contrôle de la décision de l'arbitre eu égard à l'art. 119, al. 2 *L.P.* Toutefois, elle a estimé que la compatibilité de l'art. 119, al. 2 *L.P.* et du par. 116(6) *L.C.V.* devait être traitée comme une question distincte aux fins de l'analyse pragmatique et fonctionnelle et a conclu qu'il convenait d'adopter à cet égard la norme de contrôle de la décision raisonnable *simpliciter.*

Relativement à la question de la compatibilité des dispositions, la juge Bich a déclaré que l'arbitre n'avait pas commis d'erreur. Selon elle, bien que le par. 116(6) *L.C.V.* et l'art. 119, al. 2 *L.P.* puissent coexister, dans certaines situations, ces deux dispositions sont nécessairement en conflit. Appliquant la présomption que le législateur voulait, en cas de conflit, que la nouvelle loi l'emporte sur l'ancienne et que la loi spéciale écarte la loi plus générale, la juge Bich a conclu que l'art. 119, al. 2 *L.P.* devait prévaloir.

Quant à l'application de l'art. 119, al. 2 *L.P.* à la conduite de M. Belleau, la juge Bich a statué que l'arbitre n'avait pas commis une erreur manifestement déraisonnable ni même déraisonnable. L'arbitre pouvait, dans son évaluation des circonstances particulières, tenir compte du caractère technique des infractions relatives aux armes à feu et de la tragédie familiale qui frappait M. Belleau. En outre, contrairement au juge Lemelin, la juge Bich a estimé que la conclusion de l'arbitre concernant l'alcoolisme de M. Belleau était manifestement déraisonnable. Même dans ce cas, cette conclusion ne constituait pas un élément charnière de la décision de l'arbitre. Pour ces motifs, la Cour d'appel a rétabli la sentence arbitrale.

4. Questions en litige

Le présent pourvoi soulève trois questions principales. Quelles normes convient-il d'appliquer au contrôle de la décision de l'arbitre? L'arbitre a-t-il eu tort de conclure que le par. 116(6) *L.C.V.* ne s'appliquait pas à M. Belleau? L'arbitre a-t-il eu tort de

2007 SCC 14 (CanLII)

Belleau. The third is whether the arbitrator erred in finding that Belleau had demonstrated specific circumstances which justified a sanction other than dismissal under s. 119, para. 2 *P.A*.

5. Analysis

5.1 *Standards of Review*

5.1.1 Multiple Standards of Review

It is clear that the pragmatic and functional approach may lead to different standards of review for separate findings made by an arbitrator in the course of his or her decision: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 14; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28, at para. 15. This will most frequently be the case when an arbitrator is called upon to construe legislation. The arbitrator's interpretation of the legislation — a question of law — *may* be reviewable on a different standard than the rest of the decision: see e.g. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 ("*CBC*"), at para. 49; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 14. While interpretations of general public statutes or statutes external to an administrative decision maker's constituting legislation will often be reviewed on a standard of correctness, this will not always be so: *CBC*, at para. 48. The answer in each case will depend on the proper application of the pragmatic and functional approach, which requires various factors be taken into account such as the presence or absence of a privative clause, the expertise of the decision maker, the purpose of the governing legislation and the nature of the question under review (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 29-38). Since the presence or absence of a privative clause will likely be the same for all aspects of an administrative decision, whether there is a possibility of more than a single standard of review under the pragmatic and functional approach will largely depend on whether there exist questions of

conclure que M. Belleau avait démontré que des circonstances particulières justifiaient une sanction autre que la destitution, suivant l'art. 119, al. 2 *L.P.*?

5. Analyse

5.1 *Normes de contrôle*

5.1.1 Normes de contrôle multiples

Il est évident que l'analyse pragmatique et fonctionnelle peut entraîner l'application de normes de contrôle différentes à des conclusions distinctes tirées par l'arbitre dans sa décision : *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63, par. 14; *Alberta Union of Provincial Employees c. Lethbridge Community College*, [2004] 1 R.C.S. 727, 2004 CSC 28, par. 15. Il en sera ainsi le plus souvent lorsqu'un arbitre est appelé à interpréter des dispositions législatives. L'interprétation par l'arbitre d'une disposition législative — une question de droit — *peut* être assujettie à une norme de contrôle différente de celle applicable au reste de la décision : voir par exemple *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157 (« *SRC* »), par. 49; *Newfoundland Association of Public Employees c. Terre-Neuve (Green Bay Health Care Centre)*, [1996] 2 R.C.S. 3, par. 14. Si la norme de la décision correcte sera généralement la norme de contrôle applicable à l'interprétation d'une loi générale d'intérêt public ou d'une loi autre que la loi constitutive d'un tribunal administratif, il n'en est pas toujours ainsi : *SRC*, par. 48. Dans chaque cas, la réponse dépendra de l'analyse pragmatique et fonctionnelle suivant laquelle il est nécessaire de tenir compte de plusieurs facteurs, dont la présence ou l'absence d'une clause privative, l'expertise du décideur, l'objet de la loi applicable et la nature de la question faisant l'objet du contrôle (*Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 29 à 38). La question de la présence ou de l'absence d'une clause privative sera vraisemblablement la même relativement à tous les aspects d'une décision administrative; ainsi, pour décider si plus d'une norme de contrôle s'applique dans le

19

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

different natures and whether those questions engage the decision maker's expertise and the legislative objective in different ways. Of course it may not always be easy or necessary to separate individual questions from the decision taken as a whole. The possibility of multiple standards should not be taken as a licence to parse an administrative decision into myriad parts in order to subject it to heightened scrutiny. However, reviewing courts must be careful not to subsume distinct questions into one broad standard of review. Multiple standards of review should be adopted when there are clearly defined questions that engage different concerns under the pragmatic and functional approach.

20 The question whether s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are in conflict and, if so, which one should prevail, clearly raises separate concerns from the question of whether the arbitrator properly interpreted and applied s. 119, para. 2 *P.A.* The one factor that is common to both questions is the presence of a privative clause. By virtue of s. 101 *L.C.*, the arbitrator's decision is not subject to appeal. Combined with ss. 139, 139.1 and 140 *L.C.*, s. 101 forms a relatively strong privative clause. However, a privative clause is not determinative and regard must be had to the other factors under the pragmatic and functional approach: *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4, at para. 25. In this case, the privative clause suggests greater deference in general but does not shed light on whether the level of scrutiny should be different for each question.

5.1.2 Compatibility of Section 119, para. 2 *P.A.* and Section 116(6) *C.T.A.*

21 On the issue of compatibility, the nature of the question and the relative expertise of the arbitrator suggest that a searching review is necessary. Unlike the other findings of the arbitrator, the question of whether s. 119, para. 2 *P.A.* and s. 116(6)

cadre de l'analyse pragmatique et fonctionnelle, il faut déterminer s'il existe des questions de nature différente et si ces questions font intervenir de différentes manières les connaissances spécialisées du décideur et l'objet de la loi. Bien entendu, il pourrait ne pas toujours être facile ou nécessaire d'isoler les questions particulières à analyser séparément de la décision dans son ensemble. La possibilité d'appliquer plus d'une norme de contrôle ne donne pas l'autorisation de décortiquer une décision administrative en d'innombrables parties dans le but de la scruter à la loupe. Toutefois, les tribunaux saisis du contrôle judiciaire doivent veiller à ne pas subsumer les questions distinctes sous une norme générale de contrôle. Il convient d'adopter des normes de contrôle multiples lorsque des questions clairement définies font intervenir des intérêts différents dans le cadre de l'analyse pragmatique et fonctionnelle.

La question de savoir s'il existe un conflit entre l'art. 119, al. 2 *L.P.* et le par. 116(6) *L.C.V.* et, le cas échéant, quelle disposition a préséance soulève manifestement des préoccupations autres que la question de savoir si l'arbitre a bien interprété et appliqué l'art. 119, al. 2 *L.P.* Dans les deux cas, on note la présence d'une clause privative. Selon l'art. 101 *C.T.*, la sentence arbitrale est sans appel. Combiné aux art. 139, 139.1 et 140 *C.T.*, l'art. 101 constitue une clause privative relativement rigoureuse. Toutefois, l'existence d'une clause privative n'est pas déterminante et, il convient de tenir compte des autres facteurs de l'analyse pragmatique et fonctionnelle : *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, [2006] 1 R.C.S. 140, 2006 CSC 4, par. 25. En l'espèce, la présence d'une clause privative semble commander en général un degré plus élevé de retenue mais n'indique pas si la norme à appliquer doit être différente pour chaque question.

5.1.2 Compatibilité de l'art. 119, al. 2 *L.P.* et du par. 116(6) *L.C.V.*

Quant à la question de la compatibilité, la nature de la question et l'expertise relative de l'arbitre donnent à penser qu'un contrôle plus rigoureux est nécessaire. Contrairement aux autres conclusions tirées par l'arbitre, la question

2007 SCC 14 (CanLII)

C.T.A. are in conflict is a pure question of law. It therefore does not engage the relative expertise of the arbitrator in relation to the courts and is entitled to less deference (*Pushpanathan*, at para. 37; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 8). The lower courts focussed on the fact that s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* both related to the disciplining of police officers, a matter clearly within the scope of the arbitrator's domain in this case by virtue of the collective agreement and the *Labour Code*. It is true that the interpretation of external legislation that is linked to the administrative decision maker's mandate may be given a certain degree of deference: *CBC*, at para. 48. However, the *compatibility* of these two statutes is not a question about what disciplinary sanctions should apply. It does not engage the arbitrator's special knowledge of labour and employment law. Furthermore, the determination of whether s. 119, para. 2 *P.A.* prevails over s. 116(6) *C.T.A.* is of general importance and has precedential value, a consideration which points to a lesser degree of deference (*Lethbridge*, at para. 19; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 34).

de la compatibilité de l'art. 119, al. 2 *L.P.* et du par. 116(6) *L.C.V.* est une pure question de droit. Ainsi, elle ne fait pas intervenir l'expertise relative de l'arbitre par rapport à celle des tribunaux judiciaires et commande une moins grande retenue de ces derniers (*Pushpanathan*, par. 37; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 8). Les tribunaux d'instance inférieure ont insisté sur le fait que l'art. 119, al. 2 *L.P.* et le par. 116(6) *L.C.V.* portaient tous les deux sur les mesures disciplinaires applicables aux policiers, une question qui relevait manifestement en l'espèce de la compétence de l'arbitre du fait de la convention collective et du *Code du travail*. Certes, une certaine retenue peut être indiquée lorsque le tribunal administratif interprète une loi non constitutive qui se rapporte à son mandat : *SRC*, par. 48. Toutefois, la question de la *compatibilité* de ces deux lois ne porte pas sur les sanctions disciplinaires applicables. Elle ne fait pas intervenir les connaissances spécialisées de l'arbitre en matière de droit du travail. En outre, la question de savoir si l'art. 119, al. 2 *L.P.* prévaut sur le par. 116(6) *L.C.V.* est une question d'importance générale qui a valeur de précédent, une considération qui signale une retenue moindre (*Lethbridge*, par. 19; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 34).

As for the purpose of the legislation, the object of grievance arbitration is to "secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 17). Section 100.12 *L.C.* attributes broad discretion to arbitrators in disciplinary matters in order to fulfill this purpose. In particular, s. 100.12(*a*) *L.C.* empowers arbitrators to consider any act or regulation to the extent necessary to settle the grievance. While the *Labour Code* clearly contemplates that arbitrators will be called on to interpret and apply legislation in order to settle grievances in a prompt, final and binding manner, it does not follow that the question of the compatibility of

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Quant à l'objet de la loi, le but de l'arbitrage des griefs est « d'assurer un règlement rapide, définitif et exécutoire des différends concernant l'interprétation ou l'application d'une convention collective, ainsi que les mesures disciplinaires prises par les employeurs » (*Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42, par. 17). À cette fin, l'art. 100.12 *C.T.* confère aux arbitres de vastes pouvoirs en matière disciplinaire. Plus particulièrement, l'al. 100.12*a*) *C.T.* accorde aux arbitres le pouvoir d'interpréter et d'appliquer toute loi ou tout règlement dans la mesure où il est nécessaire de le faire pour trancher un grief. Même si le *Code du travail* prévoit manifestement que les arbitres seront appelés à interpréter et à appliquer la loi afin d'assurer le règlement rapide, définitif et exécutoire de griefs, il

conflicting legislative provisions was intended to be within the exclusive purview of the grievance arbitrator or that such a task is at the core of the object of grievance arbitration. This suggests that the question of whether both provisions apply concurrently should be evaluated on a less deferential standard.

23 On balance, the factors to be considered in the pragmatic and functional approach suggest that the question of compatibility must be subject to the strictest standard of review, the standard of correctness.

5.1.3 Interpretation and Application of Section 119, para. 2 *P.A.*

24 The question of whether the arbitrator correctly interpreted and applied s. 119, para. 2 *P.A.* to Belleau's conduct raises different concerns than the question of compatibility. It is not a pure question of law but rather a question of mixed fact and law. The arbitrator had to decide whether the specific circumstances raised by Belleau fell within the proper scope of s. 119, para. 2 *P.A.* and whether those circumstances had been established on the evidence. He also had to decide what sanction was appropriate once the presence of specific circumstances had been made out. This analysis is more in line with the traditional function of a grievance arbitrator under s. 100.12(*f*) *L.C.* Furthermore, it is a decision that requires the balancing of competing interests of the police officer facing dismissal, the municipality, both as an employer and as a public body responsible for the security of the public, and of the community as a whole in maintaining respect and confidence in its police officers. Thus, the arbitrator's decision has some elements of polycentric decision making which would suggest a higher degree of deference: *Pushpanathan*, at para. 36.

25 However, not all of the factors to be considered under the pragmatic and functional approach point to the highest degree of deference. First, there is still a significant legal component to the question.

ne s'ensuit pas que la question de la conciliation de dispositions législatives en conflit devait relever de la compétence exclusive de l'arbitre de griefs ni que cette fonction est un aspect fondamental de l'objet de l'arbitrage des griefs. Ce qui donne à penser que l'évaluation de l'application concurrente des deux dispositions devrait commander une norme de retenue moins élevée.

Somme toute, les facteurs à prendre en considération dans l'analyse pragmatique et fonctionnelle semblent indiquer que la question de la compatibilité doit être assujettie à la norme de contrôle la plus rigoureuse, soit la norme de la décision correcte.

5.1.3 Interprétation et application de l'art. 119, al. 2 *L.P.*

La question de savoir si l'arbitre a correctement interprété l'art. 119, al. 2 *L.P.* et l'a correctement appliqué à la conduite de M. Belleau soulève des problèmes autres que la compatibilité. Il ne s'agit pas d'une pure question de droit, mais plutôt d'une question mixte de droit et de fait. L'arbitre devait décider si la portée de l'art. 119, al. 2 *L.P.* s'étendait aux circonstances particulières soulevées par M. Belleau et si la preuve de ces circonstances avait été faite. Il devait aussi décider de la sanction à appliquer une fois qu'avait été faite la preuve des circonstances particulières. Cette analyse relève davantage des fonctions normalement exercées par un arbitre de griefs aux termes de l'al. 100.12*f*) *C.T.* De plus, cette décision doit être prise en tenant compte d'intérêts opposés : les intérêts du policier menacé de destitution, les intérêts de la municipalité, en sa qualité d'employeur et d'organisme public responsable de la sécurité du public, ainsi que les intérêts de l'ensemble de la collectivité, à qui les policiers doivent inspirer respect et confiance. Ainsi, la décision de l'arbitre comporte certains éléments de la prise de décisions polycentriques, ce qui semblerait inviter à un degré plus élevé de retenue : *Pushpanathan*, par. 36.

Toutefois, les facteurs à prendre en compte dans le cadre de l'analyse pragmatique et fonctionnelle ne militent pas tous en faveur du degré le plus élevé de retenue. Premièrement, la question comporte

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

The arbitrator was required to decide what counts as specific circumstances sufficient to justify another sanction for the purpose of s. 119, para. 2 *P.A.* This is an important question that has a certain degree of precedential value: *Lethbridge*, at para. 19.

toujours un élément de droit important. L'arbitre devait décider ce qui constitue des circonstances particulières justifiant une autre sanction aux termes de l'art. 119, al. 2 *L.P.* C'est une question importante qui a, dans une certaine mesure, valeur de précédent : *Lethbridge*, par. 19.

Second, the discretion exercised by the arbitrator under s. 119, para. 2 *P.A.* is not the same as that exercised under s. 100.12 *L.C.* Section 119 *P.A.* is mandatory and, where it applies, results in the dismissal of a police officer except in the limited exception provided in its second paragraph. The arbitrator's discretion in disciplinary matters is thus narrowed significantly under s. 119, para. 2 *P.A.* with respect to what it would otherwise be under s. 100.12(*a*) and (*f*) *L.C.* While the decision-making process of an arbitrator called upon to interpret and apply s. 119, para. 2 *P.A.* certainly falls within the broader purpose of grievance arbitration, it is a much more limited exercise. This would suggest that the legislative intent to confide disciplinary matters to arbitrators is not as strong in the case of criminal conduct which engages s. 119 *P.A.*

26 Deuxièmement, aux termes de l'art. 119, al. 2 *L.P.*, l'arbitre n'est pas investi du même pouvoir discrétionnaire qu'aux termes de l'art. 100.12 *C.T.* L'article 119 *L.P.* est impératif et, lorsqu'il s'applique, entraîne la destitution du policier, exception faite du cas limité prévu au deuxième alinéa. Ainsi, aux termes de l'art. 119, al. 2 *L.P.*, l'arbitre dispose en matière disciplinaire d'un pouvoir discrétionnaire beaucoup plus restreint que le pouvoir que lui confèrent les al. 100.12*a*) et *f*) *C.T.* Le fait pour l'arbitre d'interpréter et d'appliquer l'art. 119, al. 2 *L.P.* s'inscrit certes dans l'objet plus général de l'arbitrage des griefs, mais il s'agit d'un exercice beaucoup plus limité de ce pouvoir décisionnel, ce qui porte à croire que l'intention législative de confier le règlement des questions disciplinaires aux arbitres n'est pas aussi ferme dans le cas d'activités criminelles faisant intervenir l'art. 119 *L.P.*

Third, the *Police Act* is an external statute. It is not part of the collective agreement or the *Labour Code*. Furthermore, the Court of Québec also has limited jurisdiction to apply s. 119, para. 2 *P.A.* in the context of directors, managers or other police officers who do not count as employees for the purposes of the *Labour Code* (ss. 87 to 89 *P.A.*). The arbitrator's relative expertise in relation to s. 119 does not suggest the highest level of deference.

27 Troisièmement, la *Loi sur la police* n'est pas une loi constitutive. Elle ne fait pas partie de la convention collective ni du *Code du travail*. En outre, la compétence de la Cour du Québec est limitée eu égard à l'application de l'art. 119, al. 2 *L.P.* aux directeurs, gestionnaires ou autres policiers qui ne sont pas des employés au sens du *Code du travail* (art. 87 à 89 *L.P.*). L'expertise relative de l'arbitre en ce qui a trait à l'art. 119 ne commande pas le degré le plus élevé de retenue.

Taking these factors into account suggests something less than the most deferential standard of review. Review on a patent unreasonableness standard will, by its nature, be relatively rare: *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at para. 18. The countervailing factors in this case point to the reasonableness standard of review for the interpretation and application of s. 119, para. 2 *P.A.*

28 Ainsi, lorsqu'ils sont pris en compte, ces facteurs invitent à l'application d'une norme de contrôle ne comportant pas la plus grande retenue. En raison de sa nature même, la norme de la décision manifestement déraisonnable est rarement appliquée : *Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23, par. 18. Les considérations opposées en l'espèce militent en faveur du contrôle de l'interprétation et de l'application de l'art. 119, al. 2 *L.P.* suivant la norme de la décision raisonnable.

5.2 *Compatibility of Section 119, para. 2 P.A. and Section 116(6) C.T.A.*

29 Before examining whether the arbitrator's decision regarding the conflict between s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* was correct, it will be helpful to briefly consider the legislative framework which governs municipal police officers.

5.2.1 Legislative Context

30 Municipal police officers, like all police officers, are governed by the *Police Act*. In 2000, the *Police Act* replaced the old *Police Act*, R.S.Q., c. P-13 and *An Act respecting Police Organization*, R.S.Q., c. O-8.1 ("*Police Organization Act*"). The new legislation is a comprehensive statute providing for the training of police officers (ss. 1 to 47), the composition, organization and regulation of provincial police forces (ss. 48 to 111), the basic requirements for entry into the profession (ss. 115 and 116), and limitations on the activities and interests of police officers (ss. 117 to 125). It is in the context of the latter provisions that s. 119 provides for the dismissal of police officers who are found guilty of indictable or hybrid criminal offences (i.e., offences which may be prosecuted either by indictment or summary conviction). The new *Police Act* also incorporates the provisions from the *Police Organization Act* relating to professional ethics. The *Code of ethics of Québec police officers*, (1990) 122 G.O. II, 1760 ("*Code of ethics*") is continued (s. 127), as well as the Police Ethics Commissioner (ss. 128 to 193), and the Comité de déontologie policière, charged with sanctioning breaches of the *Code of ethics* (ss. 194 to 255.11).

31 Municipal police forces are regulated extensively by the Act (ss. 69 to 89). In particular, every municipality has the responsibility to make a by-law regarding the internal discipline of the members of its police force (s. 256). The by-law must establish the duties and standards of conduct expected of its police officers, a disciplinary procedure and the

5.2 *Compatibilité de l'art. 119, al. 2 L.P. et du par. 116(6) L.C.V.*

Avant d'examiner si la décision de l'arbitre concernant l'incompatibilité de l'art. 119, al. 2 *L.P.* et du par. 116(6) *L.C.V.* était correcte, j'estime utile de passer brièvement en revue le cadre législatif applicable aux policiers municipaux.

5.2.1 Contexte législatif

Les policiers municipaux, comme tous les policiers, sont assujettis à la *Loi sur la police*. En 2000, la *Loi sur la police* a remplacé l'ancienne *Loi de police*, L.R.Q., ch. P-13, et la *Loi sur l'organisation policière*, L.R.Q., ch. O-8.1. La nouvelle loi est exhaustive, comportant des dispositions sur la formation des policiers (art. 1 à 47), la composition des corps de police, leur organisation et la réglementation de leurs activités (art. 48 à 111), les conditions minimales d'exercice de la profession (art. 115 et 116) ainsi que les restrictions imposées aux policiers en ce qui a trait à leurs activités et à leurs intérêts (art. 117 à 125). C'est dans le contexte de ces dispositions que l'art. 119 prévoit la destitution des policiers reconnus coupables d'actes criminels ou d'infractions mixtes (c'est-à-dire des infractions punissables sur déclaration de culpabilité par voie de mise en accusation ou par procédure sommaire). La nouvelle *Loi sur la police* incorpore également les dispositions de la *Loi sur l'organisation policière* se rapportant à l'éthique professionnelle. Elle proroge le *Code de déontologie des policiers du Québec*, (1990) 122 G.O. II, 2531 (« *Code de déontologie* ») (art. 127) et maintient la fonction de commissaire à la déontologie policière (art. 128 à 193) et le Comité de déontologie policière, qui est chargé d'imposer des sanctions aux policiers qui ont adopté une conduite dérogatoire au *Code de déontologie* (art. 194 à 255.11).

La Loi (art. 69 à 89) réglemente largement les activités des corps de police municipaux. Plus particulièrement, chaque municipalité doit prendre un règlement relatif à la discipline interne des membres de son corps de police (art. 256). Le règlement impose aux policiers des devoirs et des normes de conduite, établit une procédure disciplinaire et

2007 SCC 14 (CanLII)

sanctions that may be imposed for breach of the by-law (s. 258).

The conduct of municipal police officers is thus regulated by three separate sources flowing from the *Police Act*. One is the internal discipline by-law of the municipality, which, in the case of the appellant municipality, is entitled *Règlement numéro 756 relatif à l'éthique professionnelle et à la discipline interne des policiers-pompiers de la Ville de Lévis* ("*Règlement n^o 756*"). Section 13.10 prohibits the municipality's police officers from violating any law or regulation that the Public security service of Lévis was charged with enforcing (s. 13.10) or with contravening [TRANSLATION] "any law or regulation enacted or made by a legally constituted authority in a manner likely to compromise the effectiveness, credibility or quality of the Service" (s. 13.11). Breach of one of the requirements of *Règlement n^o 756* can lead to a number of disciplinary sanctions, including dismissal (s. 22).

Another source is the *Code of ethics*. The Code establishes "the duties and standards of conduct of police officers in their relations with the public in the performance of their duties" (s. 1). This includes the general duty to "act in such a manner as to preserve the confidence and consideration that his duties require" (s. 5). Breach of the Code may lead to dismissal (s. 234(6) *P.A.*).

Finally, the conduct of police officers is in some measure regulated by the *Police Act* itself. Section 117 prohibits police officers from undertaking certain activities or having financial interests related to those activities. Section 119, as we have seen, is concerned with criminal conduct of police officers.

It is important to note that s. 119 was a new addition to the legislative framework governing police. It reflects a heightened concern by the legislature to impose strict consequences for criminal conduct by police officers. This concern can be seen throughout the provisions of the Act that, like s. 119, were not present in the previous legislation. Section 3(3)

prévoit les sanctions à imposer en cas de manquement au règlement (art. 258).

32 Ainsi, trois sources distinctes émanant de la *Loi sur la police* régissent la conduite des policiers municipaux. La première est le règlement interne relatif à la discipline qui, pour la municipalité appelante, s'intitule le *Règlement numéro 756 relatif à l'éthique professionnelle et à la discipline interne des policiers-pompiers de la Ville de Lévis* (« *Règlement n^o 756* »). Suivant l'art. 13.10, il est interdit aux policiers de la municipalité de « contrevenir à toute loi ou à tout règlement que la Sécurité publique de Lévis est chargée de faire respecter » (art. 13.10) ou de « contrevenir à toute loi ou à tout règlement édicté par une autorité légalement constituée d'une manière susceptible de compromettre l'efficacité, la crédibilité ou la qualité du Service » (art. 13.11). Un certain nombre de sanctions, dont la destitution, peuvent être imposées pour tout manquement à l'une des dispositions du *Règlement n^o 756* (art. 22).

33 La deuxième source, le *Code de déontologie*, « détermine les devoirs et normes de conduite des policiers dans leurs rapports avec le public dans l'exercice de leurs fonctions » (art. 1). Les policiers doivent notamment « se comporter de manière à préserver la confiance et la considération que requiert [leur] fonction » (art. 5). Toute conduite dérogatoire au Code peut entraîner la destitution (par. 234(6) *L.P.*).

34 Enfin, la conduite des policiers est dans une certaine mesure régie par la *Loi sur la police* elle-même. L'article 117 interdit aux policiers de se livrer à certaines activités ou d'avoir des intérêts financiers reliés à ces activités. Comme nous l'avons vu, l'art. 119 porte sur la conduite criminelle des policiers.

35 Il importe de signaler que l'art. 119 a été ajouté récemment au cadre législatif régissant la police, une indication de l'importance accordée par le législateur à la nécessité d'imposer des conséquences sévères à la conduite criminelle des policiers. Cette préoccupation du législateur ressort de l'ensemble des dispositions de la Loi qui, comme l'art. 119, ne

2007 SCC 14 (CanLII)

of the former *Police Act* prevented only those who had been convicted of a criminal offence by way of indictment from becoming police officers. By contrast, s. 115(3) *P.A.* requires that a potential candidate have no prior criminal convictions of any kind. Other new provisions ensure that allegations of criminal conduct by police officers are investigated and that such investigations are carried out objectively and thoroughly: ss. 70, para. 5, 260, 264, 286 and 289.

36 The general sanction of dismissal provided in s. 119 *P.A.* is a significant change from the former legislation. Previously, police officers could be disciplined, and even dismissed — as they still can be — for breach of the *Code of ethics* or internal discipline regulations, including for committing a criminal offence, but the result was not certain: see *Fraternité des policiers de la Communauté urbaine de Montréal Inc. v. Communauté urbaine de Montréal*, [1985] 2 S.C.R. 74, at p. 83. This was due to the fact that the former *Police Act* was silent on the issue of criminal conduct by acting police officers. Section 3(3) of that Act prevented persons who had been convicted of a criminal offence by way of indictment from *becoming* police officers, but it did not extend to police officers during their employment: *Péloquin v. Syndicat des agents de la paix en services correctionnels du Québec*, [2000] R.J.Q. 2215 (C.A.). The new Act, through s. 119 *P.A.*, ensures that dismissal will generally be the result of serious criminal conduct and thus brings the expectations of acting police officers in line, although not perfectly, with what is required of those seeking entry into the profession.

37 The main practical effect of s. 119 *P.A.* is that it removes a large part of the discretion that previously existed with directors of police, the Police Ethics Commissioner and the Comité de déontologie policière as to whether a police officer who is

faisaient pas partie de l'ancienne loi. Aux termes du par. 3(3) de l'ancienne *Loi de police*, seules les personnes reconnues coupables d'une infraction criminelle punissable par voie de mise en accusation ne pouvaient devenir policiers. Or, le par. 115(3) *L.P.* précise comme condition d'embauche l'absence de déclaration de culpabilité antérieure, quelle qu'elle soit. Suivant d'autres nouvelles dispositions, toute enquête portant sur un policier qui fait l'objet d'une allégation relative à une infraction criminelle doit être menée avec objectivité et minutie : art. 70, al. 5, art. 260, 264, 286 et 289.

La destitution en tant que sanction générale prévue à l'art. 119 *L.P.* constitue un changement majeur par rapport à l'ancienne loi. Auparavant, les policiers pouvaient faire l'objet de mesures disciplinaires et même être destitués — ce qui est encore le cas — pour un acte dérogatoire au *Code de déontologie* ou au règlement de discipline interne, notamment s'ils commettaient une infraction criminelle, mais ce résultat n'était pas assuré : voir *Fraternité des policiers de la Communauté urbaine de Montréal Inc. c. Communauté urbaine de Montréal*, [1985] 2 R.C.S. 74, p. 83. Il en était ainsi parce que l'ancienne *Loi de police* était muette sur la question de la conduite criminelle des policiers en titre. Le paragraphe 3(3) de cette Loi empêchait l'*embauche* comme policier de toute personne reconnue coupable d'une infraction criminelle punissable par voie de mise en accusation, mais cette restriction ne s'étendait pas aux policiers pendant leur période d'emploi : *Péloquin c. Syndicat des agents de la paix en services correctionnels du Québec*, [2000] R.J.Q. 2215 (C.A.). Selon la nouvelle Loi et son art. 119, la destitution est la sanction généralement imposée à tout policier reconnu coupable d'une infraction criminelle grave, ce qui a permis d'harmoniser, quoique de manière imparfaite, les attentes à l'égard des policiers en titre et celles visant les candidats à l'exercice de la profession.

Sur le plan pratique, l'art. 119 *L.P.* a comme principal effet de retirer aux directeurs des services de police, au commissaire à la déontologie policière et au Comité de déontologie policière une partie importante de leur pouvoir

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

convicted of a indictable or hybrid criminal offence should be disciplined and, if so, to what extent. A director who discovers that a member of his or her police force has committed an offence that falls within the ambit of s. 119, para. 2 *P.A.* has no choice but to dismiss the police officer. This sanction will apply in all cases unless the officer can show there are specific circumstances that justify another sanction.

Of course discipline regulations and the *Code of ethics* continue to apply to police officers and may result in sanctions independently of s. 119 *P.A.* Criminal offences that fall outside the ambit of s. 119 *P.A.* may still be punishable by dismissal in appropriate circumstances: see e.g. *Lévis (Ville de) v. Syndicat des policiers et pompiers de Lévis*, D.T.E. 89T-344 (T.A.). However, where the offence is covered by s. 119, s. 258 *P.A.* makes clear that disciplinary sanctions imposed in accordance with the municipality's discipline by-law do not remove the general requirement to impose dismissal.

Similarly, a grievance arbitrator may no longer refer to his or her plenary discretion under s. 100.12(*f*) *L.C.* to review the reasonableness of the municipality's decision and substitute what sanction he or she sees fits considering all the circumstances. Absent specific circumstances, which must be proven by the police officer, the only finding open to the arbitrator under s. 119, para. 2 *P.A.* is dismissal.

Having set out the context of the legislation governing the conduct of police officers, we must now consider the effect of municipal law. Municipal police officers, *unlike* other police officers, are also subject to municipal law as municipal employees. In particular, s. 116 *C.T.A.*, which applies to the appellant municipality, establishes conditions for being appointed or holding office as an officer or employee ("*charge de fonctionnaire ou d'employé*"). An almost identical provision applies to municipal police officers

discrétionnaire antérieur de décider de la sanction disciplinaire, le cas échéant, qui doit être imposée à un policier reconnu coupable d'un acte criminel ou d'une infraction mixte. Le directeur d'un service de police qui apprend qu'un membre de son corps de police a commis une infraction visée à l'art. 119, al. 2 *L.P.* est tenu de le destituer. Cette sanction est imposée dans tous les cas, à moins que le policier ne puisse démontrer que des circonstances particulières justifient une autre sanction.

38 Il va sans dire que le règlement de discipline et le *Code de déontologie* continuent de s'appliquer aux policiers et peuvent entraîner l'imposition de sanctions autres que celles prévues à l'art. 119 *L.P.* La destitution peut, dans certaines circonstances, constituer la sanction imposée en cas de perpétration d'infractions criminelles qui ne sont pas visées à l'art. 119 *L.P.* : voir par exemple *Lévis (Ville de) c. Syndicat des policiers et pompiers de Lévis*, D.T.E. 89T-344 (T.A.). Toutefois, si l'infraction est prévue à l'art. 119, l'art. 258 *L.P.* précise qu'en général, la destitution demeure obligatoire, malgré toute autre sanction disciplinaire imposée en vertu d'un règlement municipal relatif à la discipline.

39 De même, un arbitre de griefs ne peut plus invoquer le pouvoir discrétionnaire absolu que prévoit l'al. 100.12*f*) *C.T.* afin de réviser le caractère raisonnable de la décision de la municipalité et d'y substituer la décision qui lui paraît juste compte tenu des circonstances de l'affaire. En l'absence de circonstances particulières, dont la preuve doit être faite par le policier, l'arbitre peut uniquement imposer la destitution en application de l'art. 119, al. 2 *L.P.*

40 Ayant énoncé le cadre législatif régissant la conduite des policiers, je dois maintenant examiner la portée du droit municipal. Les policiers municipaux, *contrairement* à d'autres policiers, sont également assujettis aux lois municipales comme tout employé de la municipalité. Plus particulièrement, l'art. 116 *L.C.V.*, qui s'applique à la municipalité appelante, énonce les conditions de nomination « à une charge de fonctionnaire ou d'employé de la municipalité » et d'exercice d'une telle charge. Une disposition quasi identique s'applique aux policiers

employed by municipalities that are governed by the *Municipal Code of Québec*, R.S.Q., c. C-27.1, s. 269. Subparagraph 6 of the first paragraph of s. 116 *C.T.A.* functions to disqualify persons who have committed an offence punishable by imprisonment for one year or more from taking up or *holding* office. As such, it disqualifies those who are employed by the municipality when the offence is committed. The period of disqualification lasts for five years from the end of the term of imprisonment or from the date of condemnation if no sentence was imposed.

41 There is, however, an important limitation to the disqualification set out in s. 116(6) *C.T.A.* The penultimate paragraph of s. 116 limits disqualification to situations where "the offence is in connection with" the office or employment. This qualification was added in 1986 in order to bring s. 116(6) and (7) *C.T.A.* in line with s. 18.2 of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, which protects employees from being dismissed or otherwise penalized in their employment for the mere fact that they were convicted of a penal or criminal offence (*An Act to amend various legislation having regard to the Charter of human rights and freedoms*, S.Q. 1986, c. 95, s. 46). Under s. 18.2 of the Quebec *Charter* there must be an objective connection with the offence and the employment in order for the dismissal not to be discriminatory: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, 2003 SCC 68, at para. 30.

42 I make note of this because it appears that the connection requirement applies differently to municipal police officers than it does to other municipal employees. A criminal offence committed by a police officer is more likely to have a connection with his or her employment than an offence committed by another municipal employee. Thus, for example, a municipal employee was able to prove that a sexual assault during working hours was not connected with his employment, and therefore that he should not be dismissed by virtue of s. 116(6) *C.T.A.* (*Syndicat des employés municipaux de Beauce*

municipaux à l'emploi des municipalités régies par le *Code municipal du Québec*, L.R.Q., ch. C-27.1, art. 269. Aux termes du par. 116(6) *L.C.V.*, aucune personne déclarée coupable d'une infraction punissable d'un emprisonnement d'un an ou plus ne peut être nommée à une charge ni l'*occuper*. Ainsi, lorsque l'infraction est commise, ce paragraphe rend l'auteur de l'infraction inhabile à occuper un emploi municipal. La période d'inhabilité subsiste pendant cinq ans après le terme d'emprisonnement ou, si aucune peine n'a été infligée, pendant les cinq années suivant la date de la condamnation.

Toutefois, l'art. 116 *L.C.V.* prévoit une restriction importante à l'inhabilité visée à son par. 6. Selon l'avant-dernier paragraphe de l'art. 116, l'inhabilité n'existe que si l'infraction a « un lien avec » la charge ou l'emploi. Cette précision a été ajoutée en 1986 afin d'harmoniser les par. 116(6) et (7) *L.C.V.* avec l'art. 18.2 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12, aux termes duquel les employés ne peuvent être congédiés ni autrement pénalisés dans le cadre de leur emploi du seul fait qu'ils ont été déclarés coupables d'une infraction pénale ou criminelle (*Loi modifiant diverses dispositions législatives eu égard à la Charte des droits et libertés de la personne*, L.Q. 1986, ch. 95, art. 46). Suivant l'art. 18.2 de la *Charte* québécoise, il doit y avoir un lien objectif entre l'infraction et l'emploi pour que le congédiement ne soit pas considéré comme une mesure discriminatoire : *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Maksteel Québec Inc.*, [2003] 3 R.C.S. 228, 2003 CSC 68, par. 30.

Je le signale parce que l'exigence relative au lien ne semble pas s'appliquer uniformément aux policiers municipaux et aux autres employés municipaux. Une infraction criminelle commise par un policier aura plus vraisemblablement un lien avec son emploi que celle commise par un autre employé de la municipalité. Ainsi par exemple, il a été possible pour un employé municipal de démontrer qu'une agression sexuelle perpétrée pendant les heures de travail n'avait pas de lien avec son emploi et que par conséquent, il ne devrait pas être congédié en application du par. 116(6) *L.C.V.* (*Syndicat des employés*

2007 SCC 14 (CanLII)

(C.S.D.) v. St-Georges (Ville de), J.E. 2000-540, SOQUIJ AZ-00019015 (C.A.)). Similarly, a municipal firefighter who defrauded the municipality's employees' credit union was held not to have committed an offence in connection with his employment (*Association des pompiers de Laval v. Ville de Laval*, [1985] T.A. 446).

The same results would not be possible for municipal police officers under s. 116(6) *C.T.A.* This is because most, if not all, criminal offences committed by a municipal police officer will be connected to his or her employment due to the importance of public confidence in the police officer's abilities to discharge his or her duties. In *Fraternité des policiers de Deux-Montagnes/Ste-Marthe-sur-le-Lac v. Deux-Montagnes (Ville de)*, J.E. 2001-524, SOQUIJ AZ-50083424, a case decided before s. 119 *P.A.* came into effect, the Court of Appeal of Quebec concluded that the arbitrator had committed a patently unreasonable error in not upholding the dismissal of a police officer convicted of concealing a stolen automobile under s. 116(6) *C.T.A.* The court noted that the arbitrator had in fact found that even though the offence had been committed outside of the officer's employment, it was of such a nature as to compromise the integrity and respect for the law that the municipality and the public were entitled to expect from a police officer (para. 18). As such, the court held that the conditions of s. 116(6) *C.T.A.* were satisfied and the officer should have been dismissed.

A similar principle emerges from the judicial application of s. 18.2 of the Quebec *Charter* to police officers who are dismissed for criminal conduct. In *Pelland v. St-Antoine (Ville de)*, J.E. 94-499, 1994 CarswellQue 1900 (C.Q.), a director of police had been dismissed following a conviction for making false declarations in order to secure bank loans. The court held that the connection requirement in s. 18.2 had been satisfied: [TRANSLATION] "In light of the nature of the position held by the applicant, his having been convicted of an indictable offence is incompatible with the very performance of the

municipaux de Beauce (C.S.D.) c. St-Georges (Ville de), J.E. 2000-540, SOQUIJ AZ-00019015 (C.A.)). De même, un tribunal d'arbitrage a conclu qu'un pompier municipal qui avait fraudé la caisse d'économie des employés de la municipalité n'avait pas commis une infraction ayant un lien avec son emploi (*Association des pompiers de Laval c. Ville de Laval*, [1985] T.A. 446).

43 Il ne serait pas possible d'obtenir les mêmes résultats dans le cas de policiers municipaux aux termes du par. 116(6) *L.C.V.*, parce que la plupart, voire toutes les infractions criminelles commises par un policier municipal auront un lien avec son emploi en raison de la grande confiance que doit inspirer au sein du public la capacité du policier de s'acquitter de ses fonctions. Dans *Fraternité des policiers de Deux-Montagnes/Ste-Marthe-sur-le-Lac c. Deux-Montagnes (Ville de)*, J.E. 2001-524, SOQUIJ AZ-50083424, un arrêt rendu avant l'entrée en vigueur de l'art. 119 *L.P.*, la Cour d'appel du Québec a jugé que l'arbitre avait commis une erreur manifestement déraisonnable en ne confirmant pas la décision, rendue en application du par. 116(6) *L.C.V.*, de congédier le policier reconnu coupable de recel d'une automobile. La Cour d'appel a fait remarquer que l'arbitre avait conclu que, même si l'infraction avait été commise alors que le policier n'était pas en devoir, elle était de nature à compromettre l'image d'intégrité et de respect de la loi que l'employeur et le public étaient en droit d'attendre d'un policier (par. 18). Dans ce contexte, la Cour a jugé qu'il avait été satisfait aux conditions énoncées au par. 116(6) *L.C.V.* et que le policier aurait dû être destitué.

44 Un principe semblable se dégage de l'application, par les tribunaux, de l'art. 18.2 de la *Charte* québécoise aux policiers congédiés du fait de leur conduite criminelle. Dans *Pelland c. St-Antoine (Ville de)*, J.E. 94-499, 1994 CarswellQue 1900 (C.Q.), un directeur de police avait été destitué après avoir été reconnu coupable d'avoir fait de fausses déclarations dans le but d'obtenir des prêts bancaires. La cour a conclu qu'il avait été satisfait au lien exigé à l'art. 18.2 : « [v]u la nature de la fonction qu'occupait le requérant, le fait d'être reconnu coupable d'un acte criminel est incompatible avec l'exercice

2007 SCC 14 (CanLII)

duties of that position, and this incompatibility is necessarily connected with his employment" (para. 38 (emphasis added)).

45 A dismissal which is the result of a disciplinary sanction will usually not attract the protection of s. 18.2 because it cannot be said that the dismissal was effected for the mere reason of the criminal offence: *Maksteel*, at para. 31. This will often be the case with municipal police officers who, unlike other municipal employees, face disciplinary sanctions for violations of the law. For example, s. 13.11 of the appellant municipality's discipline by-law prohibits police officers from violating any laws in a way that would compromise the effectiveness, credibility and quality of the public security service. In short, a municipal police officer would rarely, if ever, be able to benefit from the protection afforded by the penultimate paragraph of s. 116 to other municipal employees in the context of criminal offences.

46 This brief review of the legislative framework governing the criminal conduct of municipal police officers suggests that s. 116(6) *C.T.A.* is similar in effect to s. 119, para. 2 *P.A.* What is not clear is whether the strict consequences of criminal conduct provided for in s. 116(6) *C.T.A.* were intended to continue to apply to municipal police officers whose conduct also falls under s. 119, para. 2 *P.A.* It is to this question that I now turn.

5.2.2 Are Section 116(6) *C.T.A.* and Section 119, para. 2 *P.A.* in Conflict?

47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

> According to case law, two statutes are not repugnant simply because they deal with the same subject:

même de cette fonction et cette incompatibilité a nécessairement un lien avec son emploi » (par. 38 (je souligne)).

Il ne sera généralement pas possible d'invoquer l'art. 18.2 de la *Charte* québécoise en cas de congédiement résultant d'une sanction disciplinaire, parce que cette mesure n'aura pas été prise du seul fait de l'infraction criminelle : *Maksteel*, par. 31. Il en sera souvent ainsi dans le cas de policiers municipaux qui, contrairement aux autres employés municipaux, s'exposent à des sanctions disciplinaires lorsqu'ils violent la loi. Par exemple, l'art. 13.11 du règlement de discipline de la municipalité appelante interdit aux policiers de contrevenir à toute loi d'une manière susceptible de compromettre l'efficacité, la crédibilité ou la qualité du service de sécurité publique. Bref, les policiers municipaux pourront rarement, voire jamais, bénéficier de la protection que l'avant-dernier paragraphe de l'art. 116 offre aux autres employés de la municipalité s'ils commettent des infractions criminelles.

Il ressort de ce bref examen du cadre législatif régissant la conduite criminelle des policiers municipaux que l'effet du par. 116(6) *L.C.V.* est semblable à celui de l'art. 119, al. 2 *L.P.* On ne peut toutefois affirmer clairement que les conséquences sévères de la conduite criminelle prévues au par. 116(6) *L.C.V.* devaient continuer de s'appliquer aux policiers municipaux dont la conduite tombe également sous le coup de l'art. 119, al. 2 *L.P.* C'est cette question que j'aborde maintenant.

5.2.2 Le paragraphe 116(6) *L.C.V.* et l'art. 119, al. 2 *L.P.* sont-ils incompatibles?

Le point de départ de toute analyse d'un conflit de lois est qu'il existe une présomption de cohérence législative, et une interprétation qui donne lieu à un conflit devrait être évitée dans la mesure du possible. Le critère à appliquer pour déterminer si un conflit est inévitable est clairement énoncé par le professeur Côté dans son traité d'interprétation des lois :

> Selon la jurisprudence, deux lois ne sont pas en conflit du simple fait qu'elles s'appliquent à la même

2007 SCC 14 (CanLII)

application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818).

The arbitrator and the Court of Appeal both found that s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* were in conflict and that the conflict could not be avoided by any reasonable interpretation. I agree. Section 119, para. 2 *P.A.* requires the dismissal of police officers who have been convicted of a hybrid criminal offence, *except* if he or she can demonstrate specific circumstances which would justify another sanction. Section 116(6) *C.T.A.* provides for disqualification *without exception* from municipal employment for criminal and penal offences punishable with imprisonment for one year or more where the connection requirement is satisfied. There is a clear zone where the statutes overlap and come into conflict. Most, if not all, hybrid *Criminal Code*, R.S.C. 1985, c. C-46, offences targeted by s. 119, para. 2 *P.A.* also carry a term of imprisonment of at least 12 months. Because of the seriousness of criminal conduct by police officers, the connection requirement in the penultimate paragraph of s. 116 *C.T.A.* will most often be satisfied, especially in the case of hybrid offences, which are more serious than summary offences. Disqualification under s. 116 *C.T.A.* will, by necessity, lead to the municipal police officer's

matière : il faut que l'application de l'une exclue, explicitement ou implicitement, celle de l'autre.

(P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 443)

Ainsi, une loi prévoyant que le passager d'un train qui ne paye pas son passage doit être expulsé n'est pas en conflit avec une autre loi prévoyant uniquement l'imposition d'une amende, parce que l'application d'une loi n'exclut pas l'application de l'autre loi (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488). Par contre, il y a conflit inévitable lorsque deux lois sont directement contradictoires ou que leur application concurrente donnerait lieu à un résultat déraisonnable ou absurde. Par exemple, la loi qui autorise la prorogation du délai de dépôt d'un appel uniquement avant l'expiration du délai est en conflit direct avec une autre loi qui autorise l'acceptation d'une demande de prorogation après l'expiration du délai (*Massicotte c. Boutin*, [1969] R.C.S. 818).

48

L'arbitre et la Cour d'appel ont tous les deux conclu à l'incompatibilité du par. 116(6) *L.C.V.* et de l'art. 119, al. 2 *L.P.* et à l'impossibilité de concilier ces dispositions au moyen d'une interprétation raisonnable. Je partage leur avis. Selon l'art. 119, al. 2 *L.P.*, le policier reconnu coupable d'une infraction mixte doit être destitué, *à moins* qu'il ne démontre que des circonstances particulières justifient une autre sanction. Selon le par. 116(6) *L.C.V.*, la personne reconnue coupable d'une infraction pénale ou criminelle punissable d'un emprisonnement d'un an ou plus est inhabile à occuper une charge d'employé de la municipalité *dans tous les cas* où l'infraction a un lien avec cette charge. Il y a clairement chevauchement et incompatibilité d'un élément de ces dispositions législatives. La plupart, voire toutes les infractions mixtes prévues au *Code criminel*, L.R.C. 1985, ch. C-46, qui sont visées par l'art. 119, al. 2 *L.P.*, sont punissables d'un emprisonnement d'au moins douze mois. En raison de la gravité de la conduite criminelle des policiers, il sera presque toujours possible d'établir le lien exigé à l'avant-dernier paragraphe de l'art. 116 *L.C.V.*, notamment dans le cas d'infractions mixtes, qui sont plus graves que les infractions punissables sur

2007 SCC 14 (CanLII)

dismissal, but without any opportunity, in contrast to s. 119, para. 2 *P.A.*, to demonstrate specific circumstances.

49 In any event, it is certainly the case that Belleau's conduct in this appeal is caught by both provisions. All of his offences were punishable by imprisonment for a term of more than one year. There is also no question that they are sufficiently connected with his employment as a police officer. As a result, Belleau is faced with the situation where one statute would allow him to maintain his employment with the appellant municipality if he can show specific circumstances while the other would not. The application of s. 116(6) *C.T.A.* would necessarily preclude the application of the exception found in s. 119, para. 2 *P.A.* It is a situation where "one enactment says 'yes' and the other says 'no'" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191).

50 The appellant urges that the two provisions are complementary because s. 119 *P.A.* is concerned with a disciplinary sanction while s. 116 *C.T.A.* is a purely administrative measure providing for admissibility to municipal employment. It is true that s. 119 *P.A.* speaks of "dismissal" ("*destitution*") while s. 116 *C.T.A.* speaks of "disqualification" ("*inhabilité*"). However, the difference in wording should not obscure the practical effect of these two provisions. Both provisions ultimately result in the termination of the employment relationship. The effect of disqualification under s. 116(6) *C.T.A.* is slightly broader in that it prevents a person from holding *any* municipal employment for a period of five years, but that does not diminish the fact that disqualification first and foremost results in the dismissal of the municipal employee. If an employee is disqualified from holding employment, then dismissal must follow. This seems to me to be a necessary corollary of disqualification for acting employees.

déclaration de culpabilité par procédure sommaire. L'inhabilité prévue à l'art. 116 *L.C.V.* entraîne forcément le congédiement du policier municipal, sans toutefois que ce dernier puisse faire la preuve de circonstances particulières, comme il en a la possibilité en vertu de l'art. 119, al. 2 *L.P.*

Quoi qu'il en soit, la conduite de M. Belleau en l'espèce tombe manifestement sous le coup des deux dispositions. Toutes les infractions qu'il a commises sont punissables d'un emprisonnement de plus d'un an. Il ne fait aucun doute non plus que les infractions ont un lien avec sa charge de policier. Par conséquent, M. Belleau se retrouve dans une situation où une loi lui permet de conserver son emploi auprès de la municipalité appelante s'il peut démontrer l'existence de circonstances particulières, tandis que l'autre loi ne le lui permet pas. L'application du par. 116(6) *L.C.V.* empêcherait nécessairement l'application du régime d'exception prévu à l'art. 119, al. 2 *L.P.* Il s'agit d'un cas où « une loi dit "oui" et [. . .] l'autre dit "non" » (*Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191).

L'appelante fait valoir que les deux dispositions sont complémentaires parce que l'art. 119 *L.P.* prévoit une sanction disciplinaire, tandis que l'art. 116 *L.C.V.* constitue une mesure purement administrative établissant les conditions d'admissibilité à une charge d'employé municipal. Il est vrai qu'il est question de « destitution » à l'art. 119 *L.P.* et d'« inhabilité » à l'art. 116 *L.C.V.* Toutefois, il ne faut pas laisser cette différence de terminologie embrouiller l'incidence pratique de ces deux dispositions. Dans les deux cas, le résultat est la rupture du lien d'emploi. L'inhabilité prévue au par. 116(6) *L.C.V.* a une incidence un peu plus grande dans la mesure où elle empêche une personne d'occuper *toute* charge d'employé de la municipalité pendant une période de cinq ans, mais il n'en demeure pas moins que l'inhabilité entraîne d'abord et avant tout le congédiement de l'employé de la municipalité. Si un employé est inhabile à occuper une charge, il doit donc être congédié. À mon sens, l'inhabilité à occuper une charge a nécessairement pour corollaire le congédiement.

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

This is also the interpretation given to s. 116(6) *C.T.A.* by the jurisprudence. In cases involving municipal employees convicted of a criminal offence, it is accepted that if s. 116(6) *C.T.A.* applied, it would be the basis for the employee's dismissal: *Beauce*; *Association des pompiers de Laval*. Indeed, dismissal was the result in cases where the offence was held to have a sufficient connection with the employment: *L'Île-Perrot (Ville de) et Union des employés de service, section locale 800*, D.T.E. 2000T-619 (T.A.); *Duguay et Paspébiac (Ville de)*, D.T.E. 2003T-47, SOQUIJ AZ-50152875 (C.T.). This is also true of the application of s. 116(6) *C.T.A.* to municipal police officers before the enactment of s. 119 *P.A.* (see e.g. *Deux-Montagnes*). Section 116(6) *C.T.A.* may not be worded as a legislative sanction of dismissal, but it undeniably has such an effect.

Cette interprétation du par. 116(6) *L.C.V.* est également celle qu'en donne la jurisprudence. Dans les cas se rapportant à des employés municipaux déclarés coupables d'infractions criminelles, il est reconnu que si le par. 116(6) *L.C.V.* s'appliquait, il servirait de fondement au congédiement de l'employé : *Beauce*; *Association des pompiers de Laval*. En effet, le congédiement a été maintenu dans les cas où l'on a jugé que l'infraction comportait un lien suffisant avec l'emploi : *L'Île-Perrot (Ville de) et Union des employés de service, section locale 800*, D.T.E. 2000T-619 (T.A.); *Duguay et Paspébiac (Ville de)*, D.T.E. 2003T-47, SOQUIJ AZ-50152875 (C.T.). C'est également ainsi que le par. 116(6) *L.C.V.* a été appliqué aux policiers municipaux avant l'adoption de l'art. 119 *L.P.* (voir par exemple *Deux-Montagnes*). Le paragraphe 116(6) *L.C.V.* n'est peut-être pas libellé de manière à imposer le congédiement, mais c'est sans conteste l'effet qu'il produit. 51

Furthermore, it is hard to see the appellant's invocation of s. 116(6) *C.T.A.* in this case as anything other than an attempt to give effect to a disciplinary measure. Through s. 116(6) *C.T.A.*, the appellant hopes to find a legal basis for its decision to implement the recommendation of its director of public security to dismiss Belleau, a recommendation which was the result of a disciplinary hearing conducted in accordance with the provisions of the collective agreement and the appellant's *Règlement n^o 756* relating to disciplinary sanctions. I cannot see how an application of s. 116(6) *C.T.A.* in this case could qualify as an administrative measure.

En outre, il est difficile de concevoir la décision de l'appelante d'invoquer le par. 116(6) *L.C.V.* comme autre chose qu'une tentative de donner effet à une mesure disciplinaire. L'appelante souhaite utiliser le par. 116(6) *L.C.V.* comme fondement législatif de sa décision de donner suite à la recommandation de son directeur de la sécurité publique de congédier M. Belleau, une recommandation faite à la suite d'une enquête disciplinaire tenue en conformité avec la convention collective et le *Règlement n^o 756* de l'appelante. Je ne vois pas comment l'application du par. 116(6) *L.C.V.* pourrait en l'espèce être qualifiée de mesure administrative. 52

I further agree with the Court of Appeal that it would not be possible to resolve the conflict by interpreting s. 116(6) *C.T.A.* as imposing, in effect, a five-year suspension rather than an outright dismissal after which the police officer would regain his or her position. That would be markedly out of step with the existing jurisprudence on s. 116(6) *C.T.A.*, which, as we have seen, has uniformly interpreted s. 116(6) as operating to terminate the municipal employee's employment.

À l'instar de la Cour d'appel, je ne crois pas non plus qu'il serait possible de résoudre le conflit en interprétant le par. 116(6) *L.C.V.* comme imposant, dans les faits, non pas un congédiement pur et simple mais une suspension de cinq ans suivant laquelle le policier pourrait réintégrer son poste. Une telle approche serait manifestement contraire à la jurisprudence relative au par. 116(6) *L.C.V.* qui, comme nous l'avons vu, a toujours été interprété de manière à entraîner la cessation d'emploi de l'employé municipal. 53

54 More importantly, such an approach would not actually resolve the conflict in this case. The legislature, in s. 119, para. 2 *P.A.*, has provided for a limited exception to dismissal. When that exception applies, it results in the police officer's employment relationship with his or her police force being maintained. This is a key point. The purpose of the exception in s. 119, para. 2 *P.A.* is to allow a police officer, after the imposition of any disciplinary sanctions, to return to his or her post. An interpretation which suggests that s. 116(6) *C.T.A.* imposes a five-year suspension would negate this important objective of s. 119, para. 2 *P.A.* As Deschamps and Fish JJ. admit, such a lengthy suspension — if it can really be called a "suspension" — would force a police officer to find an equivalent position elsewhere as an officer in the Sûreté du Québec, to seek an appointment as a special constable, or even to give up police work altogether and attempt to become a municipal civil servant. These options, even if one considers them to be viable, are far removed from what the exception in s. 119, para. 2 *P.A.* provides: the preservation of the employment relationship between police officer and police force. With respect, the reading suggested by my colleagues would create two classes of police officers. Those who benefit from the exception in s. 119, para. 2 *P.A.* and those who do not.

55 Moreover, it is doubtful whether a municipal police officer who had been suspended for five years pursuant to s. 116(6) *C.T.A.* would be eligible to transfer to the Sûreté du Québec or to be hired as a special constable. Section 115 *P.A.*, including the requirement in s. 115(3) that a person must be free of a criminal conviction in order to become a police officer, applies whenever a person seeks "to be hired" as a police officer. As such, the hiring requirements apply equally to persons who want to be hired as police officers and to acting police officers who, for whatever reason, would like to be hired by another police force. This is made clear by the last paragraph of s. 115 *P.A.*, which does not apply the hiring requirements when police forces are integrated, amalgamated or merged. There would be little reason for this specific exemption if the s. 115 requirements did not also apply to acting

Ce qui est plus important, une telle approche ne réglerait pas réellement le conflit en l'espèce. À l'article 119, al. 2 *L.P.*, le législateur a prévu une exception limitée à la destitution. Dans les cas où cette exception s'applique, le lien d'emploi entre le policier et le corps de police est maintenu. Il s'agit d'un élément d'une importance primordiale. L'exception prévue à l'art. 119, al. 2 *L.P.* a pour but de permettre au policier ayant fait l'objet de sanctions disciplinaires de réintégrer son poste. L'interprétation selon laquelle le par. 116(6) *L.C.V.* impose une suspension de cinq ans neutraliserait cet objectif important de l'art. 119, al. 2 *L.P.* Comme l'ont reconnu les juges Deschamps et Fish, une suspension d'une aussi longue durée, si elle peut réellement être qualifiée de « suspension », obligerait le policier à trouver un poste équivalent ailleurs comme policier de la Sûreté du Québec ou comme constable spécial, ou même à abandonner entièrement le travail de policier et à tenter d'obtenir un emploi de fonctionnaire municipal. Ces possibilités, même si elles peuvent être jugées viables, s'écartent considérablement de ce que prévoit l'exception à l'art. 119, al. 2 *L.P.*, soit le maintien du lien d'emploi entre le policier et le corps policier. En toute déférence, l'interprétation proposée par mes collègues créerait deux catégories de policiers, ceux qui bénéficient du régime d'exception prévu à l'art. 119, al. 2 *L.P.* et ceux qui n'en bénéficient pas.

De plus, il est peu probable qu'un policier municipal qui a été suspendu de ses fonctions pour cinq ans, en application du par. 116(6) *L.C.V.*, soit admissible à une mutation à la Sûreté du Québec ou à un emploi comme constable spécial. L'article 115 *L.P.*, qui exige notamment au par. 115(3) que les candidats à un poste de policier n'aient jamais été reconnus coupables d'un acte criminel, s'applique dans tous les cas d'embauche d'un policier. Les conditions d'embauche s'appliquent également aux candidats à l'embauche comme policier ainsi qu'aux policiers en titre qui aimeraient être embauchés par un autre corps de police, peu importe la raison. C'est ce qu'indique clairement le dernier alinéa de l'art. 115 *L.P.*, en précisant que les conditions d'embauche ne s'appliquent pas dans le cas d'une intégration, d'une fusion ou de toute autre forme de regroupement de services policiers. Cette exception

2007 SCC 14 (CanLII)

police officers. All this to say that a municipal police officer who was "suspended" by virtue of s. 116(6) *C.T.A.* would also be unable to be rehired by the Sûreté du Québec or as a special constable by virtue of s. 115(3). There is therefore little grounds for thinking that the application of s. 116(6) *C.T.A.* would somehow allow a municipal police officer to potentially continue working as a police officer.

The appellant also argues that there is nothing inconsistent in the fact that Belleau is subject to two sets of obligations: one as a police officer, and the other as a municipal employee. There is of course nothing wrong with a municipal police officer having to abide by higher standards as a police officer or as a municipal employee, but where those standards come into conflict, the conflict cannot be explained away by the fact that the two standards emanate from different sources. Here, both statutes provide for the consequences of criminal conduct. One provides for an exception to the rule of dismissal; the other does not. The practical effect of s. 116(6) *C.T.A.* as it applies to municipal police officers is to negate the limited exception provided by the legislature in s. 119, para. 2 *P.A.* As such, this is not a case of one legislative regime imposing a higher standard than another. Rather, it is a case of one statute implicitly taking away what another statute has explicitly allowed. It is for this reason that whatever one thinks about which provision should prevail, the conflict is, in my opinion, unavoidable.

I hasten to add, as Bich J.A. noted, that the conflict between s. 116(6) *C.T.A.* and s. 119 *P.A.* is not complete. Both provisions continue to apply unproblematically outside of the municipal police officer context. In the case of a municipal police officer convicted of indictable offences, the two sections are also not in conflict since the first paragraph of s. 119 *P.A.* provides for dismissal without exception. Section 116(6) also covers penal offences that are not captured by s. 119 *P.A.* Some federal penal offences are punishable for a term of imprisonment for one year or more and could

particulière n'aurait pas vraiment sa raison d'être si les exigences prévues à l'art. 115 ne s'appliquaient pas aussi aux policiers en titre. Bref, un policier municipal qui a été « suspendu » en application du par. 116(6) *L.C.V.* ne pourrait pas être réembauché par la Sûreté du Québec ou comme constable spécial, suivant le par. 115(3). Il y a donc peu de raisons de croire que l'application du par. 116(6) *L.C.V.* permettrait éventuellement à un policier municipal de continuer de travailler comme policier.

56 L'appelante prétend également qu'il n'y a pas d'incohérence à obliger M. Belleau à se conformer à deux ensembles d'obligations, celles d'un policier et celles d'un employé de la municipalité. Il est tout à fait acceptable qu'un policier municipal doive respecter des normes plus élevées en sa qualité de policier ou d'employé de la municipalité. Toutefois, lorsque ces normes sont incompatibles, on ne peut donner comme explication plus ou moins ingénieuse le fait que les deux normes émanent de sources différentes. En l'espèce, les deux lois prévoient des conséquences à la conduite criminelle. L'une comporte un régime d'exception à la règle de la destitution, mais pas l'autre. En pratique, le par. 116(6) *L.C.V.*, lorsqu'il s'applique aux policiers municipaux, a pour effet de neutraliser l'exception limitée prévue par le législateur à l'art. 119, al. 2 *L.P.* Dans ce contexte, il n'est pas question d'un régime législatif qui impose une norme plus élevée qu'un autre. Il s'agit plutôt d'un cas où une loi retire implicitement ce qu'une autre loi autorise explicitement. C'est pourquoi j'estime que le conflit en l'espèce ne peut être évité, peu importe la position retenue concernant la disposition qui devrait prévaloir.

57 Je m'empresse d'ajouter, comme la juge Bich l'a signalé, que le par. 116(6) *L.C.V.* et l'art. 119 *L.P.* ne sont pas entièrement incompatibles. Les deux dispositions continuent de s'appliquer sans problème dans les situations qui ne visent pas des policiers municipaux. Dans le cas d'un policier municipal reconnu coupable d'un acte criminel, les deux dispositions ne sont également pas incompatibles puisque le premier alinéa de l'art. 119 *L.P.* prévoit la destitution sans exception. Le paragraphe 116(6) *L.C.V.* s'applique également dans le cas d'infractions pénales non visées à l'art. 119 *L.P.* Certaines

2007 SCC 14 (CanLII)

lead to the dismissal of a police officer as a municipal employee: *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 160.1; *Importation of Intoxicating Liquors Act*, R.S.C. 1985, c. I-3, s. 5(*c*); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 238(1); *Air Travellers Security Charge Act*, S.C. 2002, c. 9, s. 62(2).

infractions pénales à des lois fédérales sont punissables d'un emprisonnement d'au moins un an et pourraient entraîner le congédiement d'un policier en sa qualité d'employé de la municipalité : *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2e suppl.), art. 160.1; *Loi sur l'importation des boissons enivrantes*, L.R.C. 1985, ch. I-3, al. 5*c*); *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.), par. 238(1); *Loi sur le droit pour la sécurité des passagers du transport aérien*, L.C. 2002, ch. 9, par. 62(2).

5.2.3 How Should the Conflict Between Section 116(6) *C.T.A.* and Section 119, para. 2 *P.A.* Be Resolved?

5.2.3 Quelle est la façon de résoudre le conflit entre le par. 116(6) *L.C.V.* et l'art. 119, al. 2 *L.P.*?

58 When a conflict does exist and it cannot be resolved by adopting an interpretation which would remove the inconsistency, the question that must be answered is which provision should prevail. The objective is to determine the legislature's intent. Where there is no express indication of which law should prevail, two presumptions have developed in the jurisprudence to aid in this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general (Côté, at pp. 358-62). The first presumes that the legislature was fully cognizant of the existing laws when a new law was enacted. If a new law conflicts with an existing law, it can only be presumed that the new one is to take precedence. The second presumes that the legislature intended a special law to apply over a general one since to hold otherwise would in effect render the special law obsolete. Neither presumption is, however, absolute. Both are only indices of legislative intent and may be rebutted if other considerations show a different legislative intent (Côté, at pp. 358-59).

S'il existe effectivement un conflit et qu'il est impossible de le résoudre au moyen d'une interprétation qui éliminerait l'incohérence, il faut alors décider laquelle des dispositions doit prévaloir. L'objectif est de cerner l'intention du législateur. En l'absence d'indication expresse de la loi qui doit prévaloir, il convient de faire appel à deux principes qui se dégagent de la jurisprudence. Selon ces principes, la loi plus récente prévaut sur la loi plus ancienne, et la loi spéciale prévaut sur la loi générale (Côté, p. 453 à 459). Dans le premier cas, le législateur est réputé bien connaître l'existence des lois en vigueur lorsqu'il adopte une nouvelle loi. Si une nouvelle loi entre en conflit avec une loi existante, il faut conclure que la nouvelle loi a préséance. Dans le deuxième cas, le législateur est réputé avoir voulu que la loi spéciale l'emporte sur la loi générale, car toute autre interprétation rendrait caduque la loi spéciale. Ces principes n'ont toutefois pas un caractère absolu. Ils ne donnent qu'une indication de la volonté du législateur et peuvent être réfutés si d'autres considérations révèlent une intention législative différente (Côté, p. 453 et 454).

59 In this case, both presumptions point to the conclusion that the *Police Act* should prevail over the *Cities and Towns Act*. Section 116 *C.T.A.* has existed in some form at least since the enactment of *An Act respecting Cities and Towns*, S.Q. 1922, 13 Geo. V, c. 65, s. 123(12), while s. 119 *P.A.* is of much more recent vintage. Section 116, and the *Cities and Towns Act* generally, have been modified since the *Police Act* came into force but none

En l'espèce, les deux principes donnent à penser que la *Loi sur la police* devrait primer la *Loi sur les cités et villes*. L'article 116 *L.C.V.* existe sous une forme ou une autre au moins depuis l'adoption de la *Loi concernant les cités et les villes*, S.Q. 1922, 13 Geo. V, ch. 65, par. 123(12), alors que l'art. 119 *L.P.* est beaucoup plus récent. L'article 116 et la *Loi sur les cités et villes* en général ont été modifiés depuis l'entrée en vigueur

2007 SCC 14 (CanLII)

of these affected s. 116(6) *C.T.A.* Section 119 *P.A.* is therefore the newer provision suggesting that the legislature intended it to prevail over s. 116 *C.T.A.* in case of conflict.

The *Police Act*, and s. 119 in particular, is also of a special nature in relation to the *Cities and Towns Act* in the context of disciplinary matters. The *Police Act* applies to municipal police officers' training, the conditions for their employment and generally how the municipal police force is organized. Discipline of municipal police officers is governed either by the professional ethics regime set out in the Act or the disciplinary regulations that municipalities are *required* by the *Police Act* to put in place. Section 119 *P.A.* further requires municipalities to deal with criminal conduct by automatic dismissal. By contrast, the *Cities and Towns Act* is a general statute providing for the organization and operation of municipalities generally. Section 116 is not focussed exclusively on discipline and also serves to prevent certain persons from taking up municipal employment.

Section 119 *P.A.* thus satisfies both presumptions in that it is more recent and more specific in comparison to s. 116 *C.T.A.* But there is another reason to hold that s. 119, para. 2 *P.A.* should prevail. This has to do with the reasons for the inclusion of the exception in s. 119, para. 2 *P.A.* In particular, the specific circumstances exception was intended to meet the concerns of police associations that it might not always be fair to dismiss an acting police officer convicted of a hybrid offence (*Journal des débats de la Commission permanente des institutions*, 1st Sess., 36th Leg., May 26, 2000, at pp. 2-4). It appears from the debates surrounding s. 119, para. 2 *P.A.*, that it was drafted, like most legislation, so as to satisfy various interests. The Minister of Public Security described the balancing achieved by s. 119 in the following way:

de la *Loi sur la police*, mais aucune de ces modifications ne visait le par. 116(6) *L.C.V.* L'article 119 *L.P.* est donc la disposition postérieure, ce qui donne à penser que le législateur voulait qu'il l'emporte sur l'art. 116 *L.C.V.* en cas de conflit.

60 En outre, la *Loi sur la police* et son art. 119 en particulier sont de nature spéciale par rapport à la *Loi sur les cités et villes* eu égard aux questions de discipline. La *Loi sur la police* s'applique à la formation dispensée aux policiers municipaux, à leurs conditions d'embauche et, de façon générale à l'organisation du corps de police de la municipalité. Les mesures disciplinaires applicables aux policiers municipaux sont régies soit par les règles d'éthique professionnelle établies dans la Loi, soit par le règlement de discipline interne que les municipalités *doivent* prendre en application de la *Loi sur la police*. En outre, l'art. 119 *L.P.* exige que les municipalités imposent la destitution automatique comme sanction à la conduite criminelle. Par contre la *Loi sur les cités et villes* est une loi de nature générale qui prévoit l'organisation et le fonctionnement des municipalités en général. L'article 116 ne vise pas exclusivement les mesures disciplinaires et permet aussi d'empêcher certaines personnes d'occuper un emploi dans la municipalité.

61 L'article 119 *L.P.* satisfait ainsi aux exigences des deux principes, puisqu'il est plus récent et plus spécifique que l'art. 116 *L.C.V.* Mais il y a un autre motif de conclure à la préséance de l'art. 119, al. 2 *L.P.*, à savoir les raisons pour lesquelles il a été décidé d'inclure dans cette disposition un régime d'exception. Plus précisément, il a été décidé d'inclure le régime d'exception des circonstances particulières en raison des observations faites par les associations de policiers inquiètes du fait qu'il pourrait ne pas toujours être juste de destituer un policier en titre reconnu coupable d'une infraction mixte (*Journal des débats de la Commission permanente des institutions*, 1re sess., 36e lég., 26 mai 2000, p. 2 à 4). Il ressort des débats portant sur l'art. 119, al. 2 *L.P.* que cette disposition a été rédigée, comme la plupart des lois, dans le but de satisfaire à divers intérêts. Le ministre de la Sécurité publique a décrit ainsi les intérêts pris en compte lors de la rédaction de l'art. 119 :

2007 SCC 14 (CanLII)

[TRANSLATION] In [the case of a hybrid offence], the rule is again dismissal, except that a disciplinary committee will be convened and the police officer, if he can raise the fact that the act was committed in exceptional or specific circumstances that justify a sanction other than dismissal, then he can be heard and get something.

. . . This also satisfies concerns in the submissions made to us by the police associations, which said: Listen, it's terrible, someone who, after a 20-year career, for example, can in exceptional circumstances, let us say he is depressed because a member of his family is seriously ill, and then commits an offence he would never have committed otherwise, a minor offence such as shoplifting, or even impaired driving, etc. Well, in such circumstances, he could raise those specific circumstances, which might justify another sanction. So I think this responds at the same time to the justified criticisms that were made.

. . .

I also believe that this satisfies the public's concerns. . . . As you can see, members of the general public think, like us, that a police officer should not have a criminal record. But I think that, if certain exceptional cases, like those presented by the Fraternité des policiers de Montréal, were put to them, they might be open to their having one. This is what it means. [Emphasis added; pp. 2-3.]

62 If s. 116(6) *C.T.A.* is held to prevail over s. 119, para. 2 *P.A.*, then the stated legislative objective of providing a narrow exception for all police officers who have committed a hybrid offence during the course of their career will be defeated. Municipal police officers will be dismissed by virtue of s. 116(6) *C.T.A.* (or s. 269 of the *Municipal Code of Québec*) without the benefit of being able to prove that there are specific circumstances to justify another sanction. There is no indication in the debates that the exception in para. 2 of s. 119 *P.A.* was not intended to apply to municipal police officers. Indeed, the debates suggest that a conscious policy choice was made, after taking into account the views of various interests, to provide a specific exception for *all* acting police officers. In my view, courts should avoid an interpretation that would serve to defeat such a clearly stated legislative

Dans [le cas d'une infraction mixte], la règle, c'est encore la destitution. Sauf qu'un comité de discipline sera convoqué et que le policier, s'il peut faire valoir que l'acte a été commis dans des circonstances exceptionnelles ou particulières qui justifient une autre sanction que la destitution, il pourra se faire entendre et obtenir un résultat.

. . . Ça vient satisfaire aussi les représentations qui nous ont été faites par les associations de policiers, qui disent : Écoutez, c'est terrible, quelqu'un, après 20 ans de carrière, par exemple, peut, dans des circonstances exceptionnelles, comme il peut être dépressif parce qu'un membre de sa famille est gravement malade et puis commettre une infraction qu'il n'aurait jamais commise autrement, une infraction minime comme un vol à l'étalage ou même une conduite avec facultés affaiblies, etc. Bon. Dans ces circonstances-là, il pourra faire valoir ces circonstances particulières qui justifieraient une autre sanction. Donc, je pense que ça satisfait à la fois les critiques justifiées qui étaient faites.

. . .

Je crois aussi que ça satisfait le public. [. . .] On s'aperçoit que, dans le public en général, les gens pensent effectivement, comme nous, qu'un policier ne doit pas avoir de dossier judiciaire. Mais je pense que, si on leur exposait certains cas exceptionnels, comme l'a fait la Fraternité des policiers de Montréal, ils seraient peut-être ouverts à ce qu'ils en aient. Alors, ça va dans ce sens-là. [Je souligne; p. 2 et 3.]

La conclusion que le par. 116(6) *L.C.V.* doit primer l'art. 119, al. 2 *L.P.* irait à l'encontre de l'objectif déclaré de la loi d'établir un régime d'exception bien précis accessible à tous les policiers ayant commis une infraction mixte pendant leur carrière. Suivant le par. 116(6) *L.C.V.* (ou l'art. 269 du *Code municipal du Québec*), les policiers municipaux sont congédiés sans avoir la possibilité de démontrer que des circonstances particulières justifient une autre sanction. Rien dans les débats n'indique que le régime d'exception prévu à l'art. 119, al. 2 *L.P.* ne devait pas s'appliquer aux policiers municipaux. En fait, les débats donnent plutôt à penser qu'une décision de principe a été prise avec lucidité, après examen de tous les intérêts en cause, afin de prévoir un régime d'exception bien précis accessible à *tous* les policiers. À mon avis, les tribunaux devraient éviter toute

2007 SCC 14 (CanLII)

objective. This gives further support for the conclusion that s. 119, para. 2 *P.A.* should prevail over s. 116(6) *C.T.A.* in case of conflict.

Like the Court of Appeal, I do not find persuasive the appellant's argument that the absence of any positive exclusion of s. 116(6) *C.T.A.* in relation to municipal police officers suggests that it should prevail over s. 119, para. 2 *P.A.* The appellant points to the fact, as did Lemelin J., that the *Cities and Towns Act* has been modified a number of times subsequent to the enactment of the new *Police Act*. Some provisions of the *Cities and Towns Act* relating to discipline were even modified by the *Police Act* itself (ss. 71 and 72 *C.T.A.* by ss. 316 and 317 *P.A.*). On none of these occasions did the legislature see fit to disapply or modify the application of s. 116(6) *C.T.A.* to municipal police officers. This line of argument is, however, of little assistance when confronted with an absence of express legislative intent. It could just as easily be said that since s. 119 *P.A.* was enacted without expressly excluding municipal police officers, it was intended to apply to all police officers without distinction. Indeed, this makes more sense as it preserves the legislative bargain that was struck when s. 119 *P.A.* was drafted without offending the applicability of s. 116(6) *C.T.A.* to other municipal employees. Moreover, as Bich J.A. noted, the amendments made to the *Cities and Towns Act* were to references to the previous version of the *Police Act*. This is hardly evidence of legislative intent that s. 116(6) *C.T.A.* should take precedence over s. 119, para. 2 *P.A.*

For similar reasons, I see nothing determinative in the fact that s. 116(6) *C.T.A.* was not mentioned in the legislative debates surrounding s. 119, para. 2 *P.A.* On the contrary, this would seem to be further evidence that the legislature intended that provision to apply equally to all police officers. If municipal police officers were meant to be treated

interprétation qui irait à l'encontre d'un tel objectif clairement déclaré de la loi. Ces considérations renforcent la conclusion que l'art. 119, al. 2 *L.P.* devrait avoir préséance sur le par. 116(6) *L.C.V.* en cas de conflit.

63 À l'instar de la Cour d'appel, j'estime que l'argument de l'appelante, selon lequel le par. 116(6) *L.C.V.* devrait l'emporter sur l'art. 119, al. 2 *L.P.* parce que rien n'exclut spécifiquement son application aux policiers municipaux, n'est pas convaincant. L'appelante souligne, comme l'a fait le juge Lemelin, que la *Loi sur les cités et villes* a été modifiée à maintes reprises après l'adoption de la nouvelle *Loi sur la police*. Certaines dispositions de la *Loi sur les cités et villes* ayant trait aux mesures disciplinaires ont même été modifiées par la *Loi sur la police* elle-même (art. 71 et 72 *L.C.V.* mod. par les art. 316 et 317 *L.P.*). Le législateur n'a pas cru bon, à aucune de ces occasions, de soustraire les policiers municipaux à l'application du par. 116(6) *L.C.V.* ni de modifier l'application de cette disposition à leur égard. En l'absence d'une indication claire de la volonté du législateur, cette argumentation n'est d'aucun secours. Il serait tout aussi facile de soutenir qu'en édictant l'art. 119 *L.P.*, sans exclure expressément les policiers municipaux de son application, le législateur voulait qu'il s'applique à tous les policiers sans distinction. En fait, cet argument est plus logique puisqu'il sauvegarde les intérêts pris en compte lors de la rédaction de l'art. 119 *L.P.*, sans influer sur l'application du par. 116(6) *L.C.V.* aux autres employés municipaux. En outre, comme la juge Bich l'a fait remarquer, les modifications apportées à la *Loi sur les cités et villes* visaient des renvois à l'ancienne *Loi de police*, ce qui ne constitue certainement pas une preuve de l'intention du législateur de donner au par. 116(6) *L.C.V.* préséance sur l'art. 119, al. 2 *L.P.*

64 Pour des motifs semblables, j'estime que l'absence de mention du par. 116(6) *L.C.V.* lors des débats de l'Assemblée nationale portant sur l'art. 119, al. 2 *L.P.* n'est pas déterminante. Au contraire, il s'agirait plutôt d'une preuve supplémentaire que le législateur voulait que cette disposition s'applique également à tous les policiers. Si l'on avait

2007 SCC 14 (CanLII)

differently, one would expect that this point would have been raised in the debates.

65 A final argument raised by the appellant is that allowing s. 119, para. 2 *P.A.* to prevail over s. 116(6) *C.T.A.* would create two classes of municipal employees. The implication is that municipal police officers might be treated more leniently than other municipal employees. The Court of Appeal rejected this argument on the grounds that the same could be said about allowing s. 116(6) *C.T.A.* to prevail. This would in effect create two classes of police officers contrary to the stated intentions behind s. 119 *P.A.* There is another reason why the appellant's concern is unfounded. As we have seen, municipal police officers were treated differently from other municipal employees *before* s. 119, para. 2 *P.A.* was enacted, by virtue of the way the connection requirement in s. 116(6) *C.T.A.* applied to police officers. The concern over creating distinctions between municipal police officers and other municipal employees is therefore misplaced. Moreover, s. 119, para. 2 *P.A.*, by requiring dismissal except if there are specific circumstances, continues to impose higher standards on municipal police officers. Allowing it to prevail over s. 116(6) *C.T.A.* would not significantly alter the relative treatment of municipal police officers compared to municipal employees. It would, *a fortiori*, not result in municipal police officers being treated more leniently than municipal employees.

66 Lastly, the predominance of s. 119, para. 2 *P.A.* seems to concord with the *status quo* and would not represent a marked departure from current practice. For instance, in his report recommending the dismissal of Belleau, the appellant's director of public security relied on the breaches of the municipality's discipline regulations, s. 119, para. 2 *P.A.* and the absence, in his opinion, of specific circumstances rather than the *Cities and Towns Act*. This is not surprising given the comprehensive nature of the new *Police Act* in relation to

voulu accorder un traitement différent aux policiers municipaux, le cas échéant, ce fait aurait probablement été soulevé pendant les débats.

Comme dernier argument, l'appelante a fait valoir qu'en concluant à la préséance de l'art. 119, al. 2 *L.P.* sur le par. 116(6) *L.C.V.*, on créerait deux catégories d'employés municipaux. On laisse entendre que les policiers municipaux pourraient bénéficier d'un régime plus clément que les autres employés municipaux. La Cour d'appel a rejeté cet argument au motif que l'on pourrait en dire autant si le par. 116(6) *L.C.V.* devrait prévaloir. On créerait effectivement ainsi deux catégories de policiers, contrairement aux intentions déclarées relativement à l'art. 119 *L.P.* L'inquiétude de l'appelante n'est pas fondée pour une autre raison. Comme nous l'avons vu, les policiers municipaux et les autres employés de la municipalité n'étaient pas traités de la même façon *avant* l'adoption de l'art. 119, al. 2 *L.P.* en raison de l'incidence, sur les policiers municipaux, du lien exigé au par. 116(6) *L.C.V.* Par conséquent, la crainte de créer des distinctions entre les policiers municipaux et les autres employés municipaux est sans fondement. Qui plus est, en imposant la destitution comme sanction sauf sur preuve de circonstances particulières, l'art. 119, al. 2 *L.P.* continue d'imposer des normes de comportement plus sévères aux policiers municipaux. Donner la préséance à cette disposition plutôt qu'au par. 116(6) *L.C.V.* ne modifierait pas considérablement le traitement réservé aux policiers municipaux par rapport à celui réservé aux employés de la municipalité. A fortiori, les policiers municipaux ne bénéficieraient pas d'un régime plus clément que les autres employés de la municipalité.

Enfin, il semble que la préséance est déjà donnée à l'art. 119, al. 2 *L.P.* et que cette approche ne s'écarte pas substantiellement de la pratique actuellement en cours. Par exemple, dans son rapport recommandant la destitution de M. Belleau, le directeur de la sécurité publique de l'appelante a fondé sa décision sur les manquements au règlement de discipline de la municipalité et à l'art. 119, al. 2 *L.P.* ainsi que sur l'absence, à son avis, de circonstances particulières plutôt que sur la *Loi sur les cités et villes*. Sa position n'est pas surprenante

2007 SCC 14 (CanLII)

disciplinary matters, including criminal conduct, but it does confirm that the disruptions that would be caused by disapplying s. 116(6) *C.T.A.* in the limited context of municipal police officers convicted of hybrid criminal offences are not as grave as the appellant, with hindsight, makes them out to be.

To summarize, the conflict between s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* should be resolved in favour of the latter. As the more recent and more specific provision, s. 119, para. 2 *P.A.* should take precedence. This would give effect to legislative intention as reflected by the presumptions and, more specifically, in the debates surrounding the enactment of s. 119, para. 2 *P.A.* Section 119, para. 2 *P.A.* was intended to satisfy a number of divergent interests and to recognize that dismissal may not be the appropriate sanction in every case. No violence is done to municipal law and no unfairness is visited upon municipal employees by allowing s. 119, para. 2 *P.A.* to prevail in case of conflict. Municipal employees are still subject to s. 116(6) *C.T.A.* and still benefit from the less restrictive (relative to municipal police officers) application of its terms. Municipal police officers must still suffer the consequences of s. 116(6) *C.T.A.* for offences outside the ambit of s. 119, para. 2 *P.A.*, and they are still bound by s. 119, para. 2, which requires, as a general rule, dismissal for hybrid offences. Only in limited situations where a police officer can demonstrate specific circumstances will another sanction be possible.

étant donné la nature exhaustive de la nouvelle *Loi sur la police* eu égard aux questions de discipline, dont la conduite criminelle, mais elle confirme, avec le recul, que les perturbations qu'entraînerait la décision de soustraire à l'application du par. 116(6) *L.C.V.* les policiers municipaux reconnus coupables d'infractions criminelles mixtes ne sont pas aussi sérieuses que le soutient l'appelante.

67 En résumé, le conflit entre le par. 116(6) *L.C.V.* et l'art. 119, al. 2 *L.P.* devrait être résolu en donnant la préséance à cette dernière disposition puisque celle-ci est plus récente et de nature plus spécifique. Cette solution serait conforme à l'intention du législateur qui se dégage des principes et, plus particulièrement, des débats entourant l'adoption de l'art. 119 al. 2 *L.P.* Cette disposition visait à satisfaire à un certain nombre d'intérêts opposés et à reconnaître que la destitution pourrait ne pas être la sanction qui convient dans tous les cas. Donner la préséance à l'art. 119, al. 2 *L.P.* en cas de conflit ne porte pas atteinte au droit municipal ni ne crée une inégalité de traitement eu égard aux employés municipaux. Ces derniers demeurent assujettis au par. 116(6) *L.C.V.* et continuent de bénéficier de son application moins restrictive (comparativement aux policiers municipaux). Les policiers municipaux continuent de s'exposer aux conséquences prévues au par. 116(6) *L.C.V.* en cas de perpétration des infractions qui ne sont pas visées à l'art. 119, al. 2 *L.P.* et ils demeurent assujettis à l'application de l'art. 119, al. 2 *L.P.* qui prévoit, en règle générale, la destitution en cas de perpétration d'une infraction mixte. Une autre sanction pourra être imposée uniquement dans les cas très restreints où un policier pourra faire la preuve de circonstances particulières.

5.3 *Application of Section 119, para. 2 P.A.*

The final issue that must be considered is whether the arbitrator committed a reviewable error in finding that Belleau had demonstrated specific circumstances that justified a sanction other than dismissal under s. 119, para. 2 *P.A.* I am of the opinion that the arbitrator's decision on this issue was unreasonable, although for different reasons than those given by the Superior Court.

5.3 *Application de l'art. 119, al. 2 L.P.*

68 La dernière question qui se pose est de savoir si l'arbitre a commis une erreur donnant ouverture à la révision lorsqu'il a conclu que M. Belleau avait fait la preuve de circonstances particulières justifiant une sanction autre que la destitution, conformément à l'art. 119, al. 2 *L.P.* J'estime que la décision de l'arbitre à cet égard était déraisonnable, mais pour des motifs autres que ceux donnés par la Cour supérieure.

2007 SCC 14 (CanLII)

69 An initial problem with the arbitrator's decision is that he equated his jurisdiction under s. 119, para. 2 *P.A.* to the jurisdiction he would normally enjoy under s. 100.12(*f*) *L.C.* A grievance arbitration involving the application of s. 119, para. 2 *P.A.* is different than one involving only s. 100.12(*f*) *L.C.* Under s. 119, para. 2 *P.A.*, the municipality does not have the burden of proving that dismissal was the appropriate sanction. The burden is rather on the police officer to show that specific circumstances exist to exclude dismissal. The arbitrator is also not free to substitute the decision that he or she deems to be fair and reasonable. Unless the police officer can demonstrate specific circumstances, the arbitrator *must* confirm the dismissal. The arbitration is still governed by the collective agreement and the *Labour Code*, but the arbitrator does not have the same discretion in disciplinary matters that he or she would otherwise enjoy under s. 100.12(*f*). This is a necessary implication of s. 119 *P.A.*, which was intended to make dismissal for criminal conduct the general rule. If arbitrators maintained their plenary jurisdiction under s. 100.12(*f*) there would be little point to a provision that mandates dismissal. The reasonable interpretation of s. 119, para. 2 *P.A.* is one under which the arbitrator's jurisdiction is limited to considering whether the police officer has demonstrated specific circumstances and, if so, what other sanction should be applied.

Tout d'abord, la décision de l'arbitre pose problème dans la mesure où l'arbitre se croyait investi, aux termes de l'art. 119, al. 2 *L.P.*, du pouvoir qu'il exercerait normalement au titre de l'al. 100.12*f*) *C.T.* L'arbitrage de griefs qui fait intervenir l'art. 119, al. 2 *L.P.* est différent de celui qui ne porte que sur l'al. 100.12*f*) *C.T.* Sous le régime de l'art. 119, al. 2 *L.P.*, il n'incombe pas à la municipalité de démontrer que la destitution était la sanction adéquate. Il appartient plutôt au policier de démontrer que des circonstances particulières justifient une sanction autre que la destitution. L'arbitre n'a pas non plus le loisir de substituer à la décision de l'employeur la décision qui lui paraît juste et raisonnable. À moins que le policier ne lui fasse la preuve de l'existence de circonstances particulières, l'arbitre *doit* confirmer la destitution. La convention collective et le *Code du travail* continuent de s'appliquer à l'arbitrage, mais l'arbitre ne jouit pas en matière disciplinaire du même pouvoir discrétionnaire qu'aux termes de l'al. 100.12*f*). C'est ce qui ressort, par implication nécessaire, de l'art. 119 *L.P.*, dont l'objet était de faire de la destitution la sanction généralement appliquée dans les cas de conduite criminelle. Si les arbitres conservaient la compétence absolue que leur confère l'al. 100.12*f*), une disposition qui impose la destitution n'aurait pas d'utilité. Selon l'interprétation raisonnable de l'art. 119, al. 2 *L.P.*, le pouvoir de l'arbitre se limite à l'examen de la question de savoir si le policier a fait la preuve de l'existence de circonstances particulières et, le cas échéant, à déterminer la sanction qui devrait être imposée.

70 In deciding whether there are specific circumstances, the arbitrator must not lose sight of the special role of police officers and the effect of a criminal conviction on their capacity to carry out their functions. A criminal conviction, whether it occurs on-duty or off-duty, brings into question the moral authority and integrity required by a police officer to discharge his or her responsibility to uphold the law and to protect the public. It undermines the confidence and trust of the public in the ability of a police officer to carry out his or her duties faithfully: *Deux-Montagnes*; *Ville de Lévis*. This requirement is reflected in the police *Code of ethics*, discipline regulations such as the appellant's

Lorsqu'il se prononce sur la question des circonstances particulières, l'arbitre ne doit pas perdre de vue le rôle spécial que jouent les policiers et l'incidence d'une déclaration de culpabilité sur leur capacité d'exercer leurs fonctions. Une déclaration de culpabilité pour un acte posé par un policier, qu'il ait ou non été en devoir au moment de cet acte, remet en cause l'autorité morale et l'intégrité du policier dans l'exercice de ses responsabilités en matière d'application de la loi et de protection du public. Du point de vue du public, il y a rupture du lien de confiance nécessaire à l'exercice, par le policier, de ses fonctions : *Deux-Montagnes*; *Ville de Lévis*. C'est ce qui ressort du *Code de déontologie*,

2007 SCC 14 (CanLII)

Règlement n^o 756 and, importantly, in the *Police Act* itself in ss. 115(3) and 119 *P.A.*

While dismissal is the harshest disciplinary sanction that can be imposed, it is worth recalling that the criminal offences targeted by both paragraphs of s. 119 *P.A.* are serious ones. They are all offences for which Parliament has considered it necessary to attach the possibility of significant terms of imprisonment. A conviction for a summary offence does not entail dismissal in all cases. Dismissal is only mandatorily prescribed for indictable or hybrid offences that can be prosecuted either by indictment or summary conviction.

The limited exception provided in the second paragraph of s. 119 *P.A.* must be considered in this light. The general rule is that conviction for an indictable or hybrid criminal offence by an acting police officer leads to dismissal. The ability to invoke "specific circumstances" to justify a lesser sanction, while an important safeguard against unfairness, must not be taken as a general licence for arbitrators to impose what sanction they think is appropriate.

What constitutes "specific circumstances" is not defined in the legislation. However, in discussing the exception in s. 119, para. 2 *P.A.*, the Minister commented on what types of specific circumstances might be considered:

[TRANSLATION] Listen, it's terrible, someone who, after a 20-year career, for example, can in exceptional circumstances, let us say he is depressed because a member of his family is seriously ill, and then commits an offence he would never have committed otherwise, a minor offence such as shoplifting, or even impaired driving, etc. Well, in such circumstances, he could raise those specific circumstances, which might justify another sanction.

. . .

If we consider the examples given to us by the associations representing police officers, I think it is clear

des règlements de discipline comme le *Règlement n^o 756* de l'appelante et, il convient de le noter, du par. 115(3) et de l'art. 119 *L.P.*

71 La destitution est la sanction la plus sévère qui puisse être imposée, mais les infractions criminelles visées aux deux alinéas de l'art. 119 *L.P.* sont, rappelons-le, des infractions graves pour lesquelles le législateur a jugé nécessaire de prévoir la possibilité de lourdes peines d'emprisonnement. Une condamnation pour une infraction punissable sur déclaration de culpabilité par procédure sommaire n'entraîne pas la destitution dans tous les cas. La Loi impose la destitution uniquement dans le cas d'actes criminels et d'infractions mixtes punissables, sur déclaration de culpabilité, par voie de mise en accusation ou par procédure sommaire.

72 L'exception limitée prévue au deuxième alinéa de l'art. 119 *L.P.* doit être envisagée sous cet angle. En règle générale, un policier reconnu coupable d'un acte criminel ou d'une infraction mixte est destitué. La possibilité d'invoquer les « circonstances particulières » justifiant une sanction moins sévère assure une protection importante contre l'iniquité; toutefois, les arbitres ne doivent pas y voir une autorisation générale d'imposer la sanction qu'ils jugent indiquée.

73 Les dispositions législatives ne précisent pas en quoi consistent les « circonstances particulières ». Toutefois, lors des débats portant sur le régime d'exception prévu à l'art. 119, al. 2 *L.P.*, le ministre a donné des exemples de circonstances particulières qui pourraient être prises en compte :

Écoutez, c'est terrible, quelqu'un, après 20 ans de carrière, par exemple, peut, dans des circonstances exceptionnelles, comme il peut être dépressif parce qu'un membre de sa famille est gravement malade et puis commettre une infraction qu'il n'aurait jamais commise autrement, une infraction minime comme un vol à l'étalage ou même une conduite avec facultés affaiblies, etc. Bon. Dans ces circonstances-là, il pourra faire valoir ces circonstances particulières qui justifieraient une autre sanction.

. . .

Si on regarde les exemples que nous ont donnés les associations représentatives des policiers, je pense qu'on

2007 SCC 14 (CanLII)

that [specific circumstances] can or cannot be shown. I mean, if someone, for example, following a severe depression, continued to work, or even if he was on leave without pay because of an unfortunate incident that occurred, well, I mean, it either did or did not occur, and then, I mean, I feel that such things, which are established in an award. . . . I do not believe the burden of proof generally has so great. . . . When such things happen, they are easy to prove on a preponderance of evidence rather than by raising a doubt.

(*Journal des débats de la Commission permanente des institutions*, May 26, 2000, at pp. 3-4)

The range of appropriate considerations is of course in no way exhausted by the Minister's comments. Indeed, in the absence of any legislative indication to the contrary, it would be inappropriate to limit specific circumstances to certain types of considerations. Broadly speaking, an arbitrator may take into account any circumstance surrounding the offence which relates to whether the police officer will be able to continue to serve the public effectively and credibly. Reference to attenuating and aggravating circumstances in other employment law contexts may sometimes be useful, but this must be done with regard to the unique issues that are raised by the criminal conduct of police officers.

74 In light of these comments, the arbitrator was entitled to consider the specific circumstances that he did. Belleau's family problems were plausibly related to his conduct on the evening and morning of December 29 and 30. Similarly, it was relevant that Belleau was a long-serving officer who had no prior record of disciplinary problems and who, the evidence suggested, was generally seen as a non-violent man.

75 Another important element is of course consideration of the gravity and the nature of the offences. The Minister spoke of [TRANSLATION] "a minor offence" but, as I have said, that cannot be determinative. While s. 119, para. 2 *P.A.* imposes dismissal for all hybrid offences, that does not mean that the nature of the offences and the

voit que [les circonstances particulières] se démontrent ou ne se démontrent pas. Je veux dire, si quelqu'un, par exemple, c'est à la suite d'une dépression grave, il travaillait encore ou bien même il était en congé sans solde à cause d'un événement malheureux qui s'est produit, bien, je veux dire, il s'est produit ou il ne s'est pas produit, et puis, je veux dire, je crois que ces choses-là, qui sont établies sur sentence. . . Généralement, je ne crois pas que le fardeau de preuve ait une si grande. . . Quand ces choses-là arrivent, elles sont facilement démontrables par une prépondérance de preuve plutôt que de soulever un doute.

(*Journal des débats de la Commission permanente des institutions*, 26 mai 2000, p. 3 et 4)

Il va sans dire que le ministre n'a pas soulevé toutes les considérations possibles dans ses observations. En effet, en l'absence d'une indication contraire du législateur, il ne conviendrait pas de limiter les circonstances particulières à certaines considérations. Pour l'essentiel, un arbitre peut tenir compte de toute circonstance relative à l'infraction qui se rapporte à la capacité future du policier de servir le public avec efficacité et crédibilité. Il peut parfois être utile de faire des renvois aux circonstances atténuantes ou aggravantes dont il est question dans d'autres situations relevant du droit du travail, mais il faut tenir compte, à cet égard, des questions uniques que soulève la conduite criminelle des policiers.

À la lumière de ces commentaires, l'arbitre pouvait tenir compte des circonstances particulières comme il l'a fait. Les problèmes familiaux de M. Belleau étaient vraisemblablement reliés à sa conduite le soir du 29 décembre et le matin du 30 décembre. De même étaient pertinents les faits que M. Belleau avait de longs états de service, qu'il n'avait pas d'antécédents en matière disciplinaire et que, selon la preuve, il n'était pas considéré de manière générale comme un homme violent.

Il importe également de tenir compte, bien entendu, de la gravité et de la nature des infractions. Le ministre a parlé d'une « infraction minime » mais, comme je l'ai déjà dit, il ne peut s'agir d'un élément déterminant. L'article 119, al. 2 *L.P.* prévoit la destitution dans tous les cas d'infractions mixtes, mais cela ne veut pas dire que la nature des

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

circumstances surrounding them will not be relevant to whether specific circumstances can be found to exist in a given case. This is especially so, given the variety of hybrid offences and the obvious fact that not all offences are committed in the same way. In my view, the decision of the arbitrator is unreasonable in this case mainly because of his failure to properly relate the factors considered to the special role of a police officer. For instance, though it may have been reasonable for the arbitrator to take into account that there were no traces of violence or physical harm, it was not reasonable for him to attach great importance to this fact without considering the violent nature of the conduct of the officer. Even if there are no definitive findings of fact regarding specific acts of violence, the context here is one of domestic violence, and the officer pleaded guilty to a charge of assault on his wife; this is a very important consideration in light of the reliance of the public on police intervention in such cases, one the arbitrator could not reasonably ignore.

infractions et les circonstances s'y rapportant ne pourront servir à déterminer s'il existe des circonstances particulières dans un cas donné. Il en est tout particulièrement ainsi puisqu'il existe diverses infractions mixtes et que les infractions ne sont manifestement pas toutes commises de la même façon. À mon avis, l'arbitre a rendu une décision déraisonnable en l'espèce principalement parce qu'il n'a pas établi les liens nécessaires entre les facteurs examinés et le rôle particulier d'un policier. Par exemple, il était peut-être raisonnable que l'arbitre tienne compte de l'absence de traces de violence ou de préjudice physique, mais il n'était pas raisonnable qu'il accorde beaucoup d'importance à ce fait sans prendre en compte la nature violente de la conduite du policier. Malgré l'absence de conclusions de fait définitives concernant des actes de violence en particulier, il convient de noter qu'il est question en l'espèce de violence conjugale et que le policier a reconnu sa culpabilité à une accusation de voies de fait contre sa conjointe; il s'agit d'une considération très importante puisque le public s'en remet aux interventions des policiers dans de tels cas, une considération que l'arbitre ne pouvait raisonnablement écarter.

Furthermore, the firearm offences cannot be attributed to Belleau's personal problems, nor can they be justified, as the arbitrator sought to do, merely on the grounds that they are technical offences. Firearms are dangerous. That is why the *Criminal Code* prohibits their storage in a careless manner. Belleau, as a police officer, would have known the importance of safety surrounding firearms. The fact that his house may have been under construction is not a reasonable excuse for why the firearms were not properly stored. He knew the importance of properly storing firearms and that the state of one's house was no exception to the legal requirements. He could have easily brought the firearms to a place where they would have been legally and safely stored.

76 De plus, il n'est pas possible de mettre les infractions relatives aux armes à feu sur le compte des problèmes personnels de M. Belleau, ni de les justifier en les qualifiant d'infractions à caractère technique, comme l'arbitre a tenté de le faire. Les armes à feu sont dangereuses. C'est pourquoi le *Code criminel* interdit leur entreposage de manière négligente. En sa qualité de policier, M. Belleau était au courant de l'importance des mesures de sécurité à prendre relativement aux armes à feu. Les rénovations à sa maison n'expliquent pas de manière raisonnable pourquoi les armes à feu n'étaient pas entreposées de manière sécuritaire. Il connaissait l'importance de l'entreposage sécuritaire des armes à feu et l'état de sa maison ne lui permettait pas de se soustraire aux exigences prévues par la loi. Il aurait très bien pu apporter les armes à feu à un endroit où elles auraient pu être entreposées en toute légalité et de manière sécuritaire.

More serious still is Belleau's conscious defiance of his undertaking to the court not to communicate

77 Je juge plus sérieuse encore la décision consciente de M. Belleau de ne pas se conformer à

2007 SCC 14 (CanLII)

with his spouse. As a police officer, Belleau would have known the importance of undertakings to the court. The breach of an undertaking by a police officer is especially serious, given the role that police officers play in the administration of justice. It suggests a lack of respect for the judicial system of which he forms an integral part. Moreover, the obligation not to communicate with his spouse was the most important obligation in the undertaking. The seriousness of the breach of this obligation is further evidenced by the fact that the Crown chose to prosecute the offence by way of indictment.

78 The arbitrator excused Belleau's breach of his undertaking on the grounds that his conduct on December 29 and 30 had to be seen as forming a continuum. But it is difficult to see how his mental state and intoxication from the previous evening could reasonably explain Belleau's conduct the next day, several hours after the incident and two hours after he had agreed to the undertaking. There is no question that Belleau clearly understood the terms of his release. Indeed, his arraignment that day would have impressed upon him the seriousness of his actions the night before. I am thus unable to see how it would be reasonable to conclude that Belleau's conduct could be justified on the grounds that he was not fully aware of what he was doing when he breached his undertaking.

79 As mentioned earlier, the arbitrator failed to properly weigh the effect of Belleau's criminal conduct on his ability to carry out his duties as a police officer; this affected the rationality of his decision. Although the issue of public trust and confidence should not be approached exclusively from the vantage of media reports, it is also unreasonable to suggest that had the public been properly informed of the specific circumstances, it would still have confidence in Belleau as a police officer. Unfortunately, whether they tell the whole story or not, media reports of criminal conduct by police officers do have an effect on public confidence,

l'engagement qu'il avait pris envers le tribunal de ne pas communiquer avec sa conjointe. En sa qualité de policier, M. Belleau connaissait l'importance des engagements au tribunal. Le manquement à un engagement par un policier est particulièrement grave étant donné le rôle du policier dans l'administration de la justice. Un tel comportement dénote un manque de respect pour le système judiciaire dont le policier fait partie intégrante. En outre, l'obligation de ne pas communiquer avec sa conjointe était l'obligation la plus importante de l'engagement. D'ailleurs, le ministère public a décidé de poursuivre M. Belleau par voie de mise en accusation, ce qui constitue une autre preuve de la gravité de ce manquement.

L'arbitre a excusé le manquement de M. Belleau à son engagement, estimant qu'il fallait considérer son comportement les 29 et 30 décembre comme une suite logique. Toutefois, il est difficile de comprendre comment l'état psychologique de M. Belleau et son état d'ébriété de la veille pouvaient raisonnablement expliquer sa conduite le lendemain, plusieurs heures après l'incident et deux heures après la prise de son engagement envers le tribunal. Il ne fait aucun doute que M. Belleau avait bien compris les conditions de sa remise en liberté. En effet, son interpellation le jour même lui aurait fait comprendre la gravité des actes qu'il avait commis la veille. Par conséquent, je ne vois pas comment il serait raisonnable de conclure que la conduite de M. Belleau était justifiée parce qu'il n'était pas pleinement conscient de ce qu'il faisait lorsqu'il a violé son engagement.

Comme nous l'avons vu, l'arbitre n'a pas apprécié adéquatement les répercussions de la conduite criminelle de M. Belleau sur sa capacité d'exercer ses fonctions de policier, ce qui a influé sur la rationalité de sa décision. La question de la confiance du public ne devrait pas être abordée uniquement du point de vue des reportages des médias, mais il n'est pas non plus raisonnable de laisser entendre que le public continuerait de faire confiance à M. Belleau en sa qualité de policier s'il avait été bien informé des circonstances particulières. Malheureusement, qu'ils soient exacts ou non, les reportages des médias sur la conduite

2007 SCC 14 (CanLII)

and, once lost, that confidence is extremely difficult to regain. Moreover, it is entirely possible that for some members of the public, even if they were informed of the specific circumstances, they would still lack confidence in Belleau's ability to perform his duties. One only needs to think of a victim of domestic abuse to realize that some would have understandable difficulty trusting Belleau. This is not to say that such considerations should necessarily trump any specific circumstances that have been proven. Rather, public confidence must be an important part of the balancing that takes place when considering whether specific circumstances are found to justify the avoidance of dismissal. But in treating the issue as one about properly informing the public, the arbitrator failed to take into account the gravity of the offences committed by Belleau and the effect that they would have on public confidence.

Given all the elements discussed above, taken together, it was unreasonable for the arbitrator to conclude that the specific circumstances raised by Belleau were sufficient to satisfy the s. 119 *P.A.* exception. Such a conclusion undercuts the grave importance that is attached by s. 119 *P.A.* to criminal conduct by police officers.

6. Conclusion

This appeal should be resolved according to the law governing police and not municipal law. While s. 119, para. 2 *P.A.* allows for a narrow exception to dismissal when a police officer can demonstrate specific circumstances, the justification of another sanction must itself be reasonable. Accordingly, the appeal should be allowed and the sanction of dismissal restored, with costs to the appellant before the Court of Appeal and before this Court.

criminelle des policiers ont des répercussions sur la confiance du public, et cette confiance est très difficile à regagner une fois qu'elle a été perdue. En outre, il est tout à fait possible que certains membres du public, même s'ils avaient été bien informés des circonstances particulières de l'affaire, n'auraient toujours pas confiance en la capacité de M. Belleau d'exercer ses fonctions. Il suffit de penser par exemple à une victime de violence conjugale pour se rendre compte que certaines personnes auraient avec raison beaucoup de mal à faire confiance à M. Belleau. Je ne dis pas que de telles considérations devraient nécessairement faire échec à toutes les circonstances particulières dont l'existence a été démontrée. J'estime plutôt que la confiance du public doit figurer au nombre des éléments importants qui sont pris en compte au moment de déterminer s'il existe des circonstances particulières justifiant une sanction autre que la destitution. Or, en limitant son examen de la question à la justesse de l'information communiquée au public, l'arbitre a omis de tenir compte de la gravité des infractions commises par M. Belleau et de leur incidence possible sur la confiance du public.

80 À la lumière de tous les éléments examinés ci-dessus, considérés cumulativement, il n'était pas raisonnable que l'arbitre conclue que les circonstances particulières soulevées par M. Belleau permettaient de satisfaire à l'exception prévue à l'art. 119 *L.P.* Une telle conclusion a pour effet de diminuer la grande importance accordée à la conduite criminelle des policiers à l'art. 119 *L.P.*

6. Conclusion

81 Le présent pourvoi doit être tranché en conformité avec les textes législatifs régissant la police et non selon le droit municipal. L'article 119, al. 2 *L.P.* prévoit une exception limitée à la sanction de destitution dans les cas où le policier peut démontrer que des circonstances particulières justifient une autre sanction, mais la justification dans de tels cas doit elle-même être raisonnable. Par conséquent, je suis d'avis d'accueillir le pourvoi et de rétablir la sanction de la destitution avec dépens en faveur de l'appelante en Cour d'appel et dans cette Cour.

English version of the reasons delivered by

82 DESCHAMPS AND FISH JJ. — We agree with Bastarache J.'s conclusion concerning the applicability of s. 119, para. 2 of the *Police Act*, R.S.Q., c. P-13.1 ("*P.A.*"), to the facts of this case. With respect, however, we are of the opinion that s. 119, para. 2 *P.A.* is compatible with s. 116(6) of the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*").

83 For almost one hundred years, the Court's view has been that two provisions can apply concurrently if they are not contradictory. The fact that one provision is more restrictive or imposes different conditions than the other, or that both provisions apply to the same person and the same fact situation, is in itself insufficient to support the conclusion that one of the provisions has been repealed or is inapplicable in part. In the case at bar, disqualifying individuals from municipal employment during the five-year period provided for in s. 116 *C.T.A.* is not incompatible with the exception to dismissal set out in s. 119, para. 2 *P.A.* In the words used by Bastarache J., this is not a case where one enactment says "yes" and the other says "no". We therefore agree with the principles stated by Bastarache J. on this point, but we find that he applies them in a way that gives the concept of conflict a scope that is broader than the one it is recognized as having at law.

1. Provisions in Issue

84 Bastarache J. is of the opinion that s. 116 *C.T.A.* is inapplicable where an arbitrator concludes under s. 119, para. 2 *P.A.* that specific circumstances justify a sanction other than dismissal. In his interpretation of the provisions in question, our colleague relies, *inter alia*, on s. 18.2 of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, and s. 115 *P.A.* In our view, there is no need to rely on s. 18.2 of the Quebec *Charter* to resolve this dispute. We feel that the interpretation of that provision should await a case in which the issue is raised. Section 115 *P.A.*, however, is quite relevant, and it will be appropriate for us to discuss it, since our interpretation differs from the one advanced by

Les motifs suivants ont été rendus par

LES JUGES DESCHAMPS ET FISH — Nous partageons la conclusion du juge Bastarache concernant l'application de l'art. 119, al. 2 de la *Loi sur la police*, L.R.Q., ch. P-13.1 (« *L.P.* »), en l'espèce. Avec égards, par ailleurs, nous sommes d'avis que l'art. 119, al. 2 *L.P.* est compatible avec le par. 116(6) de la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »).

Depuis près de cent ans, la Cour tient que deux normes peuvent s'appliquer de façon concomitante si elles ne sont pas contradictoires. Le simple fait qu'une norme soit plus contraignante que l'autre, impose des conditions différentes ou s'applique à la même personne et à la même situation de faits ne suffit pas pour conclure à l'abrogation ou à l'inapplicabilité partielle de l'une ou l'autre de ces normes. En l'espèce, l'inhabilité à travailler dans la municipalité pendant la période de cinq ans prévue par l'art. 116 *L.C.V.* n'est pas incompatible avec l'application de l'exception au congédiement prévue à l'al. 2 de l'art. 119 *L.P.* Pour reprendre l'expression utilisée par le juge Bastarache, il ne s'agit pas d'un cas où une loi dit « oui » et l'autre loi dit « non ». Nous sommes en conséquence d'accord avec les principes exposés par notre collègue sur ce point, mais estimons que l'application qu'il en fait élargit la notion de conflit au-delà de la portée que le droit reconnaît à celle-ci.

1. Les dispositions en cause

Le juge Bastarache est d'avis que l'art. 116 *L.C.V.* est inapplicable lorsqu'un arbitre conclut, en vertu de l'al. 2 de l'art. 119 *L.P.*, à l'existence de circonstances particulières justifiant une sanction autre que la destitution. Dans son interprétation des dispositions en cause, notre collègue s'appuie, entre autres, sur l'art. 18.2 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12, et sur l'art. 115 *L.P.* À notre avis, il n'est pas nécessaire d'avoir recours à l'art. 18.2 de la *Charte* québécoise pour résoudre le présent litige. Nous estimons qu'il est préférable d'attendre pour interpréter cette disposition un dossier où la question se posera. L'article 115 *L.P.* est cependant très

2007 SCC 14 (CanLII)

Bastarache J. The provisions to which we will be referring read as follows:

Police Act

Police Officers.

115. To be hired as a police officer a person must meet the following requirements:

. . .

(3) not have been found guilty, in any place, of an act or omission defined in the Criminal Code (Revised Statutes of Canada, 1985, chapter C-46) as an offence, or of an offence referred to in section 183 of that Code under one of the Acts listed therein;

. . .

Special constables.

The requirements specified in subparagraphs 1 to 3 of the first paragraph apply also to special constables.

Additional requirements.

The Government may, by regulation, prescribe additional hiring requirements for police officers and special constables.

Additional requirements.

Municipalities may do likewise as regards members of their police forces and municipal special constables. Such additional requirements may vary depending on whether they apply to a police officer or to a special constable.

Applicability.

The hiring requirements do not apply to the members of police forces when police services are integrated, amalgamated or otherwise merged.

Conviction.

119. Any police officer or special constable who is found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section

pertinent et il est utile d'en discuter, parce que notre interprétation diffère de celle suggérée par le juge Bastarache. Voici le texte des dispositions auxquelles nous nous référerons :

Loi sur la police

Conditions d'embauche.

115. Les conditions minimales pour être embauché comme policier sont les suivantes :

. . .

3º ne pas avoir été reconnu coupable, en quelque lieu que ce soit, d'un acte ou d'une omission que le Code criminel (Lois révisées du Canada (1985), chapitre C-46) décrit comme une infraction, ni d'une des infractions visées à l'article 183 de ce Code, créées par l'une des lois qui y sont énumérées;

. . .

Constables spéciaux.

Les exigences prévues aux paragraphes 1º à 3º du premier alinéa s'appliquent également aux constables spéciaux.

Conditions supplémentaires.

Le gouvernement peut, par règlement, prescrire des conditions supplémentaires d'embauche pour les policiers et les constables spéciaux.

Conditions supplémentaires.

Les municipalités peuvent faire de même à l'égard des membres de leur corps de police et des constables spéciaux municipaux. Ces conditions supplémentaires peuvent être différentes selon qu'elles s'appliquent à un policier ou à un constable spécial.

Application.

Les conditions d'embauche ne s'appliquent pas dans le cas d'une intégration, d'une fusion ou de toute autre forme de regroupement de services policiers aux membres de ces services.

Destitution.

119. Est automatiquement destitué tout policier ou constable spécial qui a été reconnu coupable, en quelque lieu que ce soit et par suite d'un jugement passé en

2007 SCC 14 (CanLII)

115 that is triable only on indictment, shall, once the judgment has become *res judicata*, be automatically dismissed.

Conviction.

A disciplinary sanction of dismissal must, once the judgment concerned has become *res judicata*, be imposed on any police officer or special constable who is found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the police officer or special constable shows that specific circumstances justify another sanction.

Cities and Towns Act

Disqualification under other Act.

116. The following persons shall not be appointed to or hold any office as an officer or employee of the municipality:

. . .

Crime;

(6) Any person convicted of treason or of an act punishable under a law of the Parliament of Canada or of the Legislature of Québec, by imprisonment for one year or more.

Such disqualification shall continue for five years after the term of imprisonment fixed by the sentence, and, if only a fine was imposed or the sentence is suspended, for five years from the date of such condemnation, unless the person has obtained a pardon;

. . .

Disqualification.

Disqualification from municipal office or employment under subparagraph 6 or 7 of the first paragraph shall be incurred only if the offence is in connection with such an office or employment.

2. Golden Rule Applicable to Conflicts

85 The golden rule where laws conflict is that if there is a reasonable interpretation that allows two enactments to be reconciled, that interpretation must prevail. As Professor Pierre-André Côté writes:

force de chose jugée, d'un acte ou d'une omission visé au paragraphe 3º de l'article 115, poursuivable uniquement par voie de mise en accusation.

Sanction disciplinaire de destitution.

Doit faire l'objet d'une sanction disciplinaire de destitution tout policier ou constable spécial qui a été reconnu coupable, en quelque lieu que ce soit et par suite d'un jugement passé en force de chose jugée, d'un tel acte ou d'une telle omission, poursuivable soit sur déclaration de culpabilité par procédure sommaire, soit par voie de mise en accusation, à moins qu'il ne démontre que des circonstances particulières justifient une autre sanction.

Loi sur les cités et villes

Inhabilité.

116. Les personnes suivantes ne peuvent être nommées à une charge de fonctionnaire ou d'employé de la municipalité, ni l'occuper :

. . .

Acte criminel;

6º Toute personne déclarée coupable de trahison ou d'un acte punissable en vertu d'une loi du Parlement du Canada ou de la Législature du Québec, d'un an d'emprisonnement ou plus.

Cette inhabilité subsiste durant cinq années après le terme d'emprisonnement fixé par la sentence, et, s'il y a condamnation à une amende seulement ou si la sentence est suspendue, durant cinq années de la date de cette condamnation, à moins que la personne ait obtenu un pardon;

. . .

Inhabilité.

L'inhabilité à une charge de fonctionnaire ou d'employé prévue au paragraphe 6º ou 7º du premier alinéa n'existe que si l'infraction a un lien avec cette charge.

2. La règle d'or en matière de conflit

Suivant la règle d'or en matière de conflit de lois, si une interprétation raisonnable permet de concilier deux lois, cette interprétation doit prévaloir. Le professeur Pierre-André Côté écrit :

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

But there is a strong presumption against implied repeal of one enactment by another. Any interpretation permitting reconciliation is to be favoured, because it is assumed this better reflects the work of a . . . legislature.

(*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 349)

This statement of the rule is based on a comment by the Quebec Court of King's Bench that has never been called into question:

Repeal by implication is not favoured. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statute book or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it, is more likely to be in consonance with the real intention.

(*Duval v. The King* (1938), 64 B.R. 270, at p. 273)

In *Daniels v. White*, [1968] S.C.R. 517, at p. 526, Judson J. endorsed an equally clear and restrictive formulation of the rule taken from *Halsbury's Laws of England* (3rd ed. 1961), vol. 36, at p. 466: two laws conflict "if, but only if, [one of them] is so inconsistent with or repugnant to [the] other that the two are incapable of standing together" (see to the same effect R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 178). The courts have interpreted the meaning of the word "conflict" as narrowly as possible.

Some commentators implicitly incorporate the constitutional principles of the paramountcy doctrine into the analysis of conflicts between statutes or regulations: Sullivan, at pp. 178-79. The "doctrinal similarity" to the principles of paramountcy was noted by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 38-39. The parallels are obvious. Thus, in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, a "conflict" is defined as a situation in which "one enactment says 'yes' and the other says 'no'; 'the same

Or, il y a une présomption forte contre l'abrogation tacite d'un texte par un autre : elle ne doit jamais être encouragée. À l'inverse, toute interprétation qui permet d'éviter les conflits de lois doit être favorisée, car on présume qu'elle a plus de chances de refléter la volonté du législateur . . .

(*Interprétation des lois* (3e éd. 1999), p. 442)

86 Cette formulation de la règle s'appuie sur un énoncé de la Cour du Banc du Roi du Québec, qui n'a jamais été remis en question :

[TRADUCTION] L'abrogation implicite n'est pas considérée avec faveur. Il est raisonnable de présumer que le législateur n'a pas voulu maintenir en vigueur des dispositions vraiment contradictoires ni, par contre, prendre une mesure aussi importante que l'abrogation sans en exprimer l'intention. Il ne faut pas adopter une telle interprétation à moins qu'elle ne soit inévitable. Toute interprétation raisonnable qui permet d'éviter ce résultat a de bonnes chances d'être conforme à l'intention véritable.

(*Duval c. Le Roi* (1938), 64 B.R. 270, p. 273)

87 De même, dans *Daniels c. White*, [1968] R.C.S. 517, p. 526, le juge Judson approuve une formulation de la règle tout aussi claire et restrictive tirée de *Halsbury's Laws of England* (3e éd. 1961), vol. 36, p. 466 : il y a conflit entre deux lois [TRADUCTION] « si et seulement si elles sont à ce point incompatibles ou contraires qu'elles ne puissent coexister » (au même effet, R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), p. 178). Dans la mesure du possible, les tribunaux restreignent le sens du mot « conflit » à sa portée la plus étroite.

88 Certains auteurs incorporent implicitement à l'analyse des conflits de lois ou de règlements les principes constitutionnels de la doctrine de la prépondérance : Sullivan, p. 178-179. Cette "ressemblance doctrinale" a d'ailleurs été notée par le juge La Forest dans *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 38-39. Le rapprochement est évident. Ainsi, dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191, un conflit est défini comme étant une situation où « une loi dit "oui" et [où] l'autre dit "non"; "on demande aux mêmes

citizens are being told to do inconsistent things'; compliance with one is defiance of the other".

89 If, for reasons related in large part to the balancing of legislative powers within Confederation, a restrictive approach has been taken to conflicts in constitutional law, the rule should in our view be applied even more rigorously where the conflicting laws have been enacted by a single legislature. Since the legislature is presumed to know its own laws and to intend that they be applied consistently, the application of a rule favouring an interpretation that makes it possible to avoid conflicts is fully justified.

90 A finding by a court that a conflict exists is necessarily founded on an assumption that the legislature has been inconsistent in enacting its laws. It is therefore only where conflict is unavoidable that a court must apply the principles of interpretation that give precedence to one law over the other, in which case the conflicting provision will be tacitly repealed or found to be partially inapplicable.

3. The Two Provisions in Issue Are Reconcilable

91 The respondents contend that neither the appellant nor the Superior Court judge has explained how the two provisions can be applied concurrently in practice. In our opinion, the following scenarios provide a full answer to this statement:

(1) Where a municipal police officer commits an indictable offence. In such a case, the first paragraph of s. 119 *P.A.* provides that dismissal from the police force is automatic. Section 116 *C.T.A.* imposes a five-year disqualification from employment by the municipality except where the offence is not in connection with the office or employment. (This exception implicitly does not apply to police officers because there will generally be a connection between the commission of an indictable offence and employment as a police officer.) After five years, the dismissed officer is still ineligible, under

citoyens d'accomplir des actes incompatibles"; l'observa[tion] de l'une entraîne l'inobserva[tion] de l'autre ».

À notre avis, si le droit constitutionnel, pour des motifs liés en grande partie à l'équilibre des compétences législatives à l'intérieur de la confédération, a adopté une approche restrictive en matière de conflit, c'est avec plus de rigueur encore que la règle doit être appliquée dans les cas où les lois conflictuelles émanent du même législateur. Comme celui-ci est censé connaître ses propres lois et vouloir qu'elles soient appliquées de façon cohérente, la règle favorisant l'interprétation qui permet d'éviter les conflits est pleinement justifiée.

Le tribunal qui conclut à l'existence d'un conflit tient nécessairement pour acquis que le législateur a été incohérent dans l'adoption de ses lois. Ce n'est donc que dans les cas de conflit inévitable que le tribunal doit faire appel aux règles d'interprétation qui font primer une loi sur l'autre, ce qui entraîne l'abrogation tacite ou l'inapplicabilité partielle du texte qui est écarté.

3. Les deux dispositions en cause sont conciliables

Les intimés plaident que ni l'appelante ni le juge de la Cour supérieure n'ont expliqué la façon dont, en pratique, les deux dispositions s'appliquent de façon concomitante. À notre avis, les scénarios suivants répondent de façon complète à ce commentaire :

(1) Un policier municipal commet un acte criminel. Dans un tel cas, le premier alinéa de l'art. 119 *L.P.* impose la destitution automatique du policier. L'article 116 *L.C.V.* prévoit l'inhabilité à occuper un emploi auprès de la municipalité pendant une période de cinq ans, sauf dans les cas où l'infraction n'a pas de lien avec la charge ou l'emploi. (Implicitement, cette exception ne s'applique pas à l'égard des policiers, parce qu'il existera généralement un lien entre la perpétration d'un acte criminel et l'emploi de policier.) À l'expiration de la période de cinq ans, le policier qui a été destitué ne peut encore

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

s. 115 *P.A.*, to be rehired as a police officer, but can be hired as a municipal employee in any other capacity. There is no conflict under this scenario, and both laws can apply concurrently.

(2) Where a municipal police officer commits a crime that is a hybrid offence punishable by imprisonment for one year or more and there are no specific circumstances that justify a sanction other than dismissal. Both laws can apply concurrently in the same manner as in scenario (1).

(3) Where a municipal police officer commits a crime that is a hybrid offence punishable by imprisonment for one year or more but there are specific circumstances that justify a sanction other than dismissal from employment as a police officer. In this case, the officer is not dismissed from the municipal police force but, in light of s. 116 *C.T.A.*, is nonetheless disqualified for five years from employment by the municipality. After five years, however, the officer requalifies as an employee of the municipality. During the five years of disqualification, the officer can work as a police officer for the Sûreté du Québec or as a special constable, or can work for a municipality in any capacity where the offence is not in connection with the office or employment. The two laws can apply concurrently.

In our view, the two provisions are thus perfectly reconcilable. There is no conflict in the fact that, in the third scenario, they apply concurrently to deprive the officer of his or her employment as a municipal employee for a period of five years even though he or she has not lost the right to serve as a police officer: this is the consequence of the relevant provision of the *C.T.A.* The *C.T.A.* clearly evinces the legislature's intention in this regard.

Although the rule appears to involve a purely literal test, it is now accepted that a court

être réembauché comme policier en raison de l'art. 115 *L.P.*, mais il peut être embauché à tout autre titre par une municipalité. Suivant ce scénario, il n'y a pas de conflit et les deux lois peuvent s'appliquer de façon concomitante.

(2) Un policier municipal commet une infraction mixte punissable d'un emprisonnement d'un an ou plus et il n'existe pas de circonstances particulières justifiant une sanction autre que la destitution. Les deux textes de loi peuvent s'appliquer de façon concomitante tout comme dans le scénario (1).

(3) Un policier municipal commet une infraction mixte punissable d'un emprisonnement d'un an ou plus, mais il existe des circonstances particulières justifiant une sanction autre que la destitution. Dans un tel cas, le policier n'est pas congédié de son poste au sein de la police municipale, mais, du fait de l'art. 116 *L.C.V.*, il est néanmoins inhabile à occuper quelque emploi que ce soit au sein de la municipalité pendant une période de cinq ans. À l'expiration de cette période, le policier redevient habile à occuper un poste d'employé de la municipalité. Pendant la période d'inhabilité de cinq ans, le policier peut travailler comme policier à la Sûreté du Québec ou comme constable spécial, ou encore exercer toute autre fonction au sein d'une municipalité, si l'infraction qu'il a commise n'a pas de lien avec cette charge ou cet emploi. Les deux textes de loi peuvent s'appliquer de façon concomitante.

À notre avis, les deux dispositions sont donc parfaitement conciliables. Le fait que, selon le troisième scénario, leur application concomitante prive le policier de son emploi comme fonctionnaire municipal pour une période de cinq ans, alors qu'il n'a pas perdu le droit d'occuper la fonction de policier, n'est pas source d'incompatibilité : c'est la conséquence de la disposition pertinente de la *L.C.V.* La *L.C.V.* exprime clairement la volonté du législateur à cet égard.

92

Bien que la règle paraisse impliquer un test purement littéral, il est maintenant admis que, outre la

assessing the compatibility of two laws must, in addition to determining whether there is an express conflict between them, consider their respective purposes to ensure that the legislature's objective will not be frustrated if the laws in question are applied concurrently: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12. Thus, the court must ensure that the proposed interpretation does not frustrate the purposes of the provisions in question.

4. Purposes of the Provisions in Issue

93 Bastarache J. refers to certain elements that, in his opinion, show the provisions to be incompatible. In our view, it can be seen by reading all the provisions in issue together that this incompatibility is merely apparent.

94 Section 119 *P.A.* is disciplinary in nature. However, the sanction of dismissal has an impact on the individual's eligibility to serve as a police officer under the *P.A.* The use of the words *dismissal* in English and *destitution* in French clearly demonstrates the overlap. An arbitrator is not entitled to review an employer's decision to terminate the employment of a police officer who has been convicted of an indictable offence. Under s. 115 *P.A.*, the officer is not only dismissed, but is also no longer eligible to serve as a police officer. Where an officer is convicted of a hybrid offence, on the other hand, the employer and the arbitrator have a discretion that, when exercised, can have a decisive impact both on the officer's employment and on his or her eligibility to serve as a police officer. If the officer establishes the existence of specific circumstances, the employer or the arbitrator may substitute a less severe sanction for dismissal. In such a case, the officer is not disqualified from serving as a police officer under the *P.A.*

95 The fact that an officer who benefits from the exception under s. 119 *P.A.* continues to be eligible to serve as a police officer obviously has an impact on the interpretation of s. 115 *P.A.* If it is

situation de conflit exprès entre deux lois, le tribunal appelé à vérifier la compatibilité des lois examine aussi leur objet respectif pour s'assurer que la réalisation du but poursuivi par le législateur n'est pas empêchée par l'application concomitante des lois en question : *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13, par. 12. Il y a donc lieu de s'assurer que l'interprétation proposée ne fait pas obstacle à l'objet des dispositions en question.

4. Objet des dispositions en cause

Le juge Bastarache signale des éléments qu'il dit de nature à mettre en relief l'incompatibilité des dispositions. Nous estimons qu'une analyse fondée sur une lecture corrélative de toutes les dispositions en cause démontre plutôt que cette incompatibilité n'est qu'apparente.

L'article 119 *L.P.* s'inscrit dans le contexte disciplinaire. La sanction du congédiement a cependant des répercussions sur l'habilité de la personne à agir comme policier selon les termes de la *L.P.* L'usage des mots *destitution* en français et *dismissal* en anglais révèle clairement le chevauchement. Un arbitre n'a pas le droit de réviser la décision d'un employeur de mettre fin à l'emploi d'un policier déclaré coupable d'un acte criminel. Ce policier est non seulement congédié, mais il n'est plus admissible à la fonction de policier suivant l'art. 115 *L.P.* Cependant, lorsque le policier est reconnu coupable d'une infraction mixte, l'employeur ou l'arbitre bénéficient d'un pouvoir discrétionnaire dont l'exercice peut avoir des conséquences déterminantes tant sur l'emploi de l'intéressé que sur son habilité à exercer la fonction de policier. En effet, lorsque le policier fait la preuve de circonstances particulières, l'employeur ou l'arbitre peuvent alors substituer au congédiement une sanction moins sévère. Dans un tel cas, cela signifie aussi qu'il ne perd pas son habilité à exercer la fonction de policier en vertu de la *L.P.*

Le fait que le policier qui bénéficie de l'exception prévue par l'art. 119 *L.P.* continue d'être habilité à exercer la fonction de policier a des conséquences évidentes sur l'interprétation de l'art. 115

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

found under s. 119 that the officer is fit to serve as a police officer, this also holds true for any other police officer positions that he or she may apply for in the future. Thus, an officer could be dismissed because a municipality that is duly authorized to do so decides to abolish its police force and terminate the employment of all its police officers. An officer who has benefited from the exception under s. 119 *P.A.* will be able to apply for a position on another police force, because he or she will still be eligible to serve as a police officer under the *P.A.* Similarly, an officer who wants to apply for a position on another police force for personal reasons, relating perhaps to a move or a possibility of promotion, cannot be told, on the basis of s. 115 *P.A.* alone, that he or she is ineligible owing to a conviction for a hybrid offence. Section 115 must necessarily be read in conjunction with s. 119 *P.A.* Where an officer has benefited from the exception under s. 119 *P.A.*, this must be reflected in the interpretation of s. 115 *P.A.* Otherwise, it would be difficult to meet the clear objective of the exception that the legislature has expressly established, namely to allow the individual in question to continue his or her career as a police officer.

L.P. En effet, si le policier est jugé apte pour l'application de l'art. 119, cela vaut également pour les autres emplois de policier qu'il pourrait postuler dans le futur. Ainsi, on peut imaginer qu'un policier soit licencié parce qu'une municipalité, dûment autorisée à le faire, décide de démanteler son service de police et de mettre fin à l'emploi de tous ses policiers. Le policier qui a bénéficié de l'exception prévue à l'art. 119 *L.P.* pourra postuler dans un autre corps de police, puisqu'il sera toujours habilité à exercer cette fonction selon la *L.P.* De même, un policier qui voudrait solliciter un emploi dans un autre service de police pour des motifs personnels, par exemple en raison d'un déménagement ou d'une possibilité d'avancement, ne pourrait se voir reprocher, sur la seule base de l'art. 115 *L.P.*, qu'il n'est pas admissible parce qu'il a été reconnu coupable d'une infraction mixte. Cet article doit nécessairement être lu en corrélation avec l'art. 119 *L.P.* L'exception dont peut bénéficier le policier en vertu de l'art. 119 *L.P.* doit se refléter dans l'interprétation de l'art. 115 *L.P.* Autrement, l'exception qu'a expressément établie le législateur pourrait difficilement réaliser son objectif manifeste — c'est-à-dire permettre à l'intéressé de poursuivre sa carrière comme policier.

We agree with Bastarache J. that the exception must be interpreted very narrowly. However, if an officer can establish the existence of specific circumstances, he or she should be able to benefit from the conclusion of the employer or the arbitrator, as the case may be, for the purposes of any employment that requires eligibility under the *P.A.* To limit the benefit of the exception to the employment held by the officer at the time of the decision to let the officer keep his or her job would be to make the retention of eligibility conditional on circumstances that have nothing to do with the officer's conduct or competence. This cannot be in keeping with the spirit and the purpose of the exception.

96 Nous sommes d'avis, tout comme le juge Bastarache, que l'exception doit être interprétée de façon très étroite. Cependant, si le policier est en mesure de faire valoir des circonstances particulières, il doit pouvoir bénéficier de la conclusion de l'employeur ou de l'arbitre, selon le cas, pour tous les emplois qui nécessitent d'être habilité selon la *L.P.* Une interprétation qui limiterait le bénéfice de l'exception au seul emploi que le policier occupe au moment de la décision de lui permettre de conserver son poste ferait dépendre le maintien de l'habilitation de circonstances qui n'ont rien à voir avec le comportement ou la compétence du policier. Tels ne sauraient être l'esprit et le but de l'exception.

Consequently, we are of the opinion that a police officer who benefits from the exception also benefits from job mobility. Should the officer's employment be terminated for any reason whatsoever, he or she may apply for employment in another police force. This is relevant where the compatibility of

97 En conséquence, nous sommes d'avis que le policier qui bénéficie de l'exception profite aussi de la mobilité d'emploi. À l'occasion d'une cessation d'emploi, pour quelque motif que ce soit, le policier peut demander un emploi dans un autre service de police. Cette précision est pertinente en

s. 119 *P.A.* with s. 116 *C.T.A.* is concerned, because an officer who retains his or her eligibility is not barred from working for the Sûreté du Québec or as a special constable.

98 When the *P.A.* and the *C.T.A.* are read together, it is clear that the former governs the capacity to serve as a police officer and the sanctions attached to breaches of the conditions of eligibility for a position as a police officer, while the latter governs the conditions of eligibility for municipal office or employment. A person who is qualified to serve in both capacities must meet the conditions of both statutes. This dual impact on the individual's employment is not a ground for not applying one of the standards.

5. Examples From the Case Law

99 The Court has heard similar arguments in criminal law cases in which the facts were clearly analogous to those of the case at bar. In *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, the Court had to decide whether two statutory provisions could be applied concurrently. The first, a provision of the *Criminal Code*, authorized the imposition of restrictions on the operation of motor vehicles. Under the second, a provision of a province's highway safety legislation, the driver's licence of a person convicted of an offence under the *Criminal Code* was to be suspended or revoked automatically. What was in issue in the case was that the trial judge, in sentencing the offender, had exercised his discretion and decided, under the federal legislation, that no driving restrictions would be imposed on the offender. The Court did not see any problem in applying the two standards concurrently. The fact that the judge who heard the criminal case had not imposed a suspension did not render the automatic suspension provided for under provincial law inapplicable. See to the same effect: *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Bell v. Attorney General for Prince Edward Island*, [1975] 1 S.C.R. 25.

ce qui concerne la compatibilité de l'art. 119 *L.P.* avec l'art. 116 *L.C.V.*, car le policier qui conserve son habilitation n'est pas empêché de travailler à ce titre pour la Sûreté du Québec ou encore comme constable spécial.

La lecture corrélative de la *L.P.* et de la *L.C.V.* permet de constater que la première régit la capacité d'agir comme policier et les sanctions qui sont attachées aux violations des conditions d'admissibilité à cette fonction et que la deuxième régit les conditions d'admissibilité à une charge ou à un emploi municipal. Dans le cas où une personne cumule les deux habilitations, elle doit satisfaire aux conditions prescrites par les deux lois. Ce double effet sur l'emploi de l'intéressé n'est pas un motif d'inapplicabilité d'une des normes.

5. Les exemples jurisprudentiels

Le droit pénal a donné lieu à des débats similaires devant la Cour, à l'occasion de litiges où les faits s'apparentaient clairement à ceux de la présente espèce. Dans *Provincial Secretary of Prince Edward Island c. Egan*, [1941] R.C.S. 396, la Cour devait statuer sur la possibilité d'appliquer de façon concomitante deux dispositions législatives. La première, figurant dans le *Code criminel*, autorisait l'imposition de restrictions en matière de conduite automobile. La deuxième, prévue par une loi provinciale sur la sécurité routière, imposait la suspension ou révocation automatique du permis d'un contrevenant déclaré coupable d'une infraction au *Code criminel*. Le problème est survenu lorsque, en déterminant la peine, le juge de première instance a exercé son pouvoir discrétionnaire et décidé, selon la loi fédérale, que le contrevenant ne serait soumis à aucune restriction en matière de conduite. La Cour a jugé que l'application concomitante des deux normes ne soulevait aucun problème. Le fait que le juge saisi de l'accusation criminelle n'avait pas imposé de suspension ne rendait pas inopérante celle, automatique, prévue par le droit provincial. Voir au même effet : *Ross c. Régistraire des véhicules automobiles*, [1975] 1 R.C.S. 5; *Bell c. Procureur général de l'Île-du-Prince-Édouard*, [1975] 1 R.C.S. 25.

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

In our view, the parallel with the case at bar is obvious. In one case, the provincial provision requiring the suspension of the driver's licence was not rendered inapplicable by the exercise of the discretion not to suspend it. In the other case, the one now before the Court, the sanction of temporary disqualification provided for in s. 116 *C.T.A.* would not have been rendered inapplicable by the arbitrator's conclusion under s. 119, para. 2 *P.A.* that specific circumstances justified the imposition of a sanction other than dismissal.

Both cases concern the exercise of an activity: one, the driving of a motor vehicle, and the other, the holding of employment. In both situations, the activity could continue to be carried out under one provision, but was suspended under the other. These decisions make it particularly clear that conflict is to be interpreted narrowly.

In municipal law, the area of law applicable to the facts of the instant case, there are several examples of the concurrent application of two standards that differ in severity. For present purposes, it is enough to say that municipal employees are often subject to standards in addition to those provided for in the *C.T.A.* Professionals or other officers or employees who perform duties governed by different statutes are not automatically exempt from any of those statutes. For example, the courts have held that a statute establishing an administrative measure designed solely to regulate the conditions to be met to be eligible for and hold municipal office was perfectly compatible with a penal provision that applied to the same person and the same fact situation: *Ricard v. Lord*, [1941] S.C.R. 1; *Beaudoin v. Roy*, [1984] R.L. 315 (Sup. Ct.); *Roy v. Mailloux*, [1966] B.R. 468. The provisions in question are complementary. In the case of police officers, s. 115 *P.A.* explicitly provides for the possibility of imposing additional conditions on them.

Thus, the argument that a police officer who would otherwise benefit from the exception under

100 Le parallèle avec l'affaire qui nous occupe nous semble évident. Dans un cas, l'exercice du pouvoir discrétionnaire de ne pas suspendre le permis de conduire ne rendait pas inapplicable la disposition prévoyant la suspension du même permis en vertu de la loi provinciale. Dans l'autre cas, celui qui nous intéresse, le fait que l'arbitre conclue en vertu de l'art. 119, al. 2 *L.P.* que des circonstances particulières justifient l'imposition d'une sanction autre que la destitution n'aurait pas rendu inapplicable la sanction d'inhabilité temporaire prévue par l'art. 116 *L.C.V.*

101 Dans les deux cas, il s'agit de l'exercice d'une activité : d'une part la conduite automobile; d'autre part le travail. Dans les deux situations, l'activité peut être continuée en vertu d'une disposition, alors qu'elle est suspendue en vertu de l'autre. Ces décisions font ressortir avec acuité le fait que le conflit est interprété de façon restrictive.

102 Le droit municipal, domaine dans lequel s'inscrivent les faits, donne plusieurs exemples d'application concomitante de deux normes de sévérité différente. Qu'il suffise de mentionner, pour les besoins de la présente affaire, que les fonctionnaires municipaux sont souvent assujettis à des normes qui s'ajoutent à celles par ailleurs prévues par la *L.C.V.* Les professionnels ou autres fonctionnaires ou employés qui exercent par ailleurs des fonctions régies par des lois distinctes ne sont pas automatiquement exemptés de l'une ou de l'autre. Par exemple, les tribunaux ont reconnu qu'une loi établissant une mesure administrative ayant uniquement pour but de régler les conditions d'admissibilité à une charge municipale et d'occupation d'une telle charge était tout à fait compatible avec une disposition pénale s'appliquant à la même personne et à la même situation de faits : *Ricard c. Lord*, [1941] R.C.S. 1; *Beaudoin c. Roy*, [1984] R.L. 315 (C.S.); *Roy c. Mailloux*, [1966] B.R. 468. Ces dispositions sont complémentaires. Dans le cas des policiers, l'art. 115 *L.P.* prévoit d'ailleurs explicitement la possibilité que ceux-ci soient assujettis à des conditions supplémentaires.

103 L'argument selon lequel un policier ne peut voir le bénéfice de l'exception prévue à l'art. 119 être

s. 119 cannot have that benefit taken away by means of a suspension under s. 116 *C.T.A.* is supported neither by the rule for interpreting conflicts between statutes nor by the case law. The need to comply with two rules, one of which is more restrictive than the other, is an insufficient basis for concluding that a conflict exists.

6. Conclusion

104 In the case at bar, the respondents have not shown that the two provisions were incompatible. On the contrary, the two provisions complement each other in that they address two different aspects of the same fact situation.

105 For these reasons, we agree with Bastarache J.'s conclusion that the arbitrator's decision was unreasonable but would add that the two provisions at issue are not incompatible.

The following are the reasons delivered by

106 Abella J. — I agree with Justice Bastarache's analysis of s. 119, para. 2 of the *Police Act*, R.S.Q., c. P-13.1; with his conclusion that it is in conflict with and should prevail over s. 116(6) of the *Cities and Towns Act*, R.S.Q., c. C-19; with his conclusion that the arbitrator's application of s. 119, para. 2 to Belleau was unreasonable. Where I part company with him, with great respect, is in his discussion of the standards of review.

107 The primary concern I have relates to his determination that the arbitrator's decision *whether* to apply s. 119, para. 2 should be subjected to a different standard than his decision on *how* to apply it. It seems to me that applying the factors in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the clear legislative directive here is that the arbitrator's decision as a whole is entitled to deference.

108 First, there is an unequivocal privative clause in s. 101 of the Quebec *Labour Code*, R.S.Q.,

écarté par une suspension fondée sur l'art. 116 *L.C.V.* ne trouve donc appui ni dans la règle d'interprétation des conflits de lois ni dans la jurisprudence. Le fait de devoir se conformer à deux règles, l'une plus contraignante que l'autre, n'est pas suffisant pour conclure à l'existence d'un conflit.

6. Conclusion

En l'espèce, les intimés n'ont pas réussi à démontrer que les deux dispositions étaient incompatibles. Au contraire, les deux dispositions se complètent, en ce qu'elles traitent de deux aspects différents d'une même situation de faits.

Pour ces motifs, nous arrivons à la même conclusion que le juge Bastarache sur le caractère déraisonnable de la décision de l'arbitre, mais ajoutons toutefois que les deux dispositions en cause ne sont pas incompatibles.

Version française des motifs rendus par

La juge Abella — Je suis d'accord avec le juge Bastarache pour ce qui est de son analyse de l'art. 119, al. 2 de la *Loi sur la police*, L.R.Q., ch. P-13.1, et de sa conclusion que cette disposition est en conflit avec le par. 116(6) de la *Loi sur les cités et villes*, L.R.Q., ch. C-19, et devrait prévaloir. J'accepte également sa conclusion que la décision de l'arbitre d'appliquer l'art. 119, al. 2 à M. Belleau était déraisonnable. En toute déférence cependant, je ne partage pas son avis sur la question des normes de contrôle.

Ma principale réserve a trait à sa conclusion selon laquelle il faut assujettir à des normes de contrôle différentes la décision de l'arbitre concernant l'*opportunité* d'appliquer l'art. 119, al. 2 et sa décision concernant la *façon* de l'appliquer. À mon sens, il ressort de l'application des facteurs énoncés dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, que la législation appelle manifestement à la retenue eu égard à l'ensemble de la décision de l'arbitre.

Tout d'abord, l'art. 101 du *Code du travail* du Québec, L.R.Q., ch. C-27, comporte une clause

2007 SCC 14 (CanLII)

2007 SCC 14 (CanLII)

c. C-27, stating that the arbitrator's award is "without appeal" and "binds the parties". Second, s. 100.12(*a*) of the *Labour Code* authorizes the arbitrator to "interpret and apply any Act or regulation to the extent necessary to settle a grievance".

The privative clause is the legislature's way of protecting the arbitrator's exclusive responsibility for deciding the grievance, and s. 100.12(*a*) clothes him with the authority to determine how *any* relevant statutory provision ought to apply to it. Any assessment of the degree of deference owed to the arbitrator must be respectful of these unambiguous legislative instructions. Combined with the expertise of the arbitrator in labour disputes and the legislative objective of having them resolved expeditiously and conclusively, there seems to me to be a strong argument in favour of an integrated standard for assessing the arbitrator's interpretation both of his jurisdictional mandate and its application.

As this Court held in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39, the interpretation of legislation, external or otherwise, that is "intimately connected with the mandate of the tribunal and is encountered frequently as a result" is entitled to deference. (See also *Canada Post Corp. v. Smith* (1998), 40 O.R. (3d) 97 (C.A.).) In interpreting the applicability of s. 119, para. 2 of the *Police Act* and s. 116(6) of the *Cities and Towns Act*, the arbitrator was interpreting and applying legislation relating to issues of the discipline and sanctioning of police officers. Both issues are central to his mandate to decide the grievance under the collective agreement and the *Labour Code*.

There is a danger that the routine segmentation of such mandates leads to an unduly interventionist approach more reminiscent of "the wrong question" or "preliminary or collateral matter" doctrines found in cases like *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 W.L.R. 163 (H.L.), and *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local*

privative non équivoque en précisant que la sentence arbitrale est « sans appel » et qu'elle « lie les parties ». Ensuite, l'al. 100.12*a*) du *Code du travail* autorise l'arbitre à « interpréter et appliquer une loi ou un règlement dans la mesure où il est nécessaire de le faire pour décider d'un grief ».

109 La clause privative est le moyen retenu par le législateur pour protéger la compétence exclusive de l'arbitre en matière d'arbitrage de griefs, et l'al. 100.12*a*) lui confère le pouvoir de décider de quelle manière *toute* disposition législative pertinente devrait s'y appliquer. L'appréciation du degré de retenue que commande la décision de l'arbitre doit tenir compte de ces directives claires du législateur. Compte tenu en outre de l'expertise de l'arbitre en matière de conflits de travail et de l'objet de la loi qui est d'assurer un règlement rapide et définitif de ces différends, il semble se dégager, à mon sens, un argument solide à l'appui d'une norme intégrée d'évaluation de l'interprétation par l'arbitre de sa compétence et de la façon de l'exercer.

110 Suivant la décision de notre Cour dans *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 39, l'interprétation d'une loi, extrinsèque ou non, qui « est intimement liée au mandat du tribunal et où celui-ci est souvent appelé à l'examiner » commande la retenue. (Voir également *Canada Post Corp. c. Smith* (1998), 40 O.R. (3d) 97 (C.A.).) En se prononçant sur l'applicabilité de l'art. 119, al. 2 de la *Loi sur la police* et du par. 116(6) de la *Loi sur les cités et villes*, l'arbitre interprétait et appliquait des dispositions législatives portant sur les questions de discipline et de sanctions à imposer aux policiers, deux questions qui relèvent nettement du mandat que lui confèrent la convention collective et le *Code du travail* en matière d'arbitrage de griefs.

111 Le fractionnement systématique de tels mandats risque d'entraîner l'application d'une approche indûment interventionniste, qui rappelle davantage les théories de « la mauvaise question » ou de « la question préalable ou auxiliaire » énoncées notamment dans *Anisminic Ltd. c. Foreign Compensation Commission*, [1969] 2 W.L.R. 163 (H.L.), et *Metropolitan Life Insurance Co.*

796, [1970] S.C.R. 425, than of the more deferential approach applied by Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233. Dickson J.'s admonition in *C.U.P.E.* remains instructive:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

112 Similarly, legal issues ought not to be declared readily extricable when they are legitimately and necessarily intertwined with the adjudicator's mandate and expertise. In such circumstances, the decision ought to be reviewed as a whole, not as a segmented compilation subject to an increased degree of scrutiny and intervention. As LeBel J. observed in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 76:

> [T]he various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

113 This integrated approach was reinforced by Iacobucci J. in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 56, when he emphasized that "not . . . every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision."

114 Similarly in *Mattel, Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, 2006 SCC 22, Binnie J., writing for the majority, refused to separate the

c. International Union of Operating Engineers, Local 796, [1970] R.C.S. 425, plutôt que le recours à l'approche fondée sur la retenue adoptée par le juge Dickson dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, p. 233. La mise en garde du juge Dickson dans cet arrêt demeure utile :

> Il est souvent très difficile de déterminer ce qui constitue une question de compétence. À mon avis, les tribunaux devraient éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard.

De même, il ne convient pas d'affirmer que des questions de droit peuvent facilement être isolées lorsqu'elles sont légitimement et nécessairement liées au mandat et à la compétence spécialisée de l'arbitre. Dans de telles circonstances, il y a lieu de procéder au contrôle de la décision dans son ensemble plutôt qu'au contrôle d'éléments fractionnés pouvant faire l'objet d'un examen plus minutieux et d'une intervention accrue. Le juge LeBel a fait la remarque suivante dans l'arrêt *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63, par. 76 :

> Les divers éléments qui sous-tendent une décision ont plus de chance d'être inextricablement liés les uns aux autres, en particulier dans un domaine complexe comme celui des relations de travail, de sorte que la cour de justice chargée du contrôle doit considérer que la décision du tribunal forme un tout.

Le juge Iacobucci a fait ressortir l'importance de cette approche intégrée dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 56, lorsqu'il a souligné que « [c]ela ne signifie pas que chaque élément du raisonnement présenté doive passer individuellement le test du caractère raisonnable. La question est plutôt de savoir si les motifs, considérés dans leur ensemble, sont soutenables comme assise de la décision. »

De même, dans l'arrêt *Mattel, Inc. c. 3894207 Canada Inc.*, [2006] 1 R.C.S. 772, 2006 CSC 22, le juge Binnie, s'exprimant au nom de la majorité,

2007 SCC 14 (CanLII)

legal issue, the interpretation of s. 6 of the *Trademarks Act*, R.S.C. 1985, c. T-13, from the Trademarks Opposition Board's overall decision, noting, at para. 39, that the "legal issue is not neatly extricable from its factual context, but calls for an interpretation within the expertise of the Board".

a refusé d'isoler la question de droit, à savoir l'interprétation de l'art. 6 de la *Loi sur les marques de commerce*, L.R.C. 1985, ch. T-13, de l'ensemble de la décision de la Commission des oppositions des marques de commerce, soulignant au par. 39 que la « question de droit ne peut être clairement isolée de son contexte factuel, mais commande une interprétation qui relève de l'expertise de la Commission ».

If, on the other hand, the legal issue is genuinely external to the adjudicator's mandate or expertise and easily differentiated from other issues in the case, such heightened scrutiny is entirely warranted: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157.

115 Si, par contre, la question de droit ne relève réellement pas du mandat ou de la compétence spécialisée de l'arbitre et peut facilement être distinguée des autres questions en litige dans l'affaire, il est tout à fait justifié de procéder à un examen plus minutieux : *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157.

In this case, the labour arbitrator's mandate and expertise merge to entitle him to a single deferential standard of review both for his decision as to the scope of the relevant legislation and its application to this case.

116 En l'espèce, le mandat et la compétence spécialisée de l'arbitre de griefs s'allient de manière à permettre l'application d'une seule norme de contrôle fondée sur la retenue relativement à ses décisions concernant la portée de la loi applicable et son application en l'espèce.

But I agree, for the reasons given by Bastarache J., that even on that standard, the arbitrator's decision as to the appropriate sanction is unsustainable.

117 Néanmoins, je conviens avec le juge Bastarache, pour les motifs qu'il a donnés, que la décision de l'arbitre eu égard à la sanction à imposer est insoutenable, même suivant cette norme.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellant: Langlois Kronström Desjardins, Lévis.

Procureurs de l'appelante : Langlois Kronström Desjardins, Lévis.

Solicitors for the respondents: Trudel, Nadeau, Anjou.

Procureurs des intimés : Trudel, Nadeau, Anjou.

Solicitors for the intervener: Castiglio & Associés, Montréal.

Procureurs de l'intervenante : Castiglio & Associés, Montréal.

2007 SCC 14 (CanLII)

Tab 20

Court of Appeal of Manitoba
Lindsay v. Manitoba (Motor Transport)
Date: 19890908
Docket: 4/89;15/89

1989 CanLII 179 (MB CA)

PHILP J.A.:—The appellants, Robert Lindsay, 0/A R.L. Trucking (Lindsay), and George Smith (Smith), in separate applications, were each granted leave to appeal from decisions of the Motor Transport Board of Manitoba (the Board). Their appeals have been consolidated and the questions put before this court are:

> (1) Did the Board err in law or exceed or lose its jurisdiction by taking into account the cumulative effect of pending applications in its determination that the applicants' proposed extraprovincial truck undertakings would likely be detrimental to the public interest?
>
> (2) Did the Board err in law or exceed or lose its jurisdiction when it denied the applications after determining that it was not satisfied from the evidence of the corporate respondents that each of the applicants' proposed extraprovincial truck undertakings, taken alone (and ignoring the context in which they were filed, that being 106 pending applications), would likely be detrimental to the public interest?

The questions raise the Board's interpretation and application of the transition provisions of the *Motor Vehicle Transport Act, 1987,* R.S.C. 1985, c. 29 (3rd Supp.) (the new Act), which bridge the regulatory regime controlling the licensing of extraprovincial truck undertakings that prevailed under the repealed *Motor Vehicle Transport Act,* R.S.C. 1985, c. M-12 (the old Act), and the deregulated regime which will come into effect under the new Act in 1993.

"Entry criteria" are what this appeal is all about. Section 3(2) of the old Act adopted the entry test that applied in a province for a local or intraprovincial truck undertaking, as the entry test applicable in that province for the establishment of an extraprovincial truck undertaking. The test in Manitoba (as well as in other provinces), still applicable to the licensing of intraprovincial truck undertakings, is the "public convenience and necessity" test found in s. 290(2) of the *Highway Traffic Act,* S. M. 1985-86, c. 3 (C. C. S. M., c. H60). Federal government policy reflected in the new Act is the replacement of the public convenience and

necessity test by the vastly less intrusive fitness to hold a licence test. The prescribed criteria relating to fitness are minimum insurance requirements and a satisfactory safety rating.

Section 8 of the new Act provides:

> 8(1) Subject to this section and to any regulations made pursuant to section 9, the provincial transport board in each province may issue a licence to a person to operate an extra-provincial truck undertaking in the province on the
>
> like terms and conditions and in the like manner as if the extra-provincial truck undertaking were a local truck undertaking.
>
> (2) The provincial transport board in a province shall, in exercising its powers under subsection (1), issue a licence to operate an extra-provincial truck undertaking in that province to an applicant therefor who submits to the board prescribed evidence that the applicant meets the prescribed criteria relating to the fitness of the applicant to hold such a licence.
>
> (3) Notwithstanding subsection (2), where under the law of a province the provincial transport board is authorized to hold a public hearing with respect to an application for a licence to operate a local truck undertaking, the board shall not hold a public hearing with respect to an application for a licence referred to in subsection (2) unless an interested person who objects to the issue of the licence provides the board with evidence that satisfies the board that, in the absence of evidence to the contrary, the operation of the extra-provincial truck undertaking in respect of which the licence is sought would likely be detrimental to the public interest.
>
> (4) Notwithstanding subsection (2), where under the law of a province an interested person may object to the issue by the provincial transport board of a licence to operate a local truck undertaking, the provincial transport board is not required to issue a licence referred to in subsection (2) if an interested person objects to the issue of the licence and establishes to the satisfaction of the board that the operation of the extraprovincial truck undertaking in respect of which the licence is sought would likely be detrimental to the public interest.
>
> (5) In applying subsections (3) and (4), a provincial transport board shall
>
> > (a) give primary emphasis to the interests of users of transportation services, whether those services are provided by the undertaking or not; and
> >
> > (b) have regard to any statement of public transportation policy issued by the Governor in Council after consultation by the Minister with the government of each province affected thereby.
>
> (6) Subject to subsection 10(3) but notwithstanding any other provision of this Part, after the day on which subsections (3) to (5) and paragraphs 9(1)(a) to *(d)* cease to have effect,
>
> > (a) a provincial transport board may not attach any restrictions or conditions to a licence issued under the authority of this Part; and
> >
> > (b) the restrictions and conditions to which any licence issued under the authority of this Part is subject, except the condition referred to in subsection 10(3), shall cease to have effect.

1989 CanLII 179 (MB CA)

Section 8(3) to (5) is transitional, and applies to the period from January 1, 1988 (the date the new Act came into force) to January 1, 1993. That is the effect of s. 34 of the new Act:

> 34(1) Subsections 8(3) to (5) and paragraphs 9(1)(a) to *(d)* shall, subject to subsections (2) to (4), cease to have effect five years after the day on which this Act, except section 26, comes into force.
>
> (2) The Minister shall, after the expiration of three years after the coming into force of subsections 8(3) to (5) and before the expiration of four years after the coming into force of those subsections, undertake and complete a comprehensive review of the operation and effect of those subsections.
>
> (2.1) After the completion of the review referred to in subsection (2), the Minister shall cause a copy of a report of the review to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report has been prepared.
>
> (3) The Governor in Council may, by proclamation, on the recommendation of the Minister made after consultation by the Minister with the government of each province, after the completion of the review referred to in subsection (2) and before subsections 8(3) to (5) and paragraphs 9(1)(a) to *(d)* cease to have effect pursuant to subsection (1), continue subsections 8(3) to (5) and paragraphs 9(1)(a) to *(d)* in force for such further period as is specified in the proclamation.
>
> (4) The Governor in Council may, by proclamation, on the recommendation of the Minister made after consultation by the Minister with the government of each province, at any time while subsections 8(3) to (5) and paragraphs 9(1)(a) to *(d)* are in force pursuant to subsection (3) or this subsection, continue subsections 8(3) to (5) and paragraphs 9(1)(a) to (d) in force for such further period as is specified in the proclamation.

On January 1, 1993 (subject only to the possible extension of the transition period provided for under s. 34(4)) the federal government policy of the deregulation of the extraprovincial trucking industry will be complete.

In the transition period a new regime, different than that existing prior to January 1, 1988, has been put in place. A licence to operate an extraprovincial truck undertaking must be issued by the Board, without a public hearing, to an applicant who meets the criteria relating to fitness, unless an "interested person" objects to the issue of the licence, and, in practice in a summary way, satisfies the Board that the operation of the proposed truck undertaking "would likely be detrimental to the public interest" (s. 8(2) and (3) of the new Act). When an objecting interested person meets that initial burden of establishing detriment to the public interest, the persuasive burden, the burden of proving that the operation of the proposed truck undertaking "would likely be detrimental to the public interest", remains upon the objector (s. 8(4) of the new Act). This new procedure has become known in the trucking industry as the "reverse

1989 CanLII 179 (MB CA)

onus". If a person who objects fails to prove, on the civil test of the balance of probabilities, that detriment to the public interest is likely, the licence will issue upon the applicant meeting the fitness test, It is only if a person who objects makes out a *prima facie* case that detriment to the public interest would be likely, that the applicant will be called upon to refute that likelihood.

Smith applied to the Board for an extension of his public service vehicle certificate "for the transportation of general merchandise from all points in Manitoba to the Manitoba/Ontario, Manitoba/-

Saskatchewan and Manitoba/International boundaries and vice-versa".

Lindsay's application, as amended at the hearing before the Board, was for the extension of his public service vehicle certificate "for the transportation in mechanically temperature controlled vans, of fresh and frozen foods and foodstuffs, from all points in Manitoba to the Manitoba/Saskatchewan, Manitoba/Ontario and Manitoba/International boundaries *for international traffic only* and vice-versa".

The corporate respondents objected to the issue of the licences applied for by Smith and by Lindsay. That they are "interested persons" is not disputed. They are long established carriers with extensive intraprovincial and extraprovincial licences. Nor can it be disputed, in my view, that they have private interests to protect that may not always be identical to the interests of the public in general.

Smith's application came on for hearing before the Board on October 3, 1988. The hearing was a consolidated one, involving applications by three other applicants (including Canadian Freightways Limited), as well as Smith. This was the first contested hearing before the Board under the new Act. At the commencement of the hearing the Board applied the reverse onus procedure, and called upon the corporate respondents to establish to its satisfaction that the operation of the extraprovincial truck undertakings applied for would likely be detrimental to the public interest. This stage in the proceedings continued over 11 days of evidence and argument. Dr. Greg Mason, a transportation expert, testified, as did a representative of each of the corporate respondents. Not a single "user of transportation services" testified, the significance of which I will comment upon later. At the conclusion of this initial stage of the hearing the Board ruled that the corporate respondents "had provided evidence which

1989 CanLII 179 (MB CA)

satisfied the Board that the operations of the applicants would likely be detrimental to the public interest, in the absence of evidence to the contrary".

Parenthetically, and of no significance in these appeals, that finding was followed by the inexplicable and seemingly contradictory finding:

> However, in the application of Canadian Freightways Limited ("CFL"), the Board was of the view that counsel had elicited in cross-examination sufficient evidence to the contrary, regarding his client's operation, so as to rebut the case of the respondents and obviate the need for this particular applicant to tender evidence.

The Board's reasons for its conclusion that the corporate respondents had met the "reverse onus" are set out in its lengthy and detailed decision dated November 21, 1988, issued in the Canadian Freightways Limited application (the C. F. L. decision). These findings and conclusions, we are told, were adopted and applied by the Board in subsequent hearings. They were certainly adopted and applied in the hearing of the Lindsay application, as I will comment upon further in these reasons.

The hearing of Smith's application reconvened on December 22, 1988, and evidence was put before the Board in support of the application. By majority decision of the Board, Smith's application was granted in part, and written reasons for the decision were subsequently released on January 26, 1989. The reasons of the majority of the Board referred to the C. F. L. decision. Those reasons adopted the Board's finding "that the granting over the short term of all applications currently pending would substantially destabilize the trucking industry".

The reasons of the majority then considered the cumulative effect of all pending applications, and set out its interpretation of s. 8(4) of the new Act. The majority concluded:

> The wording of this subsection is broad enough to allow the Board to consider the context in which the applicant would operate. It does not require the Board to put on blinkers and ignore the cumulative effect of the individual licensing decisions it will be called upon to make.

Lindsay's amended application was heard by the Board on December 5 and 6, 1988. This was the first hearing to follow the Board's decision in the Canadian Freightways Limited application. Pursuant to "procedural directions" issued by the Board's policy committee some months before, a transcript of the evidence and the exhibits in the first stage of the Canadian Freightways Limited consolidated hearing were tendered by counsel for the corporate respondents at the commencement of the hearing. No further evidence was called by the

1989 CanLII 179 (MB CA)

corporate respondents. Lindsay was given the right to cross-examine any of the witnesses who had testified at the consolidated hearing; he did not exercise that right. Lindsay then testified in support of his application.

The reasons of the Board do not say so, but the inference to be drawn from the proceedings is that the Board concluded, on the evidence at the prior consolidated hearing, that the corporate respondents had established to the Board's satisfaction that the undertaking for which Lindsay sought a licence would likely be detrimental to the public interest.

The Board's written reasons denying the Lindsay application

were issued on December 14, 1988. Again, as in the reasons of the majority in the Smith application, the Board quoted from its summary of findings in the C.F.L. decision, and reconfirmed the rationale for its conclusion in the C.F.L. decision on the cumulative effect issue:

> Although there may be no demonstrable detriment to the public interest from the granting of a single application, where there is no evidence to distinguish the applicants' operations from one another, the Board must, in order to properly assess whether detriment to the public interest is likely, assume in each application the granting of all others pending, and assess the cumulative effect on the public interest of doing so.

The Board then rejected the Lindsay application, and expressed its conclusion in the following words:

> The Board is of the view that the proposed operation of the applicant serves no demonstrated useful public purpose and is not responsive to any public demand, and thus provides no public advantage or benefit whatsoever. In the opinion of the Board, in the context of the flood of applications before us, such an operation would likely be detrimental to the public interest.

Smith and Lindsay argue that in adopting the "cumulative effect" test, the Board went beyond the statutory scheme in s. 8 of the new Act. Simply put, they argue that the Board has imposed upon each of them the requirement of establishing that their proposed extraprovincial truck undertakings "would be beneficial to the interests of users or the public interest generally", and that that requirement is not found in the legislation. To understand their arguments, it will be necessary to refer again to the C. F.L. decision which forms part of the Smith application, and which was adopted and applied in the Lindsay application.

At the conclusion of the first stage of the consolidated hearing, the Board found, as I have noted above, that the corporate respondents "had provided evidence which satisfied the

1989 CanLII 179 (MB CA)

Board that the operations of the applicants would likely be detrimental to the public interest, in the absence of evidence to the contrary". That conclusion, taken alone and assuming the existence of facts to support it, would seem to be one within the Board's powers and jurisdiction to make. But I think that conclusion has to be viewed in the context of the Board's adoption of the "cumulative effect" test. In determining whether the extraprovincial licences sought in the Smith application and in the Lindsay application would likely be detrimental to the public interest, the Board assumed in each case the granting of all other pending applications. In its C.F.L. decision the Board referred to the "106 applications currently waiting to be heard, (of which) 61 are general freight applications, and 37 specify a broad or major class of commodity".

1989 CanLII 179 (MB CA)

Any doubt that might otherwise be entertained as to the impact of such an assumption on the assessment of detriment to the public interest is dispelled by the Board's restatement of its conclusion at the end of the C.F. L. decision. The Board stated:

> The Board was not satisfied from the evidence of the respondents that the operation of any one of the four applicants, taken alone and ignoring the context in which it was filed, would likely be detrimental to the public interest.

That assumption, the granting of all pending applications, was crucial to the Board's finding in its C.F.L. decision on the likelihood or probability of substantial destabilization of the Manitoba trucking industry in the transition period, and that latter finding was crucial to the Board's determination of the likelihood of detriment to the public interest. On the basis of that finding, the Board called upon Lindsay and Smith "to tender evidence respecting the operation proposed which indicates how it would be beneficial to the interests of users or to the public interest generally, or to tender evidence which rebuts the above findings". The Board said that it did so in order that it "would then be in a position to balance the benefits and detriments and assess whether, on balance, the granting of the particular application would likely be detrimental to the public interest".

Counsel for Smith and Lindsay argue that the Board, by assuming the cumulative effect of all pending applications, has asked itself the wrong question: Would the operation of the extra-provincial truck undertaking in respect of which a licence is sought by Smith (or by Lindsay) likely be detrimental to the public interest, assuming that all other pending applications are granted? The right question, they argue, is: Would the operation of the extraprovincial truck

undertaking in respect of which a licence is sought by Smith (or by Lindsay), likely be detrimental to the public interest, considered in the context of existing transportation facilities?

Counsel cite *Anisminic Ltd. v. Foreign Compensation Com'n,* [1969] 2 A.C. 147 (H. L.), in which the "wrong question" test was propounded in a case of judicial review of jurisdiction in the face of a preclusive or privative clause; *Metropolitan Life Ins. Co.* v. *Int'l Union of Operating Engineers, Local 796* (1970), 11 D.L.R. (3d) 336, [1970] S.C.R. 425, 70 C.L.L.C. ¶14,008 (S.C.C.), and *Re Funk and Manitoba Labour Bd.* (1976), 66 D. L.R. (3d) 35, [1976] 3 W.W.R. 209 (Man. C.A.), in which the test has been applied in cases of judicial review of jurisdiction.

1989 CanLII 179 (MB CA)

Counsel for the corporate respondents and for the Board argue

that the "wrong question" test of jurisdiction has been criticized in decisions since *Metropolitan Life, supra:* see, for example, the *obiter* comments of Laskin C.J.C. in *Volvo Canada Ltd.* v. *Int'l Union, U.A.W., Local 720* (1979), 99 D.L.R. (3d) 193 at pp. 203-4, [1980] 1 S.C.R. 178, 33 N.S.R. (2d) 22 (S.C.C.).

Counsel for the corporate respondents and for the Board say that the current approach to judicial review, articulated by Dickson J. (as he then was) in C.U.P.E., *Local 963* v. *New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237 (S.C.C.), is a more restrained, confined one. Dickson J. formulated the standard for review, which has become known as the "patently unreasonable" test, in the following questions (p. 425):

> 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?

The C. *U.P.E.* case, supra, and later decisions that have adopted and developed the "patently unreasonable" test, were concerned with the scope of the courts' non-appellate review of administrative tribunals. Counsel for the Board argues, nevertheless, that the court should apply the "patently unreasonable" test in these appeals which are brought pursuant to the specific statutory appeal provisions found in s. 283 of the *Highway Traffic Act,* and s. 58 of the *Public Utilities Board Act,* R.S.M. 1987, c. P280. The position of counsel for the corporate respondents is somewhat more restrained; he argues that the developing attitude of judicial

restraint has been extended to tribunals whose decisions are subject to the broader appellate jurisdiction.

A very helpful discussion of the changing judicial attitude to judicial review is to be found in the judgment of Blair J.A., writing for the court in *Re O.P.S.E. U. and Forer* (1985), 23 D.L.R. (4th) 97, 52 O.R. (2d) 705 (Ont. C.A.).

Monnin J.A. (as he then was) spoke of the deference to be accorded to the Board in his dissent in *Motor Transport Bd. of Manitoba* y. *Purolator Courier Ltd.* (1980), 3 Man. R. (2d) 107 at p. 133 (Man. C.A.) (reversed by the Supreme Court of Canada: 126 D.L.R. (3d) 385, [1981] 2 S.C.R. 364, 12 Man. R. (2d) 61), in the following words:

> This Board is a specialized tribunal with which courts should be loathe to interfere. Within the transport industry, the questions which were raised are important but it is better for all that these questions be answered by those persons who have special knowledge of that field of operation. Judges are hardly qualified for this type of decision.

Curial deference has been acknowledged by other courts exercising appellate review: see *Canadian Pacific Ltd.* v. Canadian *Transport Com'n* (1987), 79 N.R. 13 (F.C.A.) (leave to appeal to the Supreme Court of Canada dismissed January 25, 1988 [reported 87 N.R. 239n]), and *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Com'n* (1987), 37 D.L.R. (4th) 94, 59 O.R. (2d) 79, 23 Admin. L.R. 285 (Ont. H.C.J.).

I agree that the trend away from curial review toward curial deference is one that ought to be followed in cases where appellate jurisdiction is exercised. However, I do not think that the scope of the courts' powers in exercising appellate jurisdiction is limited by the same standard that applies to judicial review for jurisdictional error; that it is limited to cases where a tribunal's interpretation of a statute is "patently unreasonable". It has long been recognized that the powers of the court and the remedies available differ in cases of appellate review and non-appellate review. For example, in exercising appellate jurisdiction on a point of law, a court is entitled to review the correctness of the decision of the tribunal and is not limited to a review of an error of law that appears on the face of the record, as in the case of judicial review for jurisdictional error.

However, it is not necessary in these appeals to define the limits of the scope of appellate jurisdiction, for I am of the view that the Board's interpretation of s. 8 of the new Act, and its determination of likely detriment to the public interest, has failed even the more stringent

1989 CanLII 179 (MB CA)

patently unreasonable test and, as well, that in proceeding as it did in the Smith and Lindsay applications, the Board has denied the applicants natural justice and essential fairness.

I return to the C.F. L. decision. In finding that the corporate respondents had satisfied the onus upon them to establish to the Board's satisfaction that the operation of the truck undertakings applied for by Smith and by Lindsay would likely be detrimental to the public interest, the Board considered several apprehended effects of deregulation including: the vulnerability of the Manitoba trucking industry in general, and of marginal trucking operations and terminals in particular; the disruption of the balance of traffic carried by the corporate respondents and other licensed carriers; the impact upon competition and market sharing of the entry of a number of new trucking undertakings in a short run period; the financial positions of the corporate respondents, and the effect on safety.

In doing so, one might think that the Board looked far beyond

"the interest of users of transportation services" to whom, by s. 8(5)(a) of the new Act, the Board "shall give primary emphasis" in applying s. 8(3) and (4). As I have already noted, the Board's determination of likely detriment to the public interest was based solely on the evidence of representatives of the corporate respondents and their expert, and upon their dire predictions of the destabilization of the Manitoba trucking industry. Not a single user of transportation services testified as to how he would be affected by the granting of the licence sought by Smith or by Lindsay.

On the other hand, s. 8(5)(a) speaks of "primary emphasis", not "exclusive consideration", and para. *(b)* refers to other matters to which the Board shall have regard. In according curial deference to the Board, unless its interpretation is unreasonable or clearly wrong, the court ought not to interfere to say what matters should or should not have been considered by the Board in its determination of the public interest, or to conclude that the Board did not give primary emphasis to the interests of users of transportation services.

However, in the course of developing its view of what constitutes the public interest, to which 10 pages of its C.F.L. decision are devoted, the Board asserted authoritatively:

> The Board is of the view the question of what constitutes the "public interest" is a *matter* of *policy entirely within its jurisdiction,* in the absence of any statement of policy under s. 8(5)(b).

1989 CanLII 179 (MB CA)

(My emphasis.) In my view, that statement is clearly wrong and led the Board into error in its conclusion that the operation of the truck undertakings applied for by Smith and by Lindsay would likely be detrimental to the public interest. The statement goes beyond the assertion of the Board's acknowledged, unfettered discretion in determining matters of administrative policy. The words "public interest" are not defined in the new Act, but that does not make their meaning "a matter of policy entirely within [the Board's] jurisdiction". The meaning of those words, neither precise nor unambiguous in themselves, must be construed in the context of the statute in which they are found, for it is Parliament and not the Board which establishes the "policy", or the object or the purpose, of the legislation. There can be no doubt about the object or purpose of the new Act. It is the deregulation of the extraprovincial trucking industry and the removal of the public convenience and necessity entry test that previously applied, in favour of the fitness test.

The scheme of the new Act is to effect deregulation on January

1, 1993, and to provide a transition period of five years as the scope of the reform process moves from the public convenience and necessity test to the fitness test. It is in this context that the words "public interest" are to be construed. Parliament, however, has given little guidance to the Board as to the way the intent of the legislation is to be carried out in the transition period. The new Act expresses Parliament's broad policy objectives, but its scheme for the transition period, with the reverse onus procedure, is not as easily discernible. A consensus has not developed in the decisions of the boards and commissions across Canada. The New Brunswick Motor Carrier Commission, in a decision dated June 10, 1988, dismissing an application by Eassons Transport Limited for an extraprovincial licence, took into account the cumulative effect of pending applications. On the other hand, the cumulative effect argument has been rejected by the Highway Traffic Board of Saskatchewan (in a decision dated November 2, 1988, granting the application of South East Transfer Limited), and by the Nova Scotia Board of Commissioners of Public Utilities (in a decision dated September 26, 1988, approving the extraprovincial licence application of F.M. Taylor Trucking Limited).

Section 8(5) of the new Act throws some light upon the interpretation to be given to the words "public interest". Paragraph (a) refers to the "interests of users of transportation services", to whom the Board shall give primary emphasis in applying s-s. (3) and (4). Paragraph *(b)* refers

1989 CanLII 179 (MB CA)

to a "statement of public transportation policy issued by the Governor in Council", to which the Board shall have regard. No such statement had been issued by the Governor in Council at the time of the Smith and Lindsay hearings, or at the date of the hearing of this appeal. Counsel for Smith has subsequently informed us that such a statement was issued by the Governor in Council and published in the *Canada Gazette,* Part I, vol. 123, No. 23, p. 2776, on June 10, 1989, entitled: "Public Transportation Policy Pursuant to Paragraph 8(5)(b) of the Motor Vehicle Transport Act, 1987 with Respect to Objections to the Issuance of Licences for Extra Provincial Undertakings". It is similar in its wording, but not identical, to Policy Statement No. 15 adopted and published by the Board at the time the new Act came into effect (and referred to by the Board in its C.F.L. decision). Both statements appear to give permissive as well as mandatory directives that find no basis in the new Act. They appear to go far beyond the traditional scope of regulatory activity designed to carry out the intent of the law. That concern will have to await another day; it is unnecessary in these appeals

to comment further upon para. *(b)* and its apparent legislative approval of matters of substance that may be promulgated by future Orders in Council.

I think there can be no doubt that the determination of what constitutes the public interest is not "a matter of policy" entirely within the jurisdiction of the Board, nor is it a finding of fact. It is the formulation of an opinion and, when acting within its jurisdiction, it is a determination within the exclusive administrative jurisdiction of the Board. But, at the same time, it is a determination that must be justified by facts established before the Board. That, in my opinion, is the dictum of the Supreme Court of Canada confirmed in *Canadian Transport Com'n v. Worldways Airlines Ltd.* (1975), 55 D.L.R. (3d) 389, [1976] 1 S.C.R. 751, 4 N.R. 579.

The determination is not unlike the drawing of an inference by a court. An inference is a reasonable deduction from primary facts established in evidence. While the determination of the public interest is a matter within the discretion of the Board, that determination must find justification in the facts. It is here that the Board, in my opinion, fell into error. The Board's determination that the operation of the truck undertakings for which Smith and Lindsay sought licences would likely be detrimental to the public interest, was not justified by facts that had been established before the Board; rather, the determination had its foundation in assumptions the Board made. It was, at best, conjectural.

I repeat the conclusion of the Board in the C.F.L. decision:

1989 CanLII 179 (MB CA)

> The Board was not satisfied from the evidence of the respondents that the operation of any one of the four applicants, taken alone and ignoring the context in which it was filed, would likely be detrimental to the public interest.

and in its Lindsay decision:

> Although there may be no demonstrable detriment to the public interest from the granting of a single application, where there is no evidence to distinguish the applicants' operations from one another, the Board must, in order to properly assess whether detriment to the public interest is likely, assume in each application the granting of all others pending, and assess the cumulative effect on the public interest of doing so.

In my view, the Board erred in its interpretation of s. 8(4) of the new Act; and in formulating its determination of likely detriment to the public interest.

In proceeding as it did, in my view, the Board denied essential fairness to Smith and to Lindsay. It called upon Smith and Lindsay to establish that the truck undertakings they proposed to operate would benefit the public (a burden upon the applicants

that is not found in the new Act); and, alternatively, it called upon them to rebut the Board's findings of likely detriment to the public interest. Those were impossible burdens to meet in the circumstances. The transportation services proposed in the 106 applications then pending before the Board were not before the Board in the Canadian Freightways Limited consolidated hearing, or in the continuation of the Smith hearing, or in the Lindsay hearing. Those applicants did not testify and the particulars of the transportation services they intended, broadly stated in their respective applications, were not identified. Counsel for the corporate respondents pointed out that the Board's practices did not require applicants to particularize the details of the extraprovincial truck undertakings they sought to operate: the Manitoba points to be served, to and from what out-of-province points; the particular commodities to be carried; the frequency of service, and whether scheduled or contracted. That deficiency in administrative policy, it would seem, has contributed considerably to the Board's decision to resort to the cumulative effect test.

Adoption of the cumulative effect test has denied the Board the opportunity of making a proper determination, justified on the facts established before it, of the likely detriment to the public interest of a proposed transportation service. The effect of the Board's policy, as expressed in its G.F.L. decision, and as applied in the reasons issued in the Smith and Lindsay applications, is to maintain the *status quo* of regulated entry into the extraprovincial truck industry and to neutralize the reverse onus provisions of the new Act.

1989 CanLII 179 (MB CA)

Rather than addressing the public interest as it may be affected by a particular application, the Board's policy addresses the general impact of unregulated competition. Unregulated competition, it seems to me, is a matter of policy which Parliament has addressed in the enactment of the new Act. The role of the Board in the transition period is not to protect the regulated regime until January 1, 1993, but to administer the licensing of extraprovincial truck undertakings as the process moves from the public convenience and necessity test to the fitness test, with primary emphasis to the interests of users of transportation services who may be adversely affected by any particular application.

The Board erred in emphasizing the broad, province-wide implications of the elimination of economic regulation of the extraprovincial truck industry; the Board should have directed its concern, and its specialized background and expertise, primarily to the interests of users of transportation services to ensure that

they continue to be served by the trucking industry during the transition period.

I would answer affirmatively the questions put before the court in this appeal. In the result, I would certify my opinion to the Board that it erred in law in taking into account the cumulative effect of pending applications in its determination that the extra-provincial truck undertakings proposed by Smith and by Lindsay would likely be detrimental to the public interest, and in not granting those applications after concluding that it was not satisfied from the evidence of the corporate respondents that the operation of each of the proposed extraprovincial truck undertakings, taken alone, would likely be detrimental to the public interest.

Smith and Lindsay are entitled to their costs in this court. I would order one set of costs against the corporate respondents in each appeal, with a factum fee in each case of $200. No order of costs can be made against the Board, as the Board is not liable to costs in respect of an appeal: see s. 58(8) of the *Public Utilities Board Act.*

TWADDLE J.A.: —I agree with both the conclusions reached by my brother Philp and his well-expressed reasons therefor. I would dispose of the appeal as he proposes.

BARKMAN J. (dissenting):—The appellants (Smith and Lindsay) applied to the Motor Transport Board of Manitoba (the Board) pursuant to the provisions of the *Motor Vehicle Transport Act, 1987,* R.S.C. 1985, c. 29 (3rd Supp.).

1989 CanLII 179 (MB CA)

The applications of the appellants were not identical, however, the differences in the applications are of no concern to the court on the hearing of these appeals because the differences are not factors taken into account by the Board in denying both applications. Both applications were for the "extension of public service vehicle certificates for transportation ... from all points in Manitoba to Manitoba/Saskatchewan, Manitoba/Ontario and Manitoba/International Boundaries and vice versa".

The Board, after separate hearings of the applications granted Smith a restricted extension and denied Lindsay's application in its entirety.

Both appellants applied to the Court of Appeal for leave to appeal. Philp J.A. granted leave and stated that the questions to be determined by the court should be *[ante,* p. 617]:

> (1) Did the Board err in law or exceed or lose its jurisdiction by taking into account the cumulative effect of pending applications in its determination
>
> that the applicants' proposed extraprovincial truck undertakings would likely be detrimental to the public interest?
>
> (2) Did the Board err in law or exceed or lose its jurisdiction when it denied the applications after determining that it was not satisfied from the evidence of the corporate respondents that each of the applicant's proposed extraprovincial truck undertakings, taken alone (and ignoring the context in which they were filed, that being 106 pending applications), would likely be detrimental to the public interest?

In my opinion, the questions stated by Philp J.A. pose, in effect, only one question, namely: Can the Board, in assessing detriment to the public interest, properly consider the effect of similar applications pending before it, in dealing with the applications by Smith or Lindsay?

I am of the opinion that the Board can, in law, properly consider, without exceeding or losing its jurisdiction, the likely effect of similar applications pending before it when dealing with individual applications.

In arriving at this conclusion it is necessary to consider the intention of Parliament expressed in the *Motor Vehicle Transport Act, 1987* (the Act). The relevant provisions of the Act are:

> 8(1) Subject to this section and to any regulations made pursuant to section 9, the provincial transport board in each province may issue a licence to a person to operate an extra-provincial truck undertaking in the province on the like terms and conditions and in the like manner as if the extra-provincial truck undertaking were a local truck undertaking.
>
> (2) The provincial transport board in a province shall, in exercising its powers under subsection (1), issue a licence to operate an extra-provincial truck undertaking in that

1989 CanLII 179 (MB CA)

province to an applicant therefor who submits to the board prescribed evidence that the applicant meets the prescribed criteria relating to the fitness of the applicant to hold such a licence.

(3) Notwithstanding subsection (2), where under the law of a province the provincial transport board is authorized to hold a public hearing with respect to an application for a licence to operate a local truck undertaking, the board shall not hold a public hearing with respect to an application for a licence referred to in subsection (2) unless an interested person who objects to the issue of the licence provides the board with evidence that satisfies the board that, in the absence of evidence to the contrary, the operation of the extra-provincial truck undertaking in respect of which the licence is sought would likely be detrimental to the public interest.

(4) Notwithstanding subsection (2), where under the law of province an interested person may object to the issue by the provincial transport board of a licence to operate a local truck undertaking, the provincial transport board is not required to issue a licence referred to in subsection (2) if an *interested person objects to the issue of the licence and establishes to the satisfaction of the board that the operation of the extra-provincial truck undertaking in respect of which the licence is sought would likely be detrimental to the public interest.*

(5) In applying subsections (3) and (4), a provincial transport board shall

(a) give primary emphasis to the interests of users of transportation services, whether those services are provided by the undertaking or not; and

(b) have regard to any statement of public transportation policy issued by the Governor in Council after consultation by the Minister with the government of each province affected thereby.

(6) Subject to subsection 10(3) but notwithstanding any other provision of this Part, after the day on which subsections (3) to (5) and paragraphs 9(1)(a) and *(d)* cease to have effect,

(a) a provincial transport board may not attach any restrictions or conditions to a licence issued under the authority of this Part; and

(b) the restrictions and conditions to which any licence issued under the authority of this Part is subject, except the condition referred to in subsection 10(3), shall cease to have effect.

(Emphasis mine.)

The appeals before the court fall under the provisions of s. 8(4) above-stated. The specific provision to be considered on these appeals is the portion emphasized. In both applications there were interested persons objecting to the issue of the licence to each of the appellants and the persons objecting established to the satisfaction of the Board that the operation of the extra-provincial truck undertaking of each of the appellants for "a certificate of transportation ... from all points in Manitoba to Manitoba/Saskatchewan, Manitoba/Ontario and Manitoba/International Boundary and vice versa" would not be detrimental to the public

1989 CanLII 179 (MB CA)

interest. The Board in arriving at this conclusion indicated, at p. 33 of its decision on Canadian Freightways Limited's application, dated November 21, 1988, as follows:

> The Board was not satisfied from the evidence of the respondents that the operation of any one of the four applicants, taken alone and ignoring the context in which it was filed, would likely be detrimental to the public interest.

I agree with the submission of counsel for the appellant Smith that "the plain determination by the Board is that Smith's application, considered alone, would not likely be detrimental to the public interest". The same statement applies to the appellant Lindsay.

I do not agree with the submission of the appellants that "once the Board has determined that the application (Smith's or Lindsay's) before it was not likely detrimental to the public interest the applicant has established all that is required pursuant to the Act". That conclusion is based on the interpretation of s-s. (4) as meaning that the wording "the operation of the extra-provincial truck undertaking" refers only to the licence applied for by

the applicant. I am of the opinion that the said phrase must be looked at in the context of the whole of those provisions in the Act which provide for a transitional period of five years, to be regulated by the provincial board with regard to the public interest.

I concur with the statement of the Board in the Smith decision at pp. 8-9 in respect to s. 8(4) of the *Motor Vehicle Transport Act, 1987,* where it states:

> The wording of this subsection is broad enough to allow the Board to consider the context in which the applicant would operate. It does not require the Board to put on blinkers and ignore the cumulative effect of the individual licencing decisions it will be called upon to make.
>
> The words "the extra-provincial truck undertaking in respect of which the licence is sought" merely identify the applicant for the licence and were not intended to restrict the Board's discretion to consider all consequences of the granting of the licence, direct or indirect, including the fact that to do so would necessitate the granting of over 100 others over a short period of time.

In order to give any purpose or sense to the legislated transitional period, the words "the operation of the extra-provincial truck undertaking" may be interpreted to extend to such undertaking by the trucking industry in Manitoba as a whole because it is in respect of such extraprovincial trucking undertaking that the appellants applied to the Board. If my interpretation is correct, then, in my opinion, the Board properly took into consideration, in deciding whether the individual applications were likely to be detrimental to the public interest,

1989 CanLII 179 (MB CA)

the likely future developments with respect to the extraprovincial trucking undertaking in Manitoba, which is exactly what the Board did in considering the likely effect of all the 106 similar applications before it, if such applications were granted.

If the Board cannot consider all the circumstances regarding the situation in Manitoba relating to the extraprovincial trucking situation then the result of the Act would be that there is no transitional period at all.

I therefore conclude that the Board did not exceed its jurisdiction or lose its jurisdiction by considering the extraprovincial trucking undertaking as a whole in Manitoba by looking at the similar applications before it to decide if the individual applications would be detrimental to the public interest in the extraprovincial trucking undertaking in Manitoba.

I would, therefore, dismiss the appeals without costs to either party.

Appeal allowed.

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1989 CanLII 179 (MB CA)

Tab 21

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

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

c.

Ontario Power Generation Inc., Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 et Society of Energy Professionals *Intimés*

et

Corporation des services en éducation de l'Ontario *Intervenante*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether

Répertorié : Ontario (Commission de l'énergie) *c.* Ontario Power Generation Inc.

2015 CSC 44

N° du greffe : 35506.

2014 : 3 décembre; 2015 : 25 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Services publics — Électricité — Décision d'un organisme de réglementation des services publics relativement à l'établissement de tarifs — Demande d'un service public en vue d'obtenir le recouvrement de dépenses de rémunération faites ou convenues grâce aux tarifs établis par la Commission de l'énergie de l'Ontario — La Commission avait-elle l'obligation d'employer une méthode particulière axée sur la prudence pour apprécier les dépenses du service public? — Le refus de la Commission d'approuver 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public était-il raisonnable? — Loi de 1998 sur la Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, art. 78.1(5), (6).

Droit administratif — Organismes et tribunaux administratifs — Appels — Qualité pour agir — La Commission de l'énergie de l'Ontario a-t-elle agi de manière inappropriée en se pourvoyant en appel et en faisant valoir

2015 SCC 44 (CanLII)

Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

le caractère raisonnable de sa propre décision? — A-t-elle tenté de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale?

En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que le service public touche des paiements qui correspondent à ses dépenses. La Commission a refusé certains paiements sollicités par Ontario Power Generation (« OPG ») dans sa décision sur la demande d'établissement des tarifs pour la période 2011-2012. Elle a en fait refusé à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public au motif que ces dépenses étaient en rupture avec celles d'organismes comparables dans le secteur réglementé de la production d'énergie. Les juges majoritaires de la Cour divisionnaire de l'Ontario ont rejeté l'appel d'OPG et confirmé la décision de la Commission. La Cour d'appel a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs.

La thèse d'OPG en l'espèce veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence doit s'appliquer à son bénéfice. La Commission prétend pour sa part que la loi ne l'oblige pas à employer quelque méthode fondée sur le principe de la prudence et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses convenues, mais bien des dépenses prévues.

OPG exprime en outre des préoccupations sur la participation de la Commission à l'appel de sa propre décision et fait valoir que la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée et que l'organisme a tenté de se servir de l'appel pour s'auto-justifier en formulant de nouveaux arguments à l'appui de sa décision initiale. La Commission soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

2015 SCC 44 (CanLII)

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli. La décision de la Cour d'appel est annulée et celle de la Commission est rétablie.

La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon : Se pose en premier lieu la question du caractère approprié de la participation de la Commission au pourvoi. Les préoccupations relatives à la participation d'un tribunal administratif à l'appel de sa propre décision ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes. Vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Qui plus est, dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige. Les considérations suivantes permettent de délimiter l'exercice du pouvoir discrétionnaire de la cour de révision : les dispositions législatives portant sur la structure, le fonctionnement et la mission du tribunal en cause et le mandat du tribunal, à savoir si sa fonction consiste soit à trancher des différends individuels opposant plusieurs parties, soit à élaborer des politiques, à réglementer ou à enquêter, ou à défendre l'intérêt public. L'importance de l'équité, réelle et perçue, milite davantage contre la reconnaissance de la qualité pour agir du tribunal administratif qui a exercé une fonction juridictionnelle dans l'instance. Il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

L'application de ces principes à la situation considérée en l'espèce mène à la conclusion qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. La Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait d'autre choix que de prendre part à l'instance pour que sa décision

2015 SCC 44 (CanLII)

a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and

soit défendue au fond. Aussi, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Sa participation au pourvoi n'avait rien d'inapproprié en l'espèce.

La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir, alors que l'autojustification touche à la teneur des prétentions. Un tribunal s'autojustifie lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire. Un tribunal ne peut défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle. Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire, un tribunal ne puisse profiter d'un contrôle judiciaire pour modifier, changer, nuancer ou compléter ses motifs. Même s'il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, la cour de révision étant alors saisie des arguments les plus convaincants à l'appui de chacune des thèses, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Dans la présente affaire, la Commission n'a pas indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant la Cour. Les arguments qu'elle a invoqués en appel n'équivalent pas à une autojustification inadmissible.

La question de fond est celle de savoir si la Commission a employé une méthode appropriée pour refuser à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération. L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins. Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en

2015 SCC 44 (CanLII)

utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood

capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prescrit pas la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et du consommateur lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Suivant cette loi, il incombe cependant au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables. Il semble donc contraire au régime législatif de présumer que la décision du service public de faire les dépenses était prudente. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter la méthode à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

La question à trancher est celle de savoir si la Commission était tenue à l'application d'un critère excluant le recul et présumant la prudence pour décider si les dépenses de rémunération du personnel étaient justes et raisonnables. Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Toutefois, aucun élément du régime législatif n'appuie l'idée que la Commission devrait être tenue en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence de sorte que la seule décision de ne pas l'appliquer pour apprécier des dépenses convenues rendrait déraisonnable sa décision sur les paiements. Lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements.

Lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue. Dans la présente affaire, il convient mieux de voir dans

2015 SCC 44 (CanLII)

as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable

les dépenses de rémunération dont le recouvrement a été refusé à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux de ses syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conservait une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Cependant, la Commission n'était pas tenue d'appliquer un principe de prudence donné pour apprécier ces dépenses. Il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Présumer la prudence aurait été incompatible avec le fardeau de la preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses.

Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG de ces dépenses et en refusant le recouvrement de celles-ci. Puisque les dépenses en cause sont des dépenses d'exploitation, il est peu probable que le refus essuyé dissuade OPG de faire de telles dépenses à l'avenir, car les dépenses de la nature de celles dont le recouvrement a été refusé sont inhérentes à l'exploitation d'un service public. Aussi, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de

2015 SCC 44 (CanLII)

for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield

rémunération d'un service public. La Commission n'entend aucunement, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés syndiqués. Il n'était pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre de ces catégories.

Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il visait à signifier clairement à OPG qu'il lui incombe d'accroître sa performance. L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

La juge Abella (dissidente) : La Commission a rendu une décision déraisonnable en ce qu'elle n'a pas appliqué la méthode qu'elle avait elle-même établie pour déterminer le montant de paiements justes et raisonnables. Elle a à la fois méconnu le caractère contraignant en droit des conventions collectives liant Ontario Power Generation et les syndicats et omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles.

Dans ses motifs, la Commission a dit recourir à deux examens pour arrêter le montant de paiements justes et raisonnables. En ce qui concerne les « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter, la Commission a expliqué qu'elle examinait ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombait au service public d'en démontrer le caractère raisonnable. Cependant, une démarche différente était suivie pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission a expliqué

2015 SCC 44 (CanLII)

these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast

qu'elle appréciait ces dépenses en se livrant à un « contrôle de la prudence ». L'application du principe de la prudence ne soustrait pas ces dépenses à tout examen, mais elle présume que les dépenses ont été faites de manière prudente.

Toutefois, au lieu d'appliquer la méthode qu'elle avait elle-même établie, la Commission a considéré *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables sans se demander s'il s'agissait en partie de dépenses pour lesquelles la société ne pouvait prendre de mesures de réduction. Par son omission d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission a méconnu à la fois son propre cadre méthodologique et le droit du travail.

Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire. Ces conventions ne laissaient pas seulement au service public peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

Or, en appliquant la méthode qu'elle avait dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission a en fait obligé Ontario Power Generation à prouver le caractère raisonnable de toutes ses dépenses de rémunération et a conclu que l'entreprise n'avait présenté ni preuve convaincante, ni documents ou analyses qui justifiaient les barèmes de rémunération. Si elle avait eu recours à l'approche qu'elle avait dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent

2015 SCC 44 (CanLII)

costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

donc être assimilées à juste titre à des dépenses prévues. La Commission n'a toutefois tiré aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation étaient fixes et dans quelle proportion elles demeuraient assujetties au pouvoir discrétionnaire du service public. Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce sens.

En choisissant un critère éminemment susceptible de confirmer l'hypothèse de la Commission selon laquelle les dépenses issues de négociations collectives sont excessives, on se méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas. Même si la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont justes et raisonnables et, à l'intérieur de certaines limites, de définir la méthode utilisée pour établir le montant de ces paiements, dès lors qu'elle a établi une telle méthode, elle doit à tout le moins l'appliquer avec constance.

En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation ne peut savoir comment déterminer les dépenses et les investissements à faire et de quelle manière les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

2015 SCC 44 (CanLII)

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

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By Rothstein J.

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Je serais donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et de renvoyer l'affaire à la Commission pour réexamen.

Jurisprudence

Citée par le juge Rothstein

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2015 SCC 44 (CanLII)

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Glenn Zacher, *Patrick Duffy* and *James Wilson*, for the appellant.

John B. Laskin, *Crawford Smith*, *Myriam Seers* and *Carlton Mathias*, for the respondent Ontario Power Generation Inc.

Richard P. Stephenson and *Emily Lawrence*, for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach*, for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

Kahn, Jonathan. « Keep *Hope* Alive : Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs » (2010), 22 *Fordham Envtl. L. Rev.* 43.

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Glenn Zacher, *Patrick Duffy* et *James Wilson*, pour l'appelante.

John B. Laskin, *Crawford Smith*, *Myriam Seers* et *Carlton Mathias*, pour l'intimée Ontario Power Generation Inc.

Richard P. Stephenson et *Emily Lawrence*, pour l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000.

Paul J. J. Cavalluzzo et *Amanda Darrach*, pour l'intimée Society of Energy Professionals.

Mark Rubenstein, pour l'intervenante.

2015 SCC 44 (CanLII)

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ. was delivered by

[1] ROTHSTEIN J. — In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

[2] OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

[3] OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence

Version française du jugement de la juge en chef McLachlin et des juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon rendu par

[1] LE JUGE ROTHSTEIN — En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario (« Commission ») l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que l'entreprise touche des paiements qui correspondent à ses dépenses. Le présent pourvoi vise la décision de la Commission de refuser certains paiements à Ontario Power Generation Inc. (« OPG ») par suite de sa demande d'approbation de tarifs pour la période 2011-2012. Plus particulièrement, la Commission a refusé d'approuver des dépenses de 145 millions de dollars au titre de la rémunération du personnel affecté aux installations nucléaires au motif que le coût de la main-d'œuvre d'OPG était en rupture avec celui d'organismes comparables dans le secteur réglementé de la production d'énergie.

[2] OPG en a appelé devant la Cour divisionnaire de l'Ontario, dont les juges majoritaires ont rejeté l'appel et confirmé la décision de la Commission. OPG s'est alors adressée à la Cour d'appel de l'Ontario, qui a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs. La Commission interjette aujourd'hui appel devant notre Cour.

[3] OPG soutient que le refus de la Commission d'approuver ces dépenses de rémunération de ses employés est déraisonnable. Sa thèse veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence

2015 SCC 44 (CanLII)

methodology, OPG argues that its decision was unreasonable.

[4] The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

[5] OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

[6] The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility

doit s'appliquer à son bénéfice. La Commission n'ayant pas eu recours à pareille méthode pour se prononcer sur la prudence d'OPG, sa décision serait déraisonnable.

[4] La Commission rétorque que la loi ne l'oblige pas à employer quelque méthode pour appliquer le « principe de la prudence » et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses « convenues », mais bien des dépenses prévues.

[5] OPG déplore par ailleurs que la Commission soit partie à l'appel de sa propre décision. Selon elle, la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée, et la Commission tente de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale.

[6] La Commission fait valoir que la Cour a circonscrit la faculté qu'elle avait de plaider en appel lorsqu'elle lui a reconnu tous les droits d'une partie au moment d'autoriser le pourvoi. Subsidiairement, elle soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

[7] Il convient mieux, à mon sens, de voir dans les dépenses de rémunération qui ont été refusées à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conserve une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Je ne crois cependant pas, malgré ce qu'affirme OPG, que la Commission était tenue d'appliquer un principe de prudence donné pour apprécier les dépenses. La *Loi de 1998 sur la*

2015 SCC 44 (CanLII)

costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

[8] In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

[9] Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

[10] Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

[11] The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

1. (1) . . .

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the

Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, et ses règlements connexes accordent à la Commission une grande latitude dans le choix d'une méthode pour apprécier les dépenses d'un service public, sous réserve de l'obligation de faire en sorte que, au final, les paiements qu'elle ordonne soient justes et raisonnables vis-à-vis à la fois du service public et du consommateur.

[8] Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en refusant de les approuver.

[9] En ce qui concerne la participation de la Commission au pourvoi, je ne crois pas qu'il soit inapproprié qu'elle défende la justesse de sa décision, ni que les arguments qu'elle invoque en appel équivalent à une « autojustification » inadmissible.

[10] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir la décision de la Commission.

I. Cadre réglementaire

[11] La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* fait de la Commission un organisme de réglementation investi du pouvoir de surveiller, entre autres choses, la production d'électricité en Ontario. Son article premier énonce les objectifs de la Commission dans la réglementation de l'électricité, dont les suivants :

1. (1) . . .

1. Protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité.

2. Promouvoir l'efficacité économique et la rentabilité dans les domaines de la production, du transport, de la distribution et de la vente d'électricité ainsi que de la gestion de la demande d'électricité et faciliter le maintien d'une industrie de l'électricité financièrement viable.

La Commission doit donc s'acquitter de sa fonction de réglementation dans le souci d'établir un équilibre entre l'intérêt du consommateur, d'une part,

2015 SCC 44 (CanLII)

electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576, at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, at para. 48.

[12] One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; . . .

[13] Section 78.1(6) provides: ". . . the burden of proof is on the applicant in an application made under this section".

[14] As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that the amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on

et l'efficacité et la viabilité financière du secteur de l'électricité, d'autre part. On lui attribue aussi un rôle de « substitut du marché » (2012 ONSC 729, 109 O.R. (3d) 576, par. 54; 2013 ONCA 359, 116 O.R. (3d) 793, par. 38). Sa fonction consiste alors à reproduire au mieux les forces auxquelles serait soumis un service public dans un contexte concurrentiel (*Toronto Hydro-Electric System Ltd. c. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, par. 48).

[12] L'un des leviers les plus puissants dont dispose la Commission pour atteindre ses objectifs réside dans son pouvoir de fixer le montant des paiements que touche l'entreprise pour la prestation du service. Voici l'extrait pertinent du par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* :

(5) La Commission peut fixer les autres paiements qu'elle estime justes et raisonnables :

a) dans le cadre d'une requête en vue d'obtenir une ordonnance prévue au présent article, si elle n'est pas convaincue que le montant du paiement qui fait l'objet de la requête est juste et raisonnable; . . .

[13] Le paragraphe 78.1(6) dispose pour sa part : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du présent article ».

[14] Suivant mon interprétation de ces dispositions, le service public demande des paiements pour une période à venir (appelée « période de référence »). La Commission fait droit à la demande, sauf lorsqu'elle n'est pas convaincue que les paiements demandés sont justes et raisonnables. Lorsqu'elle n'en est pas convaincue, le par. 78.1(5) lui permet de déterminer les paiements qui lui paraissent justes et raisonnables.

[15] Dans l'arrêt *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, la Cour a eu l'occasion de se prononcer sur le sens d'un libellé législatif semblable. Elle a alors statué que la tarification « juste et raisonnable » était celle [TRADUCTION] « qui, dans les circonstances, était juste pour le

2015 SCC 44 (CanLII)

the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

[16] This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171.

[17] This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

consommateur, d'une part, et qui permettait à l'entreprise d'obtenir un juste rendement sur les capitaux investis, d'autre part » (p. 192-193).

[16] Dès lors, le service public doit pouvoir à long terme recouvrer, grâce à la tarification approuvée, ses dépenses d'exploitation et ses coûts en capital, ces derniers s'entendant alors de tous les coûts liés aux capitaux investis par le service public. Le pourvoi vise principalement les dépenses d'exploitation. Si leur recouvrement n'est pas autorisé, le service public n'obtient pas l'équivalent du coût du capital, soit le rendement exigé par les investisseurs pour investir dans le service public. Le rendement exigé équivaut à celui qu'ils pourraient réaliser sur un investissement comportant un risque comparable. À long terme, à moins que le service public réglementé ne puisse obtenir l'équivalent du coût du capital, les nouveaux investissements seront découragés et l'entreprise ne pourra accroître ses activités, ni même les poursuivre. Ce sont non seulement ses actionnaires, mais aussi ses clients, qui en souffriront (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149).

[17] Évidemment, la Commission n'est pas tenue pour autant d'accepter toute dépense avancée par le service public, et le rendement obtenu par les actionnaires n'est pas non plus garanti. À court terme, ce rendement peut fluctuer, notamment lorsque la consommation d'électricité est supérieure ou inférieure à celle prévue. De même, le refus d'approuver des dépenses d'exploitation dont le service public a convenu aura un effet défavorable sur le rendement des actions. Je n'entends pas me livrer à une analyse détaillée de la manière dont le coût du capital-actions devrait être considéré par les organismes qui réglementent les services publics, mais seulement faire observer que tout refus d'approuver une dépense dont un service public a convenu a un effet sur le rendement des actions. Cet effet justifie une grande attention au vu de la nécessité qu'un service public attire les investissements à long terme et réinvestisse ses bénéfices afin de survivre et de fonctionner de manière efficace et rentable, conformément aux objectifs légaux de la Commission applicables à la réglementation de l'électricité en Ontario.

2015 SCC 44 (CanLII)

[18] As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

[19] Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

[20] In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

[21] OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated

[18] Rappelons qu'il incombe au service public de convaincre la Commission du caractère juste et raisonnable des paiements qu'il sollicite. S'il n'y parvient pas, la Commission peut rejeter la demande en partie à raison du montant qui, selon elle, n'est pas juste et raisonnable.

[19] En cas de refus d'approbation, le service public peut renoncer, si cela lui est possible, aux dépenses d'exploitation en cause. S'il ne peut y renoncer, ses actionnaires absorbent le déficit en touchant un rendement inférieur à celui prévu, c'est-à-dire le coût du capital-actions pour le service public. Il appartient dès lors à la direction de ce dernier de faire en sorte que ses dépenses correspondent à celles que la Commission tient pour justes et raisonnables.

[20] Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

II. Faits

[21] OPG est le plus grand producteur d'énergie de l'Ontario, et sa tarification est réglementée par la Commission. Elle a vu le jour en 1999 et fait partie des entreprises qui ont succédé à Ontario Hydro. Elle exploite des installations nucléaires et hydroélectriques soumises à la réglementation de la Commission qui produisent environ la moitié de l'électricité consommée dans la province. Son unique actionnaire est la province d'Ontario.

[22] Son effectif se compose d'environ 10 000 personnes pour ses activités réglementées, dont 95 p. 100 travaillent dans le secteur nucléaire. Environ 90 p. 100 des employés affectés à ses activités

2015 SCC 44 (CanLII)

businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

[23] Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.

(A.R., vol. III, at p. 215)

[24] As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 ("Board 2008-2009 Decision") (online), at pp. 5-6.

réglementées sont syndiqués, dont approximativement les deux tiers sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 (« STTSE »), et le tiers par Society of Energy Professionals (« Society »).

[23] Dès ses débuts en tant que service public indépendant, OPG a eu conscience de l'importance d'accroître sa performance d'entreprise. Dans le cadre de mesures générales prises à cette fin, elle a entrepris de comparer le rendement de son secteur nucléaire à celui de centrales comparables dans le monde. Dans un protocole d'accord intervenu avec la province d'Ontario le 17 août 2005, OPG a pris l'engagement suivant :

> [TRADUCTION] OPG visera l'amélioration constante de son secteur nucléaire et de ses services internes. Elle comparera sa performance dans ces domaines à celle de l'exploitation des réacteurs CANDU à travers le monde ainsi qu'à celle des producteurs privés et publics d'électricité d'origine nucléaire appartenant au quartile supérieur en Amérique du Nord. Sa priorité première sera d'améliorer l'exploitation de son parc nucléaire actuel.

(d.a., vol. III, p. 215)

[24] Dans la toute première demande qu'elle a présentée à la Commission en 2007 pour la période de référence 2008-2009, OPG a sollicité l'approbation de « recettes nécessaires » se chiffrant à 6,4 milliards de dollars; ce poste correspond [TRADUCTION] « aux recettes dont l'entreprise a besoin au total pour le paiement de toutes ses dépenses susceptibles d'approbation et, également, pour recouvrer tous les coûts liés aux capitaux investis » (L. Reid et J. Todd, « New Developments in Rate Design for Electricity Distributors », dans G. Kaiser et B. Heggie, dir., *Energy Law and Policy* (2011), 519, p. 521). Il s'agissait d'une majoration d'un milliard de dollars par rapport à ce qu'OPG avait demandé et obtenu en application du régime de réglementation en vigueur avant que la Commission ne soit investie de son pouvoir de réglementation vis-à-vis d'elle (EB-2007-0905, décision motivée, 3 novembre 2008 (« décision 2008-2009 de la Commission ») (en ligne), p. 5-6).

2015 SCC 44 (CanLII)

[25] The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. ("Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

[26] In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

[27] On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

[25] La Commission a estimé qu'OPG ne satisfaisait pas aux attentes de son unique actionnaire quant à la performance de son secteur nucléaire et qu'elle avait peu fait pour comparer sa performance à celle de ses pairs, alors qu'elle s'y était engagée dès 2005. De fait, la seule preuve d'une démarche en ce sens présentée par OPG dans le cadre de sa demande d'approbation de tarifs était un rapport établi par Navigant Consulting Inc. en 2006 (« rapport Navigant ») et selon lequel l'effectif d'OPG dépassait de 12 p. 100 celui de ses pairs. La Commission a conclu qu'OPG n'avait pas donné suite aux recommandations du rapport Navigant, ni commandé d'études comparatives ultérieures pour évaluer sa performance (décision 2008-2009 de la Commission, p. 27 et 30). Elle a aussi jugé les coûts d'exploitation d'OPG aux installations nucléaires de Pickering [TRADUCTION] « bien supérieurs à la moyenne du secteur » (p. 29). Elle a donc refusé d'approuver 35 millions de dollars au chapitre des recettes nécessaires et enjoint à OPG de réaliser des études comparatives pour étayer ses demandes ultérieures (p. 31).

[26] Pour expliquer l'importance de la comparaison, la Commission dit ce qui suit : [TRADUCTION] « La raison pour laquelle le protocole d'accord insiste sur la conduite d'une étude comparative est qu'une telle étude peut faire et fait ressortir toute inefficacité ou absence d'accroissement de la productivité » (décision 2008-2009 de la Commission, p. 30).

[27] Le 5 mai 2010, peu avant qu'OPG ne dépose sa deuxième demande d'approbation de tarifs — qui est l'objet du pourvoi —, le ministre de l'Énergie et de l'Infrastructure de l'Ontario a écrit au président-directeur général du service public afin que ce dernier fasse état, dans sa demande, [TRADUCTION] « d'efforts concertés pour trouver des moyens de réaliser des économies et mette l'accent sur les postes de dépense qui sont essentiels à l'exploitation sûre et fiable de ses actifs existants et de ses installations projetées déjà en cours de réalisation » (d.a., vol. IV, p. 38).

2015 SCC 44 (CanLII)

[28] On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

[29] OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

[30] A substantial portion of OPG's wage and compensation expenses was fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

[28] Le 26 mai 2010, OPG a déposé sa demande de paiements pour la période de référence 2011-2012. Elle a présenté à l'appui deux rapports de ScottMadden Inc., un cabinet-conseil en gestion générale spécialisé dans la comparaison et la planification opérationnelle d'installations nucléaires. Le rapport de la phase 1 compare la performance opérationnelle et financière d'OPG à celle d'autres entreprises à partir de mesures de la performance dans le secteur d'activité. Le rapport final de la phase 2 porte sur les objectifs d'accroissement de la performance dans l'optique d'une amélioration de l'exploitation du secteur nucléaire. OPG a collaboré avec ScottMadden pour l'établissement des rapports des phases 1 et 2, qui ont respectivement été publiés les 2 juillet et 11 septembre 2009.

[29] La demande visait la période allant du 1er janvier 2011 au 31 décembre 2012. OPG y demandait l'approbation de recettes nécessaires de 6,9 milliards de dollars, soit une augmentation de 6,2 p. 100 par rapport aux recettes d'alors compte tenu des tarifs approuvés pour la période précédente. Des 6,9 milliards de dollars sollicités au titre des recettes nécessaires, 2,8 milliards auraient été affectés à la rémunération, dont environ 2,4 milliards dans le secteur nucléaire.

[30] Une grande partie des dépenses d'OPG au chapitre des salaires et de la rémunération était déterminée par des conventions collectives intervenues avec les syndicats (STTSE et Society). Lors du dépôt de la demande, OPG était liée par une convention collective conclue avec le STTSE en vigueur d'avril 2009 à mars 2012, alors que la convention collective qui la liait à Society avait expiré le 31 décembre 2010. Ces conventions collectives prévoyaient des augmentations annuelles de salaires se situant entre 2 et 3 p. 100, auxquelles s'ajoutait 1 p. 100 pour les changements d'échelon et l'avancement. Après l'audition de la demande par la Commission dans la présente affaire, un arbitre a ordonné l'application d'une nouvelle convention collective liant OPG et Society à compter du 3 février 2011. La convention collective prévoyait des augmentations de salaires de 1 à 3 p. 100.

2015 SCC 44 (CanLII)

III. Judicial History

A. *Ontario Energy Board: 2011 LNONOEB 57 (QL) ("Board Decision")*

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (para. 73). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (para. 350). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of

III. Historique judiciaire

A. *Commission de l'énergie de l'Ontario (2011 LNONOEB 57 (QL) (« décision de la Commission »))*

[31] Dans sa décision relative à la demande d'approbation de tarifs d'OPG pour la période de référence 2011-2012, la Commission dit que le règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 ») et l'art. 78.1 de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* lui confèrent un vaste pouvoir discrétionnaire quant [TRADUCTION] « au choix d'une méthode indiquée pour fixer des tarifs justes et raisonnables » (para. 73). Elle reconnaît que différents principes peuvent s'appliquer selon qu'il s'agit du recouvrement de dépenses prévues ou de l'examen après coup de dépenses déjà faites. Pour statuer sur la demande dont elle était saisie, il convenait de tenir compte de tout élément de preuve que la Commission jugeait pertinent pour apprécier le caractère raisonnable des recettes nécessaires d'OPG.

[32] La Commission refuse d'approuver les 6,9 milliards de dollars demandés par OPG au titre des recettes nécessaires, les réduisant de 145 millions de dollars pour la période référence [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (par. 350). Cette décision défavorable tient surtout à l'opinion de la Commission selon laquelle OPG compte trop d'employés et ses niveaux de rémunération sont excessifs.

[33] Au sujet de la taille de l'effectif, la Commission relève que, selon une étude comparative qu'OPG a elle-même commandée (le rapport final de la phase 2 de ScottMadden), la dotation de certains postes peut être réduite, voire supprimée. Elle recommande à OPG de revoir sa structure organisationnelle et de réaffecter du personnel ou de supprimer des postes au cours des années suivantes. Vingt à vingt-cinq pour cent du personnel d'OPG devait en effet partir à la retraite entre 2010 et 2014 et il était possible de recourir davantage à la sous-traitance. Au chapitre de la rémunération, elle estime qu'OPG n'a pas présenté d'éléments convaincants pour justifier que les salaires de son personnel opérationnel

2015 SCC 44 (CanLII)

industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. *Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576*

[34] OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test — that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

[35] The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms

se situent au 75e percentile des salaires versés dans le secteur selon une étude de Towers Perrin. Selon la Commission, ils devraient se situer au 50e percentile, soit le même que pour le personnel de direction. Pour décider de la réduction qui s'impose, elle reconnaît qu'OPG pourrait ne pas être en mesure, pendant la période de référence, de réaliser des économies de 145 millions de dollars par la réduction de sa seule masse salariale à cause des conventions collectives en vigueur.

B. *Cour supérieure de Justice de l'Ontario, Cour divisionnaire (2012 ONSC 729, 109 O.R. (3d) 576)*

[34] OPG a fait appel de la décision au motif que celle-ci était déraisonnable et mal motivée. Elle a soutenu que la Commission aurait dû appliquer le principe de l'investissement prudent, c'est-à-dire que, dans son examen des dépenses de rémunération, elle aurait dû seulement s'interroger sur la prudence de conclure, à l'époque, les conventions collectives qui commandaient ces dépenses. Elle a ajouté que la Commission aurait dû présumer que les dépenses étaient prudentes.

[35] La décision de la formation de trois juges de la Cour divisionnaire est partagée. Au nom des juges majoritaires, la juge Hoy (aujourd'hui Juge en chef adjointe de l'Ontario) conclut que la décision de la Commission est raisonnable, car il était possible à la direction d'OPG de réduire ultérieurement ses dépenses globales de rémunération dans le respect des conventions collectives. L'application stricte du principe de l'investissement prudent n'aurait pas permis à la Commission d'atteindre son objectif, d'origine législative, de favoriser la rentabilité de la production d'électricité. Vu la présence de « deux monopoles », il importait particulièrement que la Commission exerce son pouvoir de fixer des tarifs justes et raisonnables :

> [TRADUCTION] Les conventions collectives sont intervenues entre un monopole réglementé qui refile ses coûts au consommateur et qui n'est pas soumis à la concurrence, et deux syndicats qui représentent environ 90 p. 100 des salariés et qui constituent presque un second monopole

2015 SCC 44 (CanLII)

inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. *Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793*

[37] The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

étant donné les conditions héritées d'Ontario Hydro et le fait qu'il serait extrêmement difficile d'exploiter des installations nucléaires sans les salariés. [par. 54]

[36] Dissidente, la juge Aitken opine que,

[TRADUCTION] dans la mesure où les coûts [de rémunération des employés du secteur nucléaire] étaient déterminés à l'avance, c'est-à-dire qu'ils étaient arrêtés par des conventions collectives conclues avant la demande et la période de référence, OPG devait seulement prouver la prudence ou le caractère raisonnable de la décision de conclure ces conventions au vu des circonstances connues ou qui auraient pu raisonnablement être prévues au moment de prendre la décision. [par. 83]

Elle aurait statué que l'omission de la Commission d'appliquer séparément et expressément le principe de la prudence à la partie des dépenses de rémunération du secteur nucléaire dont elle avait convenu, jumelée à son appréciation avec le recul du caractère raisonnable de ces dépenses, a rendu la décision de la Commission déraisonnable.

C. *Cour d'appel de l'Ontario (2013 ONCA 359, 116 O.R. (3d) 793)*

[37] La Cour d'appel de l'Ontario infirme le jugement de la Cour divisionnaire et renvoie le dossier à la Commission. Elle établit une distinction entre les dépenses prévues et les dépenses convenues, ces dernières correspondant à celles que le service public [TRADUCTION] « a convenu d'acquitter pendant [la période de référence] » et qu'il « ne peut modifier ou réduire pendant cette période, généralement à cause d'obligations contractuelles » (par. 29). Même si les dépenses n'ont pas à être acquittées dans l'immédiat, comme en l'espèce, celles qui, « par contrat, doivent être acquittées pendant la période de référence constituent néanmoins des dépenses convenues, même si elles n'ont pas encore été acquittées » (par. 29). La Cour d'appel statue que la Commission doit, dans son examen de ces dépenses, appliquer le principe de la prudence énoncé dans *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4 (par. 15-16). En ne respectant pas ce précédent et en obligeant OPG à « modifier des dépenses qu'elle ne peut juridiquement modifier », la Commission a agi déraisonnablement (par. 37).

2015 SCC 44 (CanLII)

IV. Issues

[38] The Board raises two issues on appeal:

1. What is the appropriate standard of review?

2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

[39] Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

[40] It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

[41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and

IV. Questions en litige

[38] La Commission soulève deux questions dans le cadre du pourvoi :

1. Quelle est la norme de contrôle applicable?

2. Sa décision de retrancher 145 millions de dollars des recettes nécessaires d'OPG est-elle raisonnable?

[39] Devant notre Cour, OPG fait valoir que la Commission outrepasse le rôle qui sied à un tribunal administratif dans le cadre d'un appel de sa propre décision, ce qui soulève la question supplémentaire suivante :

3. La Commission a-t-elle agi de manière inacceptable en se pourvoyant en tant que partie à l'appel en l'espèce?

V. Analyse

[40] Il convient en toute logique d'examiner d'abord le caractère approprié de la participation de la Commission au pourvoi. J'examinerai ensuite la norme de contrôle applicable, puis la question de fond de savoir si la décision de la Commission est raisonnable.

A. *Le rôle qui sied à la Commission dans le cadre du pourvoi*

(1) La qualité pour agir d'un tribunal administratif

[41] Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern Utilities* »), sous la plume du juge Estey, notre Cour se demande pour la première fois en quoi la participation d'un décideur administratif à l'appel ou au contrôle de sa propre décision peut soulever des doutes sur son impartialité. Pour reprendre les propos du juge Estey, « [u]ne participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures

2015 SCC 44 (CanLII)

issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

[42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

[43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

concernant des intérêts et des questions semblables ou impliquant les mêmes parties » (p. 709). Il ajoute que le tribunal administratif avait déjà le loisir de s'expliquer clairement dans sa décision initiale et « [qu'il] enfreint de façon inacceptable la réserve dont [il doit] faire preuve lorsqu'[il] particip[e] aux procédures comme partie à part entière » (p. 709).

[42] Dans *Northwestern Utilities*, notre Cour statue finalement que la portée des observations que pouvait présenter l'Alberta Public Utilities Board — qui, à l'instar de la Commission de l'énergie de l'Ontario, jouissait légalement du droit d'être entendue en appel devant une cour de justice (voir la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 33(3)) — était limitée. Le juge Estey fait remarquer ce qui suit :

> Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître. [p. 709]

[43] Dans *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, qui porte sur le contrôle judiciaire d'une décision de la commission des relations de travail de la Colombie-Britannique, notre Cour approfondit la question de la qualité pour agir d'un organisme administratif. Même si les juges majoritaires qui ont entendu le pourvoi n'adoptent pas d'approche particulière pour se prononcer, le juge La Forest, avec l'appui du juge en chef Dickson, reconnaît qu'un tribunal administratif a qualité non seulement pour expliquer le dossier et faire valoir son point de vue sur la norme de contrôle applicable, mais aussi pour soutenir que sa décision est raisonnable.

[44] Cette conclusion repose sur la nécessité de faire en sorte que la cour de révision rende un jugement parfaitement éclairé sur la décision du tribunal administratif. Le juge La Forest invoque l'arrêt *B.C.G.E.U. c. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), p. 153, pour avancer que le tribunal administratif est le mieux placé pour attirer l'attention de la cour

2015 SCC 44 (CanLII)

those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) ("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision

sur les considérations, enracinées dans la compétence ou les connaissances spécialisées du tribunal, qui peuvent rendre raisonnable ce qui autrement paraîtrait déraisonnable à quelqu'un qui n'est pas versé dans les complexités de ce domaine spécialisé.

(*Paccar*, p. 1016)

Toutefois, le juge La Forest conclut que le tribunal administratif ne peut aller jusqu'à défendre le bien-fondé de sa décision (p. 1017). Sa thèse ne convainc pas une majorité de ses collègues, mais la juge L'Heureux-Dubé, dissidente, qui se prononce elle aussi sur la qualité pour agir du tribunal administratif, souscrit à son analyse sur le fond (p. 1026).

[45] Juridictions de première instance et d'appel ont tenté tant bien que mal de concilier les opinions exprimées par les juges de la Cour dans les arrêts *Northwestern Utilities* et *Paccar*. De fait, même si notre Cour n'est jamais expressément revenue sur *Northwestern Utilities*, elle a parfois autorisé un tribunal administratif à participer à l'instance à titre de partie à part entière sans expliquer sa décision (voir p. ex. *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Ellis-Don Ltd. c. Ontario (Commission des relations de travail)*, 2001 CSC 4, [2001] 1 R.C.S. 221; *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952; voir également *Ontario (Children's Lawyer) c. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) (« *Goodis* »), par. 24).

[46] Dans un certain nombre de décisions, les cours d'appel se sont attaquées à la question et, [TRADUCTION] « pour la plupart, elles sont désormais plus enclines à autoriser un tribunal administratif à participer au contrôle judiciaire ou à l'appel, prévu par la loi, de sa propre décision » (D. Mullan, « Administrative Law and Energy Regulation », dans G. Kaiser et B. Heggie, 35, p. 51). Le survol de trois arrêts de juridictions d'appel suffit à établir la raison d'être de ce revirement.

[47] Dans *Goodis*, le Bureau de l'avocate des enfants demandait à la cour de ne pas reconnaître ou de restreindre la qualité pour agir du Commissaire

2015 SCC 44 (CanLII)

was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.
>
> (*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and

à l'information et à la protection de la vie privée dont la décision faisait l'objet d'une demande de contrôle. La Cour d'appel de l'Ontario a refusé de se montrer formaliste et d'appliquer une règle fixe qui aurait obligé le tribunal administratif à s'en tenir à des observations d'un certain type et elle a adopté plutôt une approche contextuelle et discrétionnaire (*Goodis*, par. 32-34). Elle a conclu que l'approche catégorique n'avait pas de fondement rationnel et a fait remarquer qu'une telle approche pouvait avoir des conséquences fâcheuses :

> [TRADUCTION] Par exemple, la règle catégorique qui refuse au tribunal administratif la qualité pour agir lorsque la contestation allègue le déni de justice naturelle peut priver la cour d'observations capitales lorsque la contestation se fonde des défaillances alléguées de la structure ou du fonctionnement du tribunal administratif, car ce sont des sujets sur lesquels ce dernier est particulièrement bien placé pour formuler des observations. De même, la règle qui reconnaît à un tribunal administratif la qualité pour défendre sa décision au regard du critère de la raisonnabilité, mais non du critère de la décision correcte, permet le débat inutile et empêche le débat utile. Parce que le meilleur moyen d'établir la raisonnabilité d'une décision peut être de démontrer qu'elle est correcte, une règle fondée sur cette distinction semble au mieux ténue, comme l'affirme le juge Robertson dans *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 1386 c. Bransen Construction Ltd.*, [2002] A.N.-B. nº 114, 249 R.N.-B. (2e) 93 (C.A.), par. 32.
>
> (*Goodis*, par. 34)

[48] La Cour d'appel statue qu'il faut voir dans les arrêts *Northwestern Utilities* et *Paccar* la source de [TRADUCTION] « considérations fondamentales » qui doivent guider l'exercice de son pouvoir discrétionnaire eu égard au contexte de l'affaire (*Goodis*, par. 35). Les deux considérations les plus importantes, selon ces arrêts, sont « la nécessité de faire en sorte que la cour rende une décision parfaitement éclairée sur les questions en litige » (par. 37) et « celle d'assurer l'impartialité du tribunal administratif » (par. 38). La cour doit limiter la participation du tribunal administratif lorsque cette participation est de nature à miner la confiance

2015 SCC 44 (CanLII)

to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern*

ultérieure des citoyens dans son objectivité. La Cour d'appel énumère les considérations — sur lesquelles je reviendrai — qui jouent dans la décision d'autoriser ou non le tribunal administratif à présenter des observations et dans la détermination de la mesure dans laquelle il lui est permis de le faire, le cas échéant (par. 36-38).

[49] Dans *Canada (Procureur général) c. Quadrini*, 2010 CAF 246, [2012] 2 R.C.F. 3, le juge Stratas relève deux considérations qui, en common law, limitent selon lui la participation éventuelle d'un tribunal administratif à l'appel de sa propre décision : le caractère définitif et l'impartialité. Le principe du caractère définitif veut qu'un tribunal ne puisse se prononcer de nouveau dans une affaire une fois qu'il a rendu sa décision, motifs à l'appui. J'y reviendrai plus en détail, car j'estime que ce principe se rapporte plus directement à l'« autojustification » de sa décision par le tribunal administratif qu'à sa qualité pour agir comme telle.

[50] Le principe de l'impartialité entre en jeu lorsque le tribunal administratif défend une thèse en appel car, dans certains cas, sa décision peut lui être renvoyée pour réexamen. Le juge Stratas conclut que « [l]es observations que le tribunal administratif présente dans une instance en contrôle judiciaire et qui plongent trop loin, trop intensément ou trop énergiquement dans le bien-fondé de l'affaire soumise au tribunal administratif risquent d'empêcher celui-ci de procéder par la suite à un réexamen impartial du bien-fondé de l'affaire » (*Quadrini*, par. 16). Il conclut toutefois au final que les principes applicables n'imposaient pas de « règles absolues », et il souscrit à l'approche discrétionnaire de la Cour d'appel de l'Ontario dans *Goodis* (*Quadrini*, par. 19-20).

[51] L'arrêt *Leon's Furniture Ltd. c. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110, constitue un troisième exemple récent où une cour de justice est appelée à se pencher sur le sujet. Leon's Furniture a contesté la qualité du commissaire intimé de plaider sur le fond en appel (par. 16). La Cour d'appel de l'Alberta estime elle aussi que le droit applicable doit donner suite aux considérations fondamentales soulevées dans

2015 SCC 44 (CanLII)

Utilities but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court

l'arrêt *Northwestern Utilities*, mais que la question de la qualité pour agir d'un tribunal administratif relève néanmoins d'un pouvoir discrétionnaire qu'il faut exercer eu égard aux éléments contextuels applicables (par. 28-29).

[52] Les considérations énoncées par notre Cour dans *Northwestern Utilities* témoignent de préoccupations fondamentales quant à la participation d'un tribunal administratif à l'appel de sa propre décision. Or, ces préoccupations ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire préconisée dans *Goodis*, *Leon's Furniture* et *Quadrini* offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes (voir N. Semple, « The Case for Tribunal Standing in Canada » (2007), 20 *R.C.D.A.P.* 305; L. A. Jacobs et T. S. Kuttner, « Discovering What Tribunals Do : Tribunal Standing Before the Courts » (2002), 81 *R. du B. can*. 616; F. A. V. Falzon, « Tribunal Standing on Judicial Review » (2008), 21 *R.C.D.A.P.* 21).

[53] Plusieurs considérations militent en faveur d'une démarche discrétionnaire. En particulier, vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Par exemple, il peut être en mesure d'expliquer en quoi une certaine interprétation de la disposition législative en cause peut avoir une incidence sur d'autres dispositions du régime de réglementation ou sur les réalités factuelles et juridiques de son domaine de spécialisation. Il pourrait être plus difficile d'obtenir de tels éléments d'information d'autres parties.

[54] Dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Le contrôle judiciaire se révèle optimal lorsque les deux facettes du litige sont vigoureusement défendues devant la cour de révision. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de

2015 SCC 44 (CanLII)

ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige.

[55] Les tribunaux administratifs canadiens tiennent nombre de rôles différents dans les contextes variés où ils évoluent, de sorte que la crainte d'une partialité de leur part peut être plus ou moins grande selon l'affaire en cause, ainsi que la structure du tribunal et son mandat légal. Dès lors, les dispositions législatives portant sur la structure, le fonctionnement et la mission d'un tribunal en particulier sont cruciales aux fins de l'analyse.

[56] Le mandat de la Commission, comme celui des tribunaux administratifs qui lui sont apparentés, la différencie des tribunaux administratifs appelés à trancher des différends individuels opposant plusieurs parties. Dans le cas de ces derniers, [TRADUCTION] « l'importance de l'équité, réelle et perçue, milite davantage » contre la reconnaissance de leur qualité pour agir (*Henthorne c. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, par. 42).

[57] Par conséquent, je suis d'avis qu'il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

[58] Dans la présente affaire, le par. 33(3) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit à titre préliminaire que « [l]a Commission a le droit d'être représentée par un avocat lors de l'audition de l'appel » devant la Cour divisionnaire. Cette disposition ne confère pas expressément à la Commission une qualité pour agir qui permet de faire valoir le bien-fondé de sa décision en appel, ni ne limite expressément la thèse qu'elle peut défendre à la présentation d'arguments relatifs à la compétence ou à la norme de contrôle comme le fait la disposition en cause dans l'affaire *Quadrini* (voir par. 2).

2015 SCC 44 (CanLII)

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute

[59] Au vu de cette analyse de la qualité pour agir d'un tribunal administratif, lorsque le texte législatif applicable n'est pas clair sur ce point, la cour de révision s'en remet à son pouvoir discrétionnaire pour délimiter les attributs du tribunal administratif en appel. Voici quelles sont, entre autres, les considérations — relevées par les juridictions et les auteurs précités — qui délimitent l'exercice de ce pouvoir discrétionnaire :

(1) lorsque, autrement, l'appel ou la demande de contrôle serait non contesté, il peut être avantageux que la cour de révision exerce le pouvoir discrétionnaire qui lui permet de reconnaître la qualité pour agir du tribunal administratif;

(2) lorsque d'autres parties sont susceptibles de contester l'appel ou la demande de contrôle et qu'elles ont les connaissances et les compétences spécialisées nécessaires pour bien avancer une thèse ou la réfuter, la qualité pour agir du tribunal administratif peut revêtir une importance moindre pour l'obtention d'une issue juste;

(3) le fait que la fonction du tribunal administratif consiste soit à trancher des différends individuels opposant deux parties, soit à élaborer des politiques, à réglementer ou enquêter ou à défendre l'intérêt public influe sur la mesure dans laquelle l'impartialité soulève des craintes ou non. Ces craintes peuvent jouer davantage lorsque le tribunal a exercé une fonction juridictionnelle dans l'instance visée par l'appel, et moins lorsque son rôle s'est révélé d'ordre plutôt réglementaire.

[60] Au vu de ces considérations, je conclus qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. Premièrement, la Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait donc d'autre choix que de prendre part à l'instance pour que sa décision soit défendue au fond. Contrairement à d'autres provinces, l'Ontario n'a nommé aucun défenseur des droits des clients des services publics,

2015 SCC 44 (CanLII)

with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e.

si bien que la Commission — qui est légalement garante de l'intérêt public — n'avait pas vraiment d'autre avenue que celle de se constituer partie à l'instance.

[61] Deuxièmement, la Commission a pour mandat de réglementer les activités de services publics, y compris ceux qui appartiennent au domaine de l'électricité. Son mandat de réglementation est large. Au nombre de ses nombreuses fonctions, mentionnons l'octroi de permis aux participants du marché, l'approbation de nouvelles installations de transport et de distribution et l'autorisation des tarifs exigés des consommateurs. Dans la présente affaire, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Il s'agit d'une situation différente de celle où le tribunal administratif est habilité à trancher un différend entre deux parties, le souci d'impartialité pouvant alors militer davantage contre la qualité d'agir comme partie à part entière.

[62] L'objet de la réglementation est un autre élément qui milite en faveur de la pleine reconnaissance de la qualité pour agir de la Commission, puisque la crainte d'apparence de partialité est faible en l'espèce. Pour reprendre les propos du juge Doherty dans *Enbridge*, par. 28, [TRADUCTION] « [à] l'instar de tout organisme réglementé, je suis certain que [la Commission] donne parfois raison à Enbridge et lui donne parfois tort. J'ose croire qu'Enbridge comprend parfaitement le rôle de l'organisme de réglementation et sait que [la Commission] statue sur chaque demande en fonction des faits qui lui sont propres ». Je conclus donc que la participation de la Commission au pourvoi n'a rien d'inapproprié. Reste à savoir si les arguments de la Commission sont appropriés.

(2) L'autojustification

[63] La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif (ci-après le « tribunal ») est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la

2015 SCC 44 (CanLII)

jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to

qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir (p. ex. des prétentions relatives à sa compétence ou à la justesse de sa décision), alors que l'« autojustification » touche à la teneur des prétentions.

[64] Suivant le sens attribué à cette notion par les cours de justice qui l'ont examinée dans le contexte de la qualité pour agir, un tribunal « s'autojustifie » lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire (voir p. ex. *United Brotherhood of Carpenters and Joiners of America, Local 1386 c. Bransen Construction Ltd.*, 2002 NBCA 27, 249 R.N.-B. (2e) 93). Autrement dit, un tribunal ne pourrait [TRADUCTION] « défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle » (*Goodis*, par. 42).

[65] Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, le tribunal ait statué définitivement et que son travail soit terminé, « à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire » (*Quadrini*, par. 16, citant *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848). Partant, la cour a conclu qu'un tribunal ne peut profiter d'un contrôle judiciaire pour « modifier, changer, nuancer ou compléter ses motifs » (*Quadrini*, par. 16). Dans l'arrêt *Leon's Furniture*, le juge Slatter affirme qu'un tribunal peut [TRADUCTION] « offrir différentes interprétations de ses motifs ou de sa conclusion, [mais] non tenter de remanier ses motifs, invoquer de nouveaux arguments ou se prononcer sur des questions de fait que ne soulève pas déjà le dossier » (par. 29).

[66] En revanche, le juge Goudge conclut, dans l'arrêt *Goodis*, avec l'accord de tous ses collègues, que même si la commissaire invoque un argument qui ne figure pas expressément dans sa décision initiale, elle peut le soulever en appel. Il reconnaît que [TRADUCTION] « [l']importance de décisions bien étayées pourrait être compromise si un tribunal pouvait simplement offrir, à l'appui de sa décision attaquée devant une cour de justice,

2015 SCC 44 (CanLII)

support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also

des motifs différents, plus convaincants, voire opposés » (par. 42), mais il conclut finalement que la commissaire peut présenter un nouvel argument dans le cadre d'un contrôle judiciaire. Le nouvel argument n'est toutefois « pas incompatible avec les motifs formulés dans la décision, car on peut en effet affirmer qu'il en fait implicitement partie » (par. 55). « La commissaire pouvait donc soulever l'argument devant la Cour divisionnaire, et celle-ci pouvait en tenir compte pour se prononcer » (par. 58).

[67] Les deux thèses avancées sur l'autojustification se défendent. D'une part, il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, car la cour de révision est alors saisie des arguments les plus convaincants à l'appui de chacune des thèses (Semple, p. 315). Cela demeure vrai même si ces arguments ne figurent pas dans la décision initiale. D'autre part, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Permettre au tribunal de présenter de nouveaux arguments en appel ou dans le cadre du contrôle judiciaire de sa décision initiale peut aussi amener les parties à conclure que le processus n'est pas équitable. Il peut surtout en être ainsi lorsque le tribunal est appelé à trancher des différends opposant deux personnes privées, puisque la présentation de nouveaux arguments en appel peut donner l'impression que le tribunal « se ligue » contre l'une des parties. Or, je le rappelle, il ne convient généralement pas que le tribunal doté d'un tel mandat participe en tant que partie à l'appel.

[68] Je ne suis pas convaincu que la formulation en appel de nouveaux arguments qui interprètent la décision initiale ou qui l'étayaient implicitement, mais non expressément, va à l'encontre du principe du caractère définitif. De même, il n'est pas contraire à ce principe de permettre au tribunal d'expliquer à la cour de révision quelles sont ses politiques et pratiques établies, même lorsque les motifs contestés n'en font pas mention. Le tribunal n'a pas à les expliquer systématiquement dans chaque décision à la seule fin de se prémunir contre une allégation d'autojustification advenant qu'il

2015 SCC 44 (CanLII)

respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> . . . if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone

soit appelé à les préciser en appel ou en contrôle judiciaire. Il peut aussi répondre aux arguments de la partie adverse dans le cadre du contrôle judiciaire de sa décision car il le fait dans le but de faire confirmer sa décision initiale, non de rouvrir le dossier et de rendre une nouvelle décision ou de modifier la décision initiale. L'effet de la décision initiale demeure inchangé même lorsque le tribunal demande sa confirmation en offrant une interprétation de cette décision ou en invoquant des motifs qui la sous-tendent implicitement.

[69] Cependant, je ne crois pas qu'un tribunal devrait avoir la possibilité inconditionnelle de présenter une thèse entièrement nouvelle dans le cadre d'un contrôle judiciaire, car lui reconnaître cette faculté pourrait l'exposer à des allégations d'iniquité et nuire au prononcé de décisions bien motivées au départ. Je suis d'avis qu'il y a un juste équilibre entre ces considérations et celles voulant que la cour de révision entende les arguments les plus convaincants de chacune des parties lorsqu'il est permis au tribunal d'offrir différentes interprétations de ses motifs ou de ses conclusions ou de présenter des arguments qui sous-tendent implicitement ses motifs initiaux (voir *Leon's Furniture*, par. 29; *Goodis*, par. 55).

[70] Je ne crois pas que, dans la présente affaire, la Commission a indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant notre Cour. Dans son mémoire en réplique, la Commission signale — à juste titre, selon moi — que ses observations mettent simplement en évidence ce qui ressort du dossier ou répondent aux arguments des intimées.

[71] J'exhorte toutefois la Commission et, de façon générale, tout tribunal qui se constitue partie à une instance à se soucier du ton qu'il adopte lors du contrôle judiciaire de sa décision. Comme le fait remarquer le juge Goudge dans l'arrêt *Goodis*,

> [TRADUCTION] le tribunal administratif qui veut faire valoir son point de vue lors du contrôle judiciaire de sa décision [doit] porte[r] une attention particulière au ton qu'il adopte. Bien qu'il ne s'agisse pas d'un motif précis pour lequel sa qualité pourrait être restreinte, il ne

2015 SCC 44 (CanLII)

of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

[73] The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998*, the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35. Nothing in this case suggests the presumption should be rebutted.

[74] This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the

fait aucun doute que le ton des observations proposées offre une toile de fond à cet égard. Le tribunal qui désire contester une demande de contrôle judiciaire sera utile à la cour dans la mesure où ses observations permettront d'éclaircir les questions et où elles seront fondées sur ses connaissances spécialisées, au lieu d'être empreintes d'un parti pris agressif contre la partie adverse. [par. 61]

[72] En l'espèce, la Commission a généralement présenté des arguments utiles dans le cadre d'un débat contradictoire, mais respectueux. Une mise en garde s'impose toutefois selon moi en ce qui concerne l'affirmation de la Commission selon laquelle l'application du critère de l'investissement prudent [TRADUCTION] « ne changerait vraisemblablement pas l'issue de l'affaire » si la décision lui était renvoyée pour réexamen (m.a., par. 99). Une telle affirmation peut, si elle est poussée trop loin, faire douter de l'impartialité du tribunal au point où une cour de justice serait justifiée d'exercer son pouvoir discrétionnaire et de limiter la qualité pour agir du tribunal de manière à préserver son impartialité.

B. *Norme de contrôle*

[73] Les parties conviennent que la norme de contrôle qui s'applique aux actes de la Commission lorsqu'elle fait appel à son expertise pour fixer les tarifs et approuver des paiements sur le fondement de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* est celle de la décision raisonnable. Je suis d'accord. En outre, dans la mesure où l'issue du pourvoi repose sur l'interprétation de cette loi — la loi constitutive de la Commission —, l'application de la norme de la décision raisonnable doit être présumée (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 30; *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, par. 35). Rien ne donne à penser en l'espèce que la présomption soit réfutée.

[74] Le pourvoi fait intervenir deux notions distinctes de ce qui est « raisonnable ». L'une est liée à la norme de contrôle : en appel, la Cour doit apprécier la « justification [. . .], [. . .] la transparence et [. . .] l'intelligibilité » du raisonnement de la

2015 SCC 44 (CanLII)

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. *Choice of Methodology Under the Ontario Energy Board Act, 1998*

[75] The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

[76] The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

[77] The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

Commission et se demander si la décision appartient « aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » (*Dunsmuir*, par. 47). L'autre est d'origine législative : la Commission doit utiliser son pouvoir de fixation des tarifs de manière à établir un équilibre qu'elle considère juste et raisonnable entre les intérêts du service public et ceux des consommateurs. Je m'efforce ci-après de respecter cette distinction.

C. *Choix de la méthode suivant la Loi de 1998 sur la Commission de l'énergie de l'Ontario*

[75] La question de savoir si le refus de la Commission d'approuver le recouvrement de certaines dépenses est raisonnable ou non dépend du lien de ce refus avec les pouvoirs légaux et réglementaires de la Commission d'approuver des paiements au service public et de répercuter ces paiements sur les tarifs exigés des consommateurs. Les pouvoirs généraux de la Commission en matière de fixation des tarifs et des paiements sont énoncés précédemment à la rubrique « Cadre réglementaire ».

[76] L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins.

[77] Or, la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prévoit ni à l'art. 78.1 ni à quelque autre article la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et des consommateurs lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Certes, sous réserve de certaines exceptions prévues au par. 6(2), le par. 6(1) du règlement 53/05 permet expressément à la Commission de [TRADUCTION] « définir la forme, la méthode, les hypothèses et les calculs utilisés pour rendre une ordonnance qui établit le montant du paiement aux fins de l'article 78.1 de la Loi ».

2015 SCC 44 (CanLII)

[78] As a contrasting example, para. 4.1 of s. 6(2) of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were prudently incurred" and that "the financial commitments were prudently made": para. 4.1 of s. 6(2). The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

[78] En revanche, la disposition 4.1 du par. 6(2) du règlement 53/05 prescrit le recours à une méthode particulière lorsque la Commission examine [TRADUCTION] « les dépenses faites et les engagements financiers fermes pris dans le cadre de la planification et de la préparation relatives à la réalisation d'installations nucléaires projetées ». La Commission doit être convaincue que « les dépenses ont été faites de manière prudente » et que « les engagements financiers ont été pris de manière prudente » (la disposition 4.1 du par. 6(2)). La disposition établit donc un cadre précis où l'analyse de la Commission est axée sur la prudence de la décision de faire certaines dépenses ou de convenir de certaines dépenses. L'absence d'un libellé en ce sens dans la disposition générale qu'est le par. 6(1) constitue un autre motif de considérer que le règlement confère à la Commission un large pouvoir discrétionnaire quant à la méthode à employer pour ordonner un paiement lorsque les dispositions particulières du par. 6(2) ne s'appliquent pas.

[79] Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

[79] Pour ce qui concerne la question de savoir si la présomption de prudence doit s'appliquer aux décisions d'OPG de faire des dépenses, ni la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, ni le règlement 53/05 n'établissent expressément une telle présomption. D'ailleurs, suivant cette loi, il incombe au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables (par. 78.1(6) et (7)). Il semble donc contraire au régime législatif de présumer que la décision de faire des dépenses est prudente.

[80] Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998*: ". . . the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just

[80] La juge Abella conclut que l'examen des dépenses d'OPG par la Commission aurait dû consister à « contrôl[er] la prudence des dépenses après coup et [à] appliqu[er] la présomption réfutable selon laquelle elles étaient raisonnables » (par. 150). Or, une telle approche est contraire au régime législatif. La Commission jouit certes d'une grande marge de manœuvre quant au choix d'une méthode, mais elle n'a pas la faculté d'inverser le fardeau de la preuve établi au par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du

2015 SCC 44 (CanLII)

and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

[81] In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. *Characterization of Costs at Issue*

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be

présent article ». Il ne s'ensuit pas, bien sûr, que le requérant doit systématiquement prouver le caractère juste et raisonnable de chacune de ses dépenses, individuellement. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter les méthodes à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

[81] La cour de justice appelée à contrôler la décision de la Commission d'approuver ou non des paiements à un service public doit se demander si la conclusion de la Commission selon laquelle un paiement d'un certain montant est « juste et raisonnable » tant pour le service public que pour le consommateur est raisonnable ou non. Cette approche concorde avec les décisions de notre Cour sur l'établissement de tarifs dans d'autres secteurs réglementés où l'organisme de réglementation dispose d'un pouvoir discrétionnaire qui lui permet de recourir à une méthode ou à une autre. Dans ces décisions, la Cour signale que « [l]'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir » (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 40 (tarification des télécommunications), citant *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), p. 13 (tarification du transport ferroviaire des marchandises)). Certes, de nos jours, il faut voir dans ces propos la reconnaissance du pouvoir d'une cour de justice d'intervenir lorsqu'elle estime que l'exercice du pouvoir discrétionnaire a débouché sur une décision déraisonnable. Reste donc à décider si la méthode d'analyse retenue par la Commission pour refuser d'approuver les dépenses en l'espèce a rendu sa décision déraisonnable selon la norme du paiement « juste et raisonnable ».

D. *Qualification des dépenses en cause*

[82] Les dépenses prévues sont celles que le service public n'a pas encore acquittées et qu'un pouvoir discrétionnaire lui permet de renoncer à faire.

2015 SCC 44 (CanLII)

made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

Lorsque leur approbation est refusée, le service public peut soit modifier ses plans et renoncer aux dépenses, soit les faire malgré le refus étant entendu qu'elles seront assumées par les actionnaires plutôt que par les consommateurs. À l'opposé, les dépenses convenues sont celles que ses actionnaires et lui n'auront d'autre choix que d'assumer si l'organisme de réglementation refuse de permettre leur recouvrement et d'approuver les paiements sollicités. Cela peut advenir lorsque le service public a déjà déboursé la somme en cause ou qu'il a pris un engagement contraignant ou était assujetti à d'autres obligations qui écartent tout pouvoir discrétionnaire lui permettant de ne pas acquitter la somme ultérieurement.

[83] There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

[83] Les parties ne s'entendent pas sur la qualification des dépenses que la Commission a refusé d'approuver. Selon cette dernière, les dépenses de rémunération pour la période de référence sont des dépenses prévues dans la mesure où elles n'ont pas encore été acquittées. OPG soutient plutôt qu'il s'agit de dépenses convenues puisqu'elle est tenue par contrat de verser les sommes en cause au moment où elles deviennent exigibles. Ce désaccord est important car le contrôle de la prudence « sans recul », sur lequel je reviendrai plus en détail, a vu le jour dans le contexte de dépenses « convenues ». Il est en effet absurde d'appliquer ce critère lorsque le service public peut encore décider, en fin de compte, de faire ou non les dépenses; la décision de convenir de ces dépenses n'a pas encore été prise. Par conséquent, lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility

[84] En l'espèce, au moins une partie des dépenses de rémunération jugées excessives par la Commission était imputable à des conventions collectives qu'OPG avait conclues avant la présentation de sa demande et qui faisaient en sorte que sa masse salariale globale dépasse le 75e percentile pour des emplois comparables dans d'autres services publics. Les conventions collectives laissaient

2015 SCC 44 (CanLII)

regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

[85] However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

[86] Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. *The Prudent Investment Test*

[87] In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has

peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, OPG devait respecter ceux établis par les conventions collectives et elle ne jouissait d'une marge de manœuvre que pour les conditions qui n'étaient pas ainsi régies. Par conséquent, les dépenses liées aux barèmes de rémunération et aux niveaux de dotation imposés par les conventions collectives étaient des dépenses convenues.

[85] La Commission conclut cependant que les dépenses de rémunération pour la période de référence ne sont pas toutes déterminées par les conventions collectives et qu'elles ne sont donc pas toutes convenues, car OPG dispose d'une certaine marge de manœuvre pour gérer globalement les niveaux de dotation en fonction du départ prévu d'employés d'âge mûr. Toutefois, la décision de la Commission ne précise pas quel pourcentage exact des 145 millions de dollars refusés au chapitre de la rémunération pourrait être recouvré grâce à la réduction naturelle du nombre d'employés ou à d'autres ajustements, ni quel pourcentage serait nécessairement assumé par le service public et son actionnaire. Par conséquent, les dépenses refusées en l'espèce doivent être considérées comme des dépenses convenues, du moins en partie. Il est déraisonnable d'y voir en totalité des dépenses prévues étant donné l'effet contraignant des conventions collectives sur OPG.

[86] Après avoir établi que les dépenses refusées sont, du moins partiellement, des dépenses convenues, il faut déterminer si la Commission a agi de façon raisonnable en appliquant le critère de l'investissement prudent sans exclure le recul. J'examine donc maintenant l'historique jurisprudentiel du critère de l'investissement prudent et les données méthodologiques y afférentes.

E. *Le critère de l'investissement prudent*

[87] Décider si la méthode de la Commission était raisonnable en l'espèce exige de se pencher sur l'historique du critère de l'investissement prudent (parfois appelé « contrôle de la prudence » ou « critère de la prudence ») pour déterminer ses origines, le situer dans le contexte et savoir quelle portée lui

2015 SCC 44 (CanLII)

been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

[88] American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 54.

[89] The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn.1.

[90] In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

ont attribué les services publics, les organismes de réglementation et les rédacteurs législatifs.

(1) Jurisprudence américaine

[88] La jurisprudence américaine a joué un rôle important dans l'application du critère de l'investissement prudent aux services publics réglementés. Rappelons d'abord l'observation de notre Cour selon laquelle, « [b]ien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 54).

[89] L'application du critère de l'investissement prudent aux services publics réglementés s'origine de l'opinion concordante du juge Brandeis, de la Cour suprême des États-Unis, datant de 1923 et selon laquelle les services publics ont droit à la déférence lorsqu'ils cherchent à recouvrer [TRADUCTION] « un investissement qui, normalement, serait considéré comme raisonnable » (*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1).

[90] Dans les décennies qui ont suivi, les organismes de réglementation américains chargés de l'examen de dépenses déjà faites par les services publics ont généralement appliqué soit le critère axé sur [TRADUCTION] « l'emploi et l'utilité », soit le critère de « l'investissement prudent » (J. Kahn, « Keep *Hope* Alive : Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs » (2010), 22 *Fordham Envtl. L. Rev.* 43, p. 49). À chacun de ces critères correspond une approche différente pour déterminer quelles dépenses peuvent équitablement et raisonnablement être refilées aux consommateurs. Le critère de l'emploi et de l'utilité permet au service public d'obtenir un rendement, mais seulement sur l'investissement qui est réellement employé et qui se révèle utile à l'exploitation de l'entreprise, étant entendu que les consommateurs ne doivent pas être tenus de payer pour un investissement dont ils ne bénéficient pas.

2015 SCC 44 (CanLII)

[91] By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test — a test that allows for payments related to investments that may not be used or useful — it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

[92] The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

[91] Au critère de l'investissement prudent correspond l'approche retenue par le juge Brandeis et selon laquelle des dépenses peuvent être recouvrées si elles ne sont pas imprudentes compte tenu de ce qu'on sait au moment où est fait l'investissement ou la dépense (Kahn, p. 49-50). Bien qu'il puisse sembler problématique du point de vue de la protection des intérêts des consommateurs d'adopter le critère de l'investissement prudent — dans la mesure où il autorise un paiement pour un investissement qui n'a été ni employé ni utile —, ce critère permet aux organismes de réglementation d'atténuer les possibles effets draconiens du critère de l'emploi et de l'utilité, lequel impose un lourd fardeau au service public. Par exemple, refuser le recouvrement d'un mauvais investissement qui paraissait raisonnable au moment où il a été fait risque de compromettre la santé financière du service public et d'avoir un effet dissuasif sur l'investissement ultérieur de capitaux par ce dernier. Pareil résultat peut ensuite entraîner des conséquences négatives pour les consommateurs, dont les intérêts à long terme sont mieux servis si le secteur de l'électricité est à la fois dynamique, efficace et viable. Par conséquent, un organisme de réglementation peut recourir au critère de l'investissement prudent afin d'établir un juste équilibre entre les intérêts des consommateurs et ceux du service public (voir Kahn, p. 53-54).

[92] Les États ont eu recours à des approches différentes pour établir le fondement légal de la réglementation des services publics. Certains ont permis aux organismes de réglementation d'appliquer le critère de l'investissement prudent, alors que d'autres ont légiféré pour écarter le recouvrement de capitaux investis qui n'étaient [TRADUCTION] « ni employés ni utiles au public » (*Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), p. 302). Fait à signaler, dans cette affaire où on lui demandait si des paiements « justes et raisonnables » à un service public nécessitaient, sur le plan constitutionnel, que le critère de l'investissement prudent s'applique aux dépenses déjà faites, la Cour suprême des É.-U. a conclu que « [l']élévation d'une seule méthode de tarification au rang de norme constitutionnelle écarterait inutilement d'autres avenues dont pourraient bénéficier à la fois consommateurs et investisseurs » (p. 316).

2015 SCC 44 (CanLII)

[93] American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> . . . we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.

(*U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), at p. 274)

[94] Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

[95] Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

[96] In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

[93] Les cours de justice américaines ont aussi reconnu que, dans certains contextes, des aspects du critère de l'investissement prudent peuvent se révéler moins justifiables. Par exemple, saisie du contrôle judiciaire de coûts transférés à un service public par une entreprise affiliée non réglementée, la Cour suprême de l'Utah s'est demandé s'il était justifié de présumer que les coûts étaient raisonnables et elle a conclu par la négative :

> [TRADUCTION] . . . nous ne pensons pas que les dépenses de l'affiliée devraient être présumées raisonnables. Bien que la pression exercée par un marché concurrentiel puisse nous permettre de présumer, faute d'une preuve contraire, que les dépenses d'une entreprise non affiliée sont raisonnables, on ne peut en dire autant des dépenses d'une affiliée qui ne sont pas faites dans le cadre d'une opération sans lien de dépendance.

(*U.S. West Communications, Inc. c. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), p. 274)

[94] Il appert donc de la jurisprudence américaine que le critère de l'investissement prudent s'est révélé utile pour arriver à un résultat juste et raisonnable, mais qu'il ne saurait constituer un élément obligatoire de la réglementation des services publics dont l'application s'impose même lorsqu'aucune disposition législative ne le prévoit.

(2) Jurisprudence canadienne

[95] Sous l'impulsion de la jurisprudence américaine, plusieurs organismes de réglementation et cours de justice du Canada se sont aussi penchés sur le rôle du contrôle de la prudence et ont parfois appliqué une variante du critère de l'investissement prudent. Je passerai en revue certaines de leurs décisions dans le but non pas de répertorier toutes les applications du critère, mais bien de faire état de la manière dont on l'a appliqué dans différents contextes.

[96] Dans l'arrêt *British Columbia Electric Railway Co. c. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837, le juge Martland relève que, suivant la loi en cause, l'organisme de réglementation est tenu à ce qui suit lorsqu'il fixe des tarifs :

2015 SCC 44 (CanLII)

(*a*) . . . shall consider all matters which it deems proper as affecting the rate: [and]

(*b*) . . . shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, c. 277, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

[97] In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

. . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is

[TRADUCTION]

(*a*) . . . considérer tout élément qu'il juge susceptible d'influer sur les tarifs; [et]

(*b*) . . . tenir dûment compte, notamment, de la protection du public contre les tarifs excessifs qui excèdent ce qui est juste et raisonnable en contrepartie du service de la nature et de la qualité de celui fourni et de l'obtention par le service public d'un rendement juste et raisonnable sur les biens qu'il affecte à la prestation du service ou qu'il acquiert à cette fin de manière prudente et raisonnable, selon leur valeur d'expertise. [p. 852]

(Citant *Public Utilities Act*, R.S.B.C. 1948, c. 227, al. 16(1)*b*) (abrogé S.B.C. 1973, c. 29, art. 187).)

Le juge Martland conclut de ce libellé que l'organisme de réglementation [TRADUCTION] « appelé à se prononcer sur la fixation de tarifs jouit d'un pouvoir discrétionnaire absolu quant aux éléments qu'il juge susceptibles d'influer sur les tarifs, mais qu'il doit, lorsqu'il établit la tarification, satisfaire aux deux exigences expressément prévues à l'al. (*b*) » (p. 856). Ainsi, l'organisme de réglementation est tenu par cette loi de faire en sorte que le public ne paie que ce qui est juste et raisonnable et que le service public obtienne un rendement juste et raisonnable sur la valeur des biens qu'il a utilisés *ou acquis de manière prudente et raisonnable*. Cette protection légale expresse du recouvrement du coût des biens acquis avec prudence offre un exemple de libellé législatif sur le fondement duquel notre Cour a conclu à l'existence d'une obligation non discrétionnaire d'assurer au service public un rendement juste sur les immobilisations qu'il a utilisées ou acquises avec prudence.

[97] En 2005, la Nova Scotia Utility and Review Board (« NSUARB ») a examiné puis adopté la définition du critère de l'investissement prudent proposée par l'Illinois Commerce Commission :

[TRADUCTION] . . . la prudence est la norme de diligence qu'une personne raisonnable aurait respectée dans la situation rencontrée par la direction du service public au moment où elle a dû prendre les décisions. [. . .] Le recul est exclu lorsqu'il s'agit d'apprécier la prudence. [. . .]

2015 SCC 44 (CanLII)

prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

[98] The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

[99] In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

– Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

La décision du service public est prudente si elle fait partie des décisions qu'une personne raisonnable aurait pu prendre. [. . .] La norme de la prudence reconnaît que des personnes raisonnables peuvent sincèrement différer d'opinions sans pour autant que l'une ou l'autre soit imprudente.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 (« *Nova Scotia Power 2005* »), par. 84 (CanLII))

La NSUARB conclut alors que, [TRADUCTION] « [a]près examen de la jurisprudence, [. . .] la définition d'imprudence proposée par l'Illinois Commerce Commission constitue un critère raisonnable susceptible d'application en Nouvelle-Écosse » (par. 90). Elle se demande notamment si la stratégie récente d'achat de carburant du service public a été prudente, et elle répond par la négative (par. 94). Elle ne se dit cependant pas tenue d'appliquer le critère de l'investissement prudent.

[98] En 2012, la NSUARB a renouvelé son adhésion au critère de l'investissement prudent (*Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 (« *Nova Scotia Power 2012* »), par. 143-146 (CanLII)). Dans cette affaire, le service public dont les arguments faisaient l'objet de l'examen [TRADUCTION] « a confirmé que, selon lui, il s'agit du critère que la commission devrait appliquer » (par. 146). La NSUARB a ensuite appliqué le critère de la prudence pour décider si plusieurs décisions opérationnelles du service public avaient été prudentes ou non, et elle a conclu que certaines d'entre elles ne l'avaient pas été (par. 188).

[99] En 2006, dans l'arrêt *Enbridge*, la Cour d'appel de l'Ontario se penche sur la teneur du critère de l'investissement prudent. Cet arrêt revêt un intérêt particulier pour deux raisons. Premièrement, la Cour d'appel y circonscrit précisément l'application du critère :

[TRADUCTION]

– La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.

2015 SCC 44 (CanLII)

– To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

– Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

– Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

[100] Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether

– Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.

– Le recul est exclu de l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.

– La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision. [par. 10]

[100] Deuxièmement, elle donne plusieurs fois à entendre que le recours au critère de l'investissement prudent est nécessaire pour se prononcer sur les dépenses convenues. Plus précisément, elle signale que pour décider du caractère juste et raisonnable de l'augmentation des tarifs demandée par Enbridge,

[TRADUCTION] la [Commission] était tenue de soupeser les intérêts opposés d'Enbridge et des consommateurs. Pour ce faire, elle devait appliquer ce qu'on appelle dans le domaine de la réglementation des tarifs des services publics le critère de la « prudence ». Enbridge était en droit de recouvrer ses coûts au moyen d'une augmentation de ses tarifs, mais seulement si la décision derrière ces coûts était « prudente ». [par. 8]

La Cour d'appel ajoute que la Commission a appliqué le [TRADUCTION] « bon critère » (par. 18). Ces affirmations tendent à indiquer que, selon la Cour d'appel, le contrôle de la prudence est fondamental et nécessaire afin que les paiements soient justes et raisonnables.

[101] Or, dans cette affaire, la Cour d'appel n'était pas directement saisie de la question de savoir si, dans ce contexte, l'application du critère de la prudence était nécessaire à l'appréciation du caractère juste et raisonnable des paiements. En fait, les parties s'entendaient [TRADUCTION] « pour l'essentiel sur la démarche qui devait être celle de la Commission pour apprécier la prudence d'une décision d'un

2015 SCC 44 (CanLII)

the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

[102] The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exist different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment

service public » (par. 10). La question en litige était celle de savoir si la Commission avait eu recours à cette démarche de manière raisonnable. En ce sens, l'affaire *Enbridge* s'apparente à *Nova Scotia Power 2012* : les deux concernent l'application du critère de la prudence lorsqu'aucune des parties ne soutient qu'une autre démarche aurait pu raisonnablement s'appliquer.

(3) Conclusion sur le critère de l'investissement prudent

[102] Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Il existe certes des formulations différentes du contrôle de la prudence, mais l'arrêt *Enbridge* précise en détail quelle peut être la démarche d'un organisme de réglementation appelé à décider si, au moment où le service public les a faites ou en a convenu, les dépenses étaient prudentes ou non. Le plus souvent, le contrôle de la prudence excluant le recul s'applique aux coûts en capital, mais l'arrêt *Enbridge* et les décisions *Nova Scotia Power* (*2005* et *2012*) montrent qu'il s'applique aussi aux dépenses d'exploitation. Je ne vois aucune raison de principe d'interdire à un organisme de réglementation d'appliquer le critère de la prudence aux dépenses d'exploitation.

[103] Toutefois, aucun élément du régime législatif ou de la jurisprudence applicable ne me paraît appuyer l'idée que la Commission devrait être *tenue* en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence énoncé dans l'arrêt *Enbridge*, de sorte que la seule décision de ne pas l'appliquer pour apprécier la prudence de dépenses convenues rendrait déraisonnable sa décision sur les paiements. Notre Cour n'est pas non plus justifiée de créer pareille obligation. Je le répète, lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers

2015 SCC 44 (CanLII)

amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

[104] To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

[105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements (règlement 53/05, par. 6(1)).

[104] En résumé, il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Comme nous l'avons vu, présumer la prudence serait incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec le recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses. Je précise toutefois que la présente décision ne doit pas être interprétée de façon à permettre aux organismes de réglementation de refuser à leur guise d'approuver des dépenses convenues. Le contrôle de la prudence de dépenses convenues peut, dans bien des cas, constituer un bon moyen de faire en sorte que les services publics soient traités équitablement et demeurent aptes à obtenir les investissements de capitaux requis. Comme je l'explique plus loin, en ce qui a trait plus particulièrement aux coûts en capital convenus, le contrôle de la prudence offre le plus souvent un moyen raisonnable d'établir un équilibre entre les intérêts du consommateur et ceux du service public.

[105] Cette conclusion sur le pouvoir de la Commission de décider de sa démarche découle du régime législatif qui régit son fonctionnement. D'autres régimes législatifs prévoient expressément que l'organisme de réglementation en cause est tenu d'indemniser le service public de certaines dépenses découlant de décisions prudentes (voir l'arrêt *British Columbia Electric Railway Co.*). Selon ces autres cadres législatifs, le pouvoir discrétionnaire qui permet à l'organisme de réglementation de décider de sa démarche peut être plus restreint.

2015 SCC 44 (CanLII)

(4) Application to the Board's Decision

[106] In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

[107] First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

[108] Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

(4) Application à la décision de la Commission

[106] En l'espèce, la Commission refuse à OPG le recouvrement au total de 145 millions de dollars au titre des dépenses de rémunération dans le secteur nucléaire, sur deux ans. Rappelons qu'il faut considérer que ces dépenses constituent, du moins en partie, des dépenses convenues. Compte tenu de la nature de ces dépenses en particulier et des circonstances dans lesquelles le service public en a convenu, je ne saurais conclure que la Commission a agi déraisonnablement en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG à leur égard.

[107] Premièrement, il s'agit de dépenses d'exploitation, et non de coûts en capital. Les coûts en capital, en particulier ceux qui se rapportent par exemple à l'accroissement de la capacité ou à l'amélioration des installations actuelles, comportent souvent un risque et peuvent ne pas être nécessaires, à strictement parler, à la production à court terme du service public. Ces coûts peuvent néanmoins constituer un investissement judicieux pour le bon fonctionnement et la viabilité ultérieurs de ce dernier. Dès lors, le contrôle de la prudence, qui exclut le recul (et présume ou non la prudence, selon les dispositions législatives applicables), peut jouer un rôle particulièrement important pour faire en sorte que le service public ne soit pas dissuadé d'investir de manière optimale dans le développement de ses installations.

[108] Les dépenses d'exploitation, comme celles visées en l'espèce, diffèrent des coûts en capital. Il est peu probable que le refus de les approuver dissuade OPG d'en faire à l'avenir, car les dépenses de la nature de celles qui ont été refusées sont inhérentes à l'exploitation d'un service public. Certes, une décision comme celle rendue par la Commission en l'espèce peut faire hésiter OPG à convenir de dépenses relativement élevées au chapitre de la rémunération, mais tel était précisément l'effet voulu par la Commission.

2015 SCC 44 (CanLII)

[109] Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[109] Deuxièmement, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Le contrôle de la prudence tire son origine de l'examen de décisions d'effectuer certains investissements, notamment pour accroître la capacité; il s'agit souvent de décisions isolées prises à la lumière d'un ensemble de données alors connues ou supposées.

[110] À l'opposé de celles issues de telles décisions, les dépenses de rémunération convenues d'OPG découlent d'une relation continue dans le cadre de laquelle OPG devra négocier ultérieurement les barèmes de rémunération avec les mêmes parties. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Le contrôle de la prudence se révèle tout simplement moins indiqué lorsque la Commission n'entend pas seulement indemniser le service public des engagements déjà pris, mais aussi réguler les dépenses qui seront faites dans l'avenir. En fin de compte, le refus de la Commission ne vise pas que des dépenses convenues, mais bien la totalité des dépenses de rémunération considérées globalement. Même si la Commission reconnaît qu'OPG n'avait peut-être pas de pouvoir discrétionnaire lui permettant de réduire ses dépenses à raison du montant total refusé, le refus de la Commission vise à inciter OPG à la maîtrise constante de ses dépenses de rémunération.

[111] Après que la Commission eut signifié à OPG que ses dépenses d'exploitation lui paraissaient préoccupantes (voir la décision 2008-2009 de la Commission, p. 28-32), il n'était pas déraisonnable qu'elle se montre plus stricte dans l'examen des dépenses de rémunération du service public afin d'en assurer la régulation réelle à l'avenir. Le fait que la Commission dit refuser l'approbation [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350) montre qu'elle a bel et bien conscience des répercussions actuelles de son refus.

2015 SCC 44 (CanLII)

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at para. 350. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[112] Le caractère raisonnable du refus de la Commission d'approuver des dépenses de 145 millions de dollars au titre de la rémunération tient à ce qu'elle reconnaît qu'OPG était liée dans une certaine mesure par les conventions collectives dans sa prise de décisions en matière de personnel et dans la fixation des barèmes de rémunération, et à ce qu'elle en tient compte pour déterminer la somme totale refusée (décision de la Commission, par. 350). La souplesse méthodologique dont bénéficie la Commission lui permet d'éviter les extrêmes. Lorsque le service public ne peut réduire ses dépenses, la prise en charge de celles-ci peut, si le dossier s'y prête, être modérée ou répartie entre les actionnaires du service public et les consommateurs. La modération opérée par la Commission en l'espèce montre que, en refusant d'approuver les dépenses sans recourir formellement à un contrôle de la prudence excluant le recul, elle ne perd pas de vue la nécessité de veiller à ce que tout refus ne soit pas injuste envers OPG ni, assurément, à ce qu'il ne nuise pas à sa viabilité.

[113] Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

[113] Dans ses motifs de dissidence, la juge Abella reconnaît que, lors du contrôle de la prudence, la Commission peut, du moins dans certaines circonstances, refuser des dépenses convenues (par. 152). Elle dit toutefois craindre qu'un tel refus puisse « mettre en péril la garantie d'un service d'électricité fiable » (par. 156). Le refus d'une somme importante ou opposé sans discernement pourrait exposer à un tel risque, mais il se peut aussi que l'organisme de réglementation fasse ce que la Commission fait en l'espèce, c'est-à-dire modérer son refus en tenant compte des réalités auxquelles fait face le service public.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its

[114] Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public. La coexistence du droit à la négociation collective des employés du service public et du pouvoir de la Commission de fixer le montant des paiements pour les dépenses de rémunération indique que ni l'un ni l'autre n'a

2015 SCC 44 (CanLII)

obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at para. 75. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[116] With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

préséance. La Commission ne peut empiéter sur les conventions collectives en ordonnant au service public de manquer aux obligations qu'elles lui imposent, mais les conventions collectives ne priment pas l'obligation de la Commission d'assurer un équilibre juste et raisonnable entre le service public et les consommateurs.

[115] La juge Abella affirme que l'examen des dépenses convenues auquel se livre la Commission à partir d'éléments de recul paraît contredire ce que l'organisme affirme précédemment dans sa décision. La Commission écrit en effet qu'elle prendra en compte tout élément de preuve pertinent pour apprécier les dépenses prévues, mais qu'elle s'en tiendra à un examen sans recul pour ce qui concerne les dépenses à l'égard desquelles OPG [TRADUCTION] « ne pouvait prendre de mesures de réduction » (décision de la Commission, par. 75). À mon sens, on peut en conclure qu'elle recourt à une démarche raisonnable pour l'analyse de dépenses que l'on peut assimiler avec assurance soit à des dépenses prévues, soit à des dépenses convenues. Cependant, toutes les dépenses ne sont pas susceptibles d'une distinction aussi nette par la Commission lorsqu'il s'agit d'apprécier le montant des paiements pour une période de référence.

[116] En ce qui a trait aux dépenses de rémunération en cause, la Commission refuse de préciser quelle partie de la somme totale refusée correspond à des dépenses prévues et quelle partie correspond à des dépenses convenues pour les besoins de son analyse. Le juge Hoy fait observer que, [TRADUCTION] « [v]u la complexité de l'activité d'OPG et l'autonomie de gestion dont elle jouit, [la Commission] n'a pas tenté de déterminer avec précision le montant dont les dépenses de rémunération prévues d'OPG auraient pu être réduites dans le contexte des conventions collectives en vigueur » (motifs de la C. div., par. 53). En somme, la Commission ne départage pas les dépenses de rémunération totales entre celles qui sont « prévues » et celles qui sont « convenues ». Elle considère plutôt que les dépenses de rémunération refusées se composent à la fois de dépenses prévues et de dépenses convenues sur lesquelles la direction conservait une certaine maîtrise, mais non une maîtrise totale.

2015 SCC 44 (CanLII)

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at paras. 73-75, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

[118] Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at

[117] Il n'est pas déraisonnable que la Commission considère que la prévision du taux d'attrition du personnel constitue en soi une entreprise incertaine et qu'elle n'est pas en mesure de microgérer les décisions d'affaires qui relèvent des dirigeants d'OPG. Dès lors, toute tentative de prédire la mesure exacte dans laquelle OPG pourrait abaisser ses dépenses de rémunération (autrement dit, quelle partie de ces dépenses est prévue) serait empreinte d'incertitude. Il n'est donc pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche est compatible avec l'analyse de la Commission figurant aux par. 73-75 de sa décision et correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre des catégories mentionnées dans cette analyse.

[118] Tout au long de ses motifs, la juge Abella rappelle que les dépenses découlant des conventions collectives ne peuvent être rajustées. Je n'en disconviens pas. Cependant, lorsqu'elle opine que les conventions collectives « rend[ent] *illégale* la modification par le service public [. . .] des barèmes de rémunération et des niveaux de dotation » à l'égard de son personnel syndiqué (par. 149 (en italique dans l'original)), d'aucuns pourraient en conclure que la Commission tente de quelque manière de s'immiscer dans l'exécution des obligations d'OPG suivant les conventions collectives. Il importe de ne pas oublier que la Commission n'entend pas, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés.

[119] Enfin, la remarque de ma collègue selon laquelle la Commission canadienne de sûreté nucléaire (« CCSN ») « [a] impos[é] [. . .] des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires » (par. 127) importe peu quant aux questions soulevées en l'espèce. Bien que le régime établi par la CCSN impose sûrement des conditions

2015 SCC 44 (CanLII)

pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

[121] I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

[122] Abella J. (dissenting) — The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned

d'exploitation et de dotation aux installations nucléaires (voir dossier OPG, p. 43-46), nul élément des motifs de la Commission et nulle plaidoirie devant notre Cour n'indiquent que le refus de la Commission entraînera le non-respect des dispositions de la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9.

[120] Je rappelle qu'il est essentiel qu'un service public obtienne à long terme l'équivalent du coût du capital. Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il vise à [TRADUCTION] « signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350). L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

VI. Conclusion

[121] Je conclus que la Commission n'a pas agi de manière inappropriée en se pourvoyant en tant que partie en appel; elle n'a pas non plus agi déraisonnablement en refusant d'approuver les dépenses de rémunération en cause. Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir celle de la Commission.

Version française des motifs rendus par

[122] La juge Abella (dissidente) — La Commission de l'énergie de l'Ontario a été mise sur pied en 1960. Son mandat était alors d'établir les tarifs applicables à la vente et au stockage de gaz naturel et d'autoriser les projets de construction de pipelines. Au fil du temps, ses compétences et ses fonctions ont évolué. En 1973, le législateur lui a confié la responsabilité d'examiner les tarifs d'électricité puis de faire rapport au ministre de l'Énergie. Pendant cette

2015 SCC 44 (CanLII)

Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

[124] As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, paras. 1 and 2 of s. 1(1).

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in

période, en Ontario, le marché de l'électricité était peu réglementé. Il était dominé par la société d'État Ontario Hydro, qui possédait des installations de production d'énergie fournissant plus de 90 p. 100 de l'électricité dans la province (Ron W. Clark, Scott A. Stoll et Fred D. Cass, *Ontario Energy Law : Electricity* (2012), p. 134; *Rapport annuel 2011*, Bureau du vérificateur général de l'Ontario, p. 1 et 72).

[123] À la fin des années 1990, une série de mesures législatives a été adoptée en vue d'axer le secteur de l'électricité sur le marché et de le soumettre à la concurrence. Ontario Hydro a été scindée en cinq entités. L'une d'elles, Ontario Power Generation Inc., s'est vu confier l'actif de production d'électricité de l'ancienne société Ontario Hydro. Elle a été constituée en société commerciale dont le seul actionnaire est la province d'Ontario (Clark, Stoll et Cass, p. 5-7 et 134).

[124] Depuis le 1er avril 2008, la Commission est légalement investie du pouvoir de fixer les paiements pour l'électricité produite par les installations prescrites que possède Ontario Power Generation (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, L.O. 1998, c. 15, ann. B, par. 78.1(2); règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 », art. 3). Suivant le régime législatif, Ontario Power Generation est tenue de faire une demande à la Commission pour obtenir l'approbation de paiements « justes et raisonnables » (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 78.1(5)). La Commission établit sa propre méthode pour déterminer ce qui constitue des paiements « justes et raisonnables » au regard des objectifs législatifs qui consistent à maintenir une « industrie de l'électricité financièrement viable » et à « protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité » (règlement 53/05, par. 6(1); *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, dispositions 1 et 2 du par. 1(1).

[125] Ontario Power Generation demeure le plus grand producteur d'électricité de la province. L'Ontario Hydro Employees' Union (auquel a succédé le Syndicat des travailleurs et travailleuses du secteur

2015 SCC 44 (CanLII)

the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

[126] Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

[127] The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

[128] On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs — wages, benefits, pension servicing, and annual incentives — to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for

énergétique) a été accrédité comme agent négociateur auprès de l'entreprise dans les années 1950, alors que Society of Energy Professionals l'a été à son tour en 1992 (Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (en ligne), art. 6.2). Le personnel d'Ontario Power Generation affecté à ses activités réglementées se compose aujourd'hui d'environ 10 000 personnes, dont 90 p. 100 sont syndiquées. Deux tiers de ces employés syndiqués sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, un tiers par Society of Energy Professionals.

[126] Le syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals avaient tous deux conclu des conventions collectives avec Ontario Hydro avant la création d'Ontario Power Generation. Lorsqu'elle a succédé à Ontario Hydro, Ontario Power Generation a hérité de la totalité des obligations issues de ces conventions (*Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, c. 1, ann. A, art. 69), qui la lient et l'empêchent de réduire unilatéralement les niveaux de dotation ou les barèmes de rémunération.

[127] La Commission canadienne de sûreté nucléaire, un organisme fédéral indépendant chargé de faire respecter la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9, impose également des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires.

[128] Le 26 mai 2010, Ontario Power Generation a demandé à la Commission d'approuver des recettes nécessaires se chiffrant à 6 909,6 millions de dollars pour la période allant du 1er janvier 2011 au 31 décembre 2012, dont 2 783,9 millions devaient être affectés à la rémunération du personnel — salaires, avantages sociaux, prestations de retraite et incitatifs annuels (EB-2010-0008, p. 8, 49 et 80).

[129] Dans sa décision, la Commission dit soumettre à [TRADUCTION] « deux types d'examen » les dépenses du service public. En ce qui concerne les dépenses prévues — par le service public, pour une

2015 SCC 44 (CanLII)

a future period and which can still be reduced or avoided — the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review . . . conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

[130] The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

[131] On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and

période ultérieure et qu'il est toujours possible de réduire ou d'éviter —, la Commission soutient qu'il incombe à Ontario Power Generation de démontrer leur caractère raisonnable. En revanche, pour ce qui est des dépenses à l'égard desquelles « [l]a société ne pouvait prendre de mesures de réduction », à savoir les dépenses convenues, la Commission dit qu'elle effectuera « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence », c'est-à-dire une présomption selon laquelle les dépenses du service public sont raisonnables (p. 19).

[130] La Commission ne fait aucune distinction entre les dépenses de rémunération qui sont réductibles et celles qui ne le sont pas. Elle soumet plutôt toutes les dépenses de rémunération à l'appréciation qu'elle réserve aux dépenses prévues réductibles et elle refuse d'approuver les paiements demandés à raison de 145 millions de dollars au motif que les barèmes de rémunération et les niveaux de dotation sont trop élevés.

[131] En appel, les juges majoritaires de la Cour divisionnaire confirment l'ordonnance de la Commission. Dans ses motifs dissidents, la juge Aitken conclut que la décision de la Commission est déraisonnable, car elle n'applique pas la bonne approche aux dépenses de rémunération, lesquelles constituent, par l'effet de conventions collectives contraignantes en droit, des dépenses fixes et non ajustables. Selon elle, la Commission [TRADUCTION] « regroupe » plutôt toutes les dépenses de rémunération et ne fait aucune distinction entre celles qui découlent d'obligations contractuelles obligatoires et celles qui n'en découlent pas. Comme elle l'affirme :

[TRADUCTION] Premièrement, j'estime que les dépenses de rémunération du secteur nucléaire [d'Ontario Power Generation], pour une période ultérieure, assujetties à une contrainte en raison de conventions collectives qui s'appliquaient avant la demande et la période de référence, constituent des dépenses déjà faites qui doivent faire l'objet d'un contrôle de la prudence après coup, en deux étapes. Deuxièmement, dans l'analyse (mais pas nécessairement dans l'appréciation finale) des dépenses de rémunération du secteur nucléaire dont fait état la demande, la [Commission] était tenue de faire une distinction entre les dépenses déjà effectuées et d'autres

2015 SCC 44 (CanLII)

not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

réellement prévues, mais non préétablies. Troisièmement, à mon avis, la [Commission] devait soumettre à un contrôle de la prudence la partie des dépenses de rémunération du secteur nucléaire qui découlait de contrats obligatoires conclus avant la demande et la période de référence. Pour ce qui est des autres facteurs présidant à la rémunération globale du secteur nucléaire, la [Commission] pouvait, en se fondant sur toute la preuve disponible, décider s'ils étaient raisonnables ou non. Quatrièmement, si un contrôle de la prudence avait été effectué, des éléments de preuve auraient pu raisonnablement permettre à la [Commission] de conclure à la réfutation de la présomption de prudence en ce qui a trait aux éléments issus des conventions collectives qui influaient sur les dépenses. Malheureusement, je constate que nulle part dans sa décision la [Commission] ne se livre à une telle analyse. Elle regroupe sans distinctions toutes les dépenses de rémunération du secteur nucléaire. Elle considère qu'elles ont toutes la même origine et qu'aucune ne découle d'obligations contractuelles auxquelles [Ontario Power Generation] était tenue par une convention collective conclue avant la demande et la période de référence. Enfin, j'estime que, lorsqu'elle se penche sur le caractère raisonnable de la rémunération globale du secteur nucléaire, la [Commission] commet l'erreur de tenir compte d'éléments de preuve ayant vu le jour après la conclusion des conventions collectives pour apprécier le caractère raisonnable des barèmes de rémunération et d'autres dispositions contraignantes des conventions collectives. [par. 75]

[132] The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

[132] La Cour d'appel souscrit à l'unanimité à la conclusion de la juge Aitken et statue que [TRADUCTION] « les dépenses de rémunération en cause devant la [Commission] étaient des dépenses convenues » qu'il aurait donc fallu apprécier en présumant leur prudence. Elles reconnaissent toutes deux qu'il était loisible à la Commission de conclure que la présomption était réfutée en ce qui concerne les obligations contractuelles obligatoires, mais qu'elle a agi déraisonnablement en ne tenant pas compte de la nature immuable des coûts fixes.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs

[133] Je suis d'accord. Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les dépenses de rémunération

2015 SCC 44 (CanLII)

were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": para. 75.

[134] In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

[135] Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93.

[136] The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being

d'Ontario Power Generation étaient donc en très grande partie préétablies et ne pouvaient être rajustées par l'entreprise au cours de la période considérée. Il s'agit précisément du type de dépenses que la Commission qualifie, dans sa décision, de dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » et qui doivent faire l'objet d'un « contrôle de la prudence comportant l'application d'une présomption de prudence » (par. 75).

[134] Soit dit tout en respect, la Commission rend une décision déraisonnable en ne reconnaissant pas le caractère contraignant en droit et non réductible des dépenses auxquelles le service public s'était engagé lors de la signature des conventions collectives et en omettant de soumettre ces dépenses au contrôle qui s'imposait pourtant selon elle à leur égard.

Analyse

[135] Conformément au par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, sur demande d'Ontario Power Generation, la Commission fixe le montant des paiements « justes et raisonnables » auxquels a droit le service public. Dans le contexte de la réglementation des services publics, l'expression « justes et raisonnables » traduit l'objectif qui consiste à [TRADUCTION] « naviguer entre les récifs » que sont, d'une part, les tarifs excessifs imposés au consommateur et, d'autre part, la rétribution insuffisante du service public (*Verizon Communications Inc. c. Federal Communications Commission*, 535 U.S. 467 (2002), p. 481; voir aussi *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193).

[136] La méthode retenue par la Commission pour déterminer le montant des paiements « justes et raisonnables » auxquels a droit Ontario Power Generation prend en partie appui sur la notion de « prudence ». En droit réglementaire, la prudence offre un [TRADUCTION] « fondement juridique pour se prononcer sur le respect des obligations des services publics liées à l'intérêt public, plus particulièrement en ce qui concerne le processus de tarification » (Robert E. Burns et autres, *The Prudent Investment Test in the 1980s*, rapport NRRI-84-16, The National Regulatory Research Institute, avril 1985, p. 20). Apparue

2015 SCC 44 (CanLII)

used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown. [Emphasis added.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting)

[137] The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

[TRADUCTION]

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be

au début du 20e siècle, cette notion jurisprudentielle visait à remédier à la [TRADUCTION] « complexité paralysante » des approches différentes utilisées par les organismes de réglementation pour arrêter des montants « justes et raisonnables », et elle présumait que le service public réglementé avait agi raisonnablement (*Verizon Communications*, p. 482). Ainsi, comme l'explique le juge Brandeis dans un extrait bien connu datant de 1923 :

> [TRADUCTION] L'emploi de l'expression « investissement prudent » n'est pas décisif. L'établissement de la base de tarification ne devrait pas exclure les investissements qui, dans des circonstances ordinaires, seraient considérés raisonnables. Cet emploi vise plutôt à exclure les dépenses qui pourraient être jugées malhonnêtes ou manifestement excessives ou imprudentes. On peut supposer que tout investissement considéré a été fait dans l'exercice d'un jugement raisonnable, sauf preuve du contraire. [Je souligne.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1, le juge Brandeis (dissident))

[137] La présomption de prudence constitue le point de départ de l'examen que la Commission appelle [TRADUCTION] « contrôle de la prudence ». Lorsqu'elle entreprend ce contrôle de la prudence, la Commission applique un « ensemble bien établi de principes » :

[TRADUCTION]

- La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.
- Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.
- Le recul est exclu dans l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.
- La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et

2015 SCC 44 (CanLII)

based on facts about the elements that could or did enter into the decision at the time.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2.)

[138] This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4, at paras. 8 and 10-12.

[139] In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence — and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.

reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), par. 55, citant *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), par. 3.12.2.)

[138] Dans *Enbridge Gas Distribution Inc. (Re)*, par. 3.12.1 à 3.12.5, conf. par *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4, par. 8 et 10-12, la Commission et la Cour d'appel de l'Ontario considèrent ce contrôle — qui comporte l'application d'une présomption de prudence et exclut le recul — comme la méthode appropriée pour fixer des tarifs « justes et raisonnables ».

[139] Toutefois, dans la présente affaire, la Commission choisit de ne pas soumettre toutes les dépenses à un contrôle de la prudence. Elle dit plutôt recourir à deux examens. Le premier s'appliquerait aux « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter. Dans ses motifs, la Commission explique qu'elle examine ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombe au service public de démontrer le caractère raisonnable de ses dépenses :

[TRADUCTION] Lors de l'examen des dépenses prévues, il incombe à la société d'établir le bien-fondé de sa demande et d'étayer son allégation selon laquelle ces dépenses sont raisonnables. Elle doit fournir un large éventail d'éléments de preuve en ce sens, notamment des analyses de rentabilité et de tendances, des données de référence, etc. Le critère applicable n'est pas celui de la malhonnêteté, de la négligence ou de la perte menant au gaspillage, mais bien celui du caractère raisonnable. Et dans l'appréciation du caractère raisonnable, la Commission n'est pas tenue d'examiner uniquement les données qui intéressent [Ontario Power Generation]. Elle a le pouvoir discrétionnaire de conclure que les dépenses prévues sont déraisonnables au vu de la preuve, laquelle peut se rapporter à l'analyse coût/bénéfice, à l'incidence sur les consommateurs, aux comparaisons avec d'autres entités ou à autre chose.

2015 SCC 44 (CanLII)

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [paras. 74-75]

[140] A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [para. 75]

[141] In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

This issue concerns expenditures which have largely already been incurred by the company. . . . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket

L'avantage d'une période de référence ultérieure est qu'elle permet à la société de connaître à l'avance la décision de la Commission concernant le recouvrement de dépenses prévues. Par exemple, lorsque des dépenses sont refusées, la société peut modifier ses plans en conséquence. Autrement dit, l'actionnaire n'a pas nécessairement à assumer un coût (à moins que la société ne décide, en tout état de cause, de maintenir les dépenses jugées excessives). [par. 74-75]

[140] Selon la Commission, une démarche différente serait suivie pour les dépenses à l'égard desquelles la société ne pouvait [TRADUCTION] « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission explique qu'elle jauge ces dépenses en se livrant à un « contrôle de la prudence » qui comporte l'application d'une présomption selon laquelle les dépenses ont été faites de manière prudente :

[TRADUCTION] Des considérations quelque peu différentes entreront en jeu lors d'un contrôle de la prudence après coup. La dépense que la Commission refusera alors d'approuver sera nécessairement assumée par l'actionnaire. La société ne pourra plus prendre de mesures de réduction à son égard. C'est pourquoi la Commission estime qu'il existe une différence entre les deux types d'examen, le contrôle après coup constituant un contrôle de la prudence assorti d'une présomption de prudence. [par. 75]

[141] À titre d'exemple, dans *Enersource Hydro Mississauga Inc. (Re)*, la Commission conclut qu'elle doit effectuer un contrôle de la prudence pour apprécier les dépenses qu'Enersource a déjà faites :

[TRADUCTION] Le présent dossier porte sur des dépenses que la société a déjà faites en grande partie. [. . .] Comme il est question de dépenses antérieures qui sont aujourd'hui contestées, la Commission doit effectuer un contrôle de la prudence. [par. 55]

[142] Comme le dit la Commission dans ses motifs, il est logique de soumettre à un contrôle de la prudence des dépenses convenues, car refuser d'approuver des dépenses auxquelles Ontario

2015 SCC 44 (CanLII)

for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce" (para. 75). The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (paras. 346 and 352), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

[144] The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

Power Generation ne peut se soustraire oblige le service public à acquitter sur ses propres deniers des dépenses déjà faites. Cela pourrait nuire au bon fonctionnement d'Ontario Power Generation et l'amener à restructurer ses liens avec les milieux financiers et ses fournisseurs de services, voire à faire faillite (voir Burns et autres, p. 129-165). Dès lors, [TRADUCTION] « les coûts en capital et les tarifs seraient supérieurs à ce qu'ils auraient été si une sanction modérée avait résulté de l'application du principe de prudence », de sorte que le consommateur ontarien serait contraint de payer des tarifs d'électricité plus élevés (Burns et autres, p. vi).

[143] Le présent pourvoi a donc pour objet la décision de la Commission de considérer *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables, sans se demander s'il s'agit en partie de dépenses pour lesquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » (par. 75). La Commission ne les qualifie pas à proprement parler de dépenses prévues, mais lorsqu'elle affirme que « les conventions collectives peuvent rendre ardue l'élimination rapide de certains postes » et que « modifier des conventions collectives [. . .] prend du temps » (par. 346 et 352), elle considère clairement qu'il s'agit de dépenses théoriquement compressibles. De plus, l'omission de soumettre celles-ci au contrôle de la prudence qu'elle dit pourtant s'appliquer aux dépenses non réductibles confirme l'assimilation des obligations issues de négociations collectives à des obligations ajustables.

[144] La Commission ne dit pas pourquoi elle estime que les dépenses de rémunération issues des conventions collectives constituent des dépenses prévues ajustables, mais par l'adoption de son approche, elle empêche Ontario Power Generation de bénéficier de l'application de sa méthode d'appréciation qui considère différemment les dépenses convenues. À mon humble avis, en omettant d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission méconnaît à la fois son propre cadre méthodologique et le droit du travail.

2015 SCC 44 (CanLII)

[145] Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

[147] The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and

[145] Ontario Power Generation était partie à des conventions collectives obligatoires qui étaient intervenues avec le Syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals et qui s'appliquaient pendant la plus grande partie de la période considérée. À l'époque de la demande, elle avait déjà conclu une convention collective avec le Syndicat des travailleurs et travailleuses du secteur énergétique pour la période comprise entre le 1er avril 2009 et le 31 mars 2012.

[146] La convention collective intervenue avec Society of Energy Professionals et imposant la médiation-arbitrage pour le règlement des différends pendant des négociations collectives a expiré le 31 décembre 2010. Par suite d'une impasse dans les négociations, les conditions d'une nouvelle convention collective pour la période du 1er janvier 2011 au 31 décembre 2012 ont été imposées par voie d'arbitrage obligatoire (*Ontario Power Generation c. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL)).

[147] Les conventions collectives conclues avec les deux syndicats prescrivaient les barèmes de rémunération des employés syndiqués, réglementaient rigoureusement les niveaux de dotation aux installations d'Ontario Power Generation et limitaient le pouvoir du service public de réduire unilatéralement ses barèmes de rémunération et ses niveaux de dotation. Par exemple, la convention collective conclue avec le Syndicat des travailleurs et travailleuses du secteur énergétique prévoyait qu'il n'y aurait aucun licenciement pendant la durée de son application. Bien au contraire, Ontario Power Generation serait contrainte soit de réaffecter tout employé excédentaire, soit de lui offrir une indemnité de départ selon les barèmes établis au préalable par le service public et le syndicat (« Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union », 1er avril 2009 au 31 mars 2012, art. 11).

[148] De même, la convention collective conclue avec Society of Energy Professionals limitait grandement le pouvoir du service public de négocier et de déterminer les barèmes de rémunération. À l'expiration de cette convention le 31 décembre 2010,

2015 SCC 44 (CanLII)

the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of 3 per cent on January 1, 2011, 2 per cent on January 1, 2012, and a further 1 per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

[149] The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: para. 347. Had the Board used the approach it said it would use for costs the company had "no opportunity . . . to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

le service public défendait la position de son unique actionnaire, la province d'Ontario, à savoir l'exclusion de toute augmentation nette des salaires pendant les deux années suivantes. Les parties n'ont pu parvenir à un accord, de sorte que le dossier a été renvoyé à l'arbitrage obligatoire comme convenu lors de négociations précédentes. Dans sa décision, l'arbitre Kevin M. Burkett a ordonné une augmentation générale des salaires de 3 p. 100 le 1er janvier 2011, de 2 p. 100 le 1er janvier 2012 et, en sus, de 1 p. 100 le 1er avril 2012 (*Ontario Power Generation c. Society of Energy Professionals*, par. 1, 9 et 28).

[149] Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire (*Loi de 1995 sur les relations de travail*, art. 56). Il était donc interdit à Ontario Power Generation de réduire unilatéralement les niveaux de dotation, les salaires ou les avantages sociaux de ses employés syndiqués. Contrairement à ce qu'affirment les juges majoritaires (par. 84), ces conventions ne laissaient pas seulement « peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble », elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

[150] En appliquant la méthode qu'elle a dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission oblige en fait Ontario Power Generation à prouver le caractère raisonnable de ses dépenses et conclut que l'entreprise n'a présenté ni [TRADUCTION] « preuve convaincante », ni « documents ou analyses » qui justifient les barèmes de rémunération (par. 347). Si elle avait eu recours à l'approche qu'elle a dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

2015 SCC 44 (CanLII)

[151] Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act, 1998* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

[151] Contrairement à ce que soutiennent les juges majoritaires, appliquer le contrôle de la prudence à ces dépenses de rémunération serait difficilement « incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ». Considérer que le par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit un fardeau de preuve aussi strict a essentiellement pour effet d'empêcher totalement la Commission d'effectuer des contrôles de la prudence, alors qu'elle en a effectués sans difficulté dans le passé et qu'elle a affirmé — comme dans ses motifs en l'espèce — qu'il y a lieu de soumettre les dépenses convenues à « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence ». Or, suivant le raisonnement des juges majoritaires, comme le contrôle de la prudence présume toujours la prudence, la Commission ne verrait pas seulement sa marge de manœuvre réduite sur le plan méthodologique, mais elle contreviendrait aussi à la Loi.

[152] The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation's] unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

[152] L'application du principe de la prudence ne soustrait pas les dépenses de rémunération du service public à tout examen. Comme le fait remarquer la Cour d'appel, le contrôle de la prudence

> [TRADUCTION] n'écarte pas la possibilité que la [Commission] puisse contrôler les barèmes de rémunération applicables aux employés syndiqués d'[Ontario Power Generation] ou le nombre de leurs postes. Lors d'un tel contrôle, il peut ressortir de la preuve, d'une part, que la présomption selon laquelle les dépenses ont été faites de manière prudente doit être écartée et, d'autre part, que les barèmes de rémunération et les niveaux de dotation convenus ne sont pas raisonnables; cependant, la [Commission] ne peut se prononcer avec le recul, mais doit tenir compte de ce qui était connu ou qui aurait dû l'être à l'époque. Le contrôle de la prudence admet un tel résultat et permet à la [Commission] de s'acquitter de son mandat légal et de jouer son rôle de substitut du marché tout en assurant un juste équilibre entre les intérêts d'[Ontario Power Generation] et ceux de ses clients. [par. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant

[153] L'affirmation des juges majoritaires selon laquelle, « si le législateur avait voulu que les dépenses [. . .] issues [de conventions collectives] se répercutent inévitablement sur les consommateurs, il

2015 SCC 44 (CanLII)

the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

[154] It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's

n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public » (par. 114), laisse perplexe. Le législateur ne voulait pas que *toute* dépense se répercute « inévitablement » sur les consommateurs. Son intention était de donner à la Commission le pouvoir d'arrêter des paiements justes et raisonnables en fonction des engagements actuels et projetés d'Ontario Power Generation. Ni les conventions collectives ni aucune autre obligation contractuelle ne devaient « inévitablement » se répercuter sur qui que ce soit. Cependant, elles devaient inévitablement peser dans la balance. Or, c'est précisément la nature unique des engagements contraignants qu'a invoquée la Commission lorsqu'elle a affirmé qu'elle soumettrait ces dépenses à un contrôle différent.

[154] Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent donc être assimilées à juste titre à des dépenses prévues. La Commission ne tire toutefois aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation sont fixes et dans quelle proportion elles demeurent assujetties au pouvoir discrétionnaire du service public. La Commission ne tire pour ainsi dire aucune conclusion de fait quant à savoir dans quelle mesure l'entreprise pouvait réduire ses dépenses de rémunération issues des conventions collectives. Au contraire, comme le souligne la juge Aitken, la Commission [TRADUCTION] « regroupe » sans distinctions toutes les dépenses liées à la rémunération, reconnaît que la réduction de celles issues des conventions collectives « prend[rait] du temps » et « [serait] ardue », et considère qu'elles sont globalement ajustables.

[155] Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce

2015 SCC 44 (CanLII)

words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": para. 75.

[156] Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

[157] The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine

sens. Pour reprendre les propos des juges majoritaires, ces dépenses correspondent à des « obligations qui écartent tout pouvoir discrétionnaire [. . .] permettant [au service public] de ne pas acquitter la somme ultérieurement » (par. 82). Selon la propre méthode de la Commission, les dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » bénéficient d'une « présomption de prudence » (par. 75).

[156] Refuser d'approuver des dépenses qu'Ontario Power Generation est juridiquement tenue d'acquitter en raison de ses conventions collectives obligerait le service public et son seul actionnaire, la province d'Ontario, à combler la différence en puisant ailleurs. Ontario Power Generation pourrait notamment être forcée de réduire ses investissements dans l'accroissement de sa capacité et dans l'amélioration de ses installations. Et, comme il s'agit du plus grand producteur d'électricité de l'Ontario, un tel refus pourrait non seulement nuire à la « viabilité financière » du secteur de l'électricité de la province, mais également mettre en péril la garantie d'un service d'électricité fiable.

[157] Les juges majoritaires tiennent cependant pour acquis que la relation continue entre Ontario Power Generation et les syndicats devrait conférer à la Commission, relativement aux dépenses de rémunération issues de négociations collectives, un pouvoir de refus plus grand que celui dont elle bénéficie dans le cadre d'une analyse qui exclut le recul et présume la prudence. Ils font droit également à la conclusion de la Commission selon laquelle les dépenses de rémunération issues de négociations collectives auxquelles Ontario Power Generation a participé pourraient être [TRADUCTION] « excessives » et concluent donc que la Commission a agi raisonnablement en écartant le principe de la « prudence » pour arriver à sa conclusion. Leur approche ne trouve aucun appui, pas même dans la méthode que la Commission établit elle-même pour déterminer le montant de paiements justes et raisonnables.

[158] En tout respect pour l'opinion contraire, en choisissant un critère éminemment susceptible de confirmer l'hypothèse que les dépenses issues de négociations collectives sont excessives, on se

2015 SCC 44 (CanLII)

whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements

méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient, soit dit tout en respect, à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas.

[159] Je reconnais que la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont « justes et raisonnables » et, à l'intérieur de certaines limites, de [TRADUCTION] « définir la [. . .] méthode » utilisée pour établir le montant de ces paiements (règlement 53/05, art. 6; *Loi de 1998 sur la Commission de l'Énergie de l'Ontario*, art. 78.1). Cela dit, dès lors qu'elle a établi une méthode pour déterminer ce qui est juste et raisonnable, la Commission doit à tout le moins l'appliquer avec constance (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149 (CanLII), par. 30-32, le juge Rothstein). Pour autant, les conventions collectives ne « priment » pas le pouvoir de la Commission de fixer les paiements, mais une fois que la Commission a choisi une méthode pour exercer son pouvoir discrétionnaire, elle doit s'y tenir. En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation serait vouée à l'incertitude quant à la démarche à suivre pour déterminer les dépenses et les investissements à faire et quant à la manière de les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster.

[160] En refusant d'approuver des dépenses de 145 millions de dollars au motif qu'Ontario Power Generation pouvait réduire ses barèmes de rémunération et ses niveaux de dotation, la Commission a méconnu le caractère contraignant en droit des

2015 SCC 44 (CanLII)

and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

[161] I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, ABELLA J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

conventions collectives et a omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

[161] Je suis donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et, à l'instar de la Cour d'appel, de renvoyer l'affaire à la Commission pour qu'elle la réexamine à la lumière des présents motifs.

Pourvoi accueilli, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Stikeman Elliott, Toronto.

Procureurs de l'intimée Ontario Power Generation Inc. : Torys, Toronto; Ontario Power Generation Inc., Toronto.

Procureurs de l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intimée Society of Energy Professionals : Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs de l'intervenante : Jay Shepherd Professional Corporation, Toronto.

2015 SCC 44 (CanLII)

Tab 22

J.M.H. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions *Intervener*

Indexed as: R. *v.* J.M.H.

2011 SCC 45

File No.: 33667.

2011: May 19; 2011: October 6.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Appeals — Powers of Court of Appeal — Evidence — Assessment — Accused charged with two counts of sexual assault — Complainant not disclosing events at time of occurrences but posting poem on line — Trial judge acquitting accused — Court of Appeal overturning acquittals and ordering new trial — Whether trial judge failed to consider evidence as a whole thereby committing error of law — Whether trial judge's allegedly flawed assessment of evidence constitutes error of law allowing appellate review of acquittal — Criminal Code, R.S.C. 1985, c. C-46, s. 676(1)(a).

H was acquitted at trial of two counts of sexual assault on his 17-year-old cousin. A alleged that on two occasions in 2006, H had non-consensual sexual intercourse with her while she was sleeping with him in his bed. A testified that she told H to "stop" both times but that he eventually had intercourse with her. On both occasions, she spent the rest of the night with H in his bed. A did not tell anyone about the occurrences but posted a poem online very soon after the first incident as "an outlet", and this led to the incidents coming to light. At trial, H denied any sexual contact with A. The trial judge had "absolutely no doubt" that sexual intercourse had taken place between H and A but was not satisfied that A was sexually assaulted without

J.M.H. *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Directeur des poursuites pénales *Intervenant*

Répertorié : R. *c.* J.M.H.

2011 CSC 45

N° du greffe : 33667.

2011 : 19 mai; 2011 : 6 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Appels — Pouvoirs de la Cour d'appel — Preuve — Appréciation — Accusé inculpé de deux chefs d'agression sexuelle — Affichage d'un poème en ligne par la plaignante, qui n'a pas signalé les incidents après qu'ils se soient produits — Acquittement de l'accusé par le juge du procès — Acquittements annulés et nouveau procès ordonné par la Cour d'appel — Le juge du procès a-t-il commis une erreur de droit en omettant de prendre en considération l'ensemble de la preuve? — L'appréciation prétendument viciée de la preuve par le juge du procès constitue-t-elle une erreur de droit permettant la révision d'un acquittement par la Cour d'appel? — Code criminel, L.R.C. 1985, ch. C-46, art. 676(1)a).

À son procès, H a été acquitté relativement à deux chefs d'agression sexuelle à l'endroit de sa cousine de 17 ans. A prétend que, à deux reprises en 2006, H a eu des rapports sexuels avec elle sans son consentement alors qu'elle était couchée avec lui dans le lit de ce dernier. A a témoigné que, les deux fois, elle lui a dit « arrête », mais qu'il a eu ensuite des rapports sexuels avec elle. Lors des deux événements, elle a passé le reste de la nuit avec H dans son lit. A n'a pas parlé des incidents à qui que ce soit, mais elle a affiché un poème en ligne très peu de temps après le premier incident « en tant qu'exutoire », entraînant ainsi la révélation des incidents. Au procès, H a nié avoir eu quelque contact sexuel que ce soit avec A. Le juge du procès n'avait « absolument aucun doute » que

2011 SCC 45 (CanLII)

her consent. The Court of appeal concluded that the trial judge erred in law in mishandling the evidence by taking a "piecemeal" approach incompatible with his obligation to consider the cumulative effect of all relevant evidence.

Held: The appeal should be allowed and the acquittals restored.

While it is an error of law for a trial judge to assess the evidence piecemeal, the trial judge's reasons here did not disclose any such error. The Court of Appeal misapprehended the record when it faulted the judge for not referring to A's testimony on the issue of consent, as he did so on at least three occasions. Moreover, the trial judge did not have to "reject" A's evidence in order to be left with a reasonable doubt arising from the whole of the evidence. In fact, he gave extensive reasons as to why he was left with a reasonable doubt on consent. There was also no basis for concluding that the trial judge used small excerpts from the poem out of context. He quoted the poem as a whole and then drew attention to language that raised concerns in his mind. Finally, the Court of Appeal erred in concluding that a couple of brief excerpts from the poem had "tipped" the balance in favour of acquittal. The trial judge's concerns regarding consent were based on the evidence of the relationship between H and A, the testimony of A's sister about how many times she had been in H's bed, and the fact that A had returned both times to the same bed in which she had been violated. The judge's references to the poem excerpts were in the context of his references to other aspects of the evidence, and he explicitly stated that he was taking account of all the circumstances of the case in reaching his conclusion.

The Crown's right of appeal from an acquittal of an indictable offence is limited to "any ground of appeal that involves a question of law alone". The jurisprudence currently recognizes at least four types of cases in which alleged mishandling of the evidence may constitute an error of law alone giving rise to a Crown appeal of an acquittal; this may not be an exhaustive list. First, it is an error of law to make a finding of fact for which there is no evidence. However, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Second, the legal effect of findings of fact or of undisputed facts may raise a question of law. Third, an assessment of the

H et A avaient eu des relations sexuelles, mais il n'était pas convaincu que A avait été agressée sexuellement sans son consentement. La Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en traitant la preuve de façon inadéquate, à savoir en procédant à une analyse « fragmentaire » incompatible avec son obligation de prendre en considération l'effet cumulatif de tous les éléments de preuve pertinents.

Arrêt : Le pourvoi est accueilli et les acquittements sont rétablis.

Bien que le juge présidant un procès commette une erreur de droit en analysant la preuve de façon fragmentaire, les motifs du juge du procès en l'espèce ne révèlent aucune erreur de ce genre. La Cour d'appel a mal interprété le dossier en reprochant au juge de ne pas faire allusion au témoignage de A sur la question du consentement, car il l'a évoqué au moins trois fois. De plus, le juge du procès n'avait pas à « rejeter » le témoignage de A pour qu'il subsiste dans son esprit un doute raisonnable soulevé par l'ensemble de la preuve. En fait, il a motivé abondamment le doute raisonnable qui subsistait dans son esprit quant au consentement. En outre, il n'y avait aucune raison de conclure que le juge du procès avait utilisé hors contexte de courts extraits du poème. Il a cité le poème dans son intégralité avant de souligner les mots qui suscitaient des doutes dans son esprit. Enfin, la Cour d'appel a eu tort de conclure que quelques courts extraits du poème avaient « fait pencher » la balance en faveur de l'acquittement. Les réserves du juge du procès à l'égard du consentement étaient fondées sur la preuve de la relation entre H et A, sur le témoignage de la sœur de A quant au nombre de fois que A avait couché dans le lit de H et sur le fait que A était retournée se coucher lors des deux incidents dans le lit où elle avait été violée. Le juge a mentionné des extraits du poème dans le contexte des autres éléments de preuve dont il a parlé, et il a expressément dit tenir compte de toutes les circonstances de l'espèce pour arriver à sa conclusion.

Le ministère public ne peut interjeter appel de l'acquittement d'une infraction punissable par mise en accusation que « pour tout motif d'appel qui comporte une question de droit seulement ». La jurisprudence fait actuellement état d'au moins quatre types de situations où le traitement prétendument inadéquat de la preuve peut constituer une erreur de droit seulement permettant au ministère public d'interjeter appel d'un acquittement; cette liste n'est peut-être pas exhaustive. Premièrement, une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit. Par contre, pour l'application de cette règle, la conclusion que le juge des faits entretient

2011 SCC 45 (CanLII)

evidence based on a wrong legal principle is an error of law. Fourth, the trial judge's failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law, but this error will be found to have been committed only if the reasons demonstrate that this was not done. The trial judge's reasonable doubt did not have to be based on the evidence; it could arise from the absence of evidence or a simple failure of the evidence to persuade him to the requisite level of beyond reasonable doubt. It is only where that reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

Cases Cited

Considered: *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Morin*, [1988] 2 S.C.R. 345; **referred to:** *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *Wild v. The Queen*, [1971] S.C.R. 101.

Statutes and Regulations Cited

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Canadian Judicial Council. Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence, February 2004 (online: http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_NCJI-Jury-Instruction-Final-2004-02_en.asp#_Toc290368699).

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Rouleau and Watt JJ.A.), 2009 ONCA 834, 256 O.A.C. 246, 99 O.R. (3d) 761, 249 C.C.C. (3d) 140, 72 C.R. (6th) 154, [2009] O.J. No. 4963 (QL), 2009 CarswellOnt 7362, setting aside the accused's acquittals entered by Stong J., [2009] O.J. No. 6377 (QL), 2009 CarswellOnt 8844, and ordering a new trial. Appeal allowed.

Christopher D. Hicks and *Misha Feldmann*, for the appellant.

Christine Bartlett-Hughes, for the respondent.

un doute raisonnable n'est pas une conclusion de fait. Deuxièmement, l'effet juridique des conclusions de fait ou des faits incontestés peut soulever une question de droit. Troisièmement, une appréciation de la preuve fondée sur un mauvais principe juridique constitue une erreur de droit. Quatrièmement, le juge du procès commet une erreur de droit s'il ne tient pas compte de toute la preuve qui se rapporte à la question ultime de la culpabilité ou de l'innocence, mais on ne conclura à la présence d'une telle erreur que si les motifs démontrent que cela n'a pas été fait. Le doute raisonnable du juge du procès n'avait pas à reposer sur la preuve; il pouvait découler de l'absence de preuve ou du simple fait que la preuve n'était pas parvenue à le convaincre hors de tout doute raisonnable, soit la norme à atteindre. Ce n'est que lorsqu'un doute raisonnable est vicié par une erreur de droit que l'on peut réviser en appel un acquittement.

Jurisprudence

Arrêts examinés : *R. c. B. (G.)*, [1990] 2 R.C.S. 57; *R. c. Walker*, 2008 CSC 34, [2008] 2 R.C.S. 245; *R. c. Morin*, [1992] 3 R.C.S. 286; *R. c. Morin*, [1988] 2 R.C.S. 345; **arrêts mentionnés :** *Schuldt c. La Reine*, [1985] 2 R.C.S. 592; *R. c. Lifchus*, [1997] 3 R.C.S. 320; *R. c. Biniaris*, 2000 CSC 15, [2000] 1 R.C.S. 381; *Wild c. La Reine*, [1971] R.C.S. 101.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 676(1)*a*).

Doctrine citée

Conseil canadien de la magistrature. Modèles de directives au jury, partie III, Directives finales, 9.4 Évaluation de la preuve, février 2004 (en ligne : http://www.cjc-ccm.gc.ca/french/lawyers_fr.asp?selMenu=lawyers%5FNCJI%2DJury%2DInstruction%2DFinal%2D2004%2D02%5Ffr%2Easp#_Toc187642363).

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Simmons, Rouleau et Watt), 2009 ONCA 834, 256 O.A.C. 246, 99 O.R. (3d) 761, 249 C.C.C. (3d) 140, 72 C.R. (6th) 154, [2009] O.J. No. 4963 (QL), 2009 CarswellOnt 7362, qui a annulé les acquittements inscrits par le juge Stong, [2009] O.J. No. 6377 (QL), 2009 CarswellOnt 8844, et qui a ordonné un nouveau procès. Pourvoi accueilli.

Christopher D. Hicks et *Misha Feldmann*, pour l'appelant.

Christine Bartlett-Hughes, pour l'intimée.

2011 SCC 45 (CanLII)

James D. Sutton and *Ann Marie Simmons*, for the intervener.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The appellant was acquitted at trial of two counts of sexual assault on his 17-year-old cousin. The Court of Appeal set aside the acquittals and ordered a new trial on the basis that the trial judge had erred in law by failing to consider all of the evidence in reaching his conclusion. The appellant's appeal to this Court raises both narrow and broader questions. The narrow question is whether the trial judge, in fact, failed to consider the whole of the evidence as the Court of Appeal concluded that he had; the broader question is under what circumstances a trial judge's alleged mishandling of the evidence gives rise to an error of law alone which justifies appellate intervention on a Crown appeal from an acquittal. Turning first to the narrow question, the trial judge, in my respectful view, did not make the error identified by the Court of Appeal. I would therefore allow the appeal and restore the acquittals entered at trial. However, it will be helpful to address the parties' and intervener's submissions on the broader issue concerning when, in a Crown appeal of an acquittal, alleged shortcomings in a trial judge's assessment of the evidence constitute an error of law alone justifying appellate intervention.

II. Overview of Facts and Proceedings

[2] The complainant alleged that on two occasions the appellant had non-consensual sexual intercourse with her while she was sleeping with him in his bed. She was 17 at the time of both incidents; he was 22 at the time of the first and 23 at

James D. Sutton et *Ann Marie Simmons*, pour l'intervenant.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] L'appelant a été acquitté à son procès relativement à deux chefs d'agression sexuelle à l'endroit de sa cousine de 17 ans. La Cour d'appel a annulé les acquittements et ordonné la tenue d'un nouveau procès parce que le juge du procès avait commis une erreur de droit en ne tenant pas compte de toute la preuve pour tirer sa conclusion. Le pourvoi de l'appelant devant notre Cour soulève à la fois une question précise et une question générale. La question précise est de savoir si, comme l'a conclu la Cour d'appel, le juge du procès a effectivement omis de tenir compte de toute la preuve; la question générale est de savoir dans quelles circonstances le traitement prétendument inadéquat de la preuve par le juge du procès soulève une erreur de droit seulement justifiant l'intervention de la juridiction d'appel lorsque le ministère public fait appel d'un acquittement. Pour ce qui est de la question précise d'abord, j'estime que le juge du procès n'a pas commis l'erreur que lui reproche la Cour d'appel. Je suis donc d'avis d'accueillir le pourvoi et de rétablir les acquittements prononcés au procès. Il est toutefois utile d'examiner les observations des parties et de l'intervenant sur la question plus générale relative aux circonstances dans lesquelles, lors de l'appel d'un acquittement par le ministère public, les erreurs qu'aurait commises le juge du procès dans son appréciation de la preuve constituent une erreur de droit seulement justifiant l'intervention de la juridiction d'appel.

II. Aperçu des faits et des procédures

[2] La plaignante prétend que l'appelant a eu des rapports sexuels avec elle sans son consentement à deux reprises alors qu'elle était couchée avec lui dans le lit de ce dernier. Elle avait 17 ans au moment des deux incidents; il avait 22 ans lors du

2011 SCC 45 (CanLII)

the time of the second. The trial judge found that the two incidents described by the complainant had occurred. The main issue, in his view, was whether the sexual activity had been proved to be without the complainant's consent ([2009] O.J. No. 6377 (QL)).

[3] The judge found that the appellant had "adopted a lifestyle" that included regular parties at his home and providing young women — including the complainant and her 15-year-old sister — with alcohol (para. 27).

[4] The first incident described by the complainant occurred in February 2006. The complainant and appellant were socializing in his apartment, including drinking alcohol that he had provided. The complainant's younger sister as well as the appellant's roommate and another friend were also present, but the friend left before the others went to sleep. At the end of the evening, the complainant's sister went to sleep on the couch, the roommate went to sleep in his room and the appellant and complainant went to sleep in the appellant's bed. The complainant testified her sleeping in the appellant's bed had not been discussed beforehand.

[5] The complainant testified that in the early hours of the morning, the appellant moved closer to her and began grabbing and touching her. She testified that she said "stop" but that he eventually had unprotected intercourse with her. She got up, cleaned herself off, walked around the house and returned to bed with the appellant, although she did not sleep. Later in the morning, she got up, woke up her sister and they left. She did not mention the incident, and her sister testified that nothing seemed amiss. The complainant's sister, however, testified that when she woke up on this occasion, the complainant was in the appellant's bedroom. When questioned about this apparent inconsistency between her evidence and that of the complainant, her sister responded that she could be confusing it with a different time when they were at the appellant's house.

premier incident et 23 ans lors du second. Selon le juge du procès, les deux incidents relatés par la plaignante ont eu lieu. À son sens, la question principale est de savoir si l'on a établi que l'activité sexuelle s'était déroulée sans le consentement de la plaignante ([2009] O.J. No. 6377 (QL)).

[3] Selon le juge, l'appelant a [TRADUCTION] « adopté un style de vie » comprenant des fêtes chez lui sur une base régulière et la fourniture d'alcool à de jeunes femmes, y compris la plaignante et sa sœur de 15 ans (par. 27).

[4] Le premier incident que relate la plaignante est survenu en février 2006. La plaignante et l'appelant bavardaient dans l'appartement de ce dernier et buvaient de l'alcool qu'il avait servi. La sœur cadette de la plaignante, le colocataire de l'appelant ainsi qu'un autre ami étaient là également, mais l'ami est parti avant que les autres n'aillent se coucher. À la fin de la soirée, la sœur de la plaignante est allée se coucher sur le sofa, le colocataire a fait de même dans sa chambre, et l'appelant ainsi que la plaignante se sont couchés dans le lit de ce dernier. Selon le témoignage de la plaignante, ils n'avaient pas discuté au préalable du fait qu'elle couche dans le lit de l'appelant.

[5] La plaignante a affirmé qu'aux petites heures du matin, l'appelant s'est rapproché d'elle et a commencé à la saisir et à la toucher. Selon son témoignage, elle a dit [TRADUCTION] « arrête », mais il a eu ensuite des rapports sexuels non protégés avec elle. Elle s'est levée, s'est lavée, a fait le tour de la maison, puis est retournée se coucher avec l'appelant, mais elle ne s'est pas endormie. Plus tard ce matin-là, elle s'est levée, a réveillé sa sœur et elles sont parties ensemble. La plaignante n'a pas mentionné l'incident, et sa sœur a affirmé que rien ne paraissait anormal. La sœur de la plaignante a cependant témoigné que, lorsqu'elle s'est réveillée ce matin-là, la plaignante se trouvait dans la chambre à coucher de l'appelant. Interrogée à propos de cette contradiction apparente entre son témoignage et celui de la plaignante, sa sœur a répondu qu'elle avait peut-être confondu le matin en question et un autre moment où elles étaient chez l'appelant.

2011 SCC 45 (CanLII)

[6] The second incident reported by the complainant occurred in May 2006. She again found herself at the appellant's apartment, after they both had participated in a long day of moving. She testified that she did not know how she ended up staying the night again. This time, they were alone. After watching movies, they retired to his bed. Once again, she testified that he began touching and kissing her, and that she said "no" before they had unprotected intercourse. Afterwards, she was "too on edge" to leave the apartment, despite having a car, so she returned to the same bed and went to sleep. She left the next day and did not tell anyone about the occurrence.

[7] The complainant posted a poem online. The judge found that it had been written very soon after the February 2006 incident "as an outlet" (para. 29). Her sister saw the poem on the Internet and the incidents came to light when she began to discuss it with the complainant. The complainant filed a police report, and the appellant was charged with two counts of sexual assault. At trial, the appellant testified and denied any sexual contact with the complainant.

[8] The trial judge acquitted the appellant on both counts. After summarizing virtually all of the evidence the trial judge found that he had "absolutely no doubt" (para. 26) that sexual intercourse had taken place between the appellant and complainant; he specifically rejected the appellant's denials in this regard (para. 36).

[9] However, the trial judge acknowledged that he also had to be convinced beyond a reasonable doubt that the sexual activity had occurred without the complainant's consent. He noted some "concerns" in this regard. He referred to the sister's evidence that she might have been confused between the times that she saw the complainant in the appellant's bed. The judge said that this caused him to wonder how many times the complainant had ended up in the appellant's bed. He asked himself

[6] Le deuxième incident signalé par la plaignante a eu lieu en mai 2006. Elle se trouvait à nouveau dans l'appartement de l'appelant après qu'ils eurent tous deux participé à une longue journée de déménagement. Elle a affirmé ne pas savoir comment elle avait fini par y passer une autre nuit. Ils étaient seuls à cette occasion. Après avoir regardé des films, ils se sont couchés dans son lit. Elle a témoigné qu'il a encore une fois commencé à la toucher et à l'embrasser, et qu'elle a dit [TRADUCTION] « non » avant qu'ils n'aient des rapports sexuels non protégés. Plus tard, elle était « trop énervée » pour quitter l'appartement même si elle avait une voiture. Elle est donc retournée se coucher dans le même lit et s'est endormie. Elle est partie le lendemain et n'a pas parlé de l'incident à qui que ce soit.

[7] La plaignante a affiché un poème en ligne. De l'avis du juge, elle l'a écrit très peu de temps après l'incident de février 2006 [TRADUCTION] « en tant qu'exutoire » (par. 29). Sa sœur a vu le poème sur Internet, et les incidents ont été révélés lorsqu'elle a commencé à en parler avec la plaignante. La plaignante a déposé un rapport au poste de police, et l'appelant a été accusé de deux chefs d'agression sexuelle. L'appelant a témoigné au procès et a nié avoir eu quelque contact sexuel que ce soit avec la plaignante.

[8] Le juge du procès a acquitté l'appelant relativement aux deux chefs d'accusation. Après avoir résumé presque toute la preuve, le juge du procès a dit n'avoir [TRADUCTION] « absolument aucun doute » (par. 26) que l'appelant et la plaignante avaient eu des relations sexuelles; il a rejeté explicitement les dénis de l'appelant à cet égard (par. 36).

[9] Le juge du procès a toutefois indiqué qu'il devait aussi être convaincu hors de tout doute raisonnable que l'activité sexuelle s'était déroulée sans le consentement de la plaignante. Il a dit avoir quelques « réserves » à ce sujet. Il a fait allusion au témoignage de la sœur selon lequel elle avait peut-être confondu les moments où elle avait aperçu la plaignante dans le lit de l'appelant. Le juge a dit que ce témoignage l'avait amené à se demander combien de fois la plaignante s'était retrouvée dans

2011 SCC 45 (CanLII)

"why did [the complainant] insist in going back to the same bed that she had been violated in?" (para. 34). The judge then noted that he suspected "very strongly" that the complainant was confused and that she "wrestled" with going into the accused's bedroom. He returned to the fact that "[s]he said she went to the bed on her own and it wasn't even discussed. Why?" (para. 35).

[10] The trial judge referred to the poem the complainant had written, entitled "Black Dark", and quoted it in its entirety in his oral reasons. As noted, he accepted both that it was written very shortly after the February incident, and that it had been written as an outlet. He then stated, "[w]hen I read [the complainant's] description of the incidents on February 11th, concerns are raised" (para. 31). He noted that the words "bittersweet" and "regret" which she had used in the poem were "[h]ardly the words that describe a rape" (para. 33). The trial judge then concluded that "[i]n all of the circumstances of this case, notwithstanding that I do not believe the accused, notwithstanding that I am satisfied that sexual intercourse did occur on both of these occasions, I cannot be satisfied that [the complainant] was sexually assaulted without her consent" (para. 36).

[11] The Crown appealed successfully to the Court of Appeal, which set aside the acquittals and ordered a new trial on both counts of the indictment (2009 ONCA 834, 256 O.A.C. 246). The court concluded that the trial judge erred in law in his approach to the evidence. Specifically, it found that he failed to consider some lines of the poem in the context of the others, and that he failed to consider the poem in the context of the complainant's testimony on consent. This, according to Watt J.A., was a "piecemeal" approach which was incompatible with the trial judge's obligations to consider the cumulative effect of all relevant evidence (para. 64) and constituted an error of law as set out in this Court's decision in *R. v. B. (G.)*, [1990] 2 S.C.R. 57.

le lit de l'appelant. Il s'est demandé [TRADUCTION] « pourquoi [la plaignante] tenait à retourner se coucher dans le lit où elle avait été violée? » (par. 34). Le juge a ensuite dit soupçonner « très fortement » que la plaignante était confuse et « hésitait » à entrer dans la chambre à coucher de l'accusé. Il est revenu sur le fait que « [s]elon les dires de la plaignante, elle est allée au lit de son plein gré et cela n'avait même pas fait l'objet de discussions. Pourquoi? » (par. 35).

[10] Le juge du procès a parlé du poème de la plaignante qui s'intitule *Black Dark*, et l'a cité intégralement dans les motifs qu'il a exposés de vive voix. Comme je l'ai déjà dit, il a retenu la thèse que ce poème avait été écrit en tant qu'exutoire très peu de temps après l'incident de février. Il a ajouté : [TRADUCTION] « [l]a lecture de l'exposé que fait [la plaignante] des incidents du 11 février suscite des doutes dans mon esprit » (par. 31). Le juge a signalé que les mots « aigre-doux » et « regret » qui figuraient dans le poème ne « décrivaient guère un viol » (par. 33). Le juge du procès a ensuite conclu en ces termes : « Vu les circonstances de l'espèce, et même si je ne crois pas l'accusé et je suis convaincu qu'il y a eu une relation sexuelle lors de ces deux incidents, je ne puis être convaincu que [la plaignante] a été agressée sexuellement sans son consentement » (par. 36).

[11] Le ministère public a eu gain de cause devant la Cour d'appel, qui a annulé les acquittements et ordonné un nouveau procès relativement aux deux chefs d'accusation (2009 ONCA 834, 256 O.A.C. 246). D'après la Cour d'appel, le juge du procès a commis une erreur de droit dans son examen de la preuve. Elle a conclu plus particulièrement qu'il n'avait pas examiné certaines lignes du poème à la lumière du reste du poème, et qu'il n'avait pas analysé le poème dans le contexte du témoignage de la plaignante sur le consentement. Il s'agissait, selon le juge Watt, d'une analyse [TRADUCTION] « fragmentaire », incompatible avec l'obligation du juge du procès de prendre en considération l'effet cumulatif de tous les éléments de preuve pertinents (par. 64), ce qui constituait une erreur de droit, comme l'explique notre Cour dans l'arrêt *R. c. B. (G.)*, [1990] 2 R.C.S. 57.

2011 SCC 45 (CanLII)

[12] The appellant argues that the trial judge did not approach the evidence in a "piecemeal" fashion. The appellant further argues that even if the trial judge did err as the Court of Appeal suggested, the Court of Appeal was without jurisdiction to entertain a Crown appeal because any error was an error of fact and not an error of law alone as is required by s. 676(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. The respondent Crown argues that, as held by the Court of Appeal, the trial judge did err in law by considering the evidence in a piecemeal fashion.

III. Issues

[13] There are two issues:

1. Did the trial judge fail to consider the evidence as a whole?

2. Under what circumstances does a trial judge's allegedly flawed assessment of the evidence constitute an error of law and thereby allow appellate review of an acquittal?

IV. Analysis

A. *Did the Trial Judge Fail to Consider the Evidence as a Whole?*

[14] As noted, the Court of Appeal found that the trial judge had failed to put particular passages in the complainant's poem in the context of the poem as a whole and of her sworn testimony. The court stated that

> [t]he trial judge had accepted [the complainant's] evidence that sexual intercourse had taken place, but never mentioned her testimony on the consent/non-consent issue, or said why he rejected it, apart from his reference to various isolated words in the poem on which [the complainant] was never questioned. [para. 62]

. . .

[12] Selon l'appelant, le juge du procès n'a pas analysé la preuve de manière « fragmentaire ». L'appelant prétend en outre que, même si le juge du procès avait bel et bien commis une erreur, tel que l'a affirmé la Cour d'appel, cette dernière n'avait pas compétence pour instruire un appel formé par le ministère public parce que, s'il y a eu erreur, ce ne pouvait être qu'une erreur de fait et non une erreur de droit seulement, comme l'exige l'al. 676(1)*a*) du *Code criminel*, L.R.C. 1985, ch. C-46. Pour sa part, le ministère public intimé prétend que, comme l'a conclu la Cour d'appel, le juge du procès a effectivement commis une erreur de droit en examinant la preuve de façon fragmentaire.

III. Questions en litige

[13] Deux questions se posent en l'espèce :

1. Le juge du procès a-t-il omis de prendre en considération l'ensemble de la preuve?

2. Dans quelles circonstances l'appréciation prétendument viciée de la preuve par le juge du procès constitue-t-elle une erreur de droit permettant la révision d'un acquittement par la cour d'appel?

IV. Analyse

A. *Le juge du procès a-t-il omis de prendre en considération l'ensemble de la preuve?*

[14] Comme je l'ai déjà dit, la Cour d'appel a conclu que le juge du procès n'avait pas examiné des passages précis du poème de la plaignante en tenant compte du reste du poème et de son témoignage sous serment. La Cour d'appel a mentionné que :

> [TRADUCTION] Le juge du procès avait accepté le témoignage de [la plaignante] selon lequel il y avait eu des relations sexuelles, mais [qu'il] n'avait jamais fait allusion à son témoignage sur la question du consentement ou de l'absence de consentement, ni dit pourquoi il a rejeté ce témoignage, mis à part sa mention de différents mots du poème pris isolément sur lesquels [la plaignante] n'avait jamais été interrogée. [par. 62]

. . .

2011 SCC 45 (CanLII)

. . . His piecemeal approach to isolated words in the poem was incompatible with his obligation to consider the poem as a whole, and together with the rest of the evidence on the issue. [para. 64]

While acknowledging that the trial judge considered other aspects of the complainant's conduct in his discussion of the consent/non-consent issue, the Court of Appeal concluded that "it was the isolated passages in the poem . . . that tilted the balance in favour of acquittal" (para. 70). The Court of Appeal also expressed concern that the trial judge had wrongly used the poem written in relation to the first incident in his consideration of the second.

[15] Respectfully, I cannot accept this characterization of the trial judge's decision for four reasons.

[16] First, the Court of Appeal erred when it stated that "[t]he reasons of the trial judge make *no* reference to the sworn testimony of [the complainant] given at trial" (para. 56 (emphasis in original)) and that he "had . . . never mentioned her testimony on the consent/non-consent issue, or said why he rejected it, apart from his reference to various isolated words in the poem on which [the complainant] was never questioned" (para. 62). In fact, the first eight pages of the transcription of the trial judge's oral reasons summarize the complainant's evidence, and her testimony that she did not consent is specifically referred to. The trial judge noted that, in connection with the February incident, the complainant had pushed the appellant away saying "stop" and that she pulled away, at no time consenting to the contact. In relation to the May incident, the trial judge noted that she had said "no" and pushed him away when the appellant started coming closer to her and kissing her, and that she testified that she had never consented to the incidents.

[17] Respectfully, the Court of Appeal misapprehended the record when it faulted the judge for not referring to the complainant's evidence about the

. . . Son analyse fragmentaire de mots du poème pris isolément était incompatible avec son obligation d'examiner l'ensemble du poème en tenant compte des autres éléments de preuve à cet égard. [par. 64]

Tout en reconnaissant que le juge du procès a pris en considération d'autres éléments de la conduite de la plaignante dans son analyse de la question du consentement, la Cour d'appel a conclu que [TRADUCTION] « ce sont les passages du poème pris isolément [. . .] qui ont fait pencher la balance en faveur de l'acquittement » (par. 70). La Cour d'appel s'est aussi dite préoccupée du fait que le juge du procès avait utilisé à tort le poème relatif au premier incident dans son examen du second incident.

[15] En toute déférence, je ne puis accepter cette façon de caractériser la décision du juge du procès pour quatre raisons.

[16] Premièrement, la Cour d'appel a affirmé à tort que [TRADUCTION] « [l]e juge du procès *ne* mentionne *pas* dans ses motifs le témoignage rendu sous serment par [la plaignante] au procès » (par. 56 (en italique dans l'original)) et qu'il « n'avait [. . .] jamais fait allusion à son témoignage sur la question du consentement ou de l'absence de consentement, ni dit pourquoi il a rejeté ce témoignage, mis à part sa mention de différents mots du poème pris isolément sur lesquels [la plaignante] n'avait jamais été interrogée » (par. 62). En fait, les huit premières pages de la transcription des motifs exposés de vive voix par le juge du procès résument le témoignage de la plaignante, et le passage de son témoignage quant à son absence de consentement y est explicitement mentionné. Le juge du procès a fait remarquer au sujet de l'incident de février que la plaignante avait repoussé l'appelant en disant [TRADUCTION] « arrête », et qu'elle s'était éloignée et n'avait jamais consenti au contact. Quant à l'incident de mai, le juge du procès a signalé que la plaignante avait dit « non » et avait repoussé l'appelant au moment où il s'est rapproché d'elle et l'a embrassée, et qu'elle avait affirmé n'avoir jamais consenti aux rapports sexuels.

[17] Avec égards, la Cour d'appel a mal interprété le dossier en reprochant au juge de ne pas avoir fait allusion au témoignage de la plaignante sur son

2011 SCC 45 (CanLII)

fact that she did not consent to the sexual activity. The trial judge referred to her evidence that she had not consented on at least three occasions in his reasons (paras. 7, 11 and 15).

[18] Second, the Court of Appeal's statement that the trial judge gave no reasons for rejecting the complainant's evidence is problematic for two reasons: the trial judge did not have to "reject" the complainant's evidence in order to be left with a reasonable doubt arising from the whole of the evidence, and the trial judge, as we shall see, gave extensive reasons as to why he was left with a reasonable doubt on the issue of consent.

[19] Third, there is no basis in the trial judge's reasons to conclude, as did the Court of Appeal, that he used small excerpts from the poem out of context. The judge quoted the poem as a whole and then drew attention to language that raised concerns in his mind, in the context of the rest of the evidence which he had heard.

[20] Finally, the Court of Appeal erred in concluding that it was a couple of brief excerpts from the poem that had "tilted" the balance in favour of acquittal and that the judge had improperly considered the poem in relation to the second incident. Respectfully, these conclusions are not based on a fair reading of the trial judge's reasons.

[21] The trial judge noted that he had to be satisfied beyond a reasonable doubt that the incidents occurred without the complainant's consent. He expressed his concern, based on the evidence of the relationship between the accused and the complainant and on the testimony of the complainant's sister, about how many times the complainant had been at the accused's home and ended up in his bed. He noted that the relationship between the appellant and the complainant was "strong but perverse" (para. 30). After referring to an excerpt from the poem and expressing concern arising from the complainant's use of the word "regret" in relation to the first incident, the trial judge asked "why did she insist in going back to the same bed that she

absence de consentement à l'activité sexuelle. Le juge du procès a évoqué ce témoignage au moins trois fois dans ses motifs (par. 7, 11 et 15).

[18] Deuxièmement, l'affirmation de la Cour d'appel selon laquelle le juge du procès n'a pas motivé le « rejet » du témoignage de la plaignante pose problème à deux égards : le juge du procès n'avait pas à « rejeter » le témoignage de la plaignante pour qu'il subsiste dans son esprit un doute raisonnable soulevé par l'ensemble de la preuve et, comme nous le verrons, il a motivé abondamment le doute raisonnable qui subsistait dans son esprit quant au consentement.

[19] Troisièmement, les motifs du juge du procès ne donnent aucunement matière à conclure, comme l'a fait la Cour d'appel, qu'il a utilisé hors contexte de courts extraits du poème. Le juge a cité le poème dans son intégralité avant de souligner les mots qui suscitaient des doutes dans son esprit eu égard aux autres éléments de preuve qui lui ont été présentés.

[20] Enfin, la Cour d'appel a eu tort de conclure que ce sont quelques courts extraits du poème qui avaient [TRADUCTION] « fait pencher » la balance en faveur de l'acquittement et que le juge avait eu tort d'examiner le poème relativement au deuxième incident. En toute déférence, ces conclusions ne procèdent pas d'une interprétation juste des motifs du juge du procès.

[21] Ce dernier a signalé qu'il devait être convaincu hors de tout doute raisonnable que les incidents étaient survenus sans le consentement de la plaignante. Il a exprimé sa réserve — fondée sur la preuve de la relation entre l'accusé et la plaignante et sur le témoignage de la sœur de la plaignante — quant au nombre de fois que la plaignante s'était trouvée chez l'accusé et avait couché dans son lit. Il a relevé que l'appelant et la plaignante entretenaient une relation [TRADUCTION] « solide mais perverse » (par. 30). Après avoir mentionné un extrait du poème et exprimé sa réserve au sujet de l'emploi, par la plaignante, du mot « regret » pour parler du premier incident, le juge du procès s'est demandé « pourquoi [elle tenait] à retourner

2011 SCC 45 (CanLII)

had been violated in?" (para. 34). This comment, of course, had nothing to do with the language of the poem but was based on the other evidence that he had heard in relation to both incidents.

[22] After referring to some further language in the poem — "First taste So bittersweet" — the judge said that he suspected very strongly when he read the poem that the complainant had been confused and that she had wrestled with going into that room. He then referred to her evidence about how she had gone to the bed on her own without discussion; the trial judge asked "[w]hy?" He then concluded that "[i]n all of the circumstances of this case" he could not be satisfied that the complainant had not consented to the sexual activity. In short, the judge's references to the poem excerpts were in the context of his references to other aspects of the evidence, and he explicitly stated that he was taking into account all of the circumstances of the case in reaching his conclusion.

[23] Respectfully, the Court of Appeal erred in its conclusion that the trial judge had taken a "piecemeal" approach to the evidence, and that his use of the poem had been out of context and had "tilted the balance" in his decision to acquit. Further, I do not agree that "[t]he trial judge appears to have used the poem about the events of February 11, 2006, to support his finding on the consent/non-consent issue in connection with the allegation of May 20, 2006" (para. 63). As set out above, a fair reading of the trial judge's reasons discloses that he had reasonable doubt based on his consideration of all the evidence.

B. *Under What Circumstances Do Alleged Shortcomings in a Trial Judge's Assessment of the Evidence Constitute an Error of Law and Thereby Allow Appellate Review of an Acquittal?*

[24] The Crown's right of appeal from an acquittal of an indictable offence is limited to "any

se coucher dans le lit où elle avait été violée » (par. 34). Bien entendu, ce commentaire n'avait rien à voir avec le texte du poème; il reposait plutôt sur les autres éléments de preuve qui lui avaient été présentés à l'égard des deux incidents.

[22] Après avoir évoqué quelques autres passages du poème — [TRADUCTION] « Première impression si aigre-douce » —, le juge a dit soupçonner très fortement, à la lecture du poème, que la plaignante était confuse et avait hésité à entrer dans cette chambre. Il a ensuite parlé de son témoignage selon lequel elle était allée au lit de son plein gré sans en avoir discuté au préalable; le juge du procès s'est demandé « [p]ourquoi? ». Il a ensuite conclu que, « [v]u les circonstances de l'espèce », il ne pouvait se convaincre que la plaignante n'avait pas consenti à l'activité sexuelle. Bref, le juge a mentionné des extraits du poème dans le contexte des autres éléments de preuve dont il a parlé, et il a expressément dit tenir compte de toutes les circonstances de l'espèce pour arriver à sa conclusion.

[23] Avec égards, la Cour d'appel a conclu à tort que le juge du procès avait analysé la preuve de façon [TRADUCTION] « fragmentaire » et que son utilisation hors contexte du poème avait « fait pencher la balance » dans sa décision d'acquitter l'appelant. De plus, j'estime qu'elle a eu tort de dire que « [l]e juge du procès semble avoir utilisé le poème relatif à l'incident survenu le 11 février 2006 pour étayer sa conclusion quant à la question du consentement ou de l'absence de consentement à l'égard de l'incident qui serait survenu le 20 mai 2006 » (par. 63). Comme je l'ai indiqué précédemment, il ressort d'une interprétation juste des motifs du juge du procès qu'il entretenait un doute raisonnable après avoir examiné toute la preuve.

B. *Dans quelles circonstances les lacunes dont souffrirait l'appréciation de la preuve par le juge du procès constituent-elles une erreur de droit et donnent-elles ouverture, pour cette raison, à la révision d'un acquittement par la cour d'appel?*

[24] Le ministère public ne peut interjeter appel de l'acquittement d'une infraction punissable par

2011 SCC 45 (CanLII)

ground of appeal that involves a question of law alone": *Criminal Code*, s. 676(1)(*a*). This limited right of appeal engages the vexed question of what constitutes, for jurisdictional purposes, an error of law alone. This appeal raises once again the issue of when the trial judge's alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal. The jurisprudence currently recognizes four such situations. While this may not be an exhaustive list, it will be helpful to review these four situations briefly.

(1) It Is an Error of Law to Make a Finding of Fact for Which There Is No Evidence — However, a Conclusion That the Trier of Fact Has a Reasonable Doubt Is Not a Finding of Fact for the Purposes of This Rule

[25] It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604. It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met. Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, a reasonable doubt is logically derived from the evidence or absence of evidence. Juries are properly so instructed and told that they may accept some, all or none of a witness's evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence (online).

[26] The principle that it is an error of law to make a finding of fact for which there is no supporting

voie de mise en accusation que « pour tout motif d'appel qui comporte une question de droit seulement » : *Code criminel*, al. 676(1)*a*). Ce droit d'appel limité fait intervenir la question épineuse de savoir en quoi consiste une erreur de droit seulement. Le présent pourvoi soulève de nouveau la question de savoir quand les lacunes dont souffrirait l'appréciation de la preuve par le juge du procès constituent une erreur de droit qui permet au ministère public d'interjeter appel d'un acquittement. La jurisprudence fait actuellement état de quatre situations de ce genre. Cette liste n'est peut-être pas exhaustive, mais il sera utile de réviser brièvement ces quatre situations.

(1) Une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit — Par contre, pour l'application de cette règle, la conclusion que le juge des faits entretient un doute raisonnable n'est pas une conclusion de fait

[25] Il est reconnu depuis longtemps qu'une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit : *Schuldt c. La Reine*, [1985] 2 R.C.S. 592, p. 604. Il ne découle toutefois pas de ce principe qu'un acquittement peut être annulé parce qu'il n'est pas appuyé par la preuve. En l'absence de quelque fait ou élément à l'égard duquel le fardeau de preuve incombe à l'accusé, un acquittement est non pas une conclusion de fait, mais une conclusion qu'il n'a pas été satisfait à la norme de persuasion hors de tout doute raisonnable. Qui plus est, comme l'a souligné la Cour dans *R. c. Lifchus*, [1997] 3 R.C.S. 320, au par. 39, un doute raisonnable doit logiquement découler de la preuve ou de l'absence de preuve. Le juge en avise à juste titre les jurés et leur dit qu'ils peuvent accepter une partie ou l'ensemble de la déposition d'un témoin ou la rejeter entièrement : *Lifchus*, par. 30 et 36; Conseil canadien de la magistrature, Modèles de directives au jury, partie III, Directives finales, 9.4 Évaluation de la preuve (en ligne).

[26] La règle selon laquelle une conclusion de fait qui n'est appuyée par aucun élément de preuve

2011 SCC 45 (CanLII)

evidence does not, in general, apply to a decision to acquit based on a reasonable doubt. As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22:

> A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. . . . [W]hereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]

[27] The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33: ". . . as a matter of law, the concept of 'unreasonable acquittal' is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt."

(2) The Legal Effect of Findings of Fact or of Undisputed Facts Raises a Question of Law

[28] *R. v. Morin*, [1992] 3 S.C.R. 286, lists this as one category of cases in which the trial judge's assessment of the evidence may give rise to an error of law. As Sopinka J. put it, at p. 294:

> If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute.

In short, the appellate court can simply apply the trial judge's findings of fact to the proper legal principles; the trial judge's error, if there is one, may safely be traced to a question of law rather

constitue une erreur de droit ne s'applique généralement pas à l'acquittement fondé sur un doute raisonnable. Comme l'a dit le juge Binnie au par. 22 de l'arrêt *R. c. Walker*, 2008 CSC 34, [2008] 2 R.C.S. 245 :

> La différence majeure entre la position du ministère public et celle de l'accusé dans un procès criminel tient à ce que, bien sûr, l'accusé jouit de la présomption d'innocence. [. . .] [T]andis que l'accusé ne peut être déclaré coupable que si la poursuite établit chacun des éléments factuels de l'infraction au-delà de tout doute raisonnable, cette exigence ne s'applique pas à un acquittement qui, contrairement à une condamnation, peut reposer simplement sur l'absence de preuve. [Italiques omis.]

[27] Notre Cour l'a dit très clairement dans *R. c. Biniaris*, 2000 CSC 15, [2000] 1 R.C.S. 381, par. 33 : « . . . la notion d'"acquittement déraisonnable" est incompatible, en droit, avec la présomption d'innocence et l'obligation qu'a la poursuite de présenter une preuve hors de tout doute raisonnable. »

(2) L'effet juridique des conclusions de fait ou des faits incontestés soulève une question de droit

[28] Il s'agit d'un type de situations énumérées dans l'arrêt *R. c. Morin*, [1992] 3 R.C.S. 286, où l'appréciation de la preuve par le juge du procès peut donner lieu à une erreur de droit. Comme l'a dit le juge Sopinka à la p. 294 :

> Si un juge du procès conclut à l'existence de tous les faits nécessaires pour tirer une conclusion en droit et que, pour tirer cette conclusion, ces faits peuvent simplement être tenus pour avérés, une cour d'appel peut ne pas partager la conclusion tirée sans empiéter sur la fonction de recherche des faits conférée au juge du procès. Le désaccord porte sur le droit et non sur les faits ni sur les conclusions à tirer de ceux-ci. Le même raisonnement s'applique si les faits sont acceptés ou incontestés.

En bref, la cour d'appel n'a qu'à appliquer les bons principes juridiques aux conclusions de fait du juge du procès; on peut établir en toute sûreté un lien entre l'erreur du juge, s'il en est, et une question

2011 SCC 45 (CanLII)

than to any question about how to weigh the evidence.

(3) An Assessment of the Evidence Based on a Wrong Legal Principle Is an Error of Law

[29] This is another category mentioned in *Morin*. In that case, Sopinka J. stated at p. 295, "Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle." In *B. (G.)*, Wilson J. added important cautionary words concerning this basis for appellate intervention:

> . . . it will be more difficult in an appeal from an acquittal to establish with certainty that the error committed by the trial judge raised a question of law alone because of the burden of proof on the Crown in all criminal prosecutions and the increased importance of examining critically all evidence that may raise a reasonable doubt. [p. 75]

[30] This proposition was said by Lamer J. (as he then was) in *Schuldt* to constitute the proper basis for the Court's decision in *Wild v. The Queen*, [1971] S.C.R. 101. In *Schuldt*, at p. 610, it was affirmed that except in the rare cases in which a statutory provision places an onus upon the accused, it can sometimes be said as a matter of law that there is no evidence on which the court can convict, but never that there is no evidence on which it can acquit as there is always the rebuttable presumption of innocence. This approach was also adopted in *B. (G.)* by Wilson J., at pp. 69-70, and the point was further underlined in the concurring reasons of McLachlin J. (as she then was), at p. 79, where she wrote: "In the absence of . . . misdirection the law is clear that doubts about the reasonableness of the trial judge's assessment of the evidence [in the context of a Crown appeal of an acquittal] do not constitute questions of law alone . . . ."

de droit plutôt qu'une question de pondération adéquate de la preuve.

(3) Une appréciation de la preuve fondée sur un mauvais principe juridique constitue une erreur de droit

[29] Il s'agit d'un autre type de situations énoncé dans *Morin*. Comme l'a dit le juge Sopinka à la p. 295 de cet arrêt, « [l]'omission d'apprécier les éléments de preuve ne saurait constituer une erreur de droit que si elle résulte d'une mauvaise compréhension d'un principe juridique. » La juge Wilson a fait une importante mise en garde au sujet de ce moyen d'intervention en appel dans l'arrêt *B. (G.)* :

> Il sera [. . .] plus difficile dans l'appel d'un acquittement d'établir avec certitude que l'erreur commise par le juge du procès soulevait une question de droit seulement en raison du fardeau de preuve qui incombe au ministère public dans toutes les poursuites criminelles et de l'importance accrue de l'examen critique de tous les éléments de preuve susceptibles de soulever un doute raisonnable. [p. 75]

[30] Le juge Lamer, plus tard Juge en chef, a affirmé dans *Schuldt* que cette proposition constitue le véritable fondement de l'arrêt de la Cour *Wild c. La Reine*, [1971] R.C.S. 101. Le juge Lamer a mentionné dans *Schuldt*, à la p. 610, que, sauf dans les rares cas où une disposition législative impose le fardeau de la preuve à l'accusé, on peut parfois dire en droit qu'il y a absence de preuve qui puisse permettre au tribunal de déclarer le prévenu coupable, mais on ne peut jamais dire qu'il y a absence de preuve qui lui permette de l'acquitter, car il y a toujours la présomption d'innocence qui doit être réfutée. La juge Wilson a elle aussi fait sienne cette approche aux p. 69 et 70 de l'arrêt *B. (G.)*, et la juge McLachlin (maintenant Juge en chef) a également souligné ce point comme suit dans ses motifs concordants, à la p. 79 : « En l'absence d'une [. . .] erreur, la loi prévoit clairement que les doutes sur le caractère raisonnable de l'appréciation de la preuve par le juge du procès [dans le cas d'un appel formé par le ministère public à l'encontre d'un acquittement] ne constituent pas uniquement une question de droit . . . »

2011 SCC 45 (CanLII)

(4) The Trial Judge's Failure to Consider All of the Evidence in Relation to the Ultimate Issue of Guilt or Innocence Is an Error of Law

[31] This was Sopinka J.'s last category in *Morin* (pp. 295-96). The underlying legal principle is set out in another decision called *R. v. Morin*, [1988] 2 S.C.R. 345. The principle is that it is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt; the evidence must be looked at as a whole: see, e.g., *B. (G.)*, at pp. 75-77 and 79. However, Sopinka J. sounded an important warning about how this error may be identified. It is a misapplication of the *Morin* principle to apply it whenever a trial judge fails to deal with each piece of evidence or record each piece of evidence and his or her assessment of it. As noted in *Morin* (1992), at p. 296, "A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect." This was the basis of intervention relied on by the Court of Appeal, but as noted earlier, a fair reading of the trial judge's reasons does not support this finding of legal error.

[32] A trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed. As Binnie J. pointed out in *Walker*, "Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue" (para. 20). *Walker* also clearly holds that the adequacy of a trial judge's reasons is informed by the limited grounds for Crown rights of appeal from acquittals (paras. 2 and 22). As Binnie J. succinctly put it, "Caution must be taken to avoid seizing on perceived deficiencies in a trial judge's reasons for acquittal to

(4) Le juge du procès commet une erreur de droit s'il ne tient pas compte de toute la preuve qui se rapporte à la question ultime de la culpabilité ou de l'innocence

[31] C'est le dernier type de situations énumérées par le juge Sopinka dans *Morin* (p. 295 et 296). Un autre arrêt portant le même intitulé, *R. c. Morin*, [1988] 2 R.C.S. 345, en énonce le principe juridique sous-jacent. Selon ce principe, c'est une erreur de droit que d'assujettir des éléments de preuve individuels à la norme de preuve hors de tout doute raisonnable; il faut examiner l'ensemble de la preuve : voir, notamment, *B. (G.)*, p. 75-77 et 79. Le juge Sopinka a toutefois servi une importante mise en garde à propos de la manière dont on peut relever l'erreur en question. Il est erroné d'appliquer le principe établi dans *Morin* chaque fois que le juge du procès ne traite pas de chacun des éléments de preuve ou ne consigne pas chacun d'eux et l'appréciation qu'il en a faite. Comme le juge Sopinka l'a souligné à la p. 296 de l'arrêt *Morin* (1992) : « Le juge du procès doit examiner tous les éléments de preuve qui se rapportent à la question ultime à trancher, mais à moins que les motifs démontrent que cela n'a pas été fait, l'omission de consigner que cet examen a été fait ne permet pas de conclure qu'une erreur de droit a été commise à cet égard. » C'est le motif sur lequel s'est fondée la Cour d'appel pour intervenir, mais, comme je l'ai déjà dit, une interprétation juste des motifs du juge du procès n'étaie pas ce constat d'erreur de droit.

[32] Le juge du procès n'est pas tenu de mentionner chacun des éléments de preuve qu'il a examinés ou d'expliquer en détail l'appréciation qu'il a faite de chacun d'eux. Comme l'a souligné le juge Binnie dans *Walker*, « [l]es motifs sont suffisants s'ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l'abstrait, mais d'après la réponse qu'ils apportent aux éléments essentiels du litige » (par. 20). L'arrêt *Walker* établit aussi clairement que le caractère suffisant des motifs du juge du procès est fonction des moyens limités permettant au ministère public de faire appel d'un acquittement (par. 2 et 22). Comme l'a dit succinctement

2011 SCC 45 (CanLII)

create a ground of 'unreasonable acquittal' which is not open to the court under the provisions of the *Criminal Code*" (para. 2).

[33] Having reviewed four types of cases in which an alleged mishandling of the evidence may constitute an error of law alone, I return to the appellant's submissions. He argues that on a Crown appeal from an acquittal, where the error of law is alleged to be a defect in the trial judge's assessment of the evidence, a reviewable error arises only where four conditions are met: (a) an error of law has been committed; (b) the misapprehension of the evidence is not properly characterized as either an unreasonable verdict or a miscarriage of justice; (c) the Crown can show with a high degree of certainty that the error affected the verdict; and (d) there has been a shift in a legal burden to the accused. For reasons I will develop, I cannot accept this submission.

[34] The appellant's first condition — that an error of law has been committed — simply restates the question. The question is under what circumstances may an alleged mishandling of the evidence by the trial judge constitute an error of law alone giving the Crown a right of appeal from an acquittal. I have reviewed four types of situations, which may not be an exhaustive list, in which this may be the case.

[35] The appellant's second condition, relating to whether the alleged misapprehension of the evidence is "not properly characterized" as an unreasonable verdict or a miscarriage of justice, is not a helpful way of approaching the issue. Unreasonable verdict and miscarriage of justice are bases for appellate intervention in the case of conviction appeals; reference to them does not help identify errors of law alone for the purposes of Crown appeals from acquittals.

le juge Binnie, « [i]l faut prendre garde de ne pas s'arrêter aux lacunes apparentes des motifs formulés par le juge du procès lors de l'acquittement pour créer un motif d'"acquittement déraisonnable", verdict que le tribunal ne peut prononcer en vertu du *Code criminel* » (par. 2).

[33] Après avoir examiné quatre types de situations dans lesquelles un traitement prétendument inadéquat de la preuve peut constituer une erreur de droit seulement, je reviens aux observations de l'appelant. Selon lui, lorsque le ministère public interjette appel d'un acquittement et prétend qu'une faille dans l'appréciation de la preuve par le juge du procès constitue une erreur de droit, cette erreur n'est susceptible de révision que si quatre conditions sont réunies : a) une erreur de droit a été commise; b) la mauvaise interprétation de la preuve n'est pas en réalité un verdict déraisonnable ou une erreur judiciaire; c) le ministère public est à même de démontrer avec un degré de certitude élevé que l'erreur a influé sur le verdict; et d) il y a eu déplacement vers l'accusé d'un fardeau imposé par la loi. Pour les motifs exposés plus loin, je ne puis accepter cette observation.

[34] La première condition énoncée par l'appelant — une erreur de droit a été commise — ne fait que reformuler la question, qui est de savoir dans quelles circonstances un traitement prétendument inadéquat de la preuve par le juge du procès peut constituer une erreur de droit seulement qui permet au ministère public de faire appel d'un acquittement. J'ai étudié quatre types de situations — et il y en a peut-être d'autres — où cela peut se produire.

[35] La deuxième condition énoncée par l'appelant, qui a trait au point de savoir si la mauvaise interprétation de la preuve « n'est pas en réalité » un verdict déraisonnable ou une erreur judiciaire, n'est pas un moyen utile d'aborder la question. Le verdict déraisonnable et l'erreur judiciaire sont des moyens de révision en appel d'une déclaration de culpabilité; le fait de les mentionner n'aide pas à identifier les erreurs de droit seulement lorsque le ministère public fait appel d'un acquittement.

2011 SCC 45 (CanLII)

[36] The appellant's third condition, that the Crown can show a high degree of certainty that the error affected the verdict, similarly does not assist in identifying a question of law alone. This condition relates not to whether an error is one of law, but to when, in the presence of an error of law, appellate intervention is justified.

[37] The appellant's fourth point is that a trial judge's treatment of the evidence can never constitute an error of law for the purposes of permitting a Crown appeal unless there has been a shifting of the burden of proof. He bases this position on a statement by Lamer J. in *Schuldt*, at p. 604:

> . . . a finding of fact that is made in the absence of any supportive evidence is an error of law. I must say, however, that that will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact.

[38] The appellant contends that the Court's decision in *Wild* should now be considered to have been wrongly decided.

[39] Respectfully, I do not accept either of these submissions. As I explained earlier, the principle set out in *Schuldt* (and many other cases) is that a reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt. The Court has twice, in *Schuldt* and *B. (G.)*, explained the proper basis of the decision in *Wild*. It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

C. *Application to This Case*

[40] As noted, while it is an error of law for a trial judge to assess the evidence piecemeal, the trial judge's reasons in this case do not, in my view, disclose any such error.

[36] La troisième condition qu'énonce l'appelant — le ministère public est à même de démontrer avec un degré de certitude élevé que l'erreur a influé sur le verdict — n'aide pas non plus à reconnaître une question de droit seulement. Cette condition se rapporte non pas à la question de savoir si l'erreur en est une de droit, mais à celle de savoir quand la juridiction d'appel peut intervenir en cas d'erreur de droit.

[37] Selon le quatrième argument de l'appelant, le traitement de la preuve par le juge du procès peut seulement constituer une erreur de droit donnant ouverture à un appel du ministère public s'il y a eu déplacement du fardeau de preuve. L'appelant fonde cette position sur des propos tenus par le juge Lamer dans *Schuldt*, à la p. 604 :

> . . . une conclusion de fait qui n'est appuyée par aucun élément de preuve constitue une erreur de droit. Cela dit, je m'empresse d'ajouter que, dans le cas d'un acquittement, cela ne se produira que si la loi a transféré à l'accusé l'obligation de prouver un fait donné.

[38] L'appelant prétend qu'il faut désormais considérer comme mal fondé l'arrêt de la Cour *Wild*.

[39] Avec égards, je n'accepte aucune de ces observations. Comme je l'ai expliqué précédemment, l'arrêt *Schuldt* (et bien d'autres décisions) énonce le principe qu'un doute raisonnable n'a pas à reposer sur la preuve; le doute peut découler d'une absence de preuve ou du simple fait que la preuve ne parvient pas à convaincre le juge des faits hors de tout doute raisonnable, soit la norme à atteindre. La Cour a expliqué à deux reprises, dans *Schuldt* et *B. (G.)*, le fondement sur lequel repose l'arrêt *Wild*. Ce n'est que lorsqu'un doute raisonnable est vicié par une erreur de droit que l'on peut réviser en appel un acquittement.

C. *Application aux faits de l'espèce*

[40] Comme je l'ai déjà dit, bien que le juge présidant un procès commette une erreur de droit en analysant la preuve de façon fragmentaire, les motifs du juge du procès en l'espèce ne révèlent, à mon avis, aucune erreur de ce genre.

2011 SCC 45 (CanLII)

V. Disposition

[41] I would allow the appeal and restore the acquittals entered at trial.

Appeal allowed.

Solicitors for the appellant: Hicks Adams, Toronto.

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

Solicitor for the intervener: Public Prosecution Service of Canada, Gatineau.

V. Dispositif

[41] Je suis d'avis d'accueillir le pourvoi et de rétablir les acquittements prononcés au procès.

Pourvoi accueilli.

Procureurs de l'appelant : Hicks Adams, Toronto.

Procureur de l'intimée : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant : Service des poursuites pénales du Canada, Gatineau.

2011 SCC 45 (CanLII)

Tab 23

Her Majesty The Queen *Appellant*

v.

Ulybel Enterprises Limited *Respondent*

INDEXED AS: R. *v.* ULYBEL ENTERPRISES LTD.

Neutral citation: 2001 SCC 56.

File No.: 27543.

2001: January 16; 2001: September 27.

Present: Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

Courts — Jurisdiction — Superior courts — Vessel sold under authority of Federal Court of Canada and proceeds held by court in exercise of its admiralty jurisdiction — Whether provincial superior court can order forfeiture of proceeds of sale of vessel pursuant to s. 72(1) of Fisheries Act, R.S.C. 1985, c. F-14.

Fisheries — Forfeiture of proceeds of sale of fishing vessel — Scope of power to order forfeiture of proceeds — Whether continued detention of seized vessel precondition to order of forfeiture pursuant to s. 72(1) of Fisheries Act, R.S.C. 1985, c. F-14.

The respondent is the registered owner of a Canadian vessel which was observed fishing in the NAFO Convention Area without the required licence or registration card, contrary to the *Atlantic Fishery Regulations, 1985*. The vessel and its cargo of fish were seized and the Crown took physical possession of the vessel. In 1994 and 1995, actions were commenced in the Federal Court of Canada claiming interests in the vessel and the court issued arrest orders against the vessel. The respondent was subsequently indicted on charges to be tried before the Newfoundland Supreme Court, Trial Division. Meanwhile, the Crown continued to possess the vessel and was incurring storage and maintenance costs. In 1996, it intervened in one of the Federal Court actions and successfully sought an order allowing the sale of the vessel. The proceeds of the sale were deposited with the Receiver General for the benefit of the Federal Court. In 1997, the respondent was convicted of

Sa Majesté la Reine *Appelante*

c.

Ulybel Enterprises Limited *Intimée*

RÉPERTORIÉ : R. *c.* ULYBEL ENTERPRISES LTD.

Référence neutre : 2001 CSC 56.

Nº du greffe : 27543.

2001 : 16 janvier; 2001 : 27 septembre.

Présents : Les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE

Tribunaux — Compétence — Cours supérieures — La Cour fédérale du Canada a ordonné la vente d'un navire et a détenu le produit de la vente dans l'exercice de sa compétence en matière d'amirauté — La cour supérieure d'une province peut-elle ordonner la confiscation du produit de la vente d'un navire en vertu de l'art. 72(1) de la Loi sur les pêches, L.R.C. 1985, ch. F-14?

Pêche — Confiscation du produit de la vente d'un bateau de pêche — Étendue du pouvoir d'ordonner la confiscation du produit de la vente — La rétention continue d'un bateau saisi constitue-t-elle une condition préalable au prononcé d'une ordonnance de confiscation en vertu de l'art. 72(1) de la Loi sur les pêches, L.R.C. 1985, ch. F-14?

L'intimée est le propriétaire inscrit d'un navire canadien à bord duquel des personnes ont été vues en train de pêcher dans la zone régie par la convention de l'OPANO en l'absence du permis et du certificat d'enregistrement requis par le *Règlement de pêche de l'Atlantique de 1985*. Le navire et sa cargaison de poisson ont été saisis et la Couronne a pris matériellement possession du navire. En 1994 et 1995, des actions dans lesquelles on prétendait avoir un droit dans le navire ont été intentées devant la Cour fédérale du Canada, qui a délivré des ordonnances de saisie à l'égard du navire. L'intimée a ensuite été mise en accusation relativement à des chefs d'accusation qui devaient être instruits par la Section de première instance de la Cour suprême de Terre-Neuve. Entre-temps, la Couronne a conservé la possession du navire et a engagé des frais pour sa garde et son entretien. En 1996, elle est intervenue dans l'une des actions intentées devant la Cour fédérale et a réussi

2001 SCC 56 (CanLII)

the charges and the sentence included forfeiture of $50,000 of the proceeds of the sale of the vessel. The Newfoundland Court of Appeal upheld the conviction and held that the sentence was not excessive. The court held, however, that the Supreme Court, Trial Division had no jurisdiction or authority to order the forfeiture of the proceeds of sale and it overturned the order of forfeiture, holding that physical detention of a thing seized under the *Fisheries Act* is a necessary precondition to an order of forfeiture.

à obtenir une ordonnance autorisant la vente du navire. Le produit de la vente a été déposé auprès du receveur général au profit de la Cour fédérale. En 1997, l'intimée a été déclarée coupable relativement aux accusations portées contre elle et on lui a infligé une peine incluant la confiscation d'une somme de 50 000 $ sur le produit de la vente du navire. La Cour d'appel de Terre-Neuve a confirmé la déclaration de culpabilité et a jugé que la peine n'était pas excessive. Elle a cependant conclu que la Section de première instance de la Cour suprême n'avait ni la compétence ni le pouvoir d'ordonner la confiscation du produit de la vente et elle a infirmé l'ordonnance de confiscation, estimant que la rétention matérielle d'un objet saisi en vertu de la *Loi sur les pêches* est une condition préalable nécessaire au prononcé d'une ordonnance de confiscation.

Held: The appeal should be allowed and the order of forfeiture made by the Newfoundland Supreme Court**,** Trial Division restored.

Arrêt : Le pourvoi est accueilli et l'ordonnance de confiscation rendue par la Section de première instance de la Cour suprême de Terre-Neuve est rétablie.

A provincial superior court can order forfeiture of the proceeds of sale of a vessel pursuant to s. 72(1) of the *Fisheries Act* even when the vessel has been sold under the authority of the Federal Court and the proceeds are held by that court in the exercise of its admiralty jurisdiction.

La cour supérieure d'une province peut ordonner la confiscation du produit de la vente d'un navire en vertu du par. 72(1) de la *Loi sur les pêches*, même lorsque c'est la Cour fédérale qui a ordonné la vente du navire et qu'elle détient le produit de la vente dans l'exercice de sa compétence en matière d'amirauté.

In light of the kinds of property subject to seizure under s. 51 of the *Fisheries Act*, the words in s. 72(1) read in their ordinary and grammatical sense clearly contemplate an order of forfeiture of the proceeds of disposition of a vessel seized under the Act. The legislative history also supports a broader interpretation of s. 72(1). A former version of s. 72(1) limited the scope of the power to order forfeiture of proceeds to the proceeds of a disposition of perishables. In 1991, the limiting language was removed in favour of a general reference to the proceeds of "any thing seized under this Act". There is a presumption that the amendments were made for an intelligible purpose and, in this case, the effect of the 1991 amendment to s. 72(1) was to broaden the scope of the forfeiture provision to include the power to forfeit proceeds of the sale of a vessel. This effect is consistent with the intention of Parliament to increase the flexibility and severity of available penalties for *Fisheries Act* offences.

Si on interprète les termes utilisés au par. 72(1) de la *Loi sur les pêches* dans leur sens ordinaire et grammatical, en tenant compte du type de biens susceptibles de saisie aux termes de l'art. 51, il est clair que la portée du par. 72(1) s'étend au prononcé d'une ordonnance de confiscation du produit de l'aliénation d'un navire saisi en vertu de la Loi. L'historique législatif appuie aussi une interprétation plus large du par. 72(1). Une ancienne version du par. 72(1) limitait l'étendue du pouvoir d'ordonner la confiscation au produit de la vente de marchandises périssables. En 1991, les termes limitatifs ont été supprimés pour être remplacés par la mention générale du produit de « tout objet saisi ». Il existe une présomption selon laquelle les modifications poursuivent un but intelligible et, en l'espèce, la modification apportée en 1991 au par. 72(1) a eu pour effet d'élargir la portée de la disposition relative à la confiscation en y intégrant le pouvoir de confisquer le produit de la vente d'un navire. Cet effet est conforme à l'intention du législateur, qui consiste à accroître la souplesse et la sévérité des peines applicables aux infractions prévues dans la *Loi sur les pêches*.

The fact that the *Fisheries Act* preserves the property of an accused person is not fatal to the broader interpretation of the power to order forfeiture. This reflects the

Le fait que la *Loi sur les pêches* préserve les biens de l'accusé n'empêche pas l'interprétation large du pouvoir d'ordonner la confiscation. Cela reflète la présomption

2001 SCC 56 (CanLII)

presumption of innocence and the principle that the property of an accused should be preserved until culpability is determined. A person charged with an offence under the *Fisheries Act*, however, cannot rely on the presumption of innocence to prevent or delay a person with an *in rem* claim against his property from obtaining a remedy. Similarly, where culpability has been finally determined, the presumption of innocence is spent and nothing in the Act immunizes proceeds of sale realized pursuant to a civil authority from forfeiture. The scheme of the Act is strict enough to preserve the seized property of an accused and flexible enough to preserve the availability of the penalties necessary to achieve the object of the Act.

With respect to the legislative context, had Parliament intended the phrase "any proceeds realized from its disposition" to be limited to proceeds of perishables, it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Further, a continued physical detention is not expressly stated as a precondition to an order of forfeiture on the face of s. 72(1) nor is it necessary to infer it as a precondition. The process set out in s. 71(2) by which a security deposit obtains the release of seized property is beneficial to the parties and creditors and should not be discouraged. This process would be less attractive if an order of forfeiture were subject to a pre-condition of continued physical detention. Section 72(1) should thus be interpreted as contemplating the making of an order of forfeiture against a vessel that has been released from seizure and returned on the deposit of security. It follows that s. 72(1) authorizes the forfeiture of things that have been formerly seized but released from seizure. Moreover, it is evident from s. 75 that the Act contemplates the possibility of parallel proceedings, *in personam* and *in rem*, involving the same vessel. This lends support to the view that s. 72(1) authorizes the forfeiture of proceeds realized pursuant to an authority other than the *Fisheries Act*. Lastly, the admiralty provisions of the *Federal Court Act* and *Fisheries Act* should be read as a consistent, harmonious scheme for the regulation of maritime matters. Fishing vessels and their use are at the heart of the activities governed by each regime. If the Court of Appeal's narrow interpretation is adopted, an order for sale emanating from the Federal Court would terminate the jurisdiction of the Newfoundland Supreme Court to order forfeiture. Such a result does not comply with the principle of interpretation that presumes a harmony,

d'innocence et le principe selon lequel il faut préserver les biens de l'accusé jusqu'à ce qu'une déclaration de culpabilité soit prononcée. La personne accusée d'une infraction à la *Loi sur les pêches* ne peut toutefois pas invoquer la présomption d'innocence pour empêcher une personne ayant une demande *in rem* à faire valoir relativement à ses biens d'obtenir réparation ou pour retarder l'obtention de cette réparation. De même, une décision définitive qui établit la culpabilité met fin à la présomption d'innocence et rien dans la Loi n'empêche la confiscation du produit d'une vente effectuée en matière civile. Le régime établi par la Loi est suffisamment strict pour préserver les biens saisis de l'accusé et suffisamment souple pour préserver le pouvoir d'imposer les peines nécessaires à la réalisation de l'objet de la Loi.

Quant au contexte législatif, si le législateur avait voulu que les expressions « le produit de leur aliénation » et « le produit de son aliénation » se limitent au produit de la vente de marchandises périssables, il aurait pu le dire explicitement, comme il l'a fait au par. 70(3) ainsi qu'aux par. 72(2) et 72(3). En outre, il ne ressort pas expressément du par. 72(1) que la rétention matérielle continue constitue une condition préalable au prononcé d'une ordonnance de confiscation et il n'a pas lieu de conclure qu'il s'agit d'une condition préalable. Le processus par lequel le dépôt d'une garantie permet la mainlevée de la saisie des biens en vertu du par. 71(2) profite aux parties et aux créanciers, et il ne faut pas décourager le recours à celui-ci. Ce processus serait moins intéressant si une ordonnance de confiscation était assujettie à une condition préalable de rétention matérielle continue. Le paragraphe 72(1) doit donc être interprété comme prévoyant le prononcé d'une ordonnance de confiscation contre un navire ayant fait l'objet d'une mainlevée de saisie et restitué sur dépôt d'une garantie. Il s'ensuit que le par. 72(1) autorise la confiscation d'objets qui ont été saisis antérieurement, mais qui ont fait l'objet d'une mainlevée. De plus, il ressort clairement de l'art. 75 que la Loi prévoit la possibilité d'instances parallèles, *in personam* et *in rem*, touchant le même navire. Cette conclusion renforce l'opinion que le par. 72(1) autorise la confiscation du produit de la vente obtenu en vertu d'un autre texte législatif que la *Loi sur les pêches*. Enfin, on doit interpréter les dispositions en matière d'amirauté de la *Loi sur la Cour fédérale* et de la *Loi sur les pêches* comme des régimes cohérents et harmonieux de réglementation des questions maritimes. Les bateaux de pêche et leur utilisation sont au cœur des activités que régit chacun de ces systèmes. Si on adoptait l'interprétation restrictive de la Cour d'appel, une ordonnance de vente de la Cour fédé-

2001 SCC 56 (CanLII)

coherence, and consistency between statutes dealing with the same subject matter.

Cases Cited

Referred to: *R. v. Savory* (1992), 108 N.S.R. (2d) 245; *R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318; *R. v. Vautour* (2000), 226 N.B.R. (2d) 226; *R. v. Chute* (1997), 160 N.S.R. (2d) 378; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405; *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471.

Statutes and Regulations Cited

Atlantic Fishery Regulations, 1985, SOR/86-21, s. 13(1)(*a*), (*b*).
Criminal Code, R.S.C. 1985, c. C-46, s. 489.1.
Federal Court Act, R.S.C. 1985, c. F-7.
Federal Court Rules, C.R.C. 1978, c. 663, rr. 1007, 1008, 1010.
Fisheries Act, R.S.C. 1985, c. F-14 [am. 1991, c. 1], ss. 50, 51, 70, 71, 71.1, 72, 73.1, 75.

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Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Buttersworths, 1983.
Driedger on the Construction of Statutes, 3rd ed. by Ruth Sullivan. Toronto: Butterworths, 1994.

APPEAL from a judgment of the Newfoundland Court of Appeal (1999), 178 Nfld. & P.E.I.R. 321, 544 A.P.R. 321, [1999] N.J. No. 232 (QL), setting aside an order of forfeiture granted by the Supreme Court, Trial Division (1997), 150 Nfld. & P.E.I.R. 308, 470 A.P.R. 308, [1997] N.J. No. 114 (QL). Appeal allowed.

Graham Garton, Q.C., and *Gordon S. Campbell*, for the appellant.

John R. Sinnott, Q.C., for the respondent.

rale mettrait fin au pouvoir de la Cour suprême de Terre-Neuve d'ordonner la confiscation. Un tel résultat n'est pas conforme au principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet.

Jurisprudence

Arrêts mentionnés : *R. c. Savory* (1992), 108 N.S.R. (2d) 245; *R. c. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318; *R. c. Vautour* (2000), 226 R.N-B. (2e) 226; *R. c. Chute* (1997), 160 N.S.R. (2d) 378; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Gravel c. Cité de St-Léonard*, [1978] 1 R.C.S. 660; *Amos c. Insurance Corp. of British Columbia*, [1995] 3 R.C.S. 405; *Bathurst Paper Ltd. c. Ministre des Affaires municipales du Nouveau-Brunswick*, [1972] R.C.S. 471.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 489.1.
Loi sur la Cour fédérale, L.R.C. 1985, ch. F-7.
Loi sur les pêches, L.R.C. 1985, ch. F-14 [mod. 1991, ch. 1], art. 50, 51, 70, 71, 71.1, 72, 73.1, 75.
Règlement de pêche de l'Atlantique de 1985, DORS/86-21, art. 13(1)*a*), *b*).
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Doctrine citée

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Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.
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POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve (1999), 178 Nfld. & P.E.I.R. 321, 544 A.P.R. 321, [1999] N.J. No. 232 (QL), qui a annulé une ordonnance de confiscation rendue par la Cour suprême, Section de première instance (1997), 150 Nfld. & P.E.I.R. 308, 470 A.P.R. 308, [1997] N.J. No. 114 (QL). Pourvoi accueilli.

Graham Garton, c.r., et *Gordon S. Campbell*, pour l'appelante.

John R. Sinnott, c.r., pour l'intimée.

2001 SCC 56 (CanLII)

The judgment of the Court was delivered by

IACOBUCCI J. — This appeal raises the question of whether a provincial superior court can order forfeiture of the proceeds of sale of a vessel pursuant to s. 72(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14, as amended by S.C. 1991, c. 1, even when the vessel has been sold under the authority of the Federal Court of Canada and the proceeds are held by that court in the exercise of its admiralty jurisdiction.

I. Background

A. *The Vessel and its Seizure*

The "Kristina Logos" (the "vessel") is a factory freezer trawler built in 1976 and registered in Canada in 1981. On February 3, 1992, José Pratas purchased the vessel from Pêches Nordiques Inc., formerly Kosmos P/F Fishery Canada Ltd., by way of bill of sale. On the same day that he purchased the vessel, Mr. Pratas registered three documents with the Canadian Registry of Shipping: the bill of sale by which ownership of the vessel was transferred to him, a mortgage he had executed in favour of Pêches Nordiques Inc. (later transferred to Hillsdown International Ltd. and ultimately to Clearwater Atlantic Seafoods Inc.), and a declaration of ownership stating he was entitled to be registered as owner.

On October 16, 1992, Mr. Pratas sold the vessel to Ulybel Enterprises Limited (the "respondent"). The respondent was incorporated in Nova Scotia on November 22, 1989, and Mr. Pratas was its sole director and shareholder. On December 9, 1992, the bill of sale by which ownership of the vessel was transferred to the respondent, and a declaration of ownership stating that the respondent was qualified to own a Canadian ship were filed with the Canadian Registry of Shipping. At the same time, the Registry was informed that Mr. Pratas was appointed manager. Therefore, at all material times, the vessel was a Canadian vessel, of which

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi soulève la question de savoir si la cour supérieure d'une province peut ordonner la confiscation du produit de la vente d'un navire en vertu du par. 72(1) de la *Loi sur les pêches*, L.R.C. 1985, ch. F-14, modifiée par L.C. 1991, ch. 1, même lorsque c'est la Cour fédérale du Canada qui a ordonné la vente du navire et qu'elle détient le produit de la vente dans l'exercice de sa compétence en matière d'amirauté. 1

I. Les faits

A. *Le navire et sa saisie*

Le « Kristina Logos » (le « navire ») est un chalutier-usine congélateur construit en 1976 et immatriculé au Canada en 1981. Le 3 février 1992, José Pratas a acheté le navire par acte de vente de Pêches Nordiques Inc., auparavant connue sous le nom de Kosmos P/F Fishery Canada Ltd. Le même jour, M. Pratas a inscrit trois documents au Registre des navires immatriculés au Canada : l'acte de vente par lequel la propriété du navire lui a été cédée, l'hypothèque qu'il a consentie à Pêches Nordiques Inc. (cédée plus tard à Hillsdown International Ltd. et finalement à Clearwater Atlantic Seafoods Inc.) et une déclaration de propriété énonçant qu'il avait le droit d'être inscrit comme propriétaire. 2

Le 16 octobre 1992, M. Pratas a vendu le navire à Ulybel Enterprises Limited (l'« intimée »). M. Pratas était le seul administrateur et actionnaire de l'intimée, qui a été constituée en personne morale le 22 novembre 1989 en Nouvelle-Écosse. L'acte de vente cédant la propriété du navire à l'intimée et une déclaration de propriété indiquant que l'intimée réunissait les conditions voulues pour être propriétaire d'un navire canadien ont été déposés le 9 décembre 1992 au Registre des navires immatriculés au Canada. Le même jour, le bureau du Registre a appris que M. Pratas avait été nommé gestionnaire. En conséquence, pendant 3

2001 SCC 56 (CanLII)

the respondent was the registered owner, subject to a registered mortgage.

4 In 1993, the respondent entered into a Bareboat Charter with a Portuguese company named Marqueirapesca Lda. The shareholders of that company are Mr. Pratas owning 51 percent of the outstanding shares, and Carlos and Mario Neves (the "Neves Brothers") owning 49 percent. It was not contested that in 1993 and 1994 Marqueirapesca Lda. fished the vessel off the coast of Newfoundland and in the NAFO Convention Area, divisions 3M, 3N and 3O.

5 NAFO is an international body implemented to optimize the utilization, management and conservation of the Northwest Atlantic fisheries stocks in a quadrant of ocean and coastal waters with a Northern border extending from the Hudson Strait below Baffin Island to Greenland and a Western border extending from Baffin Island to Northern North Carolina. Divisions 3M, 3N and 3O fall south and west of Newfoundland. Significant parts of the Grand Banks are within two of these divisions.

6 On April 2, 1994, the vessel was observed fishing in the NAFO Convention Area without the required licence or registration card and in contravention of ss. 13(1)(*a*) and 13(1)(*b*) of the *Atlantic Fishery Regulations, 1985*, SOR/86-21 (the "Regulations"). The vessel and its cargo of fish were seized by officials of the Department of Fisheries and Oceans pursuant to s. 51 of the *Fisheries Act* and escorted to St. John's, Newfoundland. The Crown in Right of Canada thereby took physical possession of the vessel.

B. *The Litigation: One Vessel but Two Courts*

7 On April 4 and 5, 1994, two informations were sworn charging the respondent with two counts of permitting the use of the vessel for fishing without a licence and two counts of permitting the use of the vessel for fishing without a registration card

toute la période pertinente, le navire était un navire canadien grevé d'une hypothèque enregistrée, dont l'intimée était le propriétaire inscrit.

En 1993, l'intimée a conclu un contrat d'affrètement à coque nue avec une société portugaise du nom de Marqueirapesca Lda. Les actionnaires de cette société sont M. Pratas, qui détient 51 pour 100 de ses actions en circulation, et Carlos et Mario Neves (les « frères Neves »), qui en détiennent 49 pour 100. Il n'a pas été contesté qu'en 1993 et 1994, Marqueirapesca Lda. a utilisé le navire pour pêcher au large de la côte de Terre-Neuve et dans les divisions 3M, 3N et 3O de la zone régie par la convention de l'OPANO.

L'OPANO est un organisme international qui a pour but d'optimiser l'utilisation, la gestion et la conservation des stocks de poisson de l'Atlantique nord-ouest dans un quadrant des eaux côtières et océaniques dont la frontière nord s'étend du détroit d'Hudson, au sud de l'île de Baffin, jusqu'au Groenland, et dont la frontière ouest s'étend de l'île de Baffin jusqu'au nord de la Caroline du Nord. Les divisions 3M, 3N et 3O se situent au sud et à l'ouest de Terre-Neuve. Deux de ces divisions comprennent des parties importantes des Grands Bancs de Terre-Neuve.

Le 2 avril 1994, on a vu des personnes à bord du navire pêcher dans la zone régie par la convention de l'OPANO en l'absence du permis et du certificat d'enregistrement requis par les al. 13(1)*a*) et *b*) du *Règlement de pêche de l'Atlantique de 1985*, DORS/86-21 (le « Règlement »). Des fonctionnaires du ministère des Pêches et des Océans ont saisi le navire et sa cargaison de poisson en application de l'art. 51 de la *Loi sur les pêches* et ont escorté le navire à St. John's (Terre-Neuve). C'est ainsi que la Couronne du chef du Canada a pris matériellement possession du navire.

B. *Le litige : un navire et deux tribunaux*

Les 4 et 5 avril 1994, deux dénonciations ont été faites sous serment, comportant quatre chefs d'accusation contre l'intimée, dont deux étaient liés au fait d'avoir permis l'utilisation du navire pour la pêche en l'absence de certificat d'enregistrement et

2001 SCC 56 (CanLII)

contrary to ss. 13(1)(*a*) and 13(1)(*b*) of the Regulations.

On April 5, 1994, three days after the vessel was seized under the *Fisheries Act*, an action was commenced in the Federal Court of Canada by the mortgagee of the vessel, Clearwater Atlantic Seafoods Inc., seeking $125,000, alleged to be the balance of purchase monies owing from the sales of the vessel to Mr. Pratas and the respondent. On the same day, the Federal Court of Canada issued an arrest order against the vessel being held by the Crown. On May 23, 1995, a second action was brought in the Federal Court of Canada, this time by the Neves Brothers claiming an ownership interest in the vessel valued at $512,750. A second arrest order was issued on that same day.

On September 28, 1995, the respondent was indicted on the same charges as those contained in the informations sworn on April 4 and 5, 1994. The trial was scheduled to commence in the Newfoundland Supreme Court, Trial Division on November 28, 1996.

Meanwhile, the Crown continued in possession of the vessel and began to incur costs for its storage and maintenance. On November 12, 1996, approximately 19 months after the vessel was first seized and arrested, the Crown applied to intervene in the action commenced by the Neves Brothers in the Federal Court of Canada as a person claiming an interest in the property pursuant to Rule 1010 of the *Federal Court Rules*, C.R.C. 1978, c. 663. The application to intervene was supported by the Crown's claim for costs and expenses for the care and preservation of the vessel amounting to over $500,000. That amount represented the costs incurred by the Crown in seizing the vessel under the *Fisheries Act*, and the on-going cost of maintaining the ship (approximately $60,000 per year). At the same time, the Crown brought a motion for the lifting of the arrest and an order for the sale of the vessel pursuant to Federal Court Rule 1007(3).

deux autres à celui d'avoir permis l'utilisation du navire pour la pêche en l'absence de permis, en contravention des al. 13(1)*a*) et 13(1)*b*) du Règlement.

8 Trois jours après la saisie du navire en vertu de la *Loi sur les pêches*, soit le 5 avril 1994, le créancier titulaire de l'hypothèque grevant le navire, Clearwater Atlantic Seafoods Inc., a intenté une action devant la Cour fédérale du Canada pour réclamer la somme de 125 000 $, qui correspondrait au solde du prix de la vente du navire à M. Pratas et à l'intimée. Le même jour, la Cour fédérale du Canada a délivré une ordonnance de saisie à l'égard du navire qui se trouvait en la possession de la Couronne. Le 23 mai 1995, une deuxième action a été intentée devant la Cour fédérale; dans celle-ci, les frères Neves revendiquaient un droit de propriété sur le navire, droit qu'ils évaluaient à 512 750 $. La Cour fédérale a délivré une deuxième ordonnance de saisie le jour même.

9 Le 28 septembre 1995, l'intimée a été mise en accusation relativement aux mêmes chefs d'accusations que ceux figurant dans les dénonciations faites sous serment les 4 et 5 avril 1994. Le début du procès devant la Section de première instance de la Cour suprême de Terre-Neuve a été fixé au 28 novembre 1996.

10 Entre-temps, la Couronne a conservé la possession du navire et a commencé à engager des frais pour sa garde et son entretien. Le 12 novembre 1996, environ 19 mois après la première saisie du navire, la Couronne a présenté une demande d'intervention dans l'action intentée par les frères Neves devant la Cour fédérale du Canada en tant que personne prétendant avoir un droit afférent aux biens en question conformément à la règle 1010 des *Règles de la Cour fédérale*, C.R.C. 1978, ch. 663. La demande d'intervention de la Couronne s'appuyait sur sa réclamation concernant les frais et les déboursés relatifs à l'entretien et à la conservation du navire qui s'élevaient à plus de 500 000 $. Ce montant représentait les frais que la Couronne avait engagés pour saisir le navire en vertu de la *Loi sur les pêches* ainsi que les frais généraux d'entretien de ce dernier (environ 60 000 $ par année). D'autre part, la Couronne a

2001 SCC 56 (CanLII)

Rule 1007(3) provides that the court may, before judgment, order property under arrest to be sold if it is deteriorating in value.

présenté une requête en vue d'obtenir la mainlevée de la saisie et une ordonnance de vente du navire en vertu de la règle 1007(3) des *Règles de la Cour fédérale*. Cette disposition prévoit que la Cour peut, avant le jugement, ordonner que les biens saisis soient vendus s'ils perdent de leur valeur.

11 The respondent brought a motion in the Newfoundland Supreme Court, Trial Division for a declaration that the Crown was not entitled to proceed in another court to seek the sale of the vessel and an order for its release from seizure. That motion was denied on December 6, 1996.

L'intimée a présenté une requête devant la Section de première instance de la Cour suprême de Terre-Neuve en vue d'obtenir un jugement déclaratoire portant que la Couronne n'avait pas le droit de s'adresser à un autre tribunal pour solliciter la vente du navire et une ordonnance de mainlevée de la saisie de celui-ci. Cette requête a été rejetée le 6 décembre 1996.

12 On December 9, 1996, a prothonotary of the Federal Court found that the Crown had the necessary interest to intervene in the action since it had incurred expenses after the arrest of the vessel, characterized as expenses *in custodia legis*. The prothonotary found that this was an appropriate case for the Federal Court to grant an order of sale as costs and expenses would continue to mount until the ship was sold. Further, the ship's classification certificate would soon expire, which would significantly reduce the ship's value. Therefore, the prothonotary found that the case met the test found in Rule 1007(3) of the *Federal Court Rules*. Accordingly, on December 18, 1996, the Federal Court ordered the sale of the vessel ([1996] F.C.J. No. 1683 (QL); (1996), 124 F.T.R. 167).

Le 9 décembre 1996, un protonotaire de la Cour fédérale a conclu que la Couronne avait l'intérêt requis pour intervenir dans l'action étant donné qu'elle avait engagé des dépenses après la saisie du navire, dépenses qualifiées de dépenses *in custodia legis*. Le protonotaire a estimé qu'il convenait en l'espèce que la Cour fédérale délivre une ordonnance de vente puisque les frais et déboursés continueraient d'augmenter jusqu'à la vente. De plus, le certificat de classification du navire devait expirer sous peu, ce qui réduirait de façon importante la valeur de celui-ci. Le protonotaire a donc conclu que le critère figurant à la règle 1007(3) des *Règles de la Cour fédérale* était respecté. En conséquence, la Cour fédérale a ordonné la vente du navire le 18 décembre 1996 ([1996] A.C.F. nº 1683 (QL); (1996), 124 F.T.R. 167).

13 The respondent applied for a stay of the order for sale pending its appeal, but the order for sale was confirmed by the Federal Court, Trial Division ([1997] F.C.J. No. 200 (QL)). The vessel was sold on May 15, 1997 for $605,000 and, pursuant to the order of sale, the proceeds were deposited with the Receiver General in an interest bearing account for the benefit of the Federal Court. The respondent then appealed the order for sale to the Federal Court of Appeal, but since the vessel had already been sold that appeal was dismissed as being moot ((1998), 225 N.R. 32).

L'intimée a présenté une demande de sursis de l'ordonnance de vente jusqu'à ce qu'il soit statué sur son appel, mais la Section de première instance de la Cour fédérale a confirmé l'ordonnance ([1997] A.C.F. nº 200 (QL)). Le navire a été vendu le 15 mai 1997 pour la somme de 605 000 $ et, conformément à l'ordonnance de vente, le produit de la vente a été déposé auprès du receveur général dans un compte portant intérêt, au profit de la Cour fédérale. L'intimée a ensuite interjeté appel de l'ordonnance de vente auprès de la Cour d'appel fédérale, mais, comme le navire avait déjà été vendu, l'appel a été rejeté au motif qu'il était devenu théorique ([1998] A.C.F. nº 362 (QL)).

2001 SCC 56 (CanLII)

On May 21, 1997, the respondent was convicted of the charges brought against it in the Supreme Court of Newfoundland, Trial Division ((1997), 150 Nfld. & P.E.I.R. 308). On July 2, 1997, the Newfoundland Supreme Court, Trial Division imposed a sentence on the respondent that included fines totalling $120,000, the forfeiture of the proceeds of sale of the cargo of fish ($58,989.34), and the forfeiture of $50,000 of the proceeds of the sale of the vessel.

14 Le 21 mai 1997, la Section de première instance de la Cour suprême de Terre-Neuve a déclaré l'intimée coupable relativement aux accusations portées contre elle ((1997), 150 Nfld. & P.E.I.R. 308). Le 2 juillet 1997, elle lui a infligé une peine incluant des amendes s'élevant à 120 000 $, la confiscation du produit de la vente de la cargaison de poisson (58 989,34 $) et la confiscation d'une somme de 50 000 $ sur le produit de la vente du navire.

The respondent appealed its conviction and sentence to the Newfoundland Court of Appeal. Before that appeal could be heard, on August 11, 1999, a prothonotary of the Federal Court of Canada determined the ranking of the claims of the parties in the actions before it, including the claims of the mortgagee, the Neves brothers, and the Crown for fines, forfeiture and costs. The ranking of claims was conditional on the outcome of the respondent's appeal of sentence ((1999), 173 F.T.R. 31).

15 L'intimée a interjeté appel de sa déclaration de culpabilité et de sa peine auprès de la Cour d'appel de Terre-Neuve. Avant l'audition de cet appel, un protonotaire de la Cour fédérale du Canada a déterminé, le 11 août 1999, le rang des réclamations des parties aux actions intentées devant cette Cour, notamment le rang des réclamations du créancier hypothécaire, des frères Neves et de la Couronne, la réclamation de celle-ci visant les amendes, la confiscation et les frais. Le rang des réclamations était conditionnel à l'issue de l'appel interjeté par l'intimée contre sa peine ([1999] A.C.F. nº 1295 (QL)).

Another appeal was brought by the defendants to the action in the Federal Court, including Ulybel and Pratas, against the Prothonotary's ranking of claims. That appeal was heard before McKay J. of the Federal Court, Trial Division and judgment has been reserved.

16 Les défendeurs à l'action en Cour fédérale, dont Ulybel et Pratas, ont eux aussi interjeté appel pour contester le rang des réclamations établi par le protonotaire. Le juge McKay de la Section de première instance de la Cour fédérale a entendu cet appel et a différé le prononcé de son jugement.

On August 17, 1999, the Newfoundland Court of Appeal upheld the respondent's conviction and found that the sentence imposed was not excessive ((1999), 178 Nfld. & P.E.I.R. 321). However, the Court of Appeal held that the *Fisheries Act* did not provide the Newfoundland Supreme Court, Trial Division with the jurisdiction or authority to order the forfeiture of any of the proceeds of sale of a vessel. The Court of Appeal held that physical detention of a thing seized under the *Fisheries Act* is a necessary precondition to an order of forfeiture. In this case, the Court of Appeal held that the vessel must have been released from seizure when sold under the authority of the Federal Court, thereby precluding a subsequent order of forfeiture under the *Fisheries Act*. Accordingly, the Court of

17 Le 17 août 1999, la Cour d'appel de Terre-Neuve a confirmé la déclaration de culpabilité de l'intimée et a jugé que la peine infligée n'était pas excessive ((1999), 178 Nfld. & P.E.I.R. 321). La Cour d'appel a cependant conclu que la *Loi sur les pêches* ne conférait pas à la Section de première instance de la Cour suprême de Terre-Neuve la compétence ou le pouvoir d'ordonner la confiscation du produit de la vente d'un navire. Selon la Cour d'appel, la rétention matérielle d'un objet saisi en vertu de la *Loi sur les pêches* est une condition préalable nécessaire au prononcé d'une ordonnance de confiscation. La Cour d'appel a statué que la vente ordonnée par la Cour fédérale avait nécessairement entraîné la mainlevée de la saisie du navire, ce qui empêchait le prononcé ulté-

2001 SCC 56 (CanLII)

Appeal overturned the order of forfeiture made by the court below.

18 The respondent's application to this Court for leave to appeal its conviction and sentence was denied. The Crown's application to this Court for leave to appeal the decision of the Court of Appeal was granted.

19 It is important to keep in mind that none of the decisions of the Federal Court of Canada is on appeal before this Court. In fact, nothing in these reasons should be interpreted as commenting on those proceedings. The only decision on appeal is the Newfoundland Court of Appeal's reversal of the sentencing court's order of forfeiture against the proceeds of sale of the vessel.

II. Relevant Legislation

20 *Fisheries Act*, R.S.C. 1985, c. F-14, as amended by S.C. 1991, c. 1

50. Any fishery officer, fishery guardian or peace officer may arrest without warrant a person who that fishery officer, guardian or peace officer believes, on reasonable grounds, has committed an offence against this Act or any of the regulations, or whom he finds committing or preparing to commit an offence against this Act or any of the regulations.

70. (1) A fishery officer or fishery guardian who seizes any fish or other thing under this Act may retain custody of it or deliver it into the custody of any person the officer or guardian considers appropriate.

. . .

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

71. (1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or

Notre Cour a rejeté la demande d'autorisation de pourvoi qu'a présentée l'intimée contre sa déclaration de culpabilité et sa peine. Elle a accueilli la demande d'autorisation de pourvoi de la Couronne contre la décision de la Cour d'appel.

Il est important de se rappeler que les décisions de la Cour fédérale du Canada ne font l'objet d'aucun pourvoi devant notre Cour. En fait, rien dans les présents motifs ne devrait être interprété comme constituant une observation sur ces instances. La seule décision dont notre Cour est saisie est celle par laquelle la Cour d'appel de Terre-Neuve a infirmé l'ordonnance de confiscation émanant du tribunal chargé de déterminer la peine.

II. Les dispositions législatives pertinentes

Loi sur les pêches, L.R.C. 1985, ch. F-14 (modifiée par L.C. 1991, ch. 1)

50. Les agents des pêches, gardes-pêche ou agents de la paix peuvent arrêter sans mandat toute personne dont ils ont des motifs raisonnables de croire qu'elle a commis une infraction à la présente loi ou à ses règlements ou qu'ils prennent en flagrant délit d'infraction ou se préparant à commettre une infraction à la présente loi ou à ses règlements.

70. (1) L'agent des pêches ou le garde-pêche qui saisit du poisson ou un objet en vertu de la présente loi peut s'en réserver la garde ou l'attribuer à toute personne qu'il estime compétente.

. . .

(3) L'agent des pêches ou le garde-pêche qui a la garde de marchandises périssables saisies peut en disposer de la façon qu'il estime indiquée, le produit de l'aliénation étant versé au receveur général.

71. (1) Sous réserve des autres dispositions du présent article, le poisson ou les objets saisis en vertu de la présente loi ou le produit de leur aliénation peuvent être

2001 SCC 56 (CanLII)

proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

(2) Subject to subsection 72(4), a court may order any fish or other thing seized under this Act to be returned to the person from whom it was seized if security is given to Her Majesty in a form and amount that is satisfactory to the Minister.

. . .

71.1 (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order the person to pay the Minister an amount of money as compensation for any costs incurred in the seizure, storage or disposition of any fish or other thing seized under this Act by means of or in relation to which the offence was committed.

(2) Where a court orders a person to pay an amount of money as compensation under subsection (1), the amount and any interest payable on that amount constitute a debt due to Her Majesty and may be recovered as such in any court of competent jurisdiction.

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(2) Where a person is convicted of an offence under this Act that relates to fish seized pursuant to paragraph 51(*a*), the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(3) Where a person is charged with an offence under this Act that relates to fish seized pursuant to paragraph 51(*a*) and the person is acquitted but it is proved that the fish was caught in contravention of this Act or the regulations, the court may order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

. . .

73.1 (1) Subject to subsection (2), any fish or other thing seized under this Act, or any proceeds realized from its disposition, that are not forfeited to Her Majesty under section 72 shall, on the final conclusion of the proceedings relating to the fish or thing, be delivered to the person from whom the fish or thing was seized.

retenus jusqu'à ce que leur confiscation soit prononcée ou qu'une décision définitive soit rendue lors des poursuites intentées à leur égard.

(2) Sous réserve du paragraphe 72(4), le tribunal peut ordonner la restitution au saisi du poisson ou des objets saisis, sur fourniture à Sa Majesté d'une garantie que le ministre juge acceptable quant au montant et à la forme.

. . .

71.1 (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner au contrevenant d'indemniser le ministre des frais engagés dans le cadre de la saisie, de la garde ou de l'aliénation du poisson ou des objets saisis qui ont servi ou donné lieu à la perpétration de l'infraction.

(2) L'indemnisation visée au paragraphe (1) et les intérêts afférents constituent une créance de Sa Majesté dont le recouvrement peut être poursuivi à ce titre devant toute juridiction compétente.

72. (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté.

(2) Le tribunal qui déclare une personne coupable d'avoir commis une infraction à la présente loi relativement à du poisson saisi en vertu de l'alinéa 51*a*) est tenu, en sus de toute autre peine infligée, d'ordonner la confiscation au profit de Sa Majesté du poisson ou du produit de son aliénation.

(3) Le tribunal qui acquitte une personne accusée d'une infraction à la présente loi relativement à du poisson saisi en vertu de l'alinéa 51*a*) peut ordonner la confiscation au profit de Sa Majesté du poisson ou du produit de son aliénation s'il est prouvé que ce poisson a été pêché en contravention avec cette loi ou ses règlements.

. . .

73.1 (1) Sous réserve du paragraphe (2), lorsque, à l'issue des procédures portant sur le poisson ou les objets saisis, le tribunal n'a pas ordonné leur confiscation ou celle du produit de leur aliénation, les objets ou le produit sont remis au saisi.

2001 SCC 56 (CanLII)

(2) Subject to subsection 72(4), where a person is convicted of an offence relating to any fish or other thing seized under this Act and the court imposes a fine but does not order forfeiture,

(*a*) the fish or thing may be detained until the fine is paid;

(*b*) it may be sold under execution in satisfaction of the fine; or

(*c*) any proceeds realized from its disposition may be applied in payment of the fine.

. . .

75. (1) Where any thing other than fish is forfeited to Her Majesty under subsection 72(1) or (4), any person who claims an interest in the thing as owner, mortgagee, lienholder or holder of any like interest, other than a person convicted of the offence that resulted in the forfeiture or a person from whom the thing was seized, may, within thirty days after the forfeiture, apply in writing to a judge for an order pursuant to subsection (4).

. . .

(4) Where, on the hearing of an application made pursuant to subsection (1), it is made to appear to the satisfaction of the judge,

(*a*) that the applicant is innocent of any complicity in the offence or alleged offence that resulted in the forfeiture and of any collusion in relation to that offence with the person who was convicted of, or who may have committed, the offence, and

(*b*) that the applicant exercised all reasonable care in respect of the person permitted to obtain the possession of the thing in respect of which the application is made to satisfy himself that the thing was not likely to be used contrary to this Act or the regulations, or, in the case of a mortgagee or lienholder, that he exercised such care with respect to the mortgagor or the liengiver,

the applicant is entitled to an order declaring that his interest is not affected by the forfeiture and declaring the nature and extent of his interest.

(2) Sous réserve du paragraphe 72(4), les règles qui suivent s'appliquent lorsqu'une personne est déclarée coupable d'une infraction portant sur le poisson ou les objets saisis et que le tribunal inflige une amende mais n'ordonne pas la confiscation :

a) le poisson ou les objets peuvent être retenus jusqu'à l'acquittement de l'amende;

b) ils peuvent être vendus par adjudication forcée pour paiement de l'amende;

c) le produit de toute aliénation peut être affecté au paiement de l'amende.

. . .

75. (1) Sauf lorsqu'il s'agit de poisson confisqué, toute personne — autre que celle qui a été déclarée coupable de l'infraction ayant entraîné la confiscation, ou que le saisi — qui prétend avoir un droit sur un objet confisqué en vertu des paragraphes 72(1) ou (4), à titre de propriétaire, de créancier hypothécaire ou de titulaire de privilège ou de tout droit semblable, peut, dans les trente jours qui suivent la confiscation, demander par écrit à un juge de rendre l'ordonnance prévue au paragraphe (4).

. . .

(4) Le juge fait droit à la requête en rendant une ordonnance déclarant que la confiscation ne porte pas atteinte au droit du demandeur et précisant la nature et l'étendue de ce droit si, à l'audition de la demande, il constate la réunion des conditions suivantes :

a) il n'y a eu, à l'égard de l'infraction, réelle ou présumée, qui a entraîné la confiscation, aucune complicité ou collusion entre le demandeur et, selon le cas, la personne déclarée coupable ou tout auteur potentiel de l'infraction;

b) le demandeur a pris bien soin de s'assurer que l'objet ou le poisson visé par la demande ne servirait pas à la perpétration d'un acte contraire à la présente loi ou à ses règlements par la personne qui s'en est vue attribuer la possession ou, dans le cas d'un créancier hypothécaire ou d'un titulaire de privilège ou de droit semblable, le débiteur hypothécaire ou le débiteur assujetti au privilège ou droit en question.

2001 SCC 56 (CanLII)

Federal Court Rules, C.R.C. 1978, c. 663

Rule 1007. (1) The Court may, either before or after final judgment, order any property under the arrest of the Court to be appraised, or to be sold with or without appraisement, and either by public auction or by private contract, and may direct what notice by advertisement or otherwise shall be given or may dispense with the same.

(2) Without limiting paragraph (1), the Court may, either before or after final judgment, order

(*a*) that, where any property is under the arrest of the Court, it be advertised for sale in accordance with directions contained in the order, which may include any or all of the following:

. . .

(vi) any other direction that seems appropriate to the circumstances of the particular case; or

(*b*) that an agent be employed for the sale of any such property, with authority to sell subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent for his services as may be stipulated in the order.

(3) If the property is deteriorating in value, the Court may order it to be sold forthwith.

. . .

(7) As soon as possible after the execution of a commission of sale, the marshal shall pay into court the gross proceeds of the sale, and shall with the commission file his accounts and vouchers in support thereof.

. . .

Rule 1008. (1) When an application is made for payment out of any money paid into court under Rule 1007(7), the Court has power to determine the rights of all claimants thereto and may make such order and give such directions as will enable the Court to adjudicate upon the rights of all claimants to such money and to order payment out to any person of any such money or portion thereof in accordance with its findings.

. . .

Rule 1010. (1) Where property against which an action *in rem* has been brought is under arrest or money repre-

Règles de la Cour fédérale, C.R.C. 1978, ch. 663

Règle 1007. (1) La Cour pourra, avant ou après le jugement final, ordonner que des biens saisis sur son ordre soient évalués, ou soient vendus, après avoir été évalués ou non, soit aux enchères publiques, soit par contrat privé, et elle peut prescrire quel avis doit être donné à ce sujet sur publicité ou autrement, ou peut dispenser de donner avis.

(2) Sous réserve de l'alinéa (1), la Cour pourra, avant ou après le jugement final, ordonner que,

a) lorsqu'un bien est sous la saisie de la Cour, il soit mis en vente par des annonces selon les instructions contenues dans l'ordonnance qui peuvent comprendre l'une ou toutes les modalités suivantes :

. . .

(vi) pourront être émises toutes autres instructions appropriées aux circonstances; ou

b) qu'un agent ou courtier soit utilisé pour la vente de ces biens, avec l'autorisation de vendre aux conditions mentionnées dans l'ordonnance ou sous réserve d'une approbation subséquente de la Cour et selon un dédommagement pour les services de l'agent ou du courtier fixé dans l'ordonnance.

(3) Si les biens perdent de leur valeur, la Cour pourra ordonner de les vendre immédiatement.

. . .

(7) Dès que possible après l'exécution d'une commission de vente, le prévôt doit consigner à la Cour le produit brut de la vente, et il doit déposer, avec la commission, ses comptes et pièces à l'appui.

. . .

Règle 1008. (1) En cas de demande de versement par prélèvement sur de l'argent consigné au tribunal en vertu de la Règle 1007(7), la Cour aura le pouvoir de déterminer les droits de tous les réclamants sur cet argent et elle pourra rendre l'ordonnance et donner les instructions qui lui permettront de statuer sur les droits que possèdent tous les réclamants sur cet argent, et elle a également le pouvoir d'ordonner le versement à une personne de tout ou partie de cet argent selon ses conclusions.

. . .

Règle 1010. (1) Lorsque des biens visés par une action *in rem* sous saisie ou que l'argent représentant le produit

2001 SCC 56 (CanLII)

senting the proceeds of sale of property against which such an action has been brought is in court, a person who claims an interest in the property or money but who is not a defendant in the action may, with leave of the Court, intervene in the action.

de la vente des biens visés par une telle action se trouve consigné à la Cour, une personne qui prétend avoir un droit afférent aux biens ou à l'argent mais qui n'est pas défenderesse à l'action peut, avec la permission de la Cour, intervenir dans l'action.

III. Issue and Principal Arguments of the Parties

III. La question en litige et les principaux arguments des parties

21 The basic issue on appeal is whether the Newfoundland Court of Appeal erred in reversing the sentencing judge's order for forfeiture of proceeds of the vessel. The focus of argument is on the proper interpretation of the scope of the power to order the forfeiture of proceeds under s. 72(1) of the *Fisheries Act*: can it cover proceeds from the sale of a ship or is it limited to those proceeds realized from a sale of perishables pursuant to s. 70(3) of the Act?

La question fondamentale dans le présent pourvoi est celle de savoir si la Cour d'appel de Terre-Neuve a commis une erreur en infirmant l'ordonnance de confiscation du produit de la vente du navire rendue par le juge chargé de déterminer la peine. Les arguments portent surtout sur l'interprétation juste de l'étendue du pouvoir d'ordonner la confiscation du produit de la vente que confère le par. 72(1) de la *Loi sur les pêches* : ce pouvoir peut-il viser le produit de la vente d'un navire ou se limite-t-il au produit de la vente de marchandises périssables sous le régime du par. 70(3) de la Loi?

22 The appellant submits that the Court of Appeal erred by interpreting the power to make an order of forfeiture under s. 72(1) of the *Fisheries Act* too narrowly. She argues that the plain language of s. 72(1) supports a broader interpretation, one that permits the court to make an order of forfeiture against the proceeds of sale of a vessel, even where the sale of the vessel was made under the authority of another court. The appellant says that such an interpretation is necessary to harmonize the *Fisheries Act*, with the *Federal Court Act*, R.S.C. 1985, c. F-7, and the *Federal Court Rules*.

L'appelante soutient que la Cour d'appel a commis une erreur en interprétant de façon trop restrictive le pouvoir de rendre une ordonnance de confiscation prévu au par. 72(1) de la *Loi sur les pêches*. Elle prétend que le sens ordinaire du par. 72(1) appuie une interprétation plus large permettant au tribunal de rendre une ordonnance de confiscation du produit de la vente d'un navire même lorsque la vente du navire a été ordonnée par un autre tribunal. L'appelante affirme qu'une telle interprétation est nécessaire pour harmoniser la *Loi sur les pêches* avec la *Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7, et les *Règles de la Cour fédérale*.

23 The respondent adopts the position taken by the Newfoundland Court of Appeal in this case. The respondent argues that the only proceeds that are subject to forfeiture under the *Fisheries Act* are the proceeds of perishables sold pursuant to s. 70(3). The respondent says that the *Fisheries Act* should be interpreted as requiring the continued physical detention of a thing seized as a necessary precondition to an order of forfeiture of that thing. Thus, in this case, the sale of the vessel under the authority of the Federal Court precluded the sentencing

L'intimée adopte la position de la Cour d'appel de Terre-Neuve en l'espèce. D'après elle, le seul produit susceptible de confiscation en vertu de la *Loi sur les pêches* est le produit de l'aliénation des marchandises périssables prévue au par. 70(3). Elle affirme qu'il faut interpréter la *Loi sur les pêches* comme prévoyant que la rétention matérielle continue du bien saisi constitue une condition préalable nécessaire au prononcé d'une ordonnance de confiscation de ce bien. En l'espèce, la vente du navire ordonnée par la Cour fédérale empêchait donc le

2001 SCC 56 (CanLII)

court from imposing a valid order of forfeiture against the proceeds of the vessel as part of the sentence in this case. The respondent says that such an interpretation is consistent with the scheme of the Act and the presumption of innocence.

IV. Analysis

A. *Background: The Fisheries Act and the Power of Forfeiture*

It is convenient at this stage to provide some background to the *Fisheries Act* and the specific provision at issue in this appeal. The principal object of the *Fisheries Act* has been found by a number of appellate courts to be that as summarized by the Nova Scotia Court of Appeal in *R. v. Savory* (1992), 108 N.S.R. (2d) 245, at para. 14:

> The *Act* and the *Regulations* have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the *Act* and the *Regulations* is to properly manage and control the commercial fishery.

See also *R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318, at paras. 22-25; *R. v. Vautour* (2000), 226 N.B.R. (2d) 226 (Q.B.), at paras. 10-11 and 13; *R. v. Chute* (1997), 160 N.S.R. (2d) 378 (C.A.).

As noted by the sentencing judge in this case, serious problems exist in the Atlantic fishing industry:

> It is common knowledge that the fish stocks on the Grand Banks as well as elsewhere in the Atlantic fishery waters of Canada have been seriously depleted.
>
> Canada has passed certain laws to enable this country to carry out proper conservation measures. NAFO was organized for the conservation of fish stocks by setting various quotas and regulations. The regulations are aimed at the regulation of the fishing industry with a view to the preservation of fishery resources which are crucial to the operation and continuation of an important Canadian industry.

tribunal chargé de déterminer la peine d'imposer une ordonnance valide de confiscation du produit de la vente du navire comme l'un des éléments de la peine. L'intimée affirme que cette interprétation est compatible avec l'économie de la Loi et la présomption d'innocence.

IV. Analyse

A. *Historique : La Loi sur les pêches et le pouvoir de confiscation*

Il convient à ce stade-ci de fournir certaines données historiques sur la *Loi sur les pêches* et les dispositions particulières en cause dans le présent pourvoi. Un certain nombre de tribunaux d'appel ont jugé que l'objet principal de la *Loi sur les pêches* correspondait à celui que la Cour d'appel de la Nouvelle-Écosse a résumé dans l'arrêt *R. c. Savory* (1992), 108 N.S.R. (2d) 245, par. 14 : 24

> [TRADUCTION] La *Loi* et son *Règlement* ont été adoptés afin de réglementer les pêches, et les mesures de réglementation devraient s'interpréter de façon large. Un objectif important de la *Loi* et du *Règlement* est de régir et de surveiller convenablement la pêche commerciale.

Voir également *R. c. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318, par. 22-25; *R. c. Vautour* (2000), 226 R.N.-B. (2e) 226 (B.R.), par. 10, 11 et 13; *R. c. Chute* (1997), 160 N.S.R. (2d) (C.A.).

Comme l'a souligné le juge chargé de déterminer la peine en l'espèce, l'industrie de la pêche de l'Atlantique éprouve de graves problèmes : 25

> [TRADUCTION] Le grave déclin des stocks de poisson dans les Grands Bancs de Terre-Neuve et ailleurs dans les zones de pêche canadiennes de l'Atlantique est un fait notoire.
>
> Le Canada a adopté certaines lois lui permettant de prendre des mesures de conservation appropriées. L'OPANO a été mise sur pied pour favoriser la conservation des stocks de poisson par l'établissement de différents quotas et de différentes dispositions réglementaires. Ces dernières visent à réglementer l'industrie de la pêche et à préserver les ressources halieutiques, vitales pour l'exploitation et la survie d'une importante industrie canadienne.

2001 SCC 56 (CanLII)

In order to garner support for Canadian concerns over excessive fishing on the nose and tail of the Grand Banks, Canada has to demonstrate its ability to control its own vessels.

26 One of the ways that Parliament has seen fit to support the proper management and control of the commercial fishery is to provide the courts with the power to impose significant penalties upon conviction of offences under the *Fisheries Act*. The most recent amendments to the *Fisheries Act*, enacted in 1991, were primarily concerned with increasing the severity of penalties to deter the abuse of the fishery resource and make it uneconomical for rogue fishermen to flout the *Fisheries Act* and the Regulations. For instance, Parliament increased the fines for those who violate the Regulations in the Convention Area to a maximum of $500,000.

27 Parliament also amended the power to order forfeiture of property seized under the *Fisheries Act* and the proceeds of sale of such property. The power of forfeiture has long been one of the penalties available to courts in sentencing persons convicted of offences under the *Fisheries Act*. That power is contained in s. 72, the provision at issue in this appeal. Prior to the 1991 amendments, the authority to order forfeiture of proceeds was limited to proceeds arising from a sale of perishables under s. 71(3) (now s. 70(3)). Section 72 provided as follows:

72. (1) Where a person is convicted of an offence under this Act or the regulations, the convicting court or judge may, in addition to any punishment imposed, order that any thing seized pursuant to subsection 71(1), or the whole or any part of the proceeds of a sale referred to in subsection 71(3), be forfeited and, on such an order being made, the thing so ordered to be forfeited is forfeited to Her Majesty in right of Canada.

Section 71(3), for its part, provided:

71. . . .

Pour recueillir des appuis à l'égard de ses préoccupations concernant la pêche excessive sur le nez et la queue des Grands Bancs, le Canada doit démontrer sa capacité de contrôler ses propres navires.

L'une des façons dont le législateur a jugé bon de favoriser la gestion et le contrôle appropriés de la pêche commerciale consiste à conférer aux tribunaux le pouvoir d'infliger des peines très sévères en cas de déclaration de culpabilité pour des infractions prévues à la *Loi sur les pêches*. Les plus récentes modifications à la *Loi sur les pêches*, édictées en 1991, visaient principalement à accroître la sévérité des peines afin de dissuader l'utilisation abusive des ressources halieutiques et de faire en sorte qu'il ne soit pas rentable pour les pêcheurs malhonnêtes de faire fi de la *Loi sur les pêches* et du Règlement. Par exemple, le législateur a augmenté et fixé à 500 000 $ le montant maximal des amendes dont sont passibles les personnes qui contreviennent au Règlement dans la zone régie par la convention.

Le législateur a aussi modifié le pouvoir d'ordonner la confiscation des biens saisis en vertu de la *Loi sur les pêches* et du produit de leur vente. Le pouvoir de confiscation est l'une des peines dont disposent depuis longtemps les tribunaux lorsqu'ils déterminent la peine de personnes déclarées coupables d'une infraction prévue à la *Loi sur les pêches*. Ce pouvoir est énoncé à l'art. 72, soit la disposition en cause dans le présent pourvoi. Avant les modifications de 1991, cette disposition limitait le pouvoir d'ordonner la confiscation du produit de la vente au produit de la vente de marchandises périssables que prévoyait le par. 71(3) (maintenant le par. 70(3)). Voici le libellé de l'ancienne disposition :

72. (1) Le tribunal ou le juge peuvent, en sus de toute autre peine imposée à la personne déclarée coupable d'une infraction à la présente loi ou à ses règlements, ordonner la confiscation de tout objet ou poisson saisi, ou du produit, en tout ou en partie, de la vente. Le cas échéant, la confiscation s'opère au profit de Sa Majesté du chef du Canada dès que l'ordonnance est rendue.

Quant au par. 71(3), il prévoyait :

71. . . .

2001 SCC 56 (CanLII)

(3) Where, in the opinion of the person having custody of any thing seized pursuant to subsection (1), the thing will rot, spoil or otherwise perish, that person may sell the thing in such manner and for such price as that person may determine.

However, since the 1991 amendments, and at all times material to this appeal, s. 72 has provided as follows:

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

B. *Principles of Statutory Interpretation*

In numerous cases, this Court has endorsed the approach to the construction of statutes set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This famous passage from Driedger "best encapsulates" our Court's preferred approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23. Driedger's passage has been cited with approval by our Court on frequent occasions in many different interpretive settings which need not be mentioned here.

Because of the interaction in this case between the *in personam* jurisdiction of the Newfoundland Supreme Court under the *Fisheries Act* and the *in rem* admiralty jurisdiction of the Federal Court under the *Federal Court Act*, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to keep in mind the principles for harmonizing different statutes. Professor Ruth Sullivan expressed these principles as follows, in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 288:

(3) Si elle estime que des marchandises saisies en vertu du paragraphe (1) risquent de se détériorer, la personne qui en a la garde peut les vendre selon les modalités et aux prix qu'elle détermine.

Toutefois, depuis les modifications de 1991, l'art. 72 prévoit, et prévoyait pendant toute la période pertinente :

72. (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté.

B. *Les principes d'interprétation des lois*

28 Dans de nombreux arrêts, notre Cour a retenu le principe d'interprétation des lois contenu dans l'extrait suivant de Driedger, à la p. 87 de son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) :

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

29 Cet extrait célèbre de Driedger « résume le mieux » la méthode que privilégie notre Cour en matière d'interprétation des lois : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21 et 23. Notre Cour a cité avec approbation ce passage de Driedger à de nombreuses occasions et dans différents contextes d'interprétation qu'il n'y a pas lieu de mentionner en l'espèce.

30 Compte tenu de l'interaction, en l'espèce, entre la compétence *in personam* dont la Cour suprême de Terre-Neuve est investie en application de la *Loi sur les pêches* et de la compétence *in rem* en matière d'amirauté que la *Loi sur la Cour fédérale* confère à la Cour fédérale, il est important de garder à l'esprit les principes d'harmonisation des lois en examinant le « contexte global » du par. 72(1) et l'intention du législateur. Le professeur Ruth Sullivan a exprimé ainsi ces principes dans son ouvrage intitulé *Driedger on the Construction of Statutes* (3e éd. 1994), p. 288 :

2001 SCC 56 (CanLII)

The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. . . . Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

[TRADUCTION] Le sens des mots dans un texte législatif ne dépend pas seulement de leur contexte immédiat, mais aussi d'un contexte plus large, qui comprend l'ensemble de la Loi et l'ensemble des lois en vigueur. Les présomptions de cohérence et d'uniformité d'expression s'appliquent non seulement aux lois traitant d'une même matière, mais aussi quoique avec moins de force à l'ensemble des lois adoptées par le législateur. [. . .] Par conséquent, toutes choses étant égales par ailleurs, on retiendra les interprétations qui réduisent la possibilité de contradiction ou d'incohérence parmi les différentes lois.

C. *Application of Principles of Statutory Interpretation: Section 72 and the Scope of the Power to Order Forfeiture*

1. Grammatical and Ordinary Meaning

31 In interpreting the scope of the power to order forfeiture of proceeds under the *Fisheries Act*, it is natural to begin by considering the grammatical and ordinary meaning the words of s. 72(1). As already noted, s. 72(1) provides:

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty. [Emphasis added.]

32 The possessive pronoun in the phrase "any proceeds realized from its disposition" clearly refers to the antecedent "any thing seized under the Act" in the preceding clause. Section 51 is the exclusive source of the power to seize property under the *Fisheries Act*. It provides for the seizure of "any fishing vessel, vehicle, fish or other thing that [a fishery] officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act . . . ". Therefore, in light of the kinds of property subject to seizure under s. 51, reading the words in s. 72(1) in their ordinary and grammatical sense, the provision clearly contemplates the making of an order of forfeiture of the proceeds of disposition of a vessel seized under the Act. Furthermore, it is notable that the proceeds subject to forfeiture are not lim-

C. *L'application des principes d'interprétation des lois : L'article 72 et l'étendue du pouvoir d'ordonner la confiscation*

1. Le sens ordinaire et grammatical

Dans l'interprétation de l'étendue du pouvoir d'ordonner la confiscation du produit de la vente que confère la *Loi sur les pêches*, il est normal de commencer par l'examen du sens ordinaire et grammatical du libellé du par. 72(1). Comme nous l'avons vu, cette disposition prévoit :

72. (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté. [Je souligne.]

Le pronom possessif figurant dans l'expression « le produit de son aliénation » renvoie manifestement à l'antécédent « tout objet saisi » figurant dans la proposition qui précède. L'article 51 constitue l'unique source du pouvoir de saisir des biens prévu par la *Loi sur les pêches*. Cette disposition permet de saisir « les bateaux de pêche, les véhicules, le poisson et tous autres objets dont [l'agent des pêches ou le garde-pêche] a des motifs raisonnables de croire qu'ils ont été obtenus par la perpétration d'une infraction à la présente loi . . . ». En conséquence, si on interprète les termes utilisés au par. 72(1) dans leur sens ordinaire et grammatical, en tenant compte du type de biens susceptibles de saisie aux termes de l'art. 51, il est clair que la portée du par. 72(1) s'étend au prononcé d'une ordonnance de confiscation du produit de l'aliénation

2001 SCC 56 (CanLII)

ited to those proceeds realized through dispositions made under the *Fisheries Act*.

2. Legislative History and the Intention of Parliament

To understand the scope of s. 72(1), it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute: *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667, *per* Pigeon J., cited approvingly by Major J. in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, at para. 13. As noted above, a former version of the forfeiture provision did limit the scope of the power to order forfeiture of proceeds to the proceeds of a disposition of perishables made under s. 71(3) of the Act (now s. 70(3)). However, in 1991, s. 72(1) was amended and the language limiting the scope of the power to order forfeiture of proceeds was removed. Indeed, this was the only meaningful change made to s. 72(1). A review of the Minutes of Proceedings of the Legislative Committee and the Parliamentary debates in Hansard offers little insight into the intention of Parliament in making this change in the forfeiture provision. In fact, no references were made to this specific provision in either the Committee hearings or the Parliamentary debate that preceded its amendment. However, it is clear that as a whole, the 1991 amendments to the *Fisheries Act* were intended to modernize the legislation, and to increase the flexibility and severity of penalties for *Fisheries Act* offences.

It is possible that the removal of the reference to the proceeds of a disposition of perishables, in favour of a general reference to the proceeds of "any thing seized under this Act", was intended by the drafters merely to streamline the language of the section, and not to broaden the scope of forfeiture as it relates to proceeds. However, there is a

d'un navire saisi en vertu de la Loi. Il faut en outre souligner que le produit susceptible de confiscation n'est pas uniquement le produit d'une aliénation faite en vertu de la *Loi sur les pêches*.

2. L'historique de la Loi et l'intention du législateur

33 Pour comprendre la portée du par. 72(1), il est utile d'examiner son évolution sur le plan législatif. Les textes antérieurs sont de nature à jeter de la lumière sur l'intention qu'avait le législateur en les abrogeant, les modifiant, les remplaçant ou y ajoutant : *Gravel c. Cité de St-Léonard*, [1978] 1 R.C.S. 660, p. 667, le juge Pigeon, cité avec approbation par le juge Major dans l'arrêt *Amos c. Insurance Corp. of British Columbia*, [1995] 3 R.C.S. 405, par. 13. Comme je l'ai mentionné précédemment, l'ancienne disposition prévoyant la confiscation limitait l'étendue du pouvoir d'ordonner la confiscation au produit de la vente de marchandises périssables effectuée en vertu du par. 71(3) de la Loi (maintenant le par. 70(3)). Toutefois, en 1991, le par. 72(1) a été modifié et les termes limitant l'étendue du pouvoir d'ordonner la confiscation du produit de la vente ont été supprimés. Il s'agit d'ailleurs du seul changement important apporté au par. 72(1). L'examen des Procès-verbaux du Comité législatif et des Débats parlementaires publiés dans le Hansard ne nous éclaire pas beaucoup sur l'intention qu'avait le législateur en apportant cette modification à la disposition relative à la confiscation. En fait, le par. 72(1) n'a pas été mentionné dans le cadre des audiences du comité et des débats parlementaires qui ont précédé sa modification. Il est toutefois clair que, dans l'ensemble, les modifications apportées en 1991 à la *Loi sur les pêches* visaient à moderniser cette loi et à accroître la souplesse et la sévérité des peines reliées aux infractions prévues dans la *Loi sur les pêches*.

34 En supprimant la mention du produit de la vente de marchandises périssables pour la remplacer par la mention générale du produit de « tout objet saisi », les rédacteurs visaient peut-être uniquement à simplifier le libellé de l'article, et non pas à élargir l'étendue de la confiscation en ce qui a trait au produit. Il existe toutefois une présomption

2001 SCC 56 (CanLII)

presumption that amendments to the wording of a legislative provision are made for some intelligible purpose, such as to clarify the meaning, to correct a mistake, or to change the law: see Sullivan, *supra*, at p. 450. Laskin J. (as he then was) applied this presumption in *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471, at pp. 477-78. Writing for the Court, he held that "[l]egislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended". In this case, through its wholesale removal of specific limiting language, the effect of the 1991 amendment to s. 72(1) is to broaden the scope of the forfeiture provision to include the power to forfeit proceeds of the sale of a vessel. This effect is consistent with the intention of Parliament, as recorded in Hansard, to increase the flexibility and severity of available penalties for *Fisheries Act* offences.

35 Before this Court, counsel did not initially refer to the legislative history of the forfeiture provision. It appears that the Court of Appeal did not benefit from argument on the effect of the 1991 amendments on the proper interpretation of the scope of the power to order forfeiture. Nevertheless, in combination, the grammatical and ordinary meaning of the words in s. 72(1) and the intention of Parliament as indicated by the legislative history of the provision do support a broader interpretation of the scope of the forfeiture power than was given by the Court of Appeal.

3. The Scheme of the Act

36 As noted above, the *Fisheries Act* creates offences and imposes penalties in order to further its object of the proper management and control of the commercial fishing industry. In this appeal, we are particularly concerned with the scheme of that part of the *Fisheries Act* falling under the heading "Disposition of Seized Things". The provisions in that part of the *Fisheries Act* provide authority to deal with the property of a person accused of an

selon laquelle les modifications du libellé d'une disposition législative poursuivent un but intelligible, comme préciser le sens, corriger une erreur ou modifier la loi : voir Sullivan, *op. cit.*, p. 450. Le juge Laskin (plus tard Juge en chef) a appliqué cette présomption dans l'arrêt *Bathurst Paper Ltd. c. Ministre des Affaires municipales du Nouveau-Brunswick*, [1972] R.C.S. 471, p. 477-478. S'exprimant au nom de notre Cour, il a statué qu'« [i]l est raisonnable de croire que les modifications aux lois ont un but, à moins que des indices intrinsèques, ou des indices extrinsèques recevables, démontrent qu'on n'ait voulu qu'en polir le style ». Compte tenu de la suppression totale des termes restrictifs, la modification apportée en 1991 au par. 72(1) a pour effet d'élargir la portée de la disposition relative à la confiscation en y intégrant le pouvoir de confisquer le produit de la vente d'un navire. Cet effet est conforme à l'intention du législateur, consignée dans le Hansard, qui consiste à accroître la souplesse et la sévérité des peines applicables aux infractions prévues dans la *Loi sur les pêches*.

À l'origine, les avocats n'ont pas porté l'historique législatif de la disposition relative à la confiscation à l'attention de notre Cour. La Cour d'appel n'a pas eu l'avantage d'entendre des arguments concernant l'effet des modifications de 1991 sur l'interprétation juste de l'étendue du pouvoir d'ordonner la confiscation. Quoi qu'il en soit, le sens ordinaire et grammatical du libellé du par. 72(1) et l'intention du législateur qui ressort de l'historique législatif de cette disposition appuient, ensemble, une interprétation de l'étendue du pouvoir de confiscation plus large que celle retenue par la Cour d'appel.

3. Le régime établi par la Loi

Comme je l'ai mentionné précédemment, la *Loi sur les pêches* crée des infractions et impose des peines dans le but de favoriser la réalisation de son objet, savoir la gestion et le contrôle appropriés de l'industrie de la pêche commerciale. Dans le présent pourvoi, nous nous intéressons en particulier à l'économie de la partie de la *Loi sur les pêches* intitulée « Aliénation des objets saisis ». Les dispositions figurant dans cette partie confèrent le

2001 SCC 56 (CanLII)

2001 SCC 56 (CanLII)

offence under the *Fisheries Act*. Fisheries officers have the authority to seize property that they have reasonable grounds to believe was involved in the commission of an offence under the *Fisheries Act* (s. 51). Seized property can be detained until forfeiture or the close of proceedings (s. 71(1)), or returned to the owner upon the posting of security (s. 71(2)). Persons convicted of an offence may be responsible to compensate the Crown for costs incurred in the seizure, storage, or disposition of seized property (s. 71.1). Except in respect of perishables (s. 70(3)), there is no authority to dispose of or forfeit property before conviction and the close of proceedings under the *Fisheries Act*. Upon conviction, property can be ordered forfeited to Her Majesty (s. 72) or applied to the payment of fines (s. 73.1(2)). An innocent party that claims an interest in forfeited property may apply for an order declaring that his or her interest is not affected by the forfeiture (s. 75(1)).

pouvoir de disposer des biens de la personne accusée d'une infraction prévue par la *Loi sur les pêches*. Les agents des pêches ont le pouvoir de saisir les biens dont ils ont des motifs raisonnables de croire qu'ils ont été obtenus par la perpétration d'une infraction à la *Loi sur les pêches* (art. 51). Les biens saisis peuvent être retenus jusqu'à ce que leur confiscation soit prononcée ou jusqu'à l'issue des poursuites intentées à leur égard (par. 71(1)), ou restitués à leur propriétaire sur fourniture d'une garantie (par. 71(2)). Les personnes déclarées coupables d'une infraction peuvent être tenues d'indemniser la Couronne des frais engagés dans le cadre de la saisie, de la garde ou de l'aliénation des biens saisis (art. 71.1). Sauf dans le cas des marchandises périssables (par. 70(3)), rien ne permet l'aliénation ou la confiscation des biens avant le prononcé d'une déclaration de culpabilité et l'issue des poursuites intentées en application de la *Loi sur les pêches*. Dans les cas où il y a déclaration de culpabilité, le tribunal peut ordonner que les biens soient confisqués au profit de Sa Majesté (art. 72) ou soient affectés au paiement des amendes (par. 73.1(2)). La partie innocente qui prétend avoir un droit sur un bien confisqué peut solliciter une ordonnance déclarant que la confiscation ne porte pas atteinte à son droit (par. 75(1)).

It makes sense that the *Fisheries Act* would deal exhaustively with property seized under the *Fisheries Act* given the special nature of the kinds of property at issue: fish, fishing vessels, and equipment. The respondent argues that s. 489.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, also applies to the seized property of a person accused of an offence under the *Fisheries Act*. However, s. 489.1 begins with the words, "Subject to this or any other Act of Parliament . . . ". Therefore, because the federal *Fisheries Act* also deals with the property of a person accused of an offence under that Act, in my view, s. 489.1 of the *Criminal Code* has no application in this case.

37 Il est logique que la *Loi sur les pêches* traite de façon exhaustive des biens saisis en vertu de la *Loi sur les pêches* compte tenu de la nature particulière du type de biens en question : du poisson, des bateaux de pêche et du matériel. L'intimée soutient que l'art. 489.1 du *Code criminel*, L.R.C. 1985, ch. C-46, s'applique également aux biens saisis d'une personne accusée d'une infraction à la *Loi sur les pêches*. Or, cet article commence par les mots suivants : « Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale . . . ». En conséquence, comme la *Loi sur les pêches* fédérale porte aussi sur les biens d'une personne accusée d'une infraction à cette Loi, je suis d'avis que l'art. 489.1 du *Code criminel* ne s'applique pas en l'espèce.

In general, there is no authority under the Act to dispose of seized property before the close of proceedings. Thus, the scheme of the *Fisheries Act*

38 De façon générale, la Loi ne confère pas le pouvoir d'aliéner les biens saisis avant l'issue des poursuites intentées. Le régime établi par la *Loi*

properly reflects the presumption of innocence and the related principle that the property of an accused should be preserved until culpability is finally determined. The rationale for excepting seized perishables from the application of these principles is obvious: the quality and value of perishables will deteriorate in storage, hence it is in the interest of an accused that the *Fisheries Act* allow for the timely disposition of seized perishables (see s. 70(3)). However, that the *Fisheries Act* otherwise preserves the property of an accused person is not fatal to the broader interpretation of the power to order forfeiture advanced by the appellant. The property of an accused person is protected under the *Fisheries Act vis-à-vis* the quasi-criminal process under that Act, but there is nothing in the scheme of the *Fisheries Act* that would extend that protection *vis-à-vis* another civil authority. In other words, a person charged with an offence under the *Fisheries Act* cannot rely on the presumption of innocence to prevent or delay a person with an *in rem* claim against his property from obtaining a remedy. Similarly, where the culpability of a person charged with an offence under the *Fisheries Act* has been finally determined, the presumption of innocence is spent and there is nothing expressed in the *Fisheries Act* that would immunize proceeds of sale realized pursuant to a civil authority from forfeiture. In this way, the scheme of the *Fisheries Act* is, at once, strict enough to preserve the seized property of an accused subject to prosecution under the *Fisheries Act*, and flexible enough to preserve the availability of the penalties necessary to achieve the object of the *Fisheries Act*.

sur les pêches reflète donc comme il se doit la présomption d'innocence et le principe connexe selon lequel il faut préserver les biens de l'accusé jusqu'à ce qu'une déclaration de culpabilité soit prononcée dans une décision définitive. Le motif pour lequel les marchandises périssables saisies sont soustraites à l'application de ces principes est évident : la qualité et la valeur des marchandises périssables diminuent lors de la garde, de sorte qu'il est dans l'intérêt de l'accusé que la *Loi sur les pêches* permette l'aliénation de ces marchandises en temps opportun (voir le par. 70(3)). Toutefois, le fait que la *Loi sur les pêches* préserve par ailleurs les biens de l'accusé n'empêche pas l'interprétation large du pouvoir d'ordonner la confiscation qu'a préconisée l'appelante. La *Loi sur les pêches* protège les biens de l'accusé dans le cadre de la procédure quasi pénale qu'elle prévoit, mais rien dans le régime établi par cette loi n'étend cette protection en matière civile. En d'autres termes, la personne accusée d'une infraction à la *Loi sur les pêches* ne peut invoquer la présomption d'innocence pour empêcher une personne ayant une demande *in rem* à faire valoir relativement à ses biens d'obtenir réparation ou pour retarder l'obtention de cette réparation. De même, une décision définitive qui établit la culpabilité d'une personne accusée d'une infraction à la *Loi sur les pêches* met fin à la présomption d'innocence et rien dans la *Loi sur les pêches* n'empêche la confiscation du produit d'une vente effectuée en matière civile. Ainsi, le régime établi par la *Loi sur les pêches* est à la fois suffisamment strict pour préserver les biens saisis d'une personne poursuivie en vertu de la *Loi sur les pêches* et suffisamment souple pour préserver le pouvoir d'imposer les peines nécessaires à la réalisation de l'objet de la *Loi sur les pêches*.

4. The Legislative Context

(a) *Treatment of Proceeds under the Fisheries Act*

39 The remaining factor to consider is the legislative context in which s. 72(1) exists. In interpreting the s. 72(1) power to order forfeiture narrowly, the Court of Appeal relied in part on the treatment of proceeds in the preceding, consecutive ss. 70(3)

4. Le contexte législatif

a) *Le traitement du produit de la vente prescrit par la Loi sur les pêches*

Le dernier facteur à examiner est le contexte législatif du par. 72(1). Pour interpréter de façon restrictive le pouvoir d'ordonner la confiscation que confère le par. 72(1), la Cour d'appel s'est fondée en partie sur le traitement du produit de la

2001 SCC 56 (CanLII)

and 71(1). Taken together, those subsections read as follows:

70. . . .

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

71. (1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

It has been argued that because the phrase "any proceeds realized from its disposition" first appears in s. 70(3), and in that context is limited to proceeds of perishables, the phrase should continue to be read as being so limited when it appears in subsequent sections of the *Fisheries Act*. Furthermore, as an illustration of the above proposition, it is argued that s. 71(1) makes better sense if "any proceeds realized from its disposition", as it appears in that subsection, refers only to s. 70(3) proceeds. It would be unusual that s. 71(1) of the *Fisheries Act* would purport to authorize the detention of the proceeds of disposition of a vessel made pursuant to an authority other than the *Fisheries Act*. The usual course would be for the authority under which the order for sale was made to detain any proceeds arising from that order. For example, in this case, the proceeds of the sale of the Kristina Logos are currently detained by the Receiver General for the benefit of the Federal Court, the source of the order for sale. This reasoning, it is argued, justifies applying the limited interpretation of "any proceeds" found in s. 70(3) to all subsequent subsections, including s. 72(1).

However, although a limited interpretation of "any proceeds" may arguably make better sense of s. 71(1), a purely grammatical interpretation of "any proceeds" is not beyond the rationale of that

vente prévu dans les paragraphes consécutifs qui précèdent cette disposition, soit les par. 70(3) et 71(1). Considérés ensemble, ces paragraphes prévoient :

70. . . .

(3) L'agent des pêches ou le garde-pêche qui a la garde de marchandises périssables saisies peut en disposer de la façon qu'il estime indiquée, le produit de l'aliénation étant versé au receveur général.

71. (1) Sous réserve des autres dispositions du présent article, le poisson ou les objets saisis en vertu de la présente loi ou le produit de leur aliénation peuvent être retenus jusqu'à ce que leur confiscation soit prononcée ou qu'une décision définitive soit rendue lors des poursuites intentées à leur égard.

40 On a prétendu qu'étant donné que l'expression « le produit de l'aliénation » apparaît pour la première fois au par. 70(3) et qu'elle se limite dans ce contexte aux marchandises périssables, elle doit continuer d'être interprétée en ce sens lorsqu'elle figure dans les dispositions suivantes de la *Loi sur les pêches*. Pour illustrer la proposition qui précède, on prétend en outre que le par. 71(1) est plus logique si l'expression « le produit de leur aliénation », qui figure dans cette disposition, renvoie uniquement au produit dont il est fait mention au par. 70(3). Il serait inusité que le par. 71(1) de la *Loi sur les pêches* vise à autoriser la rétention du produit de l'aliénation d'un navire effectuée en vertu d'un autre texte législatif que la *Loi sur les pêches*. Normalement, la juridiction qui a ordonné la vente devrait conserver le produit de la vente. Par exemple, le receveur général conserve actuellement le produit de la vente du Kristina Logos au profit de la Cour fédérale, dont émane l'ordonnance de vente. Ce raisonnement, prétend-on, justifie l'application à tous les paragraphes qui suivent, notamment au par. 72(1), de l'interprétation restrictive de l'expression « le produit » figurant au par. 70(3).

41 Toutefois, même s'il est possible de soutenir que le par. 71(1) est plus logique si l'on attribue une interprétation restrictive à l'expression « le produit », il ne perd pas sa raison d'être et ne

2001 SCC 56 (CanLII)

provision, nor does it render it absurd. As noted above in respect of s. 72(1), read according to its ordinary and grammatical meaning, the phrase "any proceeds realized from its disposition" in s. 71 includes proceeds of vessels seized under the *Fisheries Act*. Thus, s. 71 merely makes a grant of authority to detain proceeds that is partly superfluous in that only in unusual circumstances could the s. 71 power to detain proceeds be practically exercised in respect of proceeds realized pursuant to an authority other than the *Fisheries Act*. Such circumstances could arise if the Federal Court were to make an order pursuant to Federal Court Rule 1007 that proceeds of sale be paid into court and held for the benefit of orders made by other courts. In addition, although there is no authority to dispose of seized property until after the close of proceedings, s. 71(1) of the *Fisheries Act* does provide for the detention of the proceeds of "any . . . thing seized under this Act". Furthermore, Federal Court Rule 1008 provides that the Federal Court has the power to determine the rights of all claimants to moneys paid into court pursuant to Rule 1007(7). Thus, it is difficult to differentiate, on a principled basis, between a situation where the Crown establishes a claim in the provincial court which is then executed in the Federal Court and the situation in this case where the provincial court purports to order forfeiture of monies in the hands of a Federal Court. In the result, one is not necessarily driven to infer, as the Court of Appeal concluded, that, taken together, ss. 70(3) and 71(1) serve to limit the grant of power to order forfeiture in s. 72(1).

devient pas absurde si on interprète cette expression selon son sens purement grammatical. Comme je l'ai mentionné précédemment relativement au par. 72(1), selon son sens ordinaire et grammatical, l'expression « le produit de leur aliénation » figurant à l'art. 71 englobe le produit de la vente des navires saisis en vertu de la *Loi sur les pêches*. Ainsi, l'art. 71 confère simplement un pouvoir de rétention du produit de la vente qui est en partie superflu, puisque ce n'est qu'exceptionnellement que ce pouvoir peut être exercé en pratique à l'égard du produit d'une vente effectuée en vertu d'un autre texte législatif que la *Loi sur les pêches*. Ce pourrait être le cas si la Cour fédérale statuait, dans une ordonnance fondée sur la règle 1007 des *Règles de la Cour fédérale*, que le produit de la vente doit être consigné à la Cour et retenu aux fins de l'exécution d'ordonnances émanant d'autres tribunaux. De plus, bien que rien ne permette l'aliénation des biens saisis avant l'issue des poursuites à leur égard, le par. 71(1) de la *Loi sur les pêches* prévoit la rétention du produit de la vente des « objets saisis en vertu de la présente loi ». En outre, selon la règle 1008 des *Règles de la Cour fédérale*, la Cour fédérale a le pouvoir de déterminer les droits de tous les réclamants sur l'argent consigné à la cour en vertu de la règle 1007(7). Il est donc difficile de faire la distinction, sur le plan des principes, entre le cas où la Couronne établit devant le tribunal provincial une réclamation exécutée par la suite en Cour fédérale et la situation en l'espèce où le tribunal provincial ordonne la confiscation de l'argent consigné à la Cour fédérale. En conséquence, ces considérations n'amènent pas nécessairement à conclure, comme l'a fait la Cour d'appel, que les par. 70(3) et 71(1), interprétés ensemble, limitent le pouvoir d'ordonner la confiscation conféré par le par. 72(1).

42 Indeed, had Parliament intended the phrase "any proceeds realized from its disposition" to be limited to proceeds of perishables in ss. 71(1) and 72(1), it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it

D'ailleurs, si le législateur avait voulu que les expressions « le produit de leur aliénation » et « le produit de son aliénation » figurant respectivement aux par. 71(1) et 72(1) se limitent au produit de la vente de marchandises périssables, il aurait pu le dire explicitement, comme il l'a fait au par. 70(3) ainsi qu'aux par. 72(2) et 72(3). Au contraire, un modèle se dessine clairement quant à l'utilisation

2001 SCC 56 (CanLII)

refers more generally to all forms of property seized under the Act and proceeds thereof.

In addition, it is notable that ss. 70(3) and 71(1) are directed at the property of a person at a stage in the proceedings where the person is only accused of an offence. Whereas s. 72(1) is directed at the property of a person who has been convicted of an offence. Thus, ss. 70(3) and 71(1) are distinct from s. 72(1) in that the former address procedural matters and the later is in effect a sentencing provision. In this sense, s. 72 stands alone and apart from the immediately preceding sections. This would seem to run against the argument that one must read ss. 70(3), 71(1) and 72(1) together in interpreting the phrase "any proceeds realized from its disposition".

(b) *Continued Physical Detention*

The appellant argues that the Court of Appeal erred by finding that continued physical detention of seized property is a precondition to an order of forfeiture under s. 72(1). The only clear and express preconditions to such an order is the conviction of the accused. Otherwise, the words in s. 72(1) are equivocal on this point. A continued physical detention precondition might make sense were the word "seized" to be read only in the present tense. However, the word "seized" can also be read in the past tense and so may also refer to things formerly seized under the Act. Furthermore, the legal definition of "forfeiture" is "a divestiture of specific property without compensation": see *Black's Law Dictionary* (6th ed. 1990), at p. 650. It may be that after a bare divestiture of the property rights of the owner, without more, the title to property would necessarily vest in the party holding possession, i.e. the Crown, where the property was detained under its authority up until forfeiture. However, s. 72(1) reads "the court may . . . order that any thing . . . or any proceeds . . . be forfeited to Her Majesty". Thus, once forfeiture has been

des expressions en cause : dans certains articles, elles sont expressément limitées au produit de la vente des marchandises périssables, alors que dans d'autres dispositions, elles renvoient de façon plus générale à tous les genres de biens saisis en vertu de la Loi et au produit de leur vente.

43 Il faut aussi souligner que les par. 70(3) et 71(1) visent les biens d'une personne à l'étape des procédures où celle-ci est seulement accusée d'une infraction. Par contre, le par. 72(1) se rapporte aux biens d'une personne déclarée coupable d'une infraction. Les paragraphes 70(3) et 71(1) diffèrent donc du par. 72(1) : les premiers traitent de questions de procédure tandis que le dernier constitue en fait une disposition relative à la détermination de la peine. En ce sens, il faut prendre l'art. 72 isolément et le considérer séparément des articles qui le précèdent immédiatement. Cette distinction semble réfuter l'argument selon lequel il faut lire les par. 70(3), 71(1) et 72(1) conjointement pour interpréter les expressions « le produit de leur aliénation » et « le produit de son aliénation ».

b) *La rétention matérielle continue*

44 Selon l'appelante, la Cour d'appel a commis une erreur en concluant que la rétention matérielle continue des biens saisis constituait une condition préalable au prononcé d'une ordonnance de confiscation sous le régime du par. 72(1). La seule condition préalable claire et explicite au prononcé d'une telle ordonnance est la déclaration de culpabilité de l'accusé. Pour le reste, le libellé du par. 72(1) est équivoque sur cette question. L'existence d'une condition préalable de rétention matérielle continue pourrait être logique si le mot « saisi » était interprété uniquement au présent. Ce terme peut toutefois être interprété au passé et viser les objets saisis antérieurement en vertu de la Loi. En outre, la définition juridique du terme « confiscation » (« *forfeiture* ») est [TRADUCTION] « le retranchement d'un bien ou droit de propriété particulière sans indemnité » (« *a divestiture of specific property without compensation* ») : voir *Black's Law Dictionary* (6e éd. 1990), p. 650. Il se pourrait qu'après le simple retranchement des droits de propriété du propriétaire, sans plus, le titre de propriété des biens soit nécessairement

2001 SCC 56 (CanLII)

ordered under s. 72(1), any rights to the property vest in Her Majesty, regardless of who has possession at the time of forfeiture. In other words, a continued physical detention is not expressly stated as a precondition to an order of forfeiture on the face of s. 72(1).

dévolu à la partie qui en a la possession, c'est-à-dire la Couronne, lorsqu'elle les retient dans l'exercice de ses pouvoirs jusqu'à la confiscation. Le paragraphe 72(1) indique toutefois que « [l]e tribunal [. . .] peut [. . .] ordonner que tout objet [. . .] ou le produit [. . .] soit confisqué au profit de Sa Majesté ». Par conséquent, une fois la confiscation ordonnée en vertu du par. 72(1), tous les droits de propriété des biens sont dévolus à Sa Majesté, peu importe qui en a la possession au moment de la confiscation. En d'autres termes, il ne ressort pas expressément du par. 72(1) que la rétention matérielle continue constitue une condition préalable au prononcé d'une ordonnance de confiscation.

45 However, the Court of Appeal inferred that continued physical detention is a necessary precondition to forfeiture after reviewing the powers to seize, retain custody of and detain property in ss. 51, 70 and 71. The Court of Appeal at para. 34 determined that:

> Following a seizure, there are two possibilities: the vessel or other object seized will be detained by the fishery officer or his agent; or, it will be returned to the owner, at which time the seizure will be at an end.

But the Court of Appeal's analysis in this regard did not, with respect, go far enough. First, the Court of Appeal did not deal with the fact that property could be released from seizure, but not returned to the owner for being subject to an arrest order or an order for sale made under the authority of another court. This is significant since, as noted above, the *Fisheries Act* was amended in 1991 to remove the limitation that only those proceeds realized by a disposition under the *Fisheries Act* are subject to forfeiture. Second, the Court of Appeal did not consider the effect of a continued physical detention precondition on the process by which a vessel may be returned to its owner upon the deposit of security under s. 71(2).

Toutefois, après avoir examiné les pouvoirs de saisie, de garde et de rétention prévus aux art. 51, 70 et 71, la Cour d'appel a conclu que la rétention matérielle continue était une condition préalable nécessaire à la confiscation. Selon la Cour d'appel (au par. 34) :

> [TRADUCTION] Il y a deux possibilités à la suite d'une saisie : le navire ou l'autre objet saisi sera soit retenu par l'agent des pêches ou son représentant, soit remis à son propriétaire, ce qui met fin à la saisie.

Malheureusement, la Cour d'appel n'a pas poussé son analyse assez loin à cet égard. Premièrement, elle n'a pas traité de la possibilité que les biens en question fassent l'objet d'une mainlevée de saisie sans être restitués à leur propriétaire parce qu'un autre tribunal en aurait ordonné la saisie ou la vente. Cet élément est important puisque, comme je l'ai mentionné précédemment, le législateur a modifié la *Loi sur les pêches* en 1991 pour supprimer la restriction selon laquelle seul le produit d'une vente effectuée en vertu de la *Loi sur les pêches* était susceptible de confiscation. Deuxièmement, la Cour d'appel n'a pas tenu compte de l'effet qu'aurait la condition préalable de rétention matérielle continue sur le processus par lequel un navire peut être restitué à son propriétaire sur dépôt d'une garantie en vertu du par. 71(2).

46 Under s. 71(2) of the *Fisheries Act*, the process by which a security deposit obtains the release of seized property is a kind of bailment. Section 71(2)

Le processus par lequel le dépôt d'une garantie permet la mainlevée de la saisie des biens en vertu du par. 71(2) de la *Loi sur les pêches* est un genre

2001 SCC 56 (CanLII)

provides that, if security is given to Her Majesty in a form and amount satisfactory to the Minister, the court has a discretionary power to order that the seized property be returned to the person from whom it was seized. In the result, a contract is formed between the Crown and the person seeking the return of the property whereby the person pledges something of value, usually money in an amount equal to or exceeding the market value of the seized property, in order to assure the performance of an obligation by furnishing a resource to be used in case of failure in the principal obligation. This arrangement is mutually beneficial since the person from whom the property was seized is able to reacquire the property and put it to good use, while the Crown need not incur expenses for the storage and maintenance of seized property. In this way, both parties, as well as any creditors, are protected from the diminution of equity that can occur when storage costs accumulate while property is detained. There are, therefore, sound and compelling reasons to interpret this legislation in a way that will harmonize the interests of the accused, the Crown, the employees and creditors that have an interest in getting productive, income-earning property back into circulation. Given the potential for a lengthy period of pre-trial detention, the benefits to be obtained by the return of property on the deposit of security are significant and recourse to this process should not be discouraged.

de cautionnement. Cette disposition confère au tribunal le pouvoir discrétionnaire d'ordonner la restitution des biens au saisi si une garantie, que le ministre juge acceptable quant au montant et à la forme, est fournie à Sa Majesté. Il y a donc formation d'un contrat entre la Couronne et la personne qui demande la restitution des biens, par lequel cette dernière donne en gage à la Couronne un objet de valeur, généralement un montant d'argent égal ou supérieur à la valeur marchande des biens saisis, pour garantir l'exécution de l'obligation principale. Cette entente profite aux deux parties parce que le saisi peut récupérer les biens et les utiliser à bon escient et que la Couronne n'a pas à engager des dépenses pour leur garde et leur entretien. De cette manière, les deux parties, de même que les créanciers, sont protégés contre la diminution de valeur résultant de l'accumulation des frais de garde au cours de la rétention des biens. Il existe donc des raisons valables et impérieuses d'interpréter cette loi de façon à harmoniser les droits de l'accusé, de la Couronne, des employés et des créanciers, qui ont intérêt à obtenir la remise en circulation des biens productifs qui génèrent des revenus. Compte tenu de la possibilité d'une longue période de rétention avant le procès, la restitution des biens sur fourniture d'une garantie comporte d'importants avantages et il ne faut pas décourager le recours à ce processus.

However, for the reasons that follow, recourse to this process would be less attractive if an order of forfeiture were subject to a precondition of continued physical detention. There appears to be no power under the Act to order the forfeiture of a security deposit, only the vessel or other property for which it is exchanged. The right to claim the security deposit is contractual and arises out of the failure of the person to whom the property was returned to perform the obligations undertaken upon the return of seized property. The parties ought to be free to include in such a contract, an obligation to deliver-up the vessel if an order of forfeiture is made against it. There is nothing in the Act to indicate an intention to constrain the parties from contracting in this way.

47

Toutefois, pour les motifs qui suivent, il serait moins intéressant de recourir à ce processus si une ordonnance de confiscation était assujettie à une condition préalable de rétention matérielle continue. La Loi ne semble pas conférer le pouvoir d'ordonner la confiscation d'un dépôt de garantie; seul le navire ou les autres biens contre lesquels la garantie est échangée peuvent être confisqués. Le droit de réclamer le dépôt de garantie est contractuel et découle de l'inexécution des obligations qu'a contractées le saisi lors de la restitution des biens. Il devrait être loisible aux parties de prévoir dans un tel contrat l'obligation de restituer le navire si celui-ci fait l'objet d'une ordonnance de confiscation. Rien dans la Loi ne fait ressortir l'intention d'empêcher les parties de stipuler ce genre de clause.

2001 SCC 56 (CanLII)

48 Furthermore, if continued physical detention were a precondition to an order of forfeiture, to preserve the availability of the penalty of forfeiture, either the Crown would have to refuse to accept a security deposit, or the court would have to exercise its discretion and refuse to order the return of the property. There is nothing in the *Fisheries Act* to indicate that the interim, interlocutory measure of the return of property on the deposit of security should trump or foreclose the remedy of forfeiture. Such an interpretation is inconsistent with the mutual benefits available under this process, the harmonization of the interests of the parties and innocent third parties, the intention of Parliament to increase the severity and flexibility of penalties under the *Fisheries Act*, and the deterrent effect of the power of forfeiture. Taking all of this into consideration, I believe it follows that s. 72(1) contemplates the making of an order of forfeiture against a vessel that has been released from seizure and returned on the deposit of security. It also follows that when s. 72(1) authorizes the forfeiture of "any thing seized under this Act", that includes things that have been formerly seized under the *Fisheries Act*, but released from seizure.

(c) *Relief from Forfeiture*

49 In addition, the Court of Appeal did not consider the implications of s. 75 of the *Fisheries Act*. Section 75 permits innocent parties with an interest against property to apply to a provincial superior court for an order that their interest is not affected by the forfeiture and declaring the extent of their interest. It is open to an innocent party to assert its interest in the form of an *in rem* claim against a vessel in the Federal Court, under its admiralty jurisdiction. Notwithstanding the respondent's argument that the courts in Newfoundland have retained their admiralty jurisdiction intact, such a course of action is natural, especially in jurisdictions where the superior courts' admiralty jurisdiction has been ceded to the Federal Court of Canada. Indeed, it would be perverse to force a litigant claiming an *in rem* interest in a seized vessel to wait for an order of forfeiture under the *Fisheries Act* in order to have the extent of its interest determined by a court of admiralty jurisdiction.

De plus, si la rétention matérielle continue était une condition préalable au prononcé d'une ordonnance de confiscation, il faudrait, pour que cette peine puisse être appliquée, que la Couronne refuse le dépôt de garantie ou que le tribunal exerce son pouvoir discrétionnaire et refuse d'ordonner la restitution des biens. Rien dans la *Loi sur les pêches* n'indique que la mesure provisoire et interlocutoire que constitue la restitution des biens sur dépôt d'une garantie devrait écarter ou rendre inapplicable la réparation de la confiscation. Une telle interprétation est incompatible avec les avantages mutuels que comporte ce processus, l'harmonisation des droits des parties et des tiers innocents, l'intention du législateur d'accroître la sévérité et la souplesse des peines prévues par la *Loi sur les pêches* et l'effet dissuasif du pouvoir de confiscation. Après avoir pris tous ces éléments en considération, j'estime que le par. 72(1) prévoit le prononcé d'une ordonnance de confiscation contre un navire ayant fait l'objet d'une mainlevée de saisie et restitué sur dépôt d'une garantie. En outre, l'autorisation de confisquer « tout objet saisi » accordée par le par. 72(1) vise les objets qui ont été saisis antérieurement en vertu de la *Loi sur les pêches*, mais qui ont fait l'objet d'une mainlevée.

c) *Le recours en cas de confiscation*

En outre, la Cour d'appel n'a pas examiné les répercussions de l'art. 75 de la *Loi sur les pêches*. L'article 75 permet aux parties innocentes détenant un droit sur des biens de solliciter auprès de la cour supérieure d'une province une ordonnance déclarant que la confiscation ne porte pas atteinte à leurs droits et précisant l'étendue de ceux-ci. Une partie innocente peut faire valoir son droit sur le navire sous la forme d'une demande *in rem* présentée devant la Cour fédérale, exerçant alors sa compétence en matière d'amirauté. Malgré l'argument de l'intimée selon lequel les tribunaux de Terre-Neuve ont conservé intacte leur compétence en matière d'amirauté, une telle procédure est normale, surtout dans les ressorts où la compétence des cours supérieures en matière d'amirauté a été cédée à la Cour fédérale du Canada. Il serait d'ailleurs abusif d'obliger la partie faisant valoir un droit réel sur un navire saisi à attendre la délivrance d'une ordonnance de confiscation en appli-

2001 SCC 56 (CanLII)

Thus, it is evident from s. 75 that the *Fisheries Act* does contemplate the possibility of parallel proceedings, *in personam* and *in rem*, involving the same vessel. This lends further support to the view that s. 72(1) authorizes the forfeiture of proceeds realized pursuant to an authority other than the *Fisheries Act*.

cation de la *Loi sur les pêches* pour qu'un tribunal compétent en matière d'amirauté détermine l'étendue de son droit. Par conséquent, il ressort clairement de l'art. 75 que la *Loi sur les pêches* prévoit la possibilité d'instances parallèles, *in personam* et *in rem*, touchant le même navire. Cette conclusion renforce l'opinion que le par. 72(1) autorise la confiscation du produit de la vente obtenu en vertu d'un autre texte législatif que la *Loi sur les pêches*.

(d) *Harmonization of Statutes*

d) *L'harmonisation des lois*

As noted above, because of the interaction in this case between the *in personam* jurisdiction of the Newfoundland Supreme Court under the *Fisheries Act* and the *in rem* jurisdiction of the Federal Court under the admiralty provisions of the *Federal Court Act*, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to apply the principles for harmonizing different statutes in this case.

50 Comme je l'ai mentionné précédemment, en raison de l'interaction entre la compétence *in personam* dont la Cour suprême de Terre-Neuve est investie en application de la *Loi sur les pêches* et de la compétence *in rem* en matière d'amirauté que la *Loi sur la Cour fédérale* confère à la Cour fédérale, il est important d'appliquer en l'espèce les principes d'harmonisation des lois dans le cadre de l'examen du « contexte global » du par. 72(1) et de l'intention du législateur.

The admiralty provisions of the *Federal Court Act* and the provisions of the *Fisheries Act* can and should be read as a consistent, harmonious scheme for the regulation of maritime matters. Fishing vessels and their use are at the heart of the activities governed by each regime, and the law in one area will inevitably exert an influence on the law in the other. For example, it is a likely scenario that many fishing vessels are mortgaged and must be active and producing income in order to discharge the mortgage. A seizure of such a vessel under the *Fisheries Act* can result in a lengthy pre-trial detention. If an owner is unable to obtain the return of the vessel by posting security, by taking the vessel out of the working ocean, it is likely that a period of detention that curtailed the income producing activities of the vessel would precipitate a civil claim against the vessel in a court of admiralty jurisdiction such as the Federal Court of Canada. Therefore, a reasonable and obvious explanation of the 1991 amendments to s. 72(1) is that the above scenario was anticipated by the legislators, who, in order to preserve the jurisdiction of the courts to impose forfeiture as a penalty, broadened the power to make an order of forfeiture to include in its scope the proceeds of a disposition

51 On peut et on doit interpréter les dispositions de la *Loi sur la Cour fédérale* en matière d'amirauté et les dispositions de la *Loi sur les pêches* comme des régimes cohérents et harmonieux de réglementation des questions maritimes. Les bateaux de pêche et leur utilisation sont au cœur des activités que régit chacun de ces systèmes, et les dispositions de l'un influenceront inévitablement les dispositions de l'autre. Par exemple, il est probable que de nombreux bateaux de pêche sont grevés d'une hypothèque et qu'ils doivent être exploités et générer des revenus pour permettre le remboursement de l'emprunt hypothécaire. La saisie d'un tel navire en application de la *Loi sur les pêches* peut donner lieu à une longue rétention avant le procès. Si le propriétaire est incapable d'obtenir la restitution du navire en fournissant une garantie, il est vraisemblable qu'une période de rétention empêchant son utilisation dans l'océan et faisant obstacle à ses activités lucratives entraîne une poursuite civile contre le navire devant un tribunal compétent en matière d'amirauté comme la Cour fédérale du Canada. Les modifications apportées en 1991 au par. 72(1) s'expliquent donc raisonnablement et manifestement de la façon suivante : le législateur a anticipé ce scénario et, afin de préserver la com-

2001 SCC 56 (CanLII)

of a seized vessel realized under an authority other than the *Fisheries Act*, thus giving effect to Parliament's intention to increase penalties for fisheries offences while also preserving the operation of the presumption of innocence *vis-à-vis* the quasi-criminal processes of the *Fisheries Act*.

52 If the Court of Appeal's narrow interpretation of s. 72(1) is adopted, an order for sale emanating from the Federal Court would terminate the jurisdiction of the Newfoundland Supreme Court to order forfeiture. As between the *Fisheries Act* and the grant of admiralty jurisdiction in the *Federal Court Act*, such a result does not comply with the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.

V. Conclusion

53 Considering the various issues in this appeal, the jurisdictional questions they raise, and the reconciliation of jurisdictions *in rem* and *in personam*, criminal and commercial, maritime and penal, and Federal Court and provincial court, I conclude that s. 72(1) does authorize the sentencing court to make an order of forfeiture against the proceeds of disposition of a vessel formerly seized under the *Fisheries Act*, but sold under the jurisdiction of the Federal Court of Canada. The sale of the vessel was contemplated, but not effected, under the *Fisheries Act*. Furthermore, the Crown in this case did not institute proceedings in the Federal Court, and its application to intervene and motion for an order for sale were not an end run around limitations in the *Fisheries Act*.

54 For the foregoing reasons, I would allow the appeal, set aside the order of the Court of Appeal,

pétence des tribunaux d'imposer la confiscation comme peine, il a élargi le pouvoir d'ordonner la confiscation au produit de la vente d'un navire saisi effectuée en vertu d'un texte législatif autre que la *Loi sur les pêches*, donnant ainsi effet à l'intention du législateur d'augmenter les peines reliées aux infractions en matière de pêche tout en protégeant l'application de la présomption d'innocence à l'égard de la procédure quasi pénale de la *Loi sur les pêches*.

Si on adoptait l'interprétation restrictive qu'a donnée la Cour d'appel au par. 72(1), une ordonnance de vente de la Cour fédérale mettrait fin au pouvoir de la Cour suprême de Terre-Neuve d'ordonner la confiscation. En ce qui a trait à l'interaction entre la *Loi sur les pêches* et la compétence en matière d'amirauté prévue dans la *Loi sur la Cour fédérale*, un tel résultat n'est pas conforme au principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet.

V. Conclusion

Compte tenu des différentes questions en cause dans le présent pourvoi, des questions de compétence qu'elles soulèvent et de la conciliation des compétences *in rem* et *in personam*, criminelle et commerciale, maritime et pénale, ainsi que de la compétence de la Cour fédérale et du tribunal provincial, je conclus que le par. 72(1) autorise le tribunal chargé de la détermination de la peine à rendre une ordonnance de confiscation du produit de l'aliénation d'un navire saisi à l'origine en application de la *Loi sur les pêches*, mais vendu dans l'exercice de la compétence de la Cour fédérale du Canada. La *Loi sur les pêches* prévoyait la vente du navire, mais ce n'est pas en application de cette loi que la vente a été effectuée. En outre, la Couronne n'a pas introduit d'instance en Cour fédérale dans la présente affaire, et sa demande d'intervention et sa requête visant l'obtention d'une ordonnance de vente ne visaient pas à contourner les restrictions de la *Loi sur les pêches*.

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de

2001 SCC 56 (CanLII)

and restore the order of forfeiture made by the sentencing judge.

Appeal allowed.

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa.

Solicitors for the respondent: Lewis, Sinnott, Shorthall & Hurley, St. John's.

la Cour d'appel et de rétablir l'ordonnance de confiscation qu'a rendue le juge chargé de la détermination de la peine.

Pourvoi accueilli.

Procureur de l'appelante : Le sous-procureur général du Canada, Ottawa.

Procureurs de l'intimée : Lewis, Sinnott, Shorthall & Hurley, St. John's.

2001 SCC 56 (CanLII)

Tab 24

CITATION: R. v. Stucky, 2009 ONCA 151
DATE: 20090217
DOCKET: C46382

COURT OF APPEAL FOR ONTARIO

2009 ONCA 151 (CanLII)

Weiler, Gillese and Armstrong JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

David Stucky

Respondent

James D. Sutton and Nicola Pfeifer, for the appellant

David M. Porter and Christine Lonsdale, for the respondent

Heard: September 30, October 1 and 2, 2008

On appeal from the acquittals entered on November 17, 2006, by Justice Arthur M. Gans of the Superior Court of Justice, sitting without a jury and reported at 2006 CanLII 41523.

Weiler and Gillese JJ.A.:

I. Overview

[1] Mr. Stucky, a resident of Ontario, operated a direct mail business in Ontario that sold lottery tickets and merchandise only to persons outside of Canada. He was charged with sixteen counts of making false or misleading representations "to the public" between 1995 and 2002 in order to promote his business interests, contrary to s. 52(1) of the

Competition Act, R.S.C. 1985, c. C-34 (the "Act"). The charges pertained to four direct mail promotions sent primarily to people in the United States, Great Britain, Australia, and New Zealand. The promotions were not mailed to anyone in Canada.

[2] Section 52(1) of the Act currently reads as follows:

> No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation *to the public* that is false or misleading in a material respect. [Emphasis added.]

[3] The trial judge found Mr. Stucky not guilty of the charges because he held that the phrase "to the public" means "to the *Canadian* public" and none of the mailings were made to persons in Canada. The trial judge also determined that but for this interpretation of "to the public", he would have convicted Mr. Stucky of six of the counts in the indictment.

[4] The Crown appeals. It submits that the trial judge erred in interpreting the phrase "to the public" as limited to the Canadian public. If successful in its appeal, the Crown seeks to have convictions entered on the six counts on which Mr. Stucky would otherwise have been convicted.

[5] Mr. Stucky submits that if the Crown is successful on appeal, a new trial should be ordered, principally because the trial judge's interventions during the proceedings undermined the appearance of fairness of the trial and compromised Mr. Stucky's ability to present a full answer and defence to the charges.

[6] Four of the counts on which Mr. Stucky would otherwise have been convicted related to promotions that took place from 1995 to 1999 (the "pre-1999 counts"). In that period, s. 52(1) of the Act created a strict liability offence. For strict liability offences, the prosecution must prove beyond a reasonable doubt that the accused committed the prohibited act. The onus then shifts to the accused who can avoid liability by establishing, on a balance of probabilities, that he or she acted with due diligence. Prior to the 1999 amendments to the Act, s. 60(2) provided for a due diligence defence, as follows:

> No person shall be convicted of an offence under section 52…if he establishes that:
>
> …

2009 ONCA 151 (CanLII)

> (b) he took reasonable precautions and exercised due diligence to prevent the occurrence of the error.

[7] In mounting his due diligence defence, Mr. Stucky placed heavy reliance on the fact that he had sought and acted on legal advice in respect of the promotions. He argues that the trial judge erred in finding that the due diligence defence had not been made out. The Crown submits that the trial judge reached the right conclusion but erred in treating reliance on legal advice as a mistake of fact.

[8] The remaining two counts at issue on appeal cover the time period from 1999 to 2002 (the "post-1999 counts"). After the 1999 amendments to the Act, s. 52 created an offence requiring proof of the accused's *mens rea*. Mr. Stucky argues that the trial judge erred in relation to these counts in finding that the Crown had proved beyond a reasonable doubt that he possessed the requisite mental element. Again, he maintains that he honestly believed the promotions were not false and misleading based on the legal advice he had received. In respect of these counts, the Crown and Mr. Stucky differ on what must be proved to satisfy the *mens rea* component of s. 52.

[9] Our conclusions on these issues can be briefly summarized. We would allow the Crown's appeal on the meaning of s. 52(1) of the Act and hold that the phrase "to the public" is not restricted to the Canadian public. We conclude that trial fairness requires that the matter be remitted for a new trial. In light of our conclusion that a new trial is warranted, we address only the strict legal issues that were raised in respect of the counts on which Mr. Stucky would otherwise have been convicted. In respect of the pre-1999 offences, we conclude that it was not open to Mr. Stucky to advance a mistake of fact defence based on the legal advice that he had received. In relation to the post-1999 offences, we conclude that the trial judge made no error in holding that to satisfy the *mens rea* component, the Crown was required to prove beyond a reasonable doubt that Mr. Stucky knew of the falsity or misleading nature of the representations, or had been reckless in that regard. In view of our conclusions, we find it unnecessary to deal with the other issues raised by Mr. Stucky.

II. The meaning of "to the public" in s. 52 of the Act

[10] In this section of the judgment, we will review the historical evolution of the misleading advertising legislation and the enforcement scheme of the Act. We then discuss why, contrary to the trial judge's decision, the phrase "to the public" should not be limited in its meaning to persons in Canada, with reference to relevant criminal law jurisprudence and the principles of statutory interpretation.

2009 ONCA 151 (CanLII)

1) The history of false and misleading advertising legislation

[11] When the misleading advertising section was first enacted in the *Criminal Code* in 1914, the word "public" did not appear, as the provision was simply concerned with the publishing of an advertisement and not the making of a false or misleading representation generally: S.C. 1914, c. 24.

[12] In 1960, the *Combines Investigation Act* was amended to prohibit the making of a misleading representation "to the public" in relation to price: S.C. 1960, c. 45. At that time, the misleading advertising prohibition was still contained in the *Criminal Code*.

[13] In 1969, the misleading advertising section of the *Code* was repealed. The prohibition against misleading advertising became part of the *Combines Investigation Act*: S.C. 1969, c. 38. In 1975, the price misrepresentation and misleading advertising sections of the *Combines Investigation Act* were combined into one section, and the offence of misleading advertising was broadened. "To the public" became one of the constituent elements of the offence of misleading advertising, and the offence included not just published advertisements but "representations" to the public: S.C. 1974-75, c. 76. The regime for enforcement remained a criminal regime, and conviction could result in imprisonment.

[14] In 1986, the *Combines Investigation Act* was renamed the *Competition Act*: S.C. 1986, c. 19 (2nd Supp.).

[15] In 1999, a number of significant amendments respecting the false and misleading advertising provisions of the Act were made. Section 52 was changed from a strict liability offence to a full *mens rea* offence: S.C. 1999, c. 2.

[16] The 1999 amendments also created an administrative or regulatory regime in Part VII.1 of the Act, entitled "Deceptive Marketing Practices". Section 74.01(1)(a) in Part VII.1 provides that a person engages in "reviewable conduct" when that person makes a false or misleading material representation "to the public". The section mirrors s. 52 in making reference to misleading representations "to the public". Unlike s. 52, the making of a misleading representation in s. 74.01(1)(a) is a matter of strict liability for which the Competition Tribunal may order a monetary penalty or make another remedial order.

2) Enforcement of the Act

[17] As a result of the 1999 amendments, the Act is enforced in the following way. The Commissioner of Competition, an independent law enforcement official who is responsible for the Act's administration and enforcement under s. 7, may commence a preliminary examination, e.g. if a complaint is received, or may commence a formal examination under ss. 9 or 10 of the Act. If the Commissioner concludes that a

2009 ONCA 151 (CanLII)

contravention of the Act has taken place, the Commissioner may either refer the matter to the federal Attorney General, who decides whether or not to prosecute, or take the administrative route and make an application to the Competition Tribunal: see s. 23 of the Act and Brian A. Facey and Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 3rd ed. (Toronto: Butterworths, 2006), at pp. 29, 37-39. Thus, in the case of an alleged misleading representation, the Commissioner may refer the matter to the Attorney General in which case a criminal prosecution may take place under s. 52, or the Commissioner may take the administrative route and apply to the Competition Tribunal for a decision that a contravention of s. 74.01(1)(a) has taken place. Once charges have been laid or an application has been filed before the Competition Tribunal, the Competition Bureau may not switch regimes: see Facey and Assef at p. 384.

2009 ONCA 151 (CanLII)

[18] In proceedings before Parliament when the 1999 changes were made, the Minister of Industry stated that criminal sanctions for misleading advertising and deceptive marketing practices remained in place for the most serious cases, while less serious cases could be dealt with through the administrative regime: see *R. v. Benlolo* (2006), 81 O.R. (3d) 440 (C.A.), at para 14, referencing *House of Commons Debates*, 074 (March 16, 1998) at 1300 (Hon. John Manley).

3) *Criminal Code* jurisprudence is applicable to the interpretation of s. 52 and the trial judge erred in not applying it

[19] The trial judge, without expressly saying so, appears to have concluded that traditional principles of criminal law had limited application to the prosecution of a public welfare offence such as that under s. 52. In his decision, he referred to *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299. In that case, Dickson J., on behalf of a unanimous court, at pp. 1302-1303, recognized public welfare offences as a distinct class of offences that, "although enforced as penal laws through the machinery of the criminal law, are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application".

[20] Since the decision in *Sault Ste. Marie*, the distinction between criminal and regulatory offences has blurred. The label attached to the offence is no longer determinative. Rather, the penalties attached to the conduct, the values underlying the offence, and whether the offence is one for which *mens rea* is required must be considered.

[21] In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, the Supreme Court was concerned with whether certain misleading advertising provisions then contained in the Act were inconsistent with ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The provisions created a strict liability offence and codified what was

essentially the common law defence of due diligence coupled with the requirement of a timely retraction. One of the arguments advanced by the Crown in seeking to have the legislation upheld was that the principles of fundamental justice in the *Charter* should be interpreted differently because the offence was a regulatory offence, as opposed to a criminal offence. Lamer C.J.C. rejected this argument, stating at p. 189 that the principles of fundamental justice did not take on a different meaning "simply because the offence can be labelled as 'regulatory'". He concluded that liability for imprisonment, as opposed to the label attached to the offence, was determinative of the analysis to be undertaken. La Forest J. agreed and observed at p. 209 that what is ultimately important are not the labels but the values at stake in the particular context. The fact that a five year term of imprisonment could be imposed if an individual was convicted required stricter conformity with the principles of fundamental justice than mere monetary penalties. As well, Cory J. was of the opinion that true crimes require *mens rea*.

2009 ONCA 151 (CanLII)

[22] The penalty of imprisonment applies to all the counts with which Mr. Stucky was charged. The offence is designed for protection of the public through reinforcement of the value of honesty, a value emphasized in the *Criminal Code*. In addition, in relation to the post-1999 counts, the requirement that the false or misleading misrepresentation be made "knowingly or recklessly" means that *mens rea* is required to be proved by the Crown beyond a reasonable doubt.

[23] While the prohibition on false or misleading advertising is found in the *Competition Act,* and not the *Criminal Code,* it is our opinion that the *Criminal Code* jurisprudence, discussed below, applies to the interpretation of s. 52.

4) *Criminal Code* jurisprudence

[24] Based on *Criminal Code* jurisprudence, it is our view that the meaning of "the public" is not restricted to the Canadian public where there is a real and substantial link or connection between the offence and Canada. Two cases are particularly important in this regard: *R. v. Chapman*, [1970] 3 O.R. 344 (C.A.), leave to appeal refused, [1970] S.C.R. viii and *Libman v. The Queen*, [1985] 2 S.C.R. 178.

[25] *Chapman* is a case with facts similar to the instant case in which the court was required to interpret the meaning of "the public". The accused were charged with several *Criminal Code* offences, including conspiracy to defraud the public by deceit, falsehood or other fraudulent means, and using the mail to transmit letters for the purposes of defrauding the public and obtaining money under false pretences: S.C. 1953-54, c. 51, ss. 323(1) and 324.[1] The accused raised the question of jurisdiction and the meaning of the phrase "the public" in the provisions because, on the facts before the court, the only

[1] The fraud provision is now contained in s. 380 of the *Code*.

members of the public who were defrauded were residents of the United States. In relation to the conspiracy to defraud offence, the court held at p. 349:

> The completion of the offence under s. 323(1) lies in the obtaining of the fruits of the fraudulent means or inducement … If there is an initiation of a fraudulent scheme in Canada (as was the case here in the mailing out of the letters of solicitation) and a realization thereof in Canada through receipt of money or securities intended to be brought in through the scheme, the offence has been committed in Canada although the inducement has extended only to persons outside Canada. In short, "the public or any person" in s. 323(1) are not limited to the Canadian public or to persons in Canada. [Citations omitted].

2009 ONCA 151 (CanLII)

[26] Similarly, in *Libman*, the accused was charged with seven counts of fraud and one count of conspiracy to commit fraud arising from a telephone solicitation sales scheme operated from Canada, whereby residents in the United States were induced to purchase shares in Central American companies. Purchasers sent money to the Central American countries and, eventually, some of the proceeds returned to Canada. La Forest J., on behalf of the court, began by noting that the presumption against extraterritoriality in criminal law was codified in s. 5(2) (now s. 6(2)) of the *Criminal Code*, R.S.C. 1970, c. C.34, which states that no person "shall be convicted in Canada for an offence committed outside of Canada". However, he concluded that the offences in question had taken place in Canada. The commission of the offences had a real and substantial connection to Canada, in that the scheme was devised in Canada, and the operation and directing minds were situated in Canada. In coming to this conclusion, La Forest J. discussed and approved the holding in the *Chapman* decision.

[27] The reasoning La Forest J. followed is equally applicable to this case and may be summarized along these lines: Canada has a legitimate interest in prosecuting persons for unlawful activities that take place abroad when the activities have a "real and substantial link" or connection to Canada. The fact that the only victims are outside of Canada does not make the activity any the less unlawful or mean that no crime has been committed in Canada when there exists "a real and substantial link" or connection to this country. The court must take into consideration all the facts that give Canada an interest in prosecuting the offence and then consider whether international comity would be offended in the circumstances. The principle of extraterritoriality has not prevented courts from taking jurisdiction over transnational offences whose impact is felt within the country. The purpose of criminal law is to protect the public from harm. That purpose is not achieved only by direct means, but also by underlining the fundamental values of our society and,

in so doing, reinforcing the law-abiding sentiments of our society. La Forest J. reflected at p. 212 that utilizing a "real and substantial link" approach is necessary in order to reinforce the fundamental values of society:

> It would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making. What would be underlined in the public's mind by allowing criminals to go free simply because their operations have grown to international proportions, I shall not attempt to expound.

2009 ONCA 151 (CanLII)

[28] Although the *Chapman* and *Libman* decisions were submitted to the trial judge he declined to follow their reasoning. Instead, the trial judge's review of the historical evolution of the provisions dealing with false or misleading representations led him to conclude that when the concept of "materially misleading misrepresentation to the public" was introduced in relation to pricing, Canada had a limited role as a world exporter. He held that the "public" reference was domestically oriented, applying the "original meaning" rule of interpretation. An example of one piece of legislative history the trial judge relied on in support of his position comes from the comments made by the Minister of Justice in 1974 when introducing a predecessor section to s. 52. Referring to the prohibition on false or misleading advertising, the Minister stated that "all Canadians" can benefit from a competitive marketplace: *House of Commons Debates* (March 1, 1974) at 480-481 (Hon. Herb Gray).

[29] In our opinion, the trial judge took an overly restrictive approach in interpreting the scope of s. 52. As noted by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: LexisNexis, 2002), at p. 113:

> [L]egislation that is enacted to regulate an ongoing activity over an indefinite period of time invites a dynamic interpretation whereas legislation that is aimed at a particular set of circumstances or is otherwise tied to a specific time or place invites a fixed interpretation.

[30] Direct mailing is an ongoing activity over an indefinite period of time that the Act regulates. A dynamic approach to the interpretation of s. 52 is more appropriate. We elaborate further on the appropriateness of this approach in dealing with the statutory interpretation of s. 52.

[31] The trial judge also relied on the presumption against extraterritorial application of legislation and the principle that any ambiguity in legislation ought to be interpreted favourably to the accused to buttress his conclusion that the phrase "to the public" was restricted to the Canadian public.

[32] To interpret the phrase "to the public" as being broader than the Canadian public does not violate the presumption against extraterritoriality. In this case, the Act is being applied to the conduct of a person who is in Canada, whose alleged misrepresentations were initiated in Canada, and whose profits were received in Canada. There is a real and substantial connection between the offence alleged and Canada, notwithstanding the fact that the "public" to whom the representations were made was located outside Canada. Applying the real and substantial connection test supports an interpretation of "the public" which includes persons outside Canada while not violating the presumption against extraterritoriality.

2009 ONCA 151 (CanLII)

5) In any event, the real and substantial link or connection test derived from *Criminal Code* jurisprudence has general application

[33] Significantly, the "real and substantial link" or connection test articulated in *Libman* has been applied outside the *Criminal Code* context and is part of our general law concerning jurisdiction. In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, the Supreme Court held that a real and substantial connection to Canada allows for the application of our *Copyright Act*, R.S.C. 1985, c. c-42, to communications that originate in Canada but are received abroad, and vice versa. At para. 60, Binnie J., writing for the majority, stated that "[a] real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness."

[34] Had the trial judge followed the reasoning in *Chapman* and *Libman*, he would have concluded that the "public" in s. 52 was not limited to the Canadian public. The mere fact that s. 52 is found in the *Competition Act* instead of the *Criminal Code* does not make the prior "real and substantial link" or connection jurisprudence any less applicable.

6) The principles of statutory interpretation, particularly the purpose of the Act and the principle of harmonization, support a conclusion that the phrase "to the public" is not limited to persons in Canada

[35] In addition to the criminal law jurisprudence outlined above, the principles of statutory interpretation support an interpretation of "to the public" which is not restricted to the Canadian public.

[36] The trial judge purported to follow the "modern approach" to statutory interpretation as articulated by Sullivan at p. 1 of her text. This formulation has been accepted by the Supreme Court in numerous cases: see, for instance, *R. v. Bell ExpressVu Limited Partnership*, [2002] 2 S.C.R. 559, at para. 26 and *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21. The modern approach states that:

> [T]he words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] As the trial judge noted, the modern approach to statutory interpretation serves as an appropriate analytical framework. What the trial judge did not appreciate, however, is that judges are required to interpret a statute by using that framework to achieve a result that promotes the purposes of the legislation and produces harmony both within the statute itself and legislation dealing with the same subject matter. Instead, his interpretation led to a result which is not in keeping with the purpose of the Act and is not in harmony with the *Criminal Code*, our international agreements, or other provisions within the statute itself. We will discuss each of these issues of interpretation in turn.

i) The purpose of the Act supports an interpretation of "to the public" which includes persons outside Canada

[38] The trial judge quoted the purpose statement as set out in s. 1.1 of the Act, which reads as follows:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to

2009 ONCA 151 (CanLII)

> participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[39] Both the Crown and Mr. Stucky agree that the primary object of the Act is to protect Canadian businesses. Indeed, one of the express purposes of the Act is to encourage competition "in order to expand opportunities for Canadian participation in world markets". Also, the Act is intended to discourage forms of commercial behaviour that are viewed as detrimental to Canada: see *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641, at p. 676. Law-abiding Canadian direct mail companies doing business abroad would suffer reputational damage and lose business opportunities if Canada did not punish Canadian companies who make misleading representations to persons outside Canada. As stated by Margaret F. Sanderson and William T. Standbury in *Competition Policy in Canada: The First Hundred Years* (Ottawa: Consumer and Corporate Affairs, 1989), at p. 48:

> Along with the obvious need to protect consumers from direct exploitation by semi-fraudulent types of representations, misrepresentation may also cause injury to honest competitors by distorting the functioning of the market. As noted earlier, the impetus toward effective misleading advertising laws in 1960 was due to pressure from business, not consumers.

[40] The trial judge's historical analysis led him to conclude that the Act was originally intended to protect only Canadian consumers and that he should implement the original intent of the legislation. However, in contrast to the trial judge's findings, there is evidence in the legislative debates that Parliament was, historically, concerned with the success of Canadian business abroad. For example, the Minister of Justice in 1960, the Hon. Davie Fulton, commented in the *House of Commons Debates*, May 30, 1960, at pp. 4342 that the Canadian economy was dependent on "successful competition in international as well as domestic markets", and that anti-combines legislation should take into account the "economic climate" in which Canada exists. As noted, Canadian businesses operating in foreign markets risk damage to their reputation when other Canadian businesses acting abroad engage in misleading representation. By using its prosecutorial powers to combat such conduct, the Canadian government promotes the Act's goal of encouraging Canadian business success worldwide. Section 52 should be interpreted in a manner which accords with this goal.

ii) The Act must be harmonized with other legislation dealing with the same type of conduct

2009 ONCA 151 (CanLII)

[41] Statutory interpretation presumes a harmony, coherence, and consistency between statutes dealing with essentially the same subject matter: *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, at para 52 and *Bell ExpressVu* at para. 27. Section 380(1) of the *Code* and s. 52 of the Act are both intended to protect the public from similar misconduct. Section 380 of the *Code* makes it an offence to "defraud the public or any person" by "deceit, falsehood or other fraudulent means" whereas s. 52 of the Act makes it an offence to "knowingly or recklessly make a representation to the public that is false or misleading in a material respect". As already discussed, the prohibition in the *Code* extends to situations where representations emanating from Canada are made to persons outside Canada. The interests of justice encourage an interpretation of the phrase "to the public" in s. 52 which is in harmony with the *Code*.

2009 ONCA 151 (CanLII)

iii) The Act must be harmonized with international agreements

[42] In *Libman*, La Forest J. noted at p. 214 that international agreements reflect a desire by states to act in concert in protecting the public welfare. He wrote:

> [W]e should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies.

[43] In this case, agreements between Canada and the United States reveal that the Canadian government is aware of the cross-border impact of deceptive mail and telemarketing practices, and has promised to cooperate and coordinate efforts to address this: see the *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Law* (the 1995 Agreement) and the *US – Canadian Task Force on Cross-Border Deceptive Marketing Practices Agreement, September 10, 1996* (the 1996 Agreement). Article VII(1) of the 1995 Agreement includes ss. 52-60 of the Act in its definition of deceptive marketing practices laws, and Canada and the United States agree to coordinate their enforcement against deceptive marketing practices with a trans-border dimension in Article VII(3)(d). The approach adopted by the trial judge would undermine these agreements, as opposed to furthering a cooperative approach.

iv) Section 52 must be harmonized with other provisions within the Act

[44] The principle of statutory interpretation that requires coherent interpretation between statutes also applies within a statute: see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at p. 343. According to this principle, the Act must be interpreted not only in a fashion which is consistent with the *Code*, but also with an eye to the internal coherence of its own scheme. Words take their meaning from the context in which they are found. In interpreting a statutory provision, courts must have regard to any adjacent and closely-related provisions as well as the act as a whole: see Sullivan at pp. 261-262.

[45] In looking at other provisions in the Act, the trial judge concluded that there was an important distinction between the representations described in s. 52 and those made by telemarketers (as captured in s. 52.1) and contained in prize promotions (as captured in s. 53). Sections 52.1 and 53 were added to the Act in 1999 and 2002, respectively, and the relevant portions are as follows:

> 52.1(1) In this section, "telemarketing" means the practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest.
>
> …
>
> (3) No person who engages in telemarketing shall
>
> > (a) make a representation that is false or misleading in a material respect;
>
> . . .
>
> 53. (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

2009 ONCA 151 (CanLII)

> (2) Subsection (1) does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent
>
> > (a) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;
> >
> > (b) distributes the prizes or benefits without unreasonable delay; and
> >
> > (c) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in any area to which the prizes or benefits have been allocated.
>
> . . .

[46] The trial judge concluded that the most important point in favour of Mr. Stucky's interpretation was the distinction between s. 52(1), which contains the phrase "to the public" and ss. 52.1 and 53, which do not. He held that ss. 52.1 and 53, which were enacted after s. 52(1), reflect Canada's "commitment to issues surrounding international commerce" (para. 55) and were not limited to representations to persons in Canada because they did not contain the "to the public" language.

[47] The trial judge concluded that, had Parliament intended to broaden the reach of s. 52(1) to put it on the same footing as ss. 52.1 and 53 and apply it to persons outside Canada, it would have amended s. 52 by deleting the words "to the public" to ensure that it mirrored ss. 52.1 and 53.

[48] We disagree. Where a possible interpretation of a section does not accord with the section's public welfare objective, the principle of harmonization suggests the court should reject that interpretation in favour of an interpretation that carries out Parliament's overall objective. In our opinion, Parliament's objective was to protect all those receiving or viewing various forms of communications from an overall impression that is misleading or deceptive in a material respect. The interpretation adopted by the trial judge fails to take into account the shared objectives of the other, closely-related misleading advertising provisions in the Act, which are not limited to persons in Canada.

2009 ONCA 151 (CanLII)

[49] In choosing to give effect to what he perceived to be the original intent of the legislation, the trial judge ignored the evolution in competition law thinking which has led to an increased concern with international business practices. This concern is reflected not only in the enactment of further sections of the Act to deal with practices such as telemarketing and the Internet, but also cross-border agreements between Canada and the United States. Our understanding of legislation should take into account current circumstances. As Sullivan writes at p. 145 of the fifth edition of her text, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008):

> As a rule, the public Acts of a legislature are not meant to operate as historical documents. They are written with an eye to the indefinite future, on the assumption that they will be applied not only to the facts in existence at the time they come into force but also to conditions and circumstances as they evolve from time to time. This assumption is codified in s. 10 of the federal *Interpretation Act* [R.S.C. 1985, c. I-21]:
>
> > The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

[50] An example of the court adopting an interpretation that carries out Parliament's overall objective having regard to the existence of legislation enacted after the section in question can be found in *Libman*. The accused was charged with conspiracy to commit the criminal offence of fraud in Canada pursuant to what was then s. 423(1)(d) of the *Criminal Code*. By contrast, section 423(3) of the *Code*, which was enacted after some of the acts charged occurred, expressly dealt with conspiracies entered into in Canada to commit a crime outside Canada. Counsel argued that, as a result, s. 423(1)(d), under which the accused was charged, only applied to conspiracies to commit a crime in Canada but did not apply where the intended victims were outside Canada. As we have indicated, the Supreme Court rejected this argument, holding that an offence that had a real and substantial link to Canada took place in Canada. Without expressly saying that it was applying the principle of harmonization, the Supreme Court opted for an interpretation that carried out the overall objective of Parliament.[2]

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[2] For another recent example of the Supreme Court applying the principle of harmonization and rejecting a too-literal interpretation in favour of an interpretation that carried out the overall objective of Parliament, see *Bristol-Myers Squibb Co. v. Canada (Attorney General),* [2005] 1 S.C.R. 533.

2009 ONCA 151 (CanLII)

[51] Furthermore, the trial judge's interpretation permits misleading representations from Canada to other countries by mail, but prohibits those representations when they are made by telephone or in regard to winning a prize. There is no juristic or practical reason for such a distinction. The trial judge's interpretation undermines, rather than promotes, the express objectives of the legislation and produces disharmony within the statute.

[52] In addition to the telemarketing and prize-winning provisions, the trial judge also focused on subsections within s. 52 in interpreting the meaning of "to the public". He concluded that ss. 52(2)(e) and (f) of the pre-1999 Act and s. 52(2.1) of the post-1999 Act, which impose liability on importers for bringing false misrepresentations in Canada, illustrate that Parliament was not concerned with a representation unless it was "imported" into Canada. They state:

> Pre-1999:
>
> 52(2) For the purpose of this section and section 53, a representation that is
>
> > (e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public,
>
> shall be deemed to be made to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by
>
> > (f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e)
>
> Post-1999:
>
> 52(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(*a*), (*b*), (*c*) or (*e*) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

2009 ONCA 151 (CanLII)

The trial judge's conclusion was underscored by the fact that s. 52(2)(d) of the Act (which did not change significantly after 1999) did not form part of the importation subsection. That subsection provides that a representation made in the course of "in-store, door-to-door or telephone selling to a person as ultimate user" is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained. He found that including it was unnecessary, as "it spoke to [in store, door-to-door and telephone] representations which by their very nature could only be made on the ground and in Canada".

[53] Before us, Mr. Stucky argued that if the words "to the public" mean "a group of people", as opposed to the Canadian public, the word "public" could not be given a consistent interpretation through out the Act, as required: see *Thomson v. Canada (Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 387. He argues that if "the public" were given a consistent meaning, the importer subsections would purport to criminalize representations made by a person outside Canada to any persons, including those outside Canada, resulting in legislation which applies wholly extraterritorially.

[54] We disagree. The importing provisions do not use the phrase "to the public" and have no bearing on the meaning of "to the public" that is, to a group of persons, with whom the accused has a real and substantial connection. The Act contains rules governing the competitive behaviour of Canadian businesses. Whereas some of its provisions have broad general application, others are directed at specific groups (see, for instance, the reference to suppliers in s. 52(3)). The importer subsections simply address one type of situation – namely, where misleading representations are imported into Canada. Parliament's decision to make importers responsible has no bearing on the accused's responsibility to the public.

[55] The trial judge also considered other sections in the Act. In particular, he referred to ss. 45, 46 and 49 as evidence of the Act's "Canadiancentric" nature. These sections are summarized below:

> s. 45(5): A conspiracy, combine, agreement or arrangement is not punishable if it relates only to the export of products from Canada. It should be noted that s. 45(6) specifies that an export conspiracy, combine, agreement or arrangement is punishable if it has prevented or lessened, or is likely to prevent or lessen, competition in the Canadian export business.
>
> s. 46: An offence in respect of a conspiracy which emanates from outside Canada is committed only if the directive that would infringe s. 45 affects a corporation in Canada.

2009 ONCA 151 (CanLII)

> s. 49(1) and (2): Financial institutions are prohibited from entering into anti-competitive arrangements or agreements, unless they are aimed at customers outside Canada or are otherwise to be performed outside Canada or "unless the agreement or arrangement is with respect to a deposit or loan made or payable outside Canada".

2009 ONCA 151 (CanLII)

[56] The Act as a whole reflects different purposes. Sections 45, 46 and 49, in particular, are concerned with market power and market delineation. In this case, we are concerned with combating false or misleading advertising practices. As Lamer C.J.C. observed in *Wholesale Travel* at pp. 190-191, while the overall objective of the Act, in general, may be to promote vigorous and fair competition, the objective of the provision in issue here is significantly narrower. That objective is two-fold: to protect consumers from the effects of false or misleading statements; and, to prevent those making such statements from reaping the benefits stemming from these statements. In interpreting the phrase "to the public", the trial judge did not consider this second objective.

[57] Our analysis of the words "to the public" would not limit "the public" exclusively to persons within Canada. We, therefore, reject the trial judge's interpretation of the phrase "to the public" in s. 52(1), and hold, instead, that it should be interpreted as meaning "a group of persons" with whom the accused has a real and substantial link or connection.

III. Did the interventions of the trial judge compromise the appearance of fairness?

[58] We must now consider whether the interventions of the trial judge should result in a new trial being ordered.

[59] As already indicated, Mr. Stucky asserts that, if the appellant's appeal is allowed in respect of the interpretation of s. 52 of the *Competition Act*, the judgment should be set aside and a new trial ordered pursuant to s. 686 of the *Code* on a number of grounds. The first of these is that the trial judge's excessive interventions at trial undermined the appearance of fairness of the trial and, accordingly, resulted in a miscarriage of justice.

[60] We agree that the trial judge's interventions at trial did undermine the appearance of fairness of the trial in that, at various times, the trial judge assumed the role of counsel for the Crown through his cross-examination of defence witnesses, including the accused, and appeared to pre-judge the credibility of the accused. Accordingly, for the reasons that follow, we would set aside the trial judgment, and order a new trial.

1) The role of a trial judge

[61] The role of a trial judge is often very demanding, owing not only to the inherent nature of the case, but also to the particular conduct of the litigants: *R. v. Brouillard*, [1985] 1 S.C.R. 39, at p. 42. In the case at bar, the trial lasted 69 days and involved the examination of multiple witnesses, including experts and the accused himself. Notwithstanding the length and complexity of a particular trial, a trial judge must exercise restraint and maintain impartiality so as to act within the scope of his or her neutral role. As cautioned by Lamer J. in *Brouillard*, at pp. 42-43:

> Like anyone, a judge may occasionally lose patience. He may then step down from his judge's bench and assume the role of counsel. When this happens, and, *a fortiori*, when this happens to the detriment of an accused, it is important that a new trial be ordered, even when the verdict of guilty is not unreasonable having regard to the evidence, and the judge has not erred with respect to the law applicable to the case and has not incorrectly assessed the facts.
>
> The reason for this is well-known. It is one of the most fundamental principles of our case law [citation omitted]
>
> > … that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[62] The principles that limit the permitted interventions by trial judges during the course of a trial and, specifically, during the examination-in-chief and cross-examination of witnesses, are well established. We review them below.

2) Permitted interventions by a trial judge

[63] In *Brouillard*, at p. 44, Lamer J. acknowledged that a trial judge may intervene to ask questions, and, where necessary, he or she has a duty to ask questions where justice requires it. However, at the same time, he expressly warned that there are definite limits on this right: *Brouillard* at p. 46. A trial judge "should confine himself as much as possible to his own responsibilities and leave to counsel…[his or her] function": *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.), at pp. 230-231.

[64] In *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), at p. 230, leave to appeal refused, [1986] 1 S.C.R. xiii, Martin J.A. set out three situations in which questions put

2009 ONCA 151 (CanLII)

by a trial judge to a witness may be justified, namely: to clear up ambiguities and call a witness to order; to explore some matter which the witnesses' answers have left vague; or, to put questions which should have been asked by counsel in order to bring out some relevant matter, but which were nonetheless omitted. He noted, however, that questions put by a trial judge to a witness should generally be put after counsel has completed his or her examination of the witness and, further, that the witness should not be cross-examined by the trial judge during examination-in-chief: *Valley* at p. 230. These comments provide guidance as to the timing and nature of interventions that a trial judge may make.

2009 ONCA 151 (CanLII)

[65] The first two situations of permitted interventions by the trial judge set out in *Valley* are self-explanatory. The third situation in which a trial judge is permitted to intervene, namely, to ask questions that should have been asked by counsel, is not an open-ended invitation to the trial judge to usurp the role of Crown counsel. The judge cannot leave his or her position of neutrality as a fact-finder and become the cross-examiner: *R. v. W.(A.)* (1994), 94 C.C.C. (3d) 441 (Ont. C.A.) Brooke J.A. in dissent, reversed for the reasons given by Brooke J.A., [1995] 4 S.C.R. 51.

[66] Where the appearance of fairness is not maintained at trial, the verdict reached cannot stand and a new trial must be ordered. In deciding whether or not the appearance of fairness has been compromised, one factor that warrants consideration is whether the trial judge gave counsel an opportunity to ask questions that arise out of the trial judge's questioning of a witness, in particular, the accused. An additional factor is whether counsel objected to the trial judge's questioning of a witness. The absence of an objection, however, is not in itself determinative.

[67] We turn now to the test for determining when this unfairness threshold is met.

3) The test for determining whether the trial judge's interventions have compromised the appearance of trial fairness

[68] The test is an objective one. As stated by Martin J.A. in *Valley,* at p. 232:

> The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or *whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial.* [Emphasis added.]

[69] The appearance of fairness and the trial judge's corresponding duty to exercise restraint and remain neutral is especially critical in the criminal context where the

accused takes the stand: *Brouillard* at p. 48. Since a criminal trial is an adversarial process between the prosecution and defence, and not an investigation by the trial judge, the examination and cross-examination of witnesses is, for the most part, the responsibility of counsel: *Valley* at p. 231. Although the trial judge is justified in occasionally intervening for one of the legitimate purposes indicated above, the trial judge must be careful not to usurp the role of counsel because otherwise the overall impression created may be fatal to the appearance of trial fairness.

[70] The effect of interventions by the trial judge on the appearance of trial fairness in a given case must be assessed in relation to the unique facts and circumstances of the particular trial: *Valley* at p. 231, citing *Torbiak* at p. 231.

[71] In *Valley* at pp. 231-32, Martin J.A. listed types of interventions by trial judges which have resulted in the quashing of criminal convictions:

> 1. Questioning an accused or a defence witness to such an extent or in a manner which conveys the impression that the trial judge has placed the authority of his or her office on the side of the prosecution and conveys the impression that the trial judge disbelieves the accused or the witness;
>
> 2. Interventions which have effectively made it impossible for defence counsel to perform his or her duty in advancing the defence; and
>
> 3. Interventions which effectively preclude the accused from telling his or her story in his or her own way.

[72] Interventions by a trial judge which can reasonably be said to create the appearance of an unfair trial may be of more than one type, and trial fairness may be undermined by one or more types of interventions: *Valley* at p. 232. However, it is important to emphasize that no trial is perfect. Accordingly, the record must be assessed in its totality and the interventions complained of in a given case must be evaluated cumulatively, not as isolated occurrences, from the perspective of a reasonable observer present throughout the trial. As stated by Doherty J.A. in *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.), at p. 320:

> It is a question of degree. At some point, incidents which, considered in isolation, may be excused as regrettable but of no consequence, combine to create an overall appearance which is incompatible with our standards of fairness.

2009 ONCA 151 (CanLII)

[73] We turn now to a description of the promotions and an assessment of the specific interventions complained of by Mr. Stucky in the case at bar.

4) The promotions

[74] In order to appreciate the interventions in the case at bar in context, we briefly describe the promotions in issue.

[75] The promotions were four direct mail promotions, of which three were lottery-reselling promotions (the lottery promotions) and one was an award incentive/ merchandise promotion.

[76] Each of the three lottery promotions – the Canadian Lottery Buyers Association (CLBA) promotion, the International Lottery Commission (ILC) promotion, and the International Monetary Funding (IMF) promotion – involved the direct mailing of promotional materials to persons located or resident in the United States, Great Britain, Australia, or New Zealand. The lottery promotions offered consumers the opportunity to participate in syndicates that purchased, as a group, lottery tickets from Canada and/or European countries.

[77] The fourth promotion, called Canadian Equity Funding (CEF), was a merchandise promotion which offered consumers an opportunity to receive, in exchange for a fixed fee, one of twenty-five "entitlement premiums" or items, depending on a pre-assigned registration number. These entitlement premiums ranged in size and value, from a significant amount of money payable (e.g. £3,000) down to a piece of costume jewellery of indeterminate and undisclosed value. Between these two extremes there was an array of household products of varying values. The CEF promotion was sent to English-speaking residents in over 200 countries, although primarily to individuals located in the United States, Great Britain, Australia, and New Zealand.

5) The trial judge's interventions

[78] In the case at bar, it is clear that the trial judge was aware of his right to intervene, particularly where he believed that Crown counsel had failed to ask questions which he felt arose from the evidence or had otherwise failed to pursue avenues of inquiry which the trial judge regarded as important. Cumulatively, over the duration of the trial, the trial judge interrupted the examination and cross-examination of defence witnesses, including Mr. Stucky, over twenty times. During these interventions, the trial judge conducted a vigorous cross-examination of the witness, often after Crown counsel had expressly indicated that he was finished dealing with the particular area in question.

[79] The trial judge also made sarcastic comments, some of which suggested that he had prematurely judged the witness' credibility.

2009 ONCA 151 (CanLII)

[80] On occasion, defence counsel objected to the questioning of defence witnesses, including the accused, by the trial judge. The failure of defence counsel to object more frequently, however, must be considered in light of the fact that the prior defence counsel had withdrawn from the file due to acrimony with the trial judge and the trial judge made sarcastic and derogatory comments about prior counsel intermittently during the course of the trial.

[81] By way of illustrating the general situation, we have selected certain interventions by the trial judge which arose during the evidence of Mr. Stucky and a defence expert witness respecting whether the IMF promotion was intended to deliberately mislead the public into thinking the material received was connected with the government or the International Monetary Fund.

[82] Mr. Stucky testified at trial that he did not intend the content of the IMF promotion to be misleading to its recipients, but rather that the choice was a "play on words" to get the readers' attention. He testified further that his belief that the promotion was not misleading was supported by the legal opinions of his lawyer, who advised him that it complied with the *Competition Act*. The trial judge intervened during Mr. Stucky's examination-in-chief and used sarcasm to suggest that he thought Mr. Stucky's evidence preposterous. Thus, at an early stage, the trial judge's comments suggest that he had already discounted Mr. Stucky's credibility:

> Well, rather than asking him the specific question, what was your intention, maybe just elicit the evidence. I mean, you may feel it's necessary to elicit those self-serving comments: no, I didn't intend to mislead, no, I always intended to conform. I'm going to take that evidence as a given, that the evidence is there. Whether I conclude that evidence is there is another matter. That's clearly to be drawn from the surrounding facts. *I have no doubt that Mr. Stucky is going to come in here and tell me with respect to each of the promotions, gosh, I never intended to mislead, gosh, I never thought those people would think that I, International Monetary Funding would be IMF, even though I used the initials IMF 65 times in each of my documents.* [Emphasis added.]

[83] During the cross-examination of Mr. Stucky by Crown counsel, notably after Crown counsel expressly indicated that he was finished dealing with the IMF promotion and was ready to proceed to another area, the trial judge intervened to cross-examine Mr. Stucky as to the use of the acronym "IMF" in the IMF promotion. During the course of this questioning, the trial judge expressed disbelief respecting Mr. Stucky's evidence. In

2009 ONCA 151 (CanLII)

addition, the trial judge cut off Mr. Stucky's responses and offered his own thoughts on the matter:

> **The Court:** Hold on a second. Are you staying with the IMF?
>
> **Mr. Sutton (Crown Counsel):** No, sir.
>
> **The Court:** You're going to move on?
>
> **Mr Sutton:** I was going to move on.
>
> **The Court:** Then I'm confused. The IMF was complaining about the fact that you were, from their perspective, trading on their name and goodwill, basically.
>
> **The Witness:** Trademark, yeah.
>
> **The Court:** You were using their mark.
>
> **The Witness:** Yeah.
>
> **The Court:** Say what you will, my take on it was that that was purposeful, that wasn't happenstance.
>
> **The Witness:** Well –
>
> **The Court:** I mean, anybody with more than a Grade 10 education knows that the IMF stands for International Monetary Fund.
>
> **The Witness:** There's no question that that familiarity was meant to –
>
> **The Court:** It wasn't just a play-on-words joke. It was done purposely, was it not?
>
> **The Witness:** It was done purposely, but there were multiple objectives to it.

2009 ONCA 151 (CanLII)

> **The Court:** I'm not saying there wasn't, and I'm not saying it wasn't good business, and I'm not saying it's illegal. I'm just – simply put, it was done purposely.
>
> **The Witness:** Yes.

[84] In addition to cutting off Mr. Stucky in mid-sentence above, and thereby not giving him an opportunity to convey his evidence in his own way, the mere asking of these questions by the trial judge at the end of Crown counsel's cross-examination in respect of the IMF promotion could create the impression that the trial judge was endeavouring to buttress the Crown's case by eliciting additional incriminatory evidence in an area which Crown counsel clearly had not pressed in cross-examination.

[85] The trial judge's premature determination of Mr. Stucky's credibility is further reflected in the following exchange with defence counsel. The trial judge had, on his own initiative, used the Internet to research and find a website showing the flags of the G-7 countries which he mentioned to counsel. He was then placed in the position of having to rule on the submissions of defence counsel regarding the admissibility of the website image of the flags of the G-7 countries.

[86] Again, the trial judge used sarcasm to convey his disbelief of Mr. Stucky's evidence but this time he went further:

> **The Court:** …And rather than being cute, I mean, I did find the official website. The fact of the matter is he's using it to show the flags, the configuration of the flags, the use of the flags, which I said to Mr. Stucky was done purposefully. *And he gave me some malarkey about the fact that he couldn't recognize the flags. A Grade 6 student could recognize the flags…The point of the exercise is that he purposely flagged this in the same order that the G7 flags are out there.* He…used the IMF moniker, the fact that the matter is he had G-& Sector – Sector G-7 on his envelope. They weren't done coincidently and as a parody, they were done to create the – using Jacobs' terms – the official aspect.
>
> **Mr. Porter:** Well, Mr. Stucky's evidence was to give an international flavour.
>
> **The Court:** *That's his evidence, Mr. Porter. I don't accept his evidence.* [Emphasis added.]

2009 ONCA 151 (CanLII)

[87] Prior to the end of trial, the trial judge indicated to the Crown that it did not need to vigorously pursue further the issue of the admissibility of the website of the G7 flags:

> **The Court:** …I've already got my own view of Mr. Stucky's recollection of the flags and his use of the flags. And I think that was embodied in my comment about Grade 6 yesterday. And it's your call.

[88] When the Crown led evidence that Mr. Stucky's use of the acronym IMF was challenged by the International Monetary Fund and legal action against him was threatened in September 1998, the trial judge further cross-examined Mr. Stucky and obtained admissions from him that, while he had ceased this promotion, he delayed in responding and that the longer the promotion continued the better it was for him.

[89] As well, the trial judge inappropriately cross-examined the defence witness Ronald Jacobs, an American expert on direct marketing, on his evidence that the recipient would know the IMF promotion was not from a government organization. Additionally, the trial judge attempted to make Jacobs change the thrust of his evidence.

[90] Early in the examination-in-chief of Mr. Jacobs, the trial judge made the following sarcastic remarks:

> **The Court:** So you buy your fireworks and your AK-47s at the same store?
>
> **The Witness:** I hope not.
>
> **The Court:** That's the American way, isn't it?

These inappropriate comments reflect a dismissive attitude by the trial judge towards the defence's witness.

[91] The Crown submits that on a consideration of the trial as a whole, no reasonable, informed observer who had been present throughout the trial could complain of the appearance of an unfair trial.

[92] We acknowledge that at various points during the trial, the trial judge indicated he maintained an open mind. He also generally asked counsel if they had any questions arising out of the interventions. Unfortunately, in our view, the above examples illustrate that a reasonable observer would conclude that the appearance of fairness of the trial was undermined.

2009 ONCA 151 (CanLII)

[93] In support of its submission that the trial judge made significant efforts to maintain an open mind and demonstrated impartiality throughout the trial proceedings, the Crown relies on the following comment by the trial judge made during closing argument:

> **The Court:** I'm not saying I don't believe Mr. Stucky. And I want him to understand, *but for that flag incident*, Mr Stucky gave – and maybe one or two other things – Stucky was a very credible and indeed well-schooled witness. And I'm not saying that in a pejorative fashion. [Emphasis added.]

2009 ONCA 151 (CanLII)

[94] Contrary to the Crown's submission, the extract relied upon illustrates that the trial judge never waivered with respect to his initial opinion of Mr. Stucky's credibility on an important aspect concerning the defence. The Crown could point to no authority where appearing to prejudge the credibility of an accused has been condoned by an appellate court.

[95] By taking one set of interventions and following them through the trial to the reasons for judgment, we have attempted to show how the trial judge's interventions were part of an overall pattern of conduct that indicated the trial judge, in effect, stepped down from the bench and improperly placed his authority on the side of the Crown.

[96] Moreover, it cannot be said that nothing came of the trial judge's interventions or that, in the end, his decision was not affected by his comments during the trial. The trial judge used the evidence and admissions he obtained to support his reasons for judgment in a number of instances.

[97] The Crown also drew our attention to passages where the trial judge intervened with respect to the Crown's witnesses and made acerbic comments to Crown counsel. The Crown submits that these interventions and comments indicate that the trial judge maintained the appearance of impartiality because he treated both sides in the same manner.

[98] The comments respecting the Crown and its witnesses do not excuse or offset the trial judge's conduct towards the defence. It is the accused who is in danger of losing his liberty or being sanctioned if found guilty at trial. As we have already emphasized, prudence and judicial restraint must be greater where the accused takes the stand: *Brouillard* at p. 48.

[99] The Crown is not an ordinary litigant: see *R. v. McNeil*, [2009] S.C.J. No. 3, at para. 49. In prosecuting those alleged to have committed a crime, the Crown represents the public interest. The Crown's role as representative of the public interest is part of the larger obligation it has to the due administration of justice. The Crown and the defence

are not adverse in interest insofar as the due administration of justice is concerned. Rather, both have an interest in ensuring that justice be done and be seen to be done.

[100] A reasonable observer present throughout the trial would conclude that the appearance of fairness of the trial was compromised by the trial judge's repeated interventions during the testimony of Mr. Stucky and key defence witnesses. When the record is considered in its entirety, we simply cannot accept the Crown's submission that the trial judge's repeated interventions, when assessed cumulatively, come within the ambit of permitted judicial conduct.

[101] For these reasons, we would order a new trial on counts 1, 5, 6, 7, 11, and 15 of the indictment.

IV. The mental culpability requirements of s. 52

1) The pre-1999 alleged offences

[102] Of the counts on which the trial judge indicated that he would have entered convictions had he decided the issue of "the public" differently, counts 1, 5, 6 and 7 related to the distribution of promotions prior to March 18, 1999, during which time the offence of misleading advertising was a strict liability offence.

[103] At para. 27 of the reasons, the trial judge summarised the applicable legal principles for pre-1999 offences, stating:

> There is no issue between the parties that the Crown is obliged to prove each and every element of the offence beyond a reasonable doubt. There is also no issue that before the 1999 Amendments, the charging section created a strict liability offence which gave rise to both a statutory (s. 60(2) of the *Competition Act*) and common law due diligence defence, which for the purposes of this prosecution, are essentially the same. In that respect, the defendant may demonstrate, on a balance of probabilities, that:
>
> (a) he took all reasonable steps to avoid the particular event complained of; or
>
> (b) reasonably believed in a mistaken set of facts, which if true, would render the act or omission innocent.[Citations omitted.]

2009 ONCA 151 (CanLII)

[104] The lynchpin of Mr. Stucky's defence in respect to the pre-1999 alleged offences was that he had obtained legal advice about the promotions and, having followed that advice, he reasonably believed that they complied with the legislation. This, it was argued, brought Mr. Stucky within the second component of the due diligence defence, namely, that he had a reasonable belief in a mistaken set of facts that, if true, would render his conduct innocent.

[105] The trial judge held that Mr. Stucky's conduct met neither component of the due diligent defence. He concluded that Mr. Stucky's reliance on his lawyer's advice, in addition to the other steps he said he had taken, was not sufficient to amount to having taken all reasonable steps, nor did it amount to a mistaken set of facts.

[106] On appeal, Mr. Stucky submits that the trial judge made a number of errors in concluding that the due diligence defence had not been made out. The alleged errors are based on the trial judge's evidentiary determinations and the application of the law to facts as he found them.

[107] The Crown argues that the trial judge erred in holding that Mr. Stucky could advance a mistake of fact defence based on the legal advice he received. The Crown contends that such a mistake is a mistake of law and, consequently, the second arm of the due diligence defence based on mistake of fact was not available to Mr. Stucky.

[108] Given our conclusion that this matter must be retried, it is not necessary or appropriate to deal with the grounds raised by Mr. Stucky and we decline to so do. As the matter raised by the Crown is a question of law, however, there is utility in deciding it at this stage of the proceedings.

[109] In our view, there can be no doubt that reliance on a lawyer's advice is a mistake of law which affords no defence to the commission of an offence. Accordingly, we do not view Mr. Stucky's reliance on legal advice as a matter properly considered under the second branch of the due diligence defence.

[110] In *R. v. Latouche* (2000), 190 D.L.R. (4th) 73 (Can. Ct. Martial App. Ct.), at para. 35, Ewaschuk J.A., citing *R. v. Jones*, [1991] 3 S.C.R. 110, described the distinction between a mistake of fact and a mistake of law in this way:

> As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter. By contrast, a

2009 ONCA 151 (CanLII)

> mistake of law exists when the mistake relates not to the actual facts but rather to their legal effect.[3]

[111] Professor Don Stuart explains the distinction in a similar fashion in *Canadian Criminal Law: A Treatise*, 5th ed. (Toronto: Carswell, 2007), at p. 366:

> A mistake of fact is said to occur when the accused is mistaken in his belief that facts exist when they do not, or that they do not exist when they do. On the other hand, a mistake of law is said to occur when the mistake is not as to the actual facts but rather as to their legal relevance, consequence or significance.

2009 ONCA 151 (CanLII)

[112] It is clear in this case that Mr. Stucky's actions were not undertaken based on any misapprehension of the facts, as he knew the content and make-up of each promotion, but, rather, in reliance on his lawyer's opinion of the publications and/or representations. That is a mistake as to the legal significance or consequences of his actions and, accordingly, is a mistake of law.

[113] There is a significant body of case law that establishes that an accused cannot rely on legal advice as a defence. In *R. v. Pontes*, [1995] 3 S.C.R. 44, at paras. 33-34, Cory J. writing for the majority, affirmed this principle:

> [I]t is important to remember the well-established principle, incorporated in s. 19 of the *Criminal Code*, R.S.C., 1985, c. C-46, that a mistake of law is no excuse…
>
> The application of this principle leads to the conclusion that an accused cannot put forward as a defence that he made diligent inquiries as to the legality of his actions or status. The submission of such a defence was specifically rejected in *Molis v. The Queen*, [1980] 2 S.C.R. 356.

[114] In *R. v. Whelan* (2002), 219 Nfld. & P.E.I.R. 52 (Nfld. C.A.), Roberts J.A. remarked that the most common argument of accused persons, in asserting that acting on their lawyer's advice should be a valid defence, is that they were unaware that the act they committed was unlawful. In rejecting this contention, Roberts J.A. stated, at para. 9:

---

[3] *Latouche* is referred to solely for the distinction between a mistake of law and a mistake of fact. It is not helpful in terms of its facts, as it concerned a mistake of fact, namely, whether the accused knew that certain documents were "official".

> If a court were to accept this argument, however, a mistake of law would constitute a valid defence and accuseds would have to know that the act they were committing was unlawful in order for the Crown to obtain a conviction. This argument displaces the mental element of the offence, suggesting that it should relate to the legality of the act and not to the act itself.

[115] In *Whelan*, the accused had been charged with disobeying a court order. The accused asserted that he relied on his lawyer's opinion regarding the meaning of the order. Roberts J.A. found that the actions of the accused in disobeying the order were undertaken not based on any mistake as to the facts, but rather in reliance on his lawyer's incorrect advice. He held that the error was a mistake of law and could not constitute a valid defence.

[116] The decision of this court in *R. v. Dalley* (1957), 8 D.L.R. (2d) 179 is to the same effect. In *Dalley*, the accused was convicted at trial of trading in securities without being registered as a broker under the *Ontario Securities Act*, R.S.O. 1950, c. 351. The accused argued on appeal that his solicitor had advised him that his actions did not amount to an offence because he was not trading in "securities" within the meaning of the statute. He contended that, based on the advice he had received from his lawyer, he did not believe he was doing anything contrary to the law and thus he had to be acquitted. In rejecting this submission, this court stated, at p. 186:

> Here, the appellant knew, as his counsel conceded, that he was not registered under the Act and that he "traded" in his dealings with Johnson. These, of course, were questions of fact. To say that he did not know that what he dealt with or traded in was a security within the meaning of the Act, amounts to an assertion that he was mistaken about a question of law. If true, and I do not doubt it, it affords the appellant no defence, in my opinion.

[117] Similarly, in *R. v. Maunder*, [1966] 1 C.C.C. 328 (Ont. Mag. Ct.), conviction affirmed, [1966] 1 C.C.C. 328 (C.A.), the trial judge held, at p. 379, that "[a] mistake of law cannot afford a defence even where the accused sought a lawyer's opinion and acted on it."

[118] To conclude on this point, we echo the following comment of McClung J.A. in *R. v. Kotch* (1990), 114 A.R. 11 (C.A.), at p. 15, "[a]bsent 'officially-induced error,' mistaken legal advice does not shield the purposeful doing of an act which may prove contrary to the criminal law."

2009 ONCA 151 (CanLII)

2) The post-1999 alleged offences

[119] For ease of reference, the post-1999 version of s. 52 is set out again. It reads as follows:

> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.

[120] The trial judge explained the difference in the *mens rea* requirements pre- and post-1999 at para. 84 of the reasons:

> As indicated in Part I, s. 52 created a "strict liability" offence before the 1999 Amendments, and an offence requiring proof of the accused's *mens rea*, thereafter. The essence of the distinction between these two types of offences has long been established in the oft-quoted decision of Dickson J. in *R. v. Sault Ste. Marie (City)*:
>
> > I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
> >
> > 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> >
> > 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the

2009 ONCA 151 (CanLII)

> accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of fact which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. [Citation omitted.]

2009 ONCA 151 (CanLII)

[121] Based on other regulatory cases, such as *R. v. Mac's Liquid Disposal (1982) Ltd.*, [1987] O.J. No. 884 (C.A.), *Anderson v. Excel Collection Services Ltd.* (2005), 260 D.L.R. (4th) 367 (Ont. Div. Ct.), *R. v. Bhatty*, [1991] O.J. No. 1380 (Ct. J.) and *R. v. Laurier Office Mart Inc*., [1994] O.J. No. 2745 (Ct. J.), affirmed, [1995] O.J. No. 2063 (Gen. Div), the trial judge held that, in respect of the counts that were alleged to have occurred after the 1999 amendments, the Crown was required to prove beyond a reasonable doubt that Mr. Stucky knew of the falsity or misleading nature of the representations, or was reckless in that regard. As a result, the trial judge concluded that an honest belief on the part of Mr. Stucky that the representations were not misleading would be a defence.

[122] The Crown contends that the trial judge erred in concluding that, in order to satisfy the *mens rea* component of s. 52, the Crown had to show knowledge of, or recklessness with respect to, the false or misleading character of the promotions in fact. The Crown argues that all that is required is proof that Mr. Stucky knew (1) the content and make-up of the promotional pieces and (2) the truth regarding them, including how the promotions actually functioned. On this view, it is not necessary for the Crown to prove that Mr. Stucky knew or was reckless as to whether the promotional materials were misleading. The Crown says that requiring it to prove that Mr. Stucky knew or was reckless as to whether the representations were misleading imposes an unnecessary burden on the Crown.

[123] The Crown's position on *mens rea* effectively makes the post-1999 offence indistinguishable from the strict liability offence, as it requires only that Mr. Stucky knew the contents of the promotions and knew the truth regarding them, not that he also had to know or be reckless as to whether they were, in fact, misleading. We do not accept that submission. In our view, the trial judge's articulation of the *mens rea* requirement for post-1999 s. 52 offences is correct. That interpretation best accords with the change from a strict liability offence to one requiring *mens rea*. It is also consistent with the case law on the "knowingly" standard in other regulatory contexts, and the objectives of s. 52 as a criminal provision.

[124] Three examples of the case law will suffice. In *Mac's Liquid*, this court concluded that the phrase "knowingly give false information" in the *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 145, required the accused to know a statement was false. An honest belief in the truth of the statement was held to be a defence.

[125] In *Anderson*, the Divisional Court considered s. 22 of the *Consumer Reporting Act*, R.S.O. 1990, c. C.33, which prohibits a person from "knowingly" supplying false or misleading information, and s. 28(10)(c) of the *Collections Agencies Act*, R.S.O. 1990, c. C.14, which makes it an offence for a person to "knowingly" contravene the Act and regulations. The court held that these provisions require that the person making a report know that the information is false.

[126] Finally, in *Bhatty*, the court found that the offence of "knowingly furnishing false information" under s. 97 of the *Insurance Act*, R.S.O. 1980, c. 218, required the Crown to prove that the accused had knowledge of the falsity of the information.

[127] The more stringent *mens rea* requirement is appropriate given that the post-1999 prohibition on false and misleading advertising is designed to catch serious criminal conduct. In *Benlolo*, Feldman J.A., writing for the court, emphasized this point at paras. 19 and 29:

> In deciding that a substantial sentence of incarceration was warranted and appropriate in this case, the trial judge distinguished the pre-1999 case law. She concluded that in making the amendments, Parliament intended that serious, egregious cases that had the hallmarks of fraud would be treated as criminal matters, while the cases that were more akin to sharp practice could be processed through the new civil stream. I agree with the trial judge that the 1999 amendments constitute a watershed in the treatment and approach to misleading advertising and that the pre-1999 case law must therefore be viewed with caution.
>
> …
>
> In 1999, Parliament amended the legislation to give the Competition Bureau more tools to use and more flexibility in its choice of enforcement mechanisms to combat new forms of misleading advertising including large-scale fraudulent schemes. It now had civil remedies that were more easily obtainable to deal with persons whose activities could be curbed and regulated through directives that would protect the

2009 ONCA 151 (CanLII)

> public without the need to engage in the acrimonious, time-consuming and onerous criminal prosecution process. On the other hand, the criminal offence was changed from a strict liability offence to one of full *mens rea*, that is, where the deception is done knowingly or with reckless disregard of the consequences.

[128] We understand the concern which underpins the Crown's position on this matter, namely, that an accused's knowledge of whether a representation is misleading is not readily susceptible of proof. In response to that concern, we commend the commonsensical approach of the Federal Court of Appeal in *Canada (Attorney General) v. Gates* (1995), 125 D.L.R. (4th) 348. In *Gates*, the court applied *Mac's Liquid* at p. 350 in concluding that making a statement, representation, or furthering information that a claimant "knew to be false or misleading" under s. 33(1) of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1 required that a claimant knowingly "misrepresent" facts. At p. 350-51 of *Gates*, the court stated:

> In deciding whether there was subjective knowledge by a claimant, however, the commission or board may take into account common sense and objective factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was, in fact, subjective knowledge, despite the denial. Not to know the obvious, therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective; it does, however, take into account objective matters in coming to a decision on subjective knowledge.

[129] In conclusion, in our view, to satisfy the *mens rea* component of s. 52 offences post-1999, the Crown must prove beyond a reasonable doubt that an accused had knowledge of the false or misleading character of the representations, or was reckless in that regard.

V. Disposition

[130] Accordingly, we would allow the appeal and order a new trial on counts 1, 5, 6, 7, 11 and 15 of the indictment.

RELEASED: February 17, 2009

2009 ONCA 151 (CanLII)

"KMW"

"K.M. Weiler J.A."
"E.E. Gillese J.A."
"I agree Robert P. Armstrong J.A."

2009 ONCA 151 (CanLII)

Tab 25

IN THE MATTER OF the *Broadcasting Act*, S.C. 1991, c. 11;

AND IN THE MATTER OF the Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168;

AND IN THE MATTER OF an application by way of a reference to the Federal Court of Appeal pursuant to ss. 18.3(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

Cogeco Cable Inc., Rogers Communications Inc., TELUS Communications Company and Shaw Communications Inc. *Appellants*

v.

Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc., Newfoundland Broadcasting Co. Ltd. and Canwest Television Limited Partnership *Respondents*

and

Canadian Radio-television and Telecommunications Commission *Intervener*

DANS L'AFFAIRE intéressant la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11;

ET DANS L'AFFAIRE DE la Politique réglementaire de radiodiffusion CRTC 2010-167 du Conseil de la radiodiffusion et des télécommunications canadiennes et l'ordonnance de radiodiffusion CRTC 2010-168;

ET DANS L'AFFAIRE D'UNE demande introduite sous forme de renvoi à la Cour d'appel fédérale en vertu des par. 18.3(1) et 28(2) de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7.

Cogeco Câble Inc., Rogers Communications Inc., TELUS Communications Company et Shaw Communications Inc. *Appelantes*

c.

Bell Media Inc. (auparavant CTV Globemedia Inc.), V Interactions Inc., Newfoundland Broadcasting Co. Ltd. et Canwest Television Limited Partnership *Intimées*

et

Conseil de la radiodiffusion et des télécommunications canadiennes *Intervenant*

Indexed as: Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168

2012 SCC 68

File No.: 34231.

2012: April 17; 2012: December 13.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Répertorié : Renvoi relatif à la Politique réglementaire de radiodiffusion CRTC 2010-167 et l'ordonnance de radiodiffusion CRTC 2010-168

2012 CSC 68

N° du greffe : 34231.

2012 : 17 avril; 2012 : 13 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

2012 SCC 68 (CanLII)

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Broadcasting — Canadian Radio-television and Telecommunications Commission ("CRTC") adopting policy establishing market-based value for signal regulatory regime — Policy empowering private local television stations ("broadcasters") to negotiate direct compensation for retransmission of signals by cable and satellite companies ("broadcasting distribution undertakings" or "BDUs"), as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether CRTC having jurisdiction under Broadcasting Act to implement proposed regime — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10.

Legislation — Conflicting legislation — CRTC adopting policy establishing market-based value for signal regulatory regime — Policy empowering broadcasters to negotiate direct compensation for retransmission of signals by BDUs, as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether proposed regime conflicting with Copyright Act — Whether Copyright Act limiting discretion of CRTC in exercising regulatory and licensing powers under Broadcasting Act — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10 — Copyright Act, R.S.C. 1985, c. C-42, ss. 2, 21, 31, 89.

Responding to recent changes to the broadcasting business environment, in 2010 the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations could choose to negotiate direct compensation for the retransmission of their signals by BDUs, such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the question of its jurisdiction to the Federal Court of Appeal, which held the proposed regime was within the statutory authority of the CRTC pursuant to its broad mandate under the *Broadcasting Act* to regulate and supervise all aspects

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit des communications — Radiodiffusion — Adoption par le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») d'une politique établissant un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché — Politique habilitant les stations privées de télévision locale (« radiodiffuseurs ») à négocier une compensation directe pour la retransmission de leurs signaux par les entreprises de câblodistribution et de communications par satellite (« entreprises de distribution de radiodiffusion » ou « EDR »), et leur conférant le droit d'interdire aux EDR de retransmettre ces signaux en cas d'échec des négociations — Le CRTC a-t-il compétence en vertu de la Loi sur la radiodiffusion pour mettre en œuvre le régime proposé? — Loi sur la radiodiffusion, L.C. 1991, ch. 11, art. 2, 3, 5, 9, 10.

Législation — Conflit de lois — Adoption par le CRTC d'une politique établissant un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché — Politique habilitant les radiodiffuseurs à négocier une compensation directe pour la retransmission de leurs signaux par les EDR, et leur conférant le droit d'interdire aux EDR de retransmettre ces signaux en cas d'échec des négociations — Le régime proposé entre-t-il en conflit avec la Loi sur le droit d'auteur? — Cette loi limite-t-elle la discrétion du CRTC lorsqu'il exerce les pouvoirs de prise de règlements et d'attribution de licences que lui confère la Loi sur la radiodiffusion? — Loi sur la radiodiffusion, L.C. 1991, ch. 11, art. 2, 3, 5, 9, 10 — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 2, 21, 31, 89.

Réagissant à des changements récents survenus dans l'industrie de la radiodiffusion, le CRTC a proposé en 2010 d'établir un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché. Suivant ce régime, les stations privées de télévision locale auraient la faculté de négocier une compensation directe pour la retransmission de leurs signaux par des EDR telles les entreprises de câblodistribution et les sociétés de communications par satellite. En vertu de ce nouveau régime, les radiodiffuseurs auraient la possibilité de permettre ou d'interdire aux EDR de retransmettre leurs services de programmation. Les EDR ont contesté la compétence du CRTC pour mettre en œuvre un tel régime, au motif qu'il entre en conflit avec certaines dispositions de la *Loi sur le droit d'auteur*. En conséquence, le CRTC a renvoyé une question touchant sa propre compétence devant la Cour

2012 SCC 68 (CanLII)

of the Canadian broadcasting system, and that no conflict existed between the regime and the *Copyright Act*.

Held (Deschamps, Abella, Cromwell and Karakatsanis JJ. dissenting): The appeal should be allowed. The proposed regulatory regime is *ultra vires* the CRTC.

Per McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ.: The provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime.

No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime, and it was not sufficient for the CRTC to find jurisdiction by referring in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. Establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act cannot be a sufficient test for conferring jurisdiction on the CRTC. Policy statements are not jurisdiction-conferring provisions and cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament. Similarly, a broadly drafted basket clause in respect of regulation making authority (s. 10(1)(*k*)), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" when issuing licences (s. 9(1)(*h*)) cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found. Here, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs or the direct economic relationship between BDUs and broadcasters. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too far removed from the core purposes intended by Parliament and from the powers granted to the CRTC under that Act.

d'appel fédérale. Cette dernière a conclu que le régime proposé relevait de la compétence reconnue par la loi au CRTC, conformément au vaste mandat que lui confère la *Loi sur la radiodiffusion* en matière de réglementation et de surveillance de tous les aspects du système de radiodiffusion canadien, et qu'il n'existait aucun conflit entre le régime proposé et la *Loi sur le droit d'auteur*.

Arrêt (les juges Deschamps, Abella, Cromwell et Karakatsanis sont dissidents) : Le pourvoi est accueilli. Le régime de réglementation proposé excède les pouvoirs du CRTC.

La juge en chef McLachlin et les juges LeBel, Fish, Rothstein et Moldaver : Lorsqu'on les interprète à la lumière de leur contexte global, on ne peut considérer que les dispositions de la *Loi sur la radiodiffusion* ont pour effet d'autoriser le CRTC à mettre en œuvre le régime proposé de compensation pour la valeur des signaux.

Aucune disposition de la *Loi sur la radiodiffusion* ne confère expressément au CRTC le pouvoir de mettre en œuvre le régime proposé, et il ne suffisait pas à ce dernier de se référer isolément à certains des objectifs de politique énoncés à l'art. 3 et de postuler que le régime proposé de compensation pour la valeur des signaux contribuerait à la réalisation de ces objectifs. La possibilité d'établir l'existence d'un lien — aussi ténu soit-il — entre un règlement projeté et un objectif de politique énuméré à l'art. 3 de la Loi ne saurait constituer un critère suffisant pour donner compétence au CRTC. Des énoncés de politique ne sont pas des dispositions attributives de compétence et ne peuvent pas servir à élargir les pouvoirs de cet organisme à des domaines non précisés par le législateur. De même, une clause générale rédigée en termes larges accordant un pouvoir général de prendre des règlements (al. 10(1)*k*)) ou une disposition conférant à l'organisme de réglementation un pouvoir non défini l'autorisant à délivrer des licences « selon les modalités qu'il précise » (al. 9(1)*h*)) ne peut être interprétée isolément, mais doit être considérée dans le contexte du reste de l'article dans lequel elle se trouve. En l'espèce, aucun des sujets précis et susceptibles d'être réglementés qui sont énumérés au par. 10(1) ne se rapporte à la création de droits exclusifs qui permettraient aux radiodiffuseurs d'autoriser ou d'interdire la distribution de signaux ou d'émissions, ou de contrôler les rapports économiques directs entre les EDR et les radiodiffuseurs. Il ressort d'une interprétation de la *Loi sur la radiodiffusion* qui tient compte du contexte global de celle-ci que la création de tels droits constitue une mesure beaucoup trop éloignée des objectifs fondamentaux visés par le législateur ainsi que des pouvoirs conférés au CRTC par cette loi.

2012 SCC 68 (CanLII)

Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*. First, the value for signal regime conflicts with s. 21(1) because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the *Copyright Act*. A broadcaster's s. 21(1)(*c*) exclusive right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not include a right to authorize or prohibit a BDU from retransmitting those communication signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in s. 21(1), specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate balance between authors' and users' rights as expressed by Parliament in s. 21(1).

Même si l'on pouvait trouver dans le texte de la *Loi sur la radiodiffusion* la compétence nécessaire pour mettre en œuvre le régime proposé de compensation pour la valeur des signaux, le régime proposé entrerait en conflit avec certaines dispositions précises édictées par le Parlement dans la *Loi sur le droit d'auteur*. Premièrement, le régime de compensation pour la valeur des signaux entre en conflit avec le par. 21(1) de cette dernière loi, en ce qu'il accorderait aux radiodiffuseurs le droit d'autoriser ou non la retransmission de signaux par les EDR, droit qui a été refusé aux radiodiffuseurs par le régime établi par la *Loi sur le droit d'auteur*. Le droit exclusif conféré aux radiodiffuseurs par l'al. 21(1)*c*) — à savoir autoriser, ou refuser d'autoriser, un autre radiodiffuseur à retransmettre simultanément ses signaux — n'emporte pas celui de permettre ou d'interdire à une EDR de retransmettre ces signaux de communication. Il ne serait pas logique de la part du législateur fédéral d'instaurer au par. 21(1) un droit de retransmission soigneusement élaboré, qui soustrait explicitement les EDR du champ d'application du droit exclusif des radiodiffuseurs sur la retransmission simultanée de leurs signaux, mais d'habiliter par ailleurs un organisme de réglementation subalterne à créer un droit fonctionnellement équivalent par l'entremise d'un régime connexe. Le régime de compensation pour la valeur des signaux nuirait à la réalisation de l'objectif de la *Loi sur le droit d'auteur* qui consiste à établir un équilibre adéquat entre les droits des créateurs et ceux des utilisateurs, tel qu'il a été exprimé par le législateur au par. 21(1).

Second, further conflict arises between the value for signal regime and the retransmission rights in s. 31, which creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a "work" carried in local signals. The value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. The value for signal regime would effectively overturn the s. 31 exception, entitling broadcasters to control the simultaneous retransmission of works while the *Copyright Act* specifically excludes retransmission from the control of copyright owners, including broadcasters. In doing so, it would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing

Deuxièmement, le régime de compensation pour la valeur des signaux entre également en conflit avec le droit de retransmission énoncé à l'art. 31, lequel crée une exception écartant la violation du droit d'auteur dans le cas de la retransmission simultanée par une EDR d'une « œuvre » portée par des signaux locaux. Toutefois, suivant le régime de compensation pour la valeur des signaux, les radiodiffuseurs jouiraient du droit d'exiger le retrait de certaines émissions. Ainsi, un radiodiffuseur qui n'arriverait pas à s'entendre avec une EDR sur la compensation payable pour la distribution de ses services de programmation aurait le droit d'exiger de cette EDR qu'elle retire de tous les signaux qu'elle distribue toute émission à l'égard de laquelle le radiodiffuseur aurait acquis les droits exclusifs de diffusion. Le régime de compensation pour la valeur des signaux aurait concrètement pour effet de réduire à néant l'exception prévue par l'art. 31, en accordant aux radiodiffuseurs le droit de contrôler la retransmission simultanée des œuvres, alors que la *Loi sur le droit d'auteur* exclut expressément cette activité du droit de contrôle des titulaires du droit d'auteur, y compris

2012 SCC 68 (CanLII)

and regulatory jurisdiction under the *Broadcasting Act*.

Section 31(2)(*b*), which provides that in order for the exception to copyright to apply the retransmission must be "lawful under the *Broadcasting Act*", is also not sufficient to ground the CRTC's jurisdiction to implement the value for signal regulatory regime. A general reference to "lawful under the *Broadcasting Act*" cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*. Finally, the value for signal regime would create a new right to authorize and prevent retransmission, in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

Per Deschamps, Abella, Cromwell and Karakatsanis JJ. (dissenting): The CRTC determined that the proposed regime was necessary to preserve the viability of local television stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. Courts have consistently determined the validity of the CRTC's exercises of power under the *Broadcasting Act* by asking whether the power was exercised in connection with a policy objective in s. 3(1). This broad jurisdiction flows from the fact that the Act contains generally-worded powers for the CRTC to regulate and supervise all aspects of the Canadian broadcasting system, to impose licensing conditions, and to make regulations as the CRTC deems appropriate to implement the objects set out in s. 3(1).

The proposed regime is within the CRTC's regulatory jurisdiction since it is demonstrably linked to several of the basic operative broadcasting policies in s. 3. The regime is merely an extension of the current regime, which places conditions, including financial ones, on BDUs for the licence to retransmit local stations' signals. This broad mandate to set licensing conditions in furtherance of Canada's broadcasting

les radiodiffuseurs. Ce faisant, le régime redéfinirait l'équilibre qu'a établi le législateur, dans la *Loi sur le droit d'auteur*, entre les intérêts respectifs des titulaires du droit d'auteur et des utilisateurs. Comme ce régime est incompatible avec l'objet visé par la *Loi sur le droit d'auteur*, il échappe à la compétence conférée au CRTC par la *Loi sur la radiodiffusion* en matière de délivrance de licences et de réglementation.

L'alinéa 31(2)*b*) — qui précise que, pour que s'applique l'exception écartant la violation du droit d'auteur, la retransmission doit être « licite en vertu de la *Loi sur la radiodiffusion* » — n'est pas non plus une assise suffisante afin de donner au CRTC compétence pour mettre en œuvre le régime réglementaire de compensation pour la valeur des signaux. L'expression générale « licite en vertu de la *Loi sur la radiodiffusion* » ne saurait autoriser le CRTC, lorsqu'il agit en vertu de dispositions attributives de compétence générales, à écarter une prescription précise du législateur dans la *Loi sur le droit d'auteur*. Enfin, le régime de compensation pour la valeur des signaux créerait un nouveau droit permettant à son titulaire d'autoriser et d'interdire la retransmission de signaux, modifiant ainsi concrètement le droit d'auteur conféré par l'art. 21. Ce régime créerait donc un nouveau type de droit d'auteur, sans la loi fédérale requise par l'art. 89.

Les juges Deschamps, Abella, Cromwell et Karakatsanis (dissidents) : Le CRTC a jugé que le nouveau régime était nécessaire pour assurer la survie des stations locales et la réalisation des objectifs de la politique de radiodiffusion énoncée au par. 3(1) de la *Loi sur la radiodiffusion*. Les tribunaux ont systématiquement statué sur la validité de l'exercice par le CRTC des pouvoirs que lui accorde la *Loi sur la radiodiffusion* en se demandant s'il était possible de rattacher l'exercice du pouvoir en cause à l'un des objectifs de politique énumérés au par. 3(1). La vaste compétence reconnue au CRTC découle des pouvoirs que la Loi lui confère en termes généraux pour réglementer et surveiller tous les aspects du système de radiodiffusion canadien, assortir de certaines conditions les licences qu'il délivre et prendre des règlements, de la manière qu'il estime indiquée pour la mise en œuvre des objectifs énoncés au par. 3(1).

Le régime proposé respecte la compétence du CRTC en matière de réglementation, étant donné qu'il se rattache manifestement à plusieurs des principes directeurs fondamentaux en matière de radiodiffusion énoncés à l'art. 3. Le nouveau régime n'est simplement que le prolongement du régime actuel, lequel impose plusieurs conditions — y compris de nature financière — aux EDR en vue de l'obtention d'une licence

2012 SCC 68 (CanLII)

policy is analogous to the CRTC's broad mandate to set rates, recently upheld by this Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

The proposed regime does not create a conflict with the *Copyright Act*. It does not give local stations a copyright in the retransmission of their television signals. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime. Nothing in either the definition of "broadcaster" or in s. 21(1)(*c*) of the *Copyright Act* immunizes BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate.

The BDUs' argument that the proposed regime creates royalties for local signals contrary to s. 31(2)(*d*) of the *Copyright Act*, turns s. 31(2)(*d*) on its head. Section 31(2)(*d*) simply requires that BDUs pay a royalty to copyright owners for retransmitting "distant signals". This provision has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission license under the *Broadcasting Act*.

Cases Cited

By Rothstein J.

Referred to: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772; *R. v. Ulybel Enterprises Ltd.*, 2001

de retransmission des signaux des stations locales. Ce large mandat d'assortir les licences de certaines conditions pour favoriser la mise en œuvre de la politique canadienne de radiodiffusion est analogue au large mandat du CRTC en matière d'établissement de tarifs, lequel a été confirmé récemment par notre Cour dans l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764.

Le régime proposé ne crée pas de conflit avec la *Loi sur le droit d'auteur*. Il ne confère pas aux stations locales un droit d'auteur à l'égard de la retransmission de leurs signaux de télévision. Les EDR tiennent leur droit de retransmettre des signaux uniquement des licences qui leur sont attribuées en vertu de l'art. 9 de la *Loi sur la radiodiffusion*, et elles doivent satisfaire aux conditions dont le CRTC a assorti leur licence, y compris celles prévues dans le régime proposé. Rien dans l'al. 21(1)*c*) de la *Loi sur le droit d'auteur* ou dans la définition de « radiodiffuseur » n'a pour effet de soustraire les EDR aux exigences établies par le CRTC en matière d'attribution de licences dans le cadre de son mandat relatif à la radiodiffusion.

L'argument des EDR selon lequel le régime proposé exige le paiement de redevances pour la retransmission de signaux locaux fait dire à l'al. 31(2)*d*) de la *Loi sur le droit d'auteur* quelque chose qu'il ne dit pas. Cet alinéa requiert simplement que les EDR qui retransmettent des « signaux éloignés » versent des redevances aux titulaires des droits d'auteur sur ces signaux. Cette disposition n'a aucun lien avec la question de savoir si les EDR peuvent être requises de verser une compensation aux stations locales pour une autre fin, à savoir pour satisfaire aux conditions assortissant leurs licences de retransmission en vertu de la *Loi sur la radiodiffusion*.

Jurisprudence

Citée par le juge Rothstein

Arrêts mentionnés : *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Renvoi relatif à la Loi sur la radiodiffusion*, 2012 CSC 4, [2012] 1 R.C.S. 142; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476; *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2; *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, [2002] 2 R.C.S. 336; *Mattel, Inc. c. 3894207 Canada Inc.*, 2006 CSC 22, [2006] 1 R.C.S. 772; *R. c. Ulybel*

2012 SCC 68 (CanLII)

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By Abella and Cromwell JJ. (dissenting)

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2012 SCC 68 (CanLII)

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Sharlow and Layden-Stevenson JJ.A.), 2011 FCA 64, 413 N.R. 312, 91 C.P.R. (4th) 389, [2011] F.C.J. No. 197 (QL), 2011

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Nadon, Sharlow et Layden-Stevenson), 2011 CAF 64, 413 N.R. 312, 91 C.P.R. (4th) 389, [2011] A.C.F. nº 197 (QL), 2011

2012 SCC 68 (CanLII)

CarswellNat 398. Appeal allowed, Deschamps, Abella, Cromwell and Karakatsanis dissenting.

Neil Finkelstein, *Steven G. Mason* and *Daniel G. C. Glover*, for the appellant Cogeco Cable Inc.

Gerald L. Kerr-Wilson and *Ariel Thomas*, for the appellants Rogers Communications Inc. and TELUS Communications Company.

Kent E. Thomson, *James Doris* and *Sarah Weingarten*, for the appellant Shaw Communications Inc.

Benjamin Zarnett, *Robert Malcomson, Peter Ruby* and *Julie Rosenthal*, for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.

No one appeared for the respondent Canwest Television Limited Partnership.

No one appeared for the intervener.

The judgment of McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] The Canadian Radio-television and Telecommunications Commission ("CRTC") has authority under the *Broadcasting Act*, S.C. 1991, c. 11, to regulate and supervise the Canadian broadcasting system. In 2010, the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations (referred to as such or as "broadcasters") could choose to negotiate direct compensation for the retransmission of their signals by broadcasting distribution undertakings ("BDUs"), such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The reference question in this appeal is

CarswellNat 6332. Pourvoi accueilli, les juges Deschamps, Abella, Cromwell et Karakatsanis sont dissidents.

Neil Finkelstein, *Steven G. Mason* et *Daniel G. C. Glover*, pour l'appelante Cogeco Câble Inc.

Gerald L. Kerr-Wilson et *Ariel Thomas*, pour les appelantes Rogers Communications Inc. et TELUS Communications Company.

Kent E. Thomson, *James Doris* et *Sarah Weingarten*, pour l'appelante Shaw Communications Inc.

Benjamin Zarnett, *Robert Malcomson*, *Peter Ruby* et *Julie Rosenthal*, pour les intimées Bell Media Inc. (auparavant CTV Globemedia Inc.), V Interactions Inc. et Newfoundland Broadcasting Co. Ltd.

Personne n'a comparu pour l'intimée Canwest Television Limited Partnership.

Personne n'a comparu pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Rothstein et Moldaver rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») possède, en vertu de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11, le pouvoir de réglementer et de surveiller le système canadien de radiodiffusion. En 2010, le CRTC a proposé d'établir un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché. Suivant ce régime, les stations privées de télévision locale (également appelées « radiodiffuseurs » dans les présents motifs) auraient la faculté de négocier une compensation directe pour la retransmission de leurs signaux par des entreprises de distribution de radiodiffusion (« EDR ») telles les entreprises de câblodistribution et les sociétés de communications par

2012 SCC 68 (CanLII)

whether the CRTC has jurisdiction to implement the proposed regime.

satellite. En vertu de ce nouveau régime, les radiodiffuseurs auraient la possibilité de permettre ou d'interdire aux EDR de retransmettre leurs services de programmation. La question soumise par renvoi dans le présent pourvoi est celle de savoir si le CRTC a compétence pour mettre en œuvre le régime proposé.

[2] The *Broadcasting Act* grants the CRTC wide discretion to implement regulations and issue licences with a view to furthering Canadian broadcasting policy as set out in the *Broadcasting Act*. However, these powers must be exercised within the statutory framework of the *Broadcasting Act*, and also the larger framework including interrelated statutes. This scheme includes the *Copyright Act*, R.S.C. 1985, c. C-42: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 44-52. As such, the CRTC, as a subordinate legislative body, cannot enact a regulation or attach conditions to licences under the *Broadcasting Act* that conflict with provisions of another related statute.

[2] La *Loi sur la radiodiffusion* confère au CRTC de vastes pouvoirs discrétionnaires l'autorisant à prendre des règlements et à attribuer des licences en vue de mettre en œuvre la politique canadienne de radiodiffusion énoncée dans la *Loi sur la radiodiffusion*. Lorsqu'il exerce ces pouvoirs, le CRTC doit toutefois respecter le cadre législatif établi par la *Loi sur la radiodiffusion*, ainsi qu'un cadre plus vaste comprenant diverses lois interreliées. La *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42, est un élément de ce régime : *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 44-52. En tant qu'organisme de réglementation subalterne, le CRTC ne peut prendre de règlements ou assortir de conditions les licences qu'il délivre en vertu de la *Loi sur la radiodiffusion*, si ces règlements ou conditions entrent en conflit avec les dispositions d'une autre loi connexe.

[3] In my opinion, the value for signal regime does just that and is therefore *ultra vires*.

[3] À mon avis, c'est exactement ce que fait le régime de compensation pour la valeur des signaux et, par conséquent, il est *ultra vires*.

II. Facts and Procedural History

II. Faits et historique procédural

[4] Broadcasters acquire, create and produce television programming, and are licensed by the CRTC to serve a certain geographic area within the reach of their respective signal transmitters. BDUs, such as cable or satellite television service providers, pick up the over-the-air signals of broadcasters and distribute them to the BDUs' subscribers for a fee. Even though broadcasters' signals are free to anyone equipped with a television and an antenna, more than 90 percent of Canadians receive these signals as part of their cable service (transcript, at p. 2).

[4] Les radiodiffuseurs acquièrent, créent et produisent des émissions de télévision. Le CRTC leur délivre des licences les autorisant à desservir une région donnée à l'intérieur de la portée de leur émetteur respectif. Des EDR, par exemple des entreprises de câblodistribution et des sociétés de communications par satellite, captent les signaux diffusés en direct par les radiodiffuseurs et les retransmettent à leurs abonnés moyennant certains frais. Même si les signaux des radiodiffuseurs peuvent être captés gratuitement par toute personne disposant d'un téléviseur et d'une antenne, plus de 90 p. 100 des Canadiens et des Canadiennes reçoivent ces signaux dans le cadre de leurs services de câblodistribution (transcription, p. 2).

2012 SCC 68 (CanLII)

[5] BDUs must be licensed by the CRTC pursuant to s. 9 of the *Broadcasting Act*. Under the current regulatory model, the CRTC requires BDUs to provide certain benefits to broadcasters, in the nature of mandatory carriage and contributions to a local programming improvement fund accessible by certain local television stations. However, the broadcasters do not receive fees directly from the BDUs for the carriage of their signals.

[6] As noted by the Federal Court of Appeal ("FCA"), 2011 FCA 64, 413 N.R. 312, at para. 6, the CRTC has concluded that the existing model does not adequately deal with recent changes to the broadcasting business environment, which have caused advertising revenues for broadcasters to fall, while the revenues of BDUs have increased. As the FCA observed, the CRTC has concluded that this has resulted in a significant shift in their relative market positions and a financial crisis for broadcasters.

[7] As a solution, the CRTC seeks to implement what it terms a "value for signal regime". This regime would permit broadcasters to negotiate with BDUs the terms upon which the BDUs may redistribute their signals. These are its main features:

- Broadcasters would have the right, every three years, to choose either to negotiate with BDUs for compensation for the right to retransmit the broadcaster's programming services, or to continue to operate under the existing regulatory regime;

- A broadcaster who participates in the value for signal regime would forego all existing regulatory protections, including, for example, mandatory distribution of its signals as part of the basic package of BDU television services, and the right to require a BDU to delete a

[5] Les EDR doivent obtenir du CRTC une licence délivrée conformément à l'art. 9 de la *Loi sur la radiodiffusion*. Suivant le modèle de réglementation actuel, le CRTC oblige les EDR à offrir aux radiodiffuseurs certains avantages, notamment la distribution obligatoire de certains signaux et une contribution à un fonds pour l'amélioration de la programmation locale auquel ont accès certaines stations de télévision locale. Toutefois, les radiodiffuseurs ne reçoivent pas directement des EDR des droits pour la distribution de leurs signaux.

[6] Comme l'a souligné la Cour d'appel fédérale (« CAF »), 2011 CAF 64 (CanLII), par. 6, le CRTC a estimé que le modèle de réglementation existant ne permet pas de répondre adéquatement aux récents changements survenus dans l'industrie de la radiodiffusion, changements par suite desquels les revenus publicitaires des radiodiffuseurs ont baissé, alors que les revenus des EDR augmentaient. Ainsi que l'a fait observer la CAF, le CRTC a conclu que cette situation s'est traduite par un changement important de la position respective des parties sur le marché et par une crise financière pour les radiodiffuseurs.

[7] À titre de solution, le CRTC a proposé l'adoption de ce qu'il appelle un « régime de compensation pour la valeur des signaux ». Ce régime permettrait aux radiodiffuseurs de négocier avec les EDR les conditions auxquelles ces dernières peuvent redistribuer leurs signaux. Voici les principales caractéristiques du régime proposé :

- Les radiodiffuseurs auraient le droit, tous les trois ans, de choisir soit de négocier avec les EDR une entente fixant la contrepartie payable par celles-ci pour le droit de retransmettre les services de programmation des radiodiffuseurs, soit de continuer à appliquer le régime de réglementation existant.

- Le radiodiffuseur qui adhérerait au régime de compensation pour la valeur des signaux renoncerait à toutes les protections réglementaires existantes, par exemple la distribution obligatoire de ses signaux dans le cadre du service télévisuel de base offert par les EDR,

2012 SCC 68 (CanLII)

non-Canadian program and substitute it with the comparable program of the broadcaster, where the two programs are simultaneously broadcast and retransmitted by the BDU;

- The CRTC would only involve itself in the negotiations for the value for signal regime if the parties do not negotiate in good faith or if they request the CRTC to arbitrate;

- If no agreement is reached between the broadcaster and the BDU on the value of the distribution of the local television's programming services, the broadcaster could require the BDU to delete any program owned by the broadcaster or for which it has acquired exclusive contractual exhibition rights from all signals distributed by the BDU in the broadcaster's market.

The proposed regime is fully described in *Broadcasting Regulatory Policy CRTC 2010-167* (2010) ("2010 Policy") (A.R., vol. II, at p. 1).

[8] The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the following question to the FCA:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

A. *Federal Court of Appeal — Sharlow J.A. (Layden-Stevenson J.A. Concurring)*

[9] Sharlow J.A., writing for the majority, found the proposed regime to be within the statutory authority of the CRTC. She found that the *Broadcasting Act*

ainsi que le droit d'obliger les EDR à retirer une émission non canadienne et à la remplacer par une émission canadienne comparable du radiodiffuseur lorsque les deux émissions sont diffusées simultanément et retransmises par l'EDR.

- Le CRTC n'interviendrait dans la négociation des ententes fondées sur le régime de compensation pour la valeur des signaux que dans les cas où les parties ne négocieraient pas de bonne foi ou lui demanderaient d'agir comme arbitre.

- Si aucune entente n'intervenait entre le radiodiffuseur et l'EDR au sujet de la valeur de la distribution des services de programmation de télévision locale, le radiodiffuseur pourrait obliger l'EDR à retirer de tous les signaux distribués par celle-ci dans le marché du radiodiffuseur toute émission appartenant au radiodiffuseur ou pour laquelle ce dernier a acquis les droits contractuels exclusifs de diffusion.

Le régime proposé est décrit en détail dans la *Politique réglementaire de radiodiffusion CRTC 2010-167* (2010) (« Politique de 2010 ») (d.a., vol. II, p. 1).

[8] Les EDR ont contesté la compétence du CRTC pour mettre en œuvre un tel régime, au motif qu'il entre en conflit avec certaines dispositions de la *Loi sur le droit d'auteur*. En conséquence, le CRTC a renvoyé la question suivante devant la CAF :

Le Conseil a-t-il la compétence, en vertu du mandat que lui confère la *Loi sur la radiodiffusion*, pour établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales?

A. *Cour d'appel fédérale — la juge Sharlow (avec l'appui de la juge Layden-Stevenson)*

[9] S'exprimant au nom de la majorité, la juge Sharlow a conclu que le régime proposé relevait de la compétence reconnue par la loi au CRTC. Elle

2012 SCC 68 (CanLII)

confers a broad mandate on the CRTC to regulate and supervise all aspects of the Canadian broadcasting system. Sharlow J.A. rejected the BDUs' argument that the proposed regime conflicts with the *Copyright Act*. She found that s. 21(1) of the *Copyright Act* gives a broadcaster a copyright in the signals it broadcasts, including the sole right to authorize a BDU to retransmit those signals (para. 33). In her opinion, while s. 31(2) provides that the s. 21 copyright is not infringed by a BDU when it retransmits a station's local signal, s. 31(2)(*b*) provides that the retransmission must be "lawful under the *Broadcasting Act*" (para. 38). She concluded that "the BDUs' statutory retransmission rights in subsection 31(2) of the *Copyright Act* [are] subject to paragraph 31(2)(*b*), [and that] Parliament has ranked the objectives of Canada's broadcasting policy ahead of those statutory retransmission rights" (para. 40).

B. *Federal Court of Appeal — Nadon J.A. (Dissenting)*

[10] In Nadon J.A.'s view, the proposed value for signal regime is *ultra vires* the powers of the CRTC because it conflicts with Parliament's "clear statement in paragraph 31(2)(*d*) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals" (para. 49). In his view, Parliament's expressed intention to treat local and distant signals differently is a limit on the CRTC's jurisdiction to impose conditions under the *Broadcasting Act* (para. 73). Given the exhaustiveness of the statutory copyright law, in Nadon J.A.'s opinion, the CRTC's regime must be *ultra vires* (para. 85).

III. Analysis

[11] The scope of the CRTC's jurisdiction under the *Broadcasting Act* must be interpreted according

a estimé que la *Loi sur la radiodiffusion* confère au CRTC un vaste mandat en matière de réglementation et de surveillance de tous les aspects du système de radiodiffusion canadien. La juge Sharlow a rejeté l'argument des EDR suivant lequel le régime proposé entrait en conflit avec la *Loi sur le droit d'auteur*. Elle a estimé que le par. 21(1) de la *Loi sur le droit d'auteur* reconnaît aux radiodiffuseurs un droit d'auteur à l'égard des signaux qu'ils émettent et que ce droit d'auteur comporte le droit exclusif d'autoriser une EDR à retransmettre ces signaux (par. 33). À son avis, bien que le par. 31(2) précise que l'EDR ne viole pas le droit d'auteur reconnu à la station privée de télévision locale par l'art. 21 lorsque l'EDR retransmet les signaux locaux de cette station, l'al. 31(2)*b*) exige que la retransmission soit « licite en vertu de la *Loi sur la radiodiffusion* » (par. 38). Elle a conclu qu'« en assujettissant les droits de retransmission accordés aux EDR par le paragraphe 31(2) de la *Loi sur le droit d'auteur* à l'alinéa 31(2)*b*), le législateur donne préséance aux objectifs de la politique canadienne de radiodiffusion » (par. 40).

B. *Cour d'appel fédérale — le juge Nadon (dissident)*

[10] Le juge Nadon a exprimé l'avis que le régime de compensation pour la valeur des signaux proposé excède la compétence du CRTC, parce qu'il est incompatible avec « l'énoncé clair du législateur à l'alinéa 31(2)*d*) de la *Loi sur le droit d'auteur* selon lequel des redevances ne doivent être payées que pour la retransmission des signaux éloignés, et non pour la retransmission des signaux locaux » (par. 49). Selon le juge, l'intention déclarée du législateur de traiter différemment les signaux locaux et les signaux éloignés vient limiter le pouvoir du CRTC d'imposer des conditions en vertu de la *Loi sur la radiodiffusion* (par. 73). De l'avis du juge Nadon, vu l'exhaustivité du cadre législatif concernant le droit d'auteur, le régime proposé excède la compétence du CRTC (par. 85).

III. Analyse

[11] La portée de la compétence conférée au CRTC par la *Loi sur la radiodiffusion* doit être

2012 SCC 68 (CanLII)

to the modern approach to statutory interpretation. *Per* Elmer A. Driedger's formulation, adopted multiple times by this Court,

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Bell ExpressVu*, at para. 26, *per* Iacobucci J., citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.)

[12] In addition,

> . . . where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.

(*Bell ExpressVu*, at para. 27)

The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 411).

[13] In my respectful opinion, for two reasons, the provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime. First, a contextual reading of the provisions of the *Broadcasting Act* themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control the exploitation of their signals or works by retransmission. Second, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*.

A. *The CRTC's Jurisdiction Under the Broadcasting Act*

[14] The reference question asks whether the CRTC has the jurisdiction to implement the

analysée suivant la méthode moderne d'interprétation législative qu'a formulée le professeur Elmer A. Driedger et que notre Cour a adoptée à maintes reprises :

> [TRADUCTION] . . . il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Bell ExpressVu*, par. 26, le juge Iacobucci, citant l'ouvrage d'E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87.)

[12] De plus :

> . . . lorsque la disposition litigieuse fait partie d'une loi qui est elle-même un élément d'un cadre législatif plus large, l'environnement qui colore les mots employés dans la loi et le cadre dans lequel celle-ci s'inscrit sont plus vastes.

(*Bell ExpressVu*, par. 27)

Le contexte global d'une disposition s'entend donc non seulement de son contexte immédiat, mais aussi de tout autre texte législatif susceptible d'en éclairer le sens (R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 411).

[13] À mon humble avis, lorsqu'on les interprète à la lumière de leur contexte global, on ne peut, et ce pour deux raisons, considérer que les dispositions de la *Loi sur la radiodiffusion* ont pour effet d'autoriser le CRTC à mettre en œuvre le régime proposé de compensation pour la valeur des signaux. Premièrement, l'interprétation contextuelle des dispositions de la *Loi sur la radiodiffusion* révèle qu'elles ne visent pas à autoriser le CRTC à créer, en faveur des radiodiffuseurs, des droits exclusifs habilitant ces derniers à contrôler l'exploitation de leurs signaux ou de leurs œuvres par retransmission. Deuxièmement, le régime proposé entrerait en conflit avec certaines dispositions précises édictées par le Parlement dans la *Loi sur le droit d'auteur*.

A. *Compétence conférée au CRTC par la Loi sur la radiodiffusion*

[14] Dans la question faisant l'objet du renvoi, on demande si le CRTC a compétence pour mettre en

2012 SCC 68 (CanLII)

proposed value for signal regime. Answering the question requires interpreting the powers granted to the CRTC under the *Broadcasting Act* and establishing whether the *Copyright Act* limits the discretion of the CRTC in the exercise of its regulatory and licensing powers. The relevant sections of the *Broadcasting Act* and of the *Copyright Act* are annexed to these reasons (see Appendix).

[15] There is no doubt that the licensing and the regulation-making powers granted to the CRTC are broad. The *Broadcasting Act* describes the mission of the CRTC as regulating and supervising "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)" (s. 5(1)).

[16] The powers granted to the CRTC are found in ss. 9 and 10 of the *Broadcasting Act*. Section 9 grounds the CRTC's licensing power. Among other things, it gives the CRTC the authority to establish classes of licences, issue licences and require licensees to perform certain acts "in furtherance of its objects". Under s. 9(1)(*b*)(i), the issuance of the licences may be subject to such terms and conditions "as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)".

[17] Section 10 confers on the CRTC the power to make regulations. It allows the CRTC to make regulations "in furtherance of its objects" and enumerates 10 specific areas for regulations. On their face, these pertain mainly to such matters as setting the standards for programs, the allocation of broadcasting time for different types of content and the carriage of certain programming services by distribution undertakings. However, s. 10(1)(*k*) is a basket clause granting the CRTC the residual authority to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects".

[18] Section 3(1) of the *Broadcasting Act* declares at length the broadcasting policy for Canada,

œuvre le régime de compensation pour la valeur des signaux proposé. Pour répondre à cette question, il faut interpréter les pouvoirs qui sont conférés au CRTC par la *Loi sur la radiodiffusion* et décider si la *Loi sur le droit d'auteur* limite la discrétion dont jouit le CRTC lorsqu'il exerce ses pouvoirs de réglementation et d'attribution de licences. Les articles applicables de la *Loi sur la radiodiffusion* et de la *Loi sur le droit d'auteur* sont reproduits à l'annexe jointe aux présents motifs.

[15] Il est incontestable que le CRTC dispose de vastes pouvoirs en matière de réglementation et d'attribution de licences. Aux termes de la *Loi sur la radiodiffusion*, le CRTC a pour mission de réglementer et de surveiller « tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion » (par. 5(1)).

[16] Les pouvoirs reconnus au CRTC sont énoncés aux art. 9 et 10 de la *Loi sur la radiodiffusion*. Le CRTC tient ses pouvoirs en matière d'attribution de licences de l'art. 9, qui lui permet notamment d'établir des catégories de licences, d'attribuer des licences et d'obliger les titulaires de licences à accomplir certains actes « dans l'exécution de sa mission ». Aux termes de l'al. 9(1)*b*), le CRTC peut assortir les licences des conditions « qu'il estime indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion ».

[17] L'article 10 confère au CRTC le pouvoir d'établir des règlements. Cet article l'autorise en effet à prendre des règlements « dans l'exécution de sa mission », en plus d'énumérer 10 aspects précis pouvant être réglementés. À première vue, il s'agit principalement de questions comme l'élaboration de normes régissant les émissions, d'attribution de temps d'antenne à différents types de contenus et de distribution de certains services de programmation par des entreprises de diffusion. L'alinéa 10(1)*k*) constitue toutefois une clause générale accordant au CRTC le pouvoir résiduel de « prendre toute autre mesure qu'il estime nécessaire à l'exécution de sa mission ».

[18] Le paragraphe 3(1) de la *Loi sur la radiodiffusion* expose en détail la politique canadienne

2012 SCC 68 (CanLII)

which this Court summarized in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 ("*ISP Reference*"), at para. 4, as:

> . . . the policy objectives listed under s. 3(1) of the Act focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.

[19] In substance, the value for signal regime would regulate the economic relationships between BDUs and broadcasters. The salient feature is that the CRTC would grant individual broadcasters an exclusive right to require deletion of the programming to which they hold exhibition rights from all signals transmitted by the BDU. This program deletion right is intended to give the broadcasters the necessary leverage to require compensation from the BDUs.

[20] No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime. However, the broadcasters submit that ss. 9(1)(*b*)(i) and 9(1)(*h*) empower the CRTC to dictate the terms of the carriage relationship between broadcasters and BDUs, in furtherance of Canadian broadcasting policy (R.F., at para. 65). The broadcasters submit that the power to do this also exists under s. 10(1)(*g*), which empowers the CRTC to make regulations "respecting the carriage of any foreign or other programming services by distribution undertakings" and s. 10(1)(*k*) which allows regulations to be made "respecting such other matters as [the CRTC] deems necessary for the furtherance of its objects".

[21] In its 2010 Policy, the CRTC determined:

> . . . in order to fulfil the policy objectives set out in section 3(1) of the Act, the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. [para. 163]

de radiodiffusion, que notre Cour a résumée ainsi dans le *Renvoi relatif à la Loi sur la radiodiffusion*, 2012 CSC 4, [2012] 1 R.C.S. 142 (« *Renvoi sur les FSI* »), au par. 4 :

> . . . les objectifs énoncés au par. 3(1) de la Loi s'attachent au contenu (enrichissement culturel du Canada, promotion du contenu canadien, offre d'une programmation originale de haute qualité, variété de la programmation, etc.).

[19] En substance, le régime de compensation pour la valeur des signaux réglementerait les relations économiques entre les EDR et les radiodiffuseurs. Sa principale caractéristique est le fait que le CRTC accorderait à chaque radiodiffuseur le droit exclusif d'exiger le retrait des émissions dont il a acquis les droits de diffusion de tous les signaux émis par une EDR. Ce droit d'exiger le retrait d'émissions se veut un moyen d'accorder aux radiodiffuseurs l'influence nécessaire pour exiger une compensation des EDR.

[20] Aucune disposition de la *Loi sur la radiodiffusion* ne confère expressément au CRTC le pouvoir de mettre en œuvre le régime proposé. Cependant, les radiodiffuseurs soutiennent que les al. 9(1)*b*) et 9(1)*h*) habilitent le CRTC à dicter aux radiodiffuseurs et aux EDR les modalités de distribution des signaux pour favoriser la réalisation des objectifs de la politique canadienne de radiodiffusion (m.i., par. 65). Les radiodiffuseurs prétendent que le pouvoir d'instaurer un tel régime découle aussi de l'al. 10(1)*g*), lequel autorise le CRTC à prendre des règlements pour « régir la fourniture de services de programmation — mêmes étrangers — par les entreprises de distribution », et de l'al. 10(1)*k*), qui lui permet de « prendre toute autre mesure qu'il estime nécessaire à l'exécution de sa mission ».

[21] Dans sa Politique de 2010, le CRTC tire la conclusion suivante :

> . . . afin d'atteindre les objectifs de politique énoncés à l'article 3(1) de la Loi, il faut corriger ce système pour permettre aux télédiffuseurs privés de négocier avec les EDR une juste valeur pour le produit qu'ils offrent aux EDR. [par. 163]

2012 SCC 68 (CanLII)

The CRTC referred specifically only to s. 3(1)(*e*) and (*f*) of the *Broadcasting Act* (see para. 152 of the 2010 Policy). In their factum, the broadcasters add ss. 3(1)(*g*), (*s*) and (*t*), 9 and 10 (R.F., at paras. 63-65, 69, 74-79 and 87). The CRTC did not refer to the jurisdiction-conferring provisions in ss. 9 and 10.

[22] Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387-88 and 390-91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.

[23] In my opinion, to find jurisdiction, it was not sufficient for the CRTC to refer in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. As stated by Gonthier J., writing for the majority of this Court in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476:

> . . . courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. [para. 42]

It is therefore necessary to consider the jurisdiction granted to the CRTC under ss. 9 and 10 of the Act to attach conditions to licences and to make regulations.

Le CRTC a mentionné de façon expresse uniquement les al. 3(1)*e*) et *f*) de la *Loi sur la radiodiffusion* (voir le par. 152 de la Politique de 2010). Dans leur mémoire, les radiodiffuseurs ajoutent les al. 3(1)*g*), *s*) et *t*), ainsi que les art. 9 et 10 (m.i., par. 63-65, 69, 74-79 et 87). Le CRTC n'a pas fait état des dispositions attributives de compétence figurant aux art. 9 et 10.

[22] Les énoncés de politique telle la déclaration relative aux objectifs de la politique canadienne de radiodiffusion que l'on trouve au par. 3(1) de la *Loi sur la radiodiffusion* ne sont pas des dispositions attributives de compétence. Ces énoncés expliquent les objectifs que poursuit le Parlement en édictant la loi en question et, ce faisant, ils circonscrivent le pouvoir discrétionnaire qui est accordé à un organisme de réglementation subalterne (Sullivan, p. 387-388 et 390-391). Les déclarations de principes ne peuvent donc pas servir à élargir les pouvoirs de cet organisme à des domaines non précisés par le législateur dans les dispositions attributives de compétence.

[23] Pour que le CRTC soit justifié de conclure qu'il avait compétence, il ne lui suffisait pas à mon avis de se référer isolément à certains des objectifs de politique énoncés à l'art. 3 et de postuler que le régime proposé de compensation pour la valeur des signaux contribuerait à la réalisation de ces objectifs. Comme l'a déclaré le juge Gonthier, au nom de la majorité, dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476 :

> . . . les cours de justice et les tribunaux administratifs doivent avoir recours aux énoncés d'intention pour établir, et non pas pour contrecarrer l'intention du législateur. À mon avis, le CRTC s'est fondé sur les objectifs de politique pour écarter l'intention du législateur qui ressort clairement du sens ordinaire du par. 43(5), de l'art. 43 dans son ensemble et de la Loi considérée comme un tout. [par. 42]

Il est par conséquent nécessaire d'examiner la compétence qui est conférée au CRTC par les art. 9 et 10 de la Loi et qui l'autorise à assortir les licences de certaines conditions et à prendre des règlements.

2012 SCC 68 (CanLII)

[24] The broadcasters argue that the test for the CRTC's jurisdiction in enacting regulations under s. 10 of the *Broadcasting Act* is whether the regulation objectively refers to one of the objectives in s. 3. They rely on this Court's decision in *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, where the majority of the Court, *per* Spence J., stated, at p. 11:

> . . . the validity of any regulation enacted in reliance upon s. 16 [now s. 10] must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively.

[25] In my opinion, *CKOY* cannot stand for the proposition that establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act is a *sufficient* test for conferring jurisdiction on the CRTC. Such an approach would conflict with the principle that policy statements circumscribe the discretion granted to a subordinate legislative body.

[26] The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. In *Bell Aliant*, this Court was asked to determine whether the creation and use of certain deferral accounts lay within the scope of the CRTC's express power to determine whether rates set by telecommunication companies are just and reasonable. The CRTC's jurisdiction over the setting of rates under s. 27 of the *Telecommunications Act*, S.C. 1993, c. 38, provides that rates must be just and reasonable. Under that section, the CRTC is specifically empowered to determine compliance with that requirement and is conferred the express authority to "adopt any method or technique that it considers appropriate" for that purpose (s. 27(5)).

[24] Les radiodiffuseurs soutiennent que le critère applicable pour décider si le CRTC a compétence pour prendre un règlement donné en vertu de l'art. 10 de la *Loi sur la radiodiffusion* consiste à se demander si, objectivement, le règlement en question se rattache à l'un des objectifs énumérés à l'art. 3. Ils s'appuient à cet égard sur l'arrêt *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2, dans lequel notre Cour à la majorité a déclaré ce qui suit, sous la plume du juge Spence, à la p. 11 :

> . . . pour déterminer la validité de règlements établis en vertu de l'art. 16 [maintenant l'art. 10], il faut décider s'ils portent sur une catégorie de sujets mentionnée à l'art. 3 de la Loi, et que, ce faisant, le tribunal examine les règlements d'un point de vue objectif.

[25] À mon avis, l'arrêt *CKOY* ne permet pas d'affirmer que la possibilité d'établir l'existence d'un lien — aussi ténu soit-il — entre un règlement projeté et un objectif de politique énuméré à l'art. 3 de la Loi constitue un critère *suffisant* pour donner compétence au CRTC. Un tel raisonnement irait à l'encontre du principe suivant lequel des énoncés de politique ont pour effet de circonscrire le pouvoir discrétionnaire conféré à un organisme de réglementation subalterne.

[26] La différence entre, d'une part, des dispositions générales permettant de prendre des règlements et d'attribuer des licences et, d'autre part, de véritables dispositions attributives de compétence est évidente lorsqu'on compare la présente espèce avec l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764. Dans cette affaire, notre Cour était appelée à décider si la création et l'utilisation de certains comptes de report relevaient du pouvoir explicite du CRTC de déterminer si les tarifs fixés par les entreprises de télécommunications sont justes et raisonnables. La compétence en matière de fixation de tarifs dont dispose le CRTC en vertu de l'art. 27 de la *Loi sur les télécommunications*, L.C. 1993, ch. 38, précise que les tarifs doivent être justes et raisonnables. Cet article habilite de façon précise le CRTC à déterminer si cette condition est respectée et, à cette fin, lui accorde le pouvoir exprès d'« utiliser la méthode ou la technique qu'il estime appropriée » (par. 27(5)).

2012 SCC 68 (CanLII)

[27] This broad, express grant of jurisdiction authorized the CRTC to create and use the deferral accounts at issue in that case. This stands in marked contrast to the provisions on which the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(*k*) and a broad licensing power under s. 9(1)(*b*)(i). Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.

[27] Dans *Bell Aliant*, la vaste compétence expresse ainsi attribuée au CRTC lui permettait de créer et d'utiliser les comptes de report en litige. Cette situation se distingue nettement du présent cas et des dispositions invoquées par les radiodiffuseurs en l'espèce, à savoir le pouvoir général de prendre des règlements prévu à l'al. 10(1)*k*) et le large pouvoir d'attribution de licences prévu à l'al. 9(1)*b*)(i). Une disposition attributive de compétence n'est pas analogue à une disposition accordant un pouvoir général de prendre des règlements ou d'attribuer des licences. En effet, alors que par le premier type de dispositions le législateur accorde expressément une compétence précise, par le second il confère un pouvoir général qui doit être interprété de manière à éviter de reconnaître un pouvoir discrétionnaire illimité que n'envisagent pas les dispositions attributives de compétence de la loi en cause.

[28] That is the fundamental point. Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC's regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion. Rather,

> discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation.

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 50, *per* Bastarache J.)

[28] Il s'agit là de l'aspect fondamental. Si la seule limite restreignant les pouvoirs conférés au CRTC par le par. 10(1) était l'obligation que le règlement concerné favorise la réalisation d'un des objectifs de politique énoncés au par. 3(1), la seule limite à laquelle serait assujetti le pouvoir de réglementation du CRTC serait sa propre appréciation de l'opportunité du règlement proposé à la lumière de l'un ou l'autre des objectifs en question, ce qui reviendrait à lui reconnaître un pouvoir discrétionnaire illimité. Au contraire, l'organisme

> doit [. . .] exercer [son pouvoir discrétionnaire] en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois.

(*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board*), 2006 CSC 4, [2006] 1 R.C.S. 140, par. 50, le juge Bastarache)

[29] A broadly drafted basket clause, such as s. 10(1)(*k*), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" (s. 9(1)(*h*)) cannot be read in isolation: *ATCO,* at para. 46. Rather, "[t]he content of a provision 'is enriched by the rest of the section in which it is found . . .'" (*Ontario v. Canadian Pacific Ltd.*,

[29] Une clause générale rédigée en termes larges, par exemple l'al. 10(1)*k*), ou encore un pouvoir non défini autorisant l'organisme de réglementation à délivrer des licences « selon les modalités qu'il précise » (al. 9(1)*h*)) ne peuvent être interprétés isolément : *ATCO*, par. 46. Au contraire, « [l]e contenu d'une disposition "est enrichi par le reste

2012 SCC 68 (CanLII)

[1995] 2 S.C.R. 1031, at para. 64, *per* Gonthier J., citing *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 647-48; see also Sullivan, at pp. 228-29). In my opinion, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.

[30] However, the broadcasters submit that s. 10(1)(*g*), which enables the CRTC to make regulations "respecting the carriage of any foreign or other programming services", and s. 9(1)(*h*), which empowers the CRTC to require a licensed BDU "to carry . . . programming services specified by the Commission", together with the broad wording of ss. 10(1)(*k*) and 9(1)(*b*)(i), empower the CRTC to "dictate the terms of the carriage relationship between broadcasters and BDUs" (R.F., at para. 65). Thus, the CRTC would, in their opinion, have jurisdiction to implement the proposed regime.

[31] I cannot agree. On their face, ss. 9(1)(*h*) and 10(1)(*g*) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country's cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(*k*) and 9(1)(*b*)(i), they entitle the CRTC to create exclusive control rights for broadcasters.

[32] This interpretation is consistent with a reading of the Act in its entire context. The *Broadcasting Act* has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition,

de l'article dans lequel il est situé" » (*Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, par. 64, le juge Gonthier, citant l'arrêt *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 647-648; voir également Sullivan, p. 228-229). À mon avis, aucun des sujets précis et susceptibles d'être réglementés qui sont énumérés au par. 10(1) ne se rapporte à la création de droits exclusifs qui permettraient aux radiodiffuseurs d'autoriser ou d'interdire la distribution de signaux ou d'émissions, ou de contrôler les rapports économiques directs entre les EDR et les radiodiffuseurs.

[30] Cependant, les radiodiffuseurs affirment que l'al. 10(1)*g*), aux termes duquel le CRTC peut, par règlement, « régir la fourniture de services de programmation — même étrangers — par les entreprises de distribution », ainsi que l'al. 9(1)*h*), qui permet au CRTC d'obliger les titulaires de licences d'exploitation d'entreprises de distribution « à offrir certains services de programmation selon les modalités qu'il précise », conjugués aux dispositions générales que sont les al. 10(1)*k*) et 9(1)*b*), habilitent le CRTC à [TRADUCTION] « dicter les modalités des rapports entre les radiodiffuseurs et les EDR en ce qui concerne la fourniture des services de programmation » (m.i., par. 65). Par conséquent, le CRTC aurait, de l'avis des radiodiffuseurs, compétence pour mettre en œuvre le régime proposé.

[31] Je ne partage pas cet avis. À première vue, les al. 9(1)*h*) et 10(1)*g*) pourraient, par exemple, permettre au CRTC d'obliger les EDR à distribuer aux Canadiens certains types d'émissions, au motif que celles-ci seraient considérées importantes pour la structure culturelle du Canada. Toutefois, cela n'équivaut pas vraiment à conclure que, conjugués aux al. 10(1)*k*) et 9(1)*b*), les alinéas susmentionnés autorisent le CRTC à conférer aux radiodiffuseurs des droits de contrôle exclusifs.

[32] Cette interprétation s'accorde avec une lecture de la Loi qui prend en compte le contexte global de celle-ci. La *Loi sur la radiodiffusion* vise des objectifs principalement culturels. Les autres pouvoirs énumérés au par. 10(1) portent sur des questions telles la répartition du temps d'antenne et

2012 SCC 68 (CanLII)

the objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, target "the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse" (*ISP Reference*, at para. 4). While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act: Sullivan, at pp. 388 and 390-91. Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.

[33] In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.

B. *The Larger Statutory Scheme — Conflict with the Copyright Act*

(1) Connection Between the *Broadcasting Act* and the *Copyright Act*

[34] Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, that would not resolve the question in this reference as the *Broadcasting Act* is part of a larger statutory scheme that includes the *Copyright Act* and the *Telecommunications Act*. As Sunny Handa et al. explain, the *Telecommunications Act* and the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are the main statutes governing carriage, and the *Broadcasting Act* deals with content, which is "the object of 'carriage'" (S. Handa et al., *Communications Law in Canada* (loose-leaf ed.),

l'élaboration de normes régissant les émissions. De plus, si on les considère globalement, les objectifs énoncés au par. 3(1) de la *Loi sur la radiodiffusion* « s'attachent au contenu (enrichissement culturel du Canada, promotion du contenu canadien, offre d'une programmation originale de haute qualité, variété de la programmation » (*Renvoi sur les FSI*, par. 4). Bien que de telles déclarations de principes ne puissent être considérées comme des attributions distinctes de pouvoirs, il faut leur accorder la valeur qui leur revient lors de l'interprétation de dispositions précises d'une loi : Sullivan, p. 388 et 390-391. Il faut présumer que le Parlement a donné au CRTC le pouvoir d'agir en vue de réaliser les objectifs culturels en question; toutefois, les moyens de réglementation mis à la disposition du CRTC pour réaliser ces objectifs ne vont pas jusqu'à lui permettre de créer des droits de contrôle exclusifs.

[33] En somme, il n'est fait mention nulle part dans la Loi de la création de droits de contrôle exclusifs sur les signaux ou les émissions. Il ressort d'une interprétation de la *Loi sur la radiodiffusion* qui tient compte du contexte global de celle-ci que la création de tels droits constitue une mesure beaucoup trop éloignée des objectifs fondamentaux visés par le législateur et des pouvoirs conférés au CRTC par la *Loi sur la radiodiffusion*.

B. *Cadre législatif plus large — Conflit avec la Loi sur le droit d'auteur*

(1) Liens entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d'auteur*

[34] Même si l'on pouvait trouver dans le texte de la *Loi sur la radiodiffusion* la compétence nécessaire pour mettre en œuvre le régime proposé de compensation pour la valeur des signaux, cela ne réglerait pas la question posée dans le présent renvoi, car la *Loi sur la radiodiffusion* s'inscrit dans un cadre législatif plus large qui englobe la *Loi sur le droit d'auteur* et la *Loi sur les télécommunications*. Comme l'expliquent Sunny Handa et autres, la *Loi sur les télécommunications* et la *Loi sur la radiocommunication*, L.R.C. 1985, ch. R-2, sont les principales lois en matière de distribution

2012 SCC 68 (CanLII)

at §3.21). In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act*, saying that "there is a connection between these two statutes". Considering that the *Broadcasting Act* and the *Radiocommunication Act* are clearly part of the same interconnected statutory scheme, it follows, in my view, that there is a connection between the *Broadcasting Act* and the *Copyright Act* as well. The three Acts (plus the *Telecommunications Act*) are part of an interrelated scheme.

[35] Indeed, the *Broadcasting Act* regulates "program[s]" that are "broadcast" for reception by the Canadian public (see s. 2(1), definitions of "broadcasting" and of "program"), with a view to implementing the Canadian broadcasting policy described in s. 3(1) of the Act. Generally speaking, "[t]he *Broadcasting Act* is primarily concerned with the programmed content delivered by means of radio waves or other means of telecommunication to the public" (Handa et al., at §5.5).

[36] The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772,

de signaux, et la *Loi sur la radiodiffusion* porte pour sa part sur le contenu des signaux, lequel constitue [TRADUCTION] « l'objet de la "distribution" » (S. Handa et autres, *Communications Law in Canada* (éd. feuilles mobiles), §3.21). Dans l'arrêt *Bell ExpressVu*, par. 52, alors qu'il interprétait une disposition de la *Loi sur les radiocommunications*, le juge Iacobucci a également examiné la *Loi sur le droit d'auteur*, soulignant qu'il existait « un lien entre cette loi et celle sur le droit d'auteur ». Étant donné que la *Loi sur la radiodiffusion* et la *Loi sur la radiocommunication* font clairement partie du même régime législatif, il s'ensuit selon moi qu'il existe aussi un lien entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d'auteur*. Ces trois lois (ainsi que la *Loi sur les télécommunications*) sont des éléments d'un régime de mesures interreliées.

[35] D'ailleurs, la *Loi sur la radiodiffusion* régit les « émissions » qui sont « diffusées » et destinées à être reçues par le public canadien (voir, au par. 2(1), la définition des termes « radiodiffusion » et « émission »), en vue de mettre en œuvre la politique canadienne de radiodiffusion énoncée au par. 3(1) de la Loi. De façon générale, [TRADUCTION] « [l]a *Loi sur la radiodiffusion* s'intéresse principalement au contenu de la programmation diffusée au public au moyen d'ondes radio ou d'autres moyens de télécommunication » (Handa et autres, §5.5).

[36] La *Loi sur le droit d'auteur* vise à la fois à encourager la créativité et à permettre aux créateurs de jouir raisonnablement du fruit de leur travail de création. La concrétisation de ces objectifs est favorisée par l'existence d'un régime soigneusement équilibré qui confère des droits économiques exclusifs à différentes catégories de titulaires du droit d'auteur sur leurs œuvres ou sur un autre objet protégé, généralement au moyen d'un monopole légal qui interdit à quiconque d'exploiter l'œuvre de certaines façons précises sans le consentement du titulaire du droit d'auteur. Ce régime établit également des droits d'utilisation telles l'utilisation équitable et certaines exemptions précises autorisant le public en général ou des catégories particulières d'utilisateurs à accéder au contenu protégé moyennant le respect de certaines conditions. (Voir, p. ex.,

2012 SCC 68 (CanLII)

at para. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56.) Among the categories of subject matter protected by copyright are the rights of broadcasters in communication signals (see ss. 2 "copyright" and 21 of the *Copyright Act*). In addition, "program[s]" within the meaning of the *Broadcasting Act*, are often pre-recorded original content which may constitute protected works, namely "dramatic work[s]" or "compilation[s]" thereof, under the *Copyright Act*: see, e.g., discussion in J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (looseleaf)), at para. 15:3(a).

Théberge c. Galerie d'Art du Petit Champlain inc., 2002 CSC 34, [2002] 2 R.C.S. 336, par. 11-12 et 30; *Mattel, Inc. c. 3894207 Canada Inc.*, 2006 CSC 22, [2006] 1 R.C.S. 772, par. 21; D. Vaver, *Intellectual Property Law : Copyright, Patents, Trade-marks* (2e éd. 2011), p. 34 et 56.) Parmi les catégories d'objets protégés par le droit d'auteur, mentionnons les droits des radiodiffuseurs sur les signaux de communication (voir la définition de « droit d'auteur » à l'art. 2, ainsi que l'art. 21 de la *Loi sur le droit d'auteur*). Qui plus est, les « émission[s] » au sens de la *Loi sur la radiodiffusion* se présentent souvent sous forme de contenu original préenregistré susceptible de constituer une œuvre protégée, à savoir des « œuvre[s] dramatique[s] » ou des « compilation[s] » de telles œuvres au sens de la *Loi sur le droit d'auteur* : voir, p. ex., l'analyse dans J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4e éd. (feuilles mobiles)), par. 15:3(a).

[37] Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter" (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.

[37] Bien que les deux lois visent des objectifs différents, les sujets dont elles traitent se recoupent inévitablement. Comme le législateur est présumé avoir voulu « l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet » (*R. c. Ulybel Enterprises Ltd.*, 2001 CSC 56, [2001] 2 R.C.S. 867, par. 52; Sullivan, p. 325-326), on donnera effet suivant leur libellé à deux dispositions s'appliquant aux mêmes faits, dès lors qu'elles n'entrent pas en conflit l'une avec l'autre.

[38] Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to *avoid* conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:

> There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones . . . .

[38] Par conséquent, lorsqu'une disposition se prête à plusieurs interprétations, la présomption de cohérence exige que, afin d'*éviter* les conflits, les lois en cause soient interprétées ensemble. Dans l'arrêt *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, par. 61, le juge en chef Lamer a écrit ce qui suit :

> Certes, selon le principe de la présomption de cohérence des lois qui portent sur des sujets analogues, l'interprète doit chercher l'harmonisation entre ces lois plutôt que leur contradiction . . .

[39] In addition, "[o]rdinarily, . . . an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation" (*Friends of the Oldman River Society v. Canada (Minister of*

[39] De plus, « [n]ormalement, la loi fédérale doit l'emporter sur le texte réglementaire incompatible » (*Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1

2012 SCC 68 (CanLII)

Transport), [1992] 1 S.C.R. 3, at p. 38). Consequently, as it would be impermissible for the CRTC, a subordinate legislative body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.

[40] It is therefore necessary to first determine if a conflict arises.

(2) Types of Conflict

[41] For the purposes of statutory interpretation, conflict is defined narrowly. It has been said that overlapping provisions will be given effect according to their terms, unless they "cannot stand together" (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at p. 499 *per* Anglin J.).

[42] In *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, the Court was concerned with incoherence between provisions of two statutes emanating from the same legislature. Bastarache J., writing for the majority, defined conflict, at para. 47:

The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

> According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for

R.C.S. 3, p. 38). En conséquence, comme il ne serait pas permis au CRTC, en tant qu'organisme de réglementation subalterne, de mettre en œuvre un texte réglementaire qui entre en conflit avec une autre loi fédérale, les dispositions attributives de compétence de nature générale de la *Loi sur la radiodiffusion* ne peuvent être interprétées de manière à permettre au CRTC de créer des conflits avec la *Loi sur le droit d'auteur*.

[40] Il est donc nécessaire de décider tout d'abord s'il y a conflit.

(2) Types de conflits

[41] En matière d'interprétation des lois, la notion de conflit est définie étroitement. Il a été jugé que des dispositions qui se chevauchent seront appliquées suivant leur libellé, à moins qu'elles [TRADUCTION] « ne puissent coexister » (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488, p. 499, le juge Anglin).

[42] Dans l'affaire *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, la Cour s'est penchée sur l'incompatibilité de dispositions de deux lois émanant du même législateur. S'exprimant au nom de la majorité, le juge Bastarache a défini comme suit la notion de « conflit », au par. 47 :

Le critère à appliquer pour déterminer si un conflit est inévitable est clairement énoncé par le professeur Côté dans son traité d'interprétation des lois :

> Selon la jurisprudence, deux lois ne sont pas en conflit du simple fait qu'elles s'appliquent à la même matière : il faut que l'application de l'une exclue, explicitement ou implicitement, celle de l'autre.

(P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 443)

Ainsi, une loi prévoyant que le passager d'un train qui ne paye pas son passage doit être expulsé n'est pas en conflit avec une autre loi prévoyant uniquement l'imposition d'une amende, parce que l'application d'une loi n'exclut pas l'application de l'autre loi (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488). Par contre, il y a conflit inévitable lorsque deux lois sont directement contradictoires ou que leur application concurrente donnerait lieu à un résultat déraisonnable ou absurde. Par exemple, la

2012 SCC 68 (CanLII)

example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818). [Emphasis added.]

[43] Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other (*Lévis*, at para. 54; Sullivan, at p. 330).

[44] This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an *impossibility of compliance* with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another. See, e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 84.

[45] Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.

loi qui autorise la prorogation du délai de dépôt d'un appel uniquement avant l'expiration du délai est en conflit direct avec une autre loi qui autorise l'acceptation d'une demande de prorogation après l'expiration du délai (*Massicotte c. Boutin*, [1969] R.C.S. 818). [Je souligne.]

[43] On entend également par résultat absurde les situations où une loi aurait concrètement pour effet d'aller à l'encontre de *l'objet* de l'autre loi (*Lévis*, par. 54; Sullivan, p. 330).

[44] Cette conception n'est pas incompatible avec la notion de conflit retenue par la jurisprudence sur le fédéralisme. Pour l'application de la doctrine de la prépondérance des lois fédérales, notre Cour a reconnu l'existence de deux types de conflits. Il y a conflit d'application lorsqu'il est *impossible de se conformer* aux deux dispositions en même temps. L'autre type de conflits concerne les cas d'incompatibilité d'objets. Dans les conflits de ce deuxième type, il n'y a pas impossibilité de se conformer à la lettre des deux lois; le conflit découle plutôt du fait que l'application d'une disposition s'opposerait à l'*objet* qu'entend réaliser le Parlement dans une autre. Voir, p. ex., *Colombie-Britannique (Procureur général) c. Lafarge Canada Inc.*, 2007 CSC 23, [2007] 2 R.C.S. 86, par. 77 et 84).

[45] Les décisions dans lesquelles les tribunaux ont appliqué la doctrine de la prépondérance fédérale présentent certaines similitudes dans la mesure où l'on y définit les conflits comme des conflits d'application ou d'objets (*Friends of the Oldman River Society*, p. 38). Ces définitions de la notion de conflits de lois sont donc utiles pour interpréter deux lois émanant du même législateur. Le pouvoir du CRTC de prendre des règlements et d'assortir de certaines conditions les licences qu'il délivre doit être considéré comme assujetti aux limites découlant de chaque type de conflits. Autrement dit, en vue de réaliser sa mission, le CRTC ne peut choisir des moyens qui entraînent un conflit d'application avec des dispositions précises de la *Loi sur la radiodiffusion*, de la *Loi sur la radiocommunication*, de la *Loi sur les télécommunications* ou de la *Loi sur le droit d'auteur*, ou encore qui seraient incompatibles avec l'objet de ces diverses lois.

2012 SCC 68 (CanLII)

(3) The Allocation of Rights Under the *Copyright Act*

(a) *Section 21*

[46] The BDUs contend that the CRTC's proposed value for signal regime conflicts with the retransmission regimes specifically established in ss. 21(1)(*c*) and 31(2) of the *Copyright Act*.

[47] It is necessary to describe the *Copyright Act*'s regimes at some length. It will become apparent from this description that, in my respectful view, the analysis of the *Copyright Act* conducted by the majority of the FCA is problematic.

[48] The BDUs first submit that s. 21(1) of the *Copyright Act* conflicts with the value for signal regime. Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

> (*a*) to fix it;
>
> (*b*) to reproduce any fixation of it that was made without the broadcaster's consent;
>
> (*c*) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and
>
> (*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

[49] The aspect relevant for this appeal is in para. (*c*). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal.

(3) Droits attribués par la *Loi sur le droit d'auteur*

a) *Article 21*

[46] Les EDR affirment que le régime de compensation pour la valeur des signaux proposé par le CRTC entre en conflit avec les régimes de retransmission expressément établis à l'al. 21(1)*c*) et au par. 31(2) de la *Loi sur le droit d'auteur.*

[47] Il est nécessaire de décrire de manière assez détaillée les régimes prévus par la *Loi sur le droit d'auteur.* À mon humble avis, cette description fera ressortir le caractère problématique de l'analyse de la *Loi sur le droit d'auteur* effectuée par les juges majoritaires de la CAF.

[48] Les EDR soutiennent tout d'abord que le par. 21(1) de la *Loi sur le droit d'auteur* entre en conflit avec le régime de compensation pour la valeur des signaux. Cette disposition accorde aux radiodiffuseurs un droit d'auteur limité sur les signaux qu'ils diffusent en direct. Ce droit d'auteur confère au radiodiffuseur le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci, d'accomplir ou d'autoriser l'un des quatre actes suivants :

> *a*) de le fixer;
>
> *b*) d'en reproduire toute fixation faite sans son autorisation;
>
> *c*) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;
>
> *d*) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas *a*), *b*) et *d*).

[49] L'aspect pertinent pour les besoins du présent pourvoi est celui prévu à l'al. *c*). Aux termes de cet alinéa, le radiodiffuseur a le droit exclusif d'autoriser un autre *radiodiffuseur* à retransmettre

2012 SCC 68 (CanLII)

Section 2 of the *Copyright Act* defines "broadcaster" as

> a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.

[50] The underlined portion of the definition refers to BDUs. BDUs are not a "broadcaster" within the meaning of the *Copyright Act* because their primary activity in relation to communication signals is their retransmission. Thus, the broadcaster's s. 21(1)(*c*) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster's exclusive right does not include a right to authorize or prohibit a BDU from retransmitting its communication signals.

(b) *Section 31*

[51] In addition to their s. 21 rights in communication signals, broadcasters may hold other retransmission rights under the *Copyright Act*. As mentioned, a pre-recorded television *program* is often copyright subject matter that can be protected as an original "dramatic work" or a "compilation" thereof (s. 2 of the *Copyright Act*). The broadcaster, as a corporation, may hold copyright in the pre-recorded program or compilation of programs carried in its signals, either as the employer of the author of such a work or as an assignee of copyright from the original author.

[52] The *Copyright Act* seeks to regulate the economic rights in communication signals, as well as the retransmission of works by BDUs. The BDUs contend that the value for signal regime would conflict with the retransmission regime for works

simultanément un signal de communication. Le mot « radiodiffuseur » est défini comme suit à l'art. 2 de la *Loi sur le droit d'auteur* :

> Organisme qui, dans le cadre de l'exploitation d'une entreprise de radiodiffusion, émet un signal de communication en conformité avec les lois du pays où il exploite cette entreprise; est exclu de la présente définition l'organisme dont l'activité principale, liée au signal de communication, est la retransmission de celui-ci.

[50] Le passage souligné de la définition réfère aux EDR. Ces dernières ne sont pas des « radiodiffuseurs » au sens de la *Loi sur le droit d'auteur*, parce que leur principale activité en ce qui concerne les signaux de communication consiste à les retransmettre. Par conséquent, le droit conféré aux radiodiffuseurs par l'al. 21(1)*c*) — à savoir autoriser, ou refuser d'autoriser, un autre radiodiffuseur à retransmettre simultanément ses signaux — ne peut être opposé aux EDR. En d'autres termes, suivant l'art. 21 de la *Loi sur le droit d'auteur*, le droit exclusif des radiodiffuseurs n'emporte pas celui de permettre ou d'interdire à une EDR de retransmettre leurs signaux de communication.

b) *Article 31*

[51] Outre les droits que leur reconnaît l'art. 21 en matière de signaux de communication, les radiodiffuseurs peuvent détenir d'autres droits de retransmission en vertu de la *Loi sur le droit d'auteur*. Comme il a été expliqué précédemment, une *émission* de télévision préenregistrée fait souvent l'objet d'un droit d'auteur qui peut être protégé en tant qu'« œuvre dramatique » originale ou « compilation » de telles œuvres (art. 2 de la *Loi sur le droit d'auteur*). À titre de personne morale, le radiodiffuseur peut être titulaire du droit d'auteur sur l'émission préenregistrée ou la compilation d'émissions qu'il diffuse en qualité d'employeur de l'auteur de l'œuvre en question ou de cessionnaire du droit d'auteur de l'auteur original.

[52] La *Loi sur le droit d'auteur* vise à régir les droits économiques sur les signaux de communication, ainsi que la retransmission des œuvres par les EDR. Celles-ci affirment que le régime de compensation pour la valeur des signaux entrerait en

2012 SCC 68 (CanLII)

set out in s. 31 of the *Copyright Act*. The proposed regime would enable broadcasters to control the simultaneous retransmission of *programs*, by granting them the right to require deletion of any *program* in which they own or control the copyright from all signals distributed by the BDU, if no agreement is reached on compensation for the simultaneous retransmission of the broadcaster's programming services.

[53] The *Copyright Act* in s. 3(1)(*f*) confers on the owner of copyright in a work the exclusive right to communicate it to the public by telecommunication. Section 3(1)(*f*) provides:

> **3.** (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right . . .
>
> . . .
>
> (*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
>
> . . .

[T]elecommunication", in s. 2 of the Act, is broadly defined to include

> any transmission of . . . intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.

[54] These general words would at first blush confer on the copyright owner, including a broadcaster in that capacity, the right to control the retransmission of the works in which it holds copyright. However, s. 31(2) of the *Copyright Act* proceeds in detailed fashion to circumscribe the right of copyright owners to control the *retransmission* of literary, dramatic, musical or artistic works carried in signals. "[S]ignal" is defined for the purposes of s. 31(2) to mean "a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station" (see s. 31(1)). Section 31(1) defines "retransmitter" as "a

conflit avec le régime de retransmission des œuvres prévu à l'art. 31 de la *Loi sur le droit d'auteur*. Le régime proposé permettrait aux radiodiffuseurs de contrôler la retransmission simultanée d'*émissions* en leur reconnaissant le droit d'exiger le retrait de toute *émission* à l'égard de laquelle ils détiennent ou contrôlent le droit d'auteur de tous les signaux distribués par l'EDR, si aucune entente n'est conclue sur la compensation à verser pour la retransmission simultanée des services de programmation du radiodiffuseur.

[53] L'alinéa 3(1)*f*) de la *Loi sur le droit d'auteur* accorde au titulaire du droit d'auteur sur une œuvre le droit exclusif de communiquer celle-ci au public par télécommunication. Cet alinéa est rédigé ainsi :

> **3.** (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif . . .
>
> . . .
>
> *f*) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;
>
> . . .

Le mot « télécommunication » est défini largement à l'art. 2 de la Loi et il s'entend notamment de

> toute transmission de [. . .] renseignements de toute nature par fil, radio, procédé visuel ou optique, ou autre système électromagnétique.

[54] Ces termes généraux semblent à première vue conférer au titulaire du droit d'auteur, y compris à un radiodiffuseur agissant en cette qualité, le droit de contrôler la retransmission des œuvres sur lesquelles il détient un droit d'auteur. Toutefois, le par. 31(2) de la *Loi sur le droit d'auteur* circonscrit de façon détaillée le droit des titulaires du droit d'auteur de contrôler la *retransmission* des œuvres littéraires, dramatiques, musicales ou artistiques portées par les signaux. Pour l'application du par. 31(2), le mot « signal » s'entend de : « [t]out signal porteur d'une œuvre transmis à titre gratuit au public par une station terrestre de radio ou de télévision » (voir le par. 31(1)). Au paragraphe 31(1), le

2012 SCC 68 (CanLII)

person who performs a function comparable to that of a cable retransmission system".

[55] Section 31(2) provides:

31. . . .

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(*a*) the communication is a retransmission of a local or distant signal;

(*b*) the retransmission is lawful under the *Broadcasting Act*;

(*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).

[56] Read together, ss. 31(1) and 31(2) create an *exception* to the exclusive right of the copyright owners of literary, dramatic, musical or artistic works to control the communication of their works to the public by telecommunication. The exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (*a*) through (*e*) are met. Paragraph (*b*) provides that the retransmission must be lawful under the *Broadcasting Act*. I will come back to the meaning of this particular condition.

[57] In the case of works carried in distant signals only, the section provides copyright owners with a right to receive royalties as payment for the simultaneous retransmission of those works by a BDU. The royalties are determined by the

terme « retransmetteur » est défini comme suit : « [p]ersonne, autre qu'un retransmetteur de nouveaux médias, dont l'activité est comparable à celle d'un système de retransmission par fil ».

[55] Voici le texte du par. 31(2) :

31. . . .

(2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une œuvre au public par télécommunication si, à la fois :

a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;

b) la retransmission est licite en vertu de la *Loi sur la radiodiffusion*;

c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;

d) dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;

e) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3)*b*).

[56] Considérés ensemble, les par. 31(1) et 31(2) créent une *exception* au droit exclusif des titulaires du droit d'auteur sur des œuvres littéraires, dramatiques, musicales ou artistiques de contrôler la communication de leurs œuvres au public par télécommunication. L'exception, ou droit de l'utilisateur, permet en fait aux EDR de retransmettre les œuvres en question sans le consentement du titulaire du droit d'auteur, lorsque les conditions énumérées aux al. *a*) à *e*) sont réunies. L'alinéa *b*) précise que la retransmission doit être licite en vertu de la *Loi sur la radiodiffusion*. Je reviendrai plus loin sur le sens de cette condition particulière.

[57] Dans le cas des œuvres portées uniquement par des signaux éloignés, la disposition en question confère aux titulaires du droit d'auteur le droit de percevoir des redevances pour la retransmission simultanée de ces œuvres par une EDR.

2012 SCC 68 (CanLII)

Copyright Board, on the basis of tariffs filed by collective societies, pursuant to the regime detailed in ss. 71 to 74 of the *Copyright Act*. Under s. 31(2), works carried in local signals attract no royalty when retransmitted in accordance with all conditions of that section. The Governor in Council has defined "local signal" as the signal of a terrestrial station reaching all or a portion of the service area of a retransmitter. A "distant signal" is a signal that is not a local signal. See ss. 1 and 2 of *Local Signal and Distant Signal Regulations*, SOR/89-254.

Ces redevances sont fixées par la Commission du droit d'auteur, en fonction des tarifs proposés par des sociétés de gestion, conformément au régime décrit en détail aux art. 71 à 74 de la *Loi sur le droit d'auteur*. Suivant le par. 31(2), les œuvres portées par des signaux locaux ne donnent droit à aucune redevance lorsqu'elles sont retransmises conformément à toutes les conditions énumérées à cette disposition. Le gouverneur en conseil a défini le terme « signal local » comme étant le signal d'une station terrestre de radio ou de télévision rejoignant tout ou une partie de la zone de desserte d'un retransmetteur. Constitue un « signal éloigné » tout signal qui n'est pas un signal local. Voir les art. 1 et 2 du *Règlement sur la définition de signal local et de signal éloigné*, DORS/89-254.

[58] It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss. 76(1) and 76(3) of the *Copyright Act*). On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(*f*), to communicate the work by telecommunication to the public. On the other hand, the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(*a*) and (*d*)). Both user rights are, subject to s. 31(2), beyond the owner's control.

[58] Il convient de souligner que, dans le cas des œuvres portées à la fois par des signaux locaux et par des signaux éloignés, le titulaire du droit d'auteur *n'a pas le droit d'interdire* la retransmission simultanée de ces œuvres; son recours se limite à recevoir, par l'intermédiaire d'une société de gestion, la redevance prescrite, mais uniquement pour la retransmission simultanée des œuvres portées par des signaux éloignés (par. 76(1) et 76(3) de la *Loi sur le droit d'auteur*). D'une part, le titulaire du droit d'auteur se voit reconnaître un droit général de retransmettre l'œuvre. Ce droit de retransmission fait partie du droit que lui reconnaît l'al. (3)(1)*f*) de communiquer l'œuvre au public par télécommunication. D'autre part, le droit général de retransmission du titulaire du droit d'auteur est limité par l'exception prévue au par. 31(2) de la *Loi sur le droit d'auteur*, qui confère effectivement deux droits de retransmission à une catégorie particulière de retransmetteurs. Le premier de ces droits autorise ces utilisateurs à retransmettre simultanément, sans avoir à verser de redevances, des œuvres portées par des signaux locaux. Le second droit permet aux utilisateurs de retransmettre simultanément des œuvres portées par des signaux éloignés, sous réserve uniquement du paiement de redevances en vertu d'une sorte de régime de licences obligatoires (*Loi sur le droit d'auteur*, al. 31(2)*a*) et *d*)). Sous réserve du par. 31(2), ces deux droits reconnus aux utilisateurs échappent au contrôle du titulaire du droit d'auteur.

2012 SCC 68 (CanLII)

[59] In sum, under the *Copyright Act*'s retransmission regimes for communication signals and for works:

- Broadcasters have a limited exclusive right in their *signals* (s. 21);
- Broadcasters do not have an exclusive right in *signals* against BDUs;
- BDUs have the right to simultaneously retransmit *works* carried in local signals without authorization and without payment to the copyright owner;
- Owners of copyright in those works, including broadcasters in that capacity, do not have the right to block retransmission of local or distant signals carrying their works;
- The Copyright Board has jurisdiction to value the compulsory licence royalty for the simultaneous retransmission of works carried in distant signals;

(4) Finding Conflict

[60] The CRTC's proposed value for signal regime would enable broadcasters to negotiate compensation for the retransmission by BDUs of their signals or programming services, regardless of whether or not they carry copyright protected "work[s]", and regardless of the fact that any such works are carried in local signals for which the *Copyright Act* provides no compensation. Importantly, contrary to the retransmission regimes of the *Copyright Act*, the value for signal regime proposed by the CRTC would grant individual broadcasters, should they elect to be governed by this regime, the *right to prohibit* the simultaneous retransmission of their programs.

[59] En résumé, suivant les régimes de retransmission prévus par la *Loi sur le droit d'auteur* à l'égard des signaux de communication et des œuvres :

- les radiodiffuseurs possèdent un droit exclusif limité sur leurs *signaux* (art. 21);
- les radiodiffuseurs ne possèdent pas, à l'égard des *signaux*, un droit exclusif opposable aux EDR;
- les EDR ont le droit de retransmettre simultanément des *œuvres* portées par des signaux locaux sans avoir été autorisées à le faire par le titulaire du droit d'auteur et sans verser à celui-ci de contrepartie à cet égard;
- les titulaires du droit d'auteur sur les œuvres en question, y compris les radiodiffuseurs agissant en cette qualité, n'ont pas le droit de bloquer la retransmission de signaux locaux ou éloignés portant leurs œuvres;
- la Commission du droit d'auteur a compétence pour évaluer les redevances relatives aux licences obligatoires pour la retransmission simultanée d'œuvres portées par des signaux éloignés.

(4) Constatation d'un conflit

[60] Le régime de compensation pour la valeur des signaux proposé par le CRTC permettrait aux radiodiffuseurs de négocier la compensation qui leur serait payée pour la retransmission par les EDR de leurs signaux et de leurs services de programmation, et ce, peu importe que ces signaux ou services portent des « œuvres » protégées par le droit d'auteur et indépendamment du fait que les œuvres en question soient portées par des signaux locaux, signaux à l'égard desquels la *Loi sur le droit d'auteur* ne prévoit aucune compensation. Fait important à signaler, contrairement aux régimes de retransmission établis par la *Loi sur le droit d'auteur*, le régime de compensation pour la valeur de signaux que propose le CRTC conférerait à certains radiodiffuseurs, advenant qu'ils choisissent d'être régis par ce régime, le *droit d'interdire* la retransmission simultanée de leurs émissions.

2012 SCC 68 (CanLII)

[61] As mentioned, the presumption of coherence between related Acts of Parliament requires avoiding an interpretation of a provision that would introduce conflict into the statutory scheme. In this case, the presumption of coherence requires that if the CRTC's proposed regulatory regime would create such conflict with the specific expressions of Parliament's intent under the *Copyright Act*, it must be *ultra vires*. Sections 21 and 31(2) of the *Copyright Act* are relevant.

[62] First, the value for signal regime conflicts with s. 21(1) of the *Copyright Act* because it would *grant* broadcasters a retransmission authorization right against BDUs that was *withheld* by the scheme of the *Copyright Act*.

[63] Looking only at the letter of the provision, s. 21 expressly speaks only to the relationship between a broadcaster and another broadcaster and not the relationship between a broadcaster and a retransmitter. As such, it is arguable that nothing in s. 21 purports to prevent another regulator from regulating the terms for carriage of a broadcaster's television signal by the BDUs, leaving it open to the CRTC, provided it is authorized to do so under the *Broadcasting Act*, to establish a value for signal regime without conflicting with s. 21.

[64] However, s. 21 cannot be considered devoid of its purpose. This Court has characterized the purpose of the *Copyright Act* as a balance between authors' and users' rights. The same balance applies to broadcasters and users. In *Théberge*, Binnie J. recognized that the *Copyright Act*

> is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately,

[61] Comme il a été mentionné précédemment, la présomption de cohérence des lois fédérales connexes exige d'éviter d'interpréter une disposition d'une manière qui créerait un conflit à l'intérieur du régime établi par ces lois. En l'espèce, si le régime de réglementation proposé par le CRTC a pour effet d'entrer en conflit avec les manifestations expresses de la volonté du législateur dans la *Loi sur le droit d'auteur*, la présomption de cohérence commande que ce régime soit déclaré *ultra vires*. L'article 21 et le par. 31(2) de la *Loi sur le droit d'auteur* sont pertinents.

[62] Premièrement, le régime de compensation pour la valeur des signaux entre en conflit avec le par. 21(1) de la *Loi sur le droit d'auteur*, en ce qu'il *accorderait* aux radiodiffuseurs le droit d'autoriser ou non la retransmission de signaux par les EDR, droit qui a été *refusé* aux radiodiffuseurs par le régime établi par la *Loi sur le droit d'auteur*.

[63] Si l'on s'en tient à la lettre de cette disposition, l'art. 21 ne traite de manière expresse que des rapports entre radiodiffuseurs et non des rapports entre radiodiffuseurs et retransmetteurs. Par conséquent, il est possible de soutenir que rien dans cette disposition n'empêche un autre organe de réglementation de définir les modalités de la distribution, par une EDR, des signaux de télévision d'un radiodiffuseur, situation qui permettrait au CRTC — à condition qu'il y soit autorisé par la *Loi sur la radiodiffusion* — d'établir un régime de compensation pour la valeur des signaux sans créer de conflit avec l'art. 21.

[64] Toutefois, l'art. 21 ne peut être analysé sans tenir compte de son objet. Notre Cour a qualifié l'objet de la *Loi sur le droit d'auteur* en disant que celle-ci visait à établir un équilibre entre les droits des créateurs et ceux des utilisateurs. Le même équilibre s'applique dans le cas des radiodiffuseurs et des utilisateurs. Dans l'arrêt *Théberge*, le juge Binnie a reconnu que la *Loi sur le droit d'auteur*

> est généralement présentée comme établissant un équilibre entre, d'une part, la promotion, dans l'intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et, d'autre part, l'obtention

2012 SCC 68 (CanLII)

to prevent someone other than the creator from appropriating whatever benefits may be generated). [para. 30]

(See also *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2004 SCC 13, [2004] 1 S.C.R. 339, at paras. 10 and 23.)

[65] This point was reiterated in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427. In that case, the Court considered whether, for the purposes of the *Copyright Act*, Internet Service Providers "communicate [works] to the public" when such works are requested by their subscribers — thereby infringing copyright in such works. The Court was required to interpret s. 2.4(1)(*b*) of the *Copyright Act*, which provides that

a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

[66] In rejecting the argument that s. 2.4(1)(*b*), as an exemption, should be read narrowly, the majority, *per* Binnie J., held that

[u]nder the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give "the fair and balanced reading that befits remedial legislation". [para. 88]

The Court recognized that "[s]ection 2.4(1)(*b*) is not a loophole but an important element of the balance struck by the statutory copyright scheme" (para. 89). The Court therefore confirmed its earlier teaching in *Théberge* that the policy balance established by the *Copyright Act* is maintained *also* by "giving due weight to [the] limited nature" of the rights of creators (*Théberge*, at para. 31).

d'une juste récompense pour le créateur (ou, plus précisément, l'assurance que personne d'autre que le créateur ne pourra s'approprier les bénéfices qui pourraient être générés). [par. 30]

(Voir également *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, par. 10 et 23.)

[65] Ce point a été réitéré dans l'arrêt *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Assoc. canadienne des fournisseurs Internet*, 2004 CSC 45, [2004] 2 R.C.S. 427. Dans cette affaire, la Cour s'est demandé si, pour l'application de la *Loi sur le droit d'auteur*, les fournisseurs Internet « communiquent [des œuvres] au public » lorsque leurs abonnés leur demandent les œuvres en question — et, de ce fait, violent le droit d'auteur sur ces œuvres. La Cour était appelée à interpréter l'al. 2.4(1)*b*) de la *Loi sur le droit d'auteur*, qui est rédigé ainsi :

. . . n'effectue pas une communication au public la personne qui ne fait que fournir à un tiers les moyens de télécommunication nécessaires pour que celui-ci l'effectue.

[66] Rejetant l'argument suivant lequel, du fait que l'al. 2.4(1)*b*) constitue une exception, il devrait être interprété restrictivement, les juges majoritaires ont tiré la conclusion suivante, sous la plume du juge Binnie :

Dans la *Loi sur le droit d'auteur*, les droits du titulaire du droit d'auteur et les restrictions y afférentes doivent être considérés de pair et recevoir « l'interprétation juste et équilibrée que commande une mesure législative visant à remédier à un état de fait ». [par. 88]

La Cour a reconnu que « [l]'alinéa 2.4(1)*b*) n'est pas une échappatoire, mais un élément important de l'équilibre établi par le régime législatif en cause » (par. 89). Elle a par conséquent confirmé le principe qu'elle avait formulé précédemment dans *Théberge*, à savoir que l'équilibre établi par la *Loi sur le droit d'auteur* est également assuré « en accordant l'importance qu'il convient à la nature limitée » des droits des créateurs (*Théberge*, par. 31).

2012 SCC 68 (CanLII)

[67] In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (*Théberge*, at para. 30).

[67] À mon avis, le par. 21(1) représente le juste équilibre qui, de l'avis du législateur, doit exister entre les droits des radiodiffuseurs sur leurs signaux de communication et le droit des utilisateurs, y compris les EDR, sur ces mêmes signaux. Il ne serait pas logique de la part du législateur fédéral d'instaurer dans la *Loi sur le droit d'auteur* un droit de retransmission soigneusement élaboré, qui soustrait explicitement les EDR du champ d'application du droit exclusif des radiodiffuseurs sur la retransmission simultanée de leurs signaux, mais d'habiliter par ailleurs un organisme de réglementation subalterne à créer un droit fonctionnellement équivalent par l'entremise d'un régime connexe. Le régime de compensation pour la valeur des signaux nuirait à la réalisation de l'objectif de la *Loi sur le droit d'auteur* qui consiste à établir « un équilibre entre, d'une part, la promotion, dans l'intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et, d'autre part, l'obtention d'une juste récompense pour le créateur » (*Théberge*, par. 30).

[68] Second, while the conflict of the proposed regime with s. 21 is sufficient to render the regime *ultra vires*, further conflict arises in my opinion between the value for signal regime and the retransmission rights in *works* set out in s. 31 of the *Copyright Act*.

[68] Deuxièmement, bien que le conflit entre le régime de compensation pour la valeur des signaux proposé et l'art. 21 soit suffisant pour rendre ce régime *ultra vires*, je suis d'avis que celui-ci entre également en conflit avec le droit de retransmission des *œuvres* énoncé à l'art. 31 de la *Loi sur le droit d'auteur.*

[69] As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a *work* carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, "program[s]" are often "work[s]" within the meaning of the *Copyright Act*. The value for signal regime would entitle broadcasters to control the simultaneous retransmission of works, while the *Copyright Act* specifically excludes it from the

[69] Comme il a été expliqué plus tôt, l'art. 31 crée une exception écartant la violation du droit d'auteur dans le cas de la retransmission simultanée par une EDR d'une *œuvre* portée par des signaux locaux. Toutefois, suivant le régime de compensation pour la valeur des signaux, les radiodiffuseurs jouiraient du droit d'exiger le retrait de certaines émissions. Ainsi, un radiodiffuseur qui n'arriverait pas à s'entendre avec une EDR sur la compensation payable pour la distribution de ses services de programmation aurait le droit d'exiger de cette EDR qu'elle retire de tous les signaux qu'elle distribue toute émission à l'égard de laquelle le radiodiffuseur aurait acquis les droits exclusifs de diffusion. Comme il a été signalé précédemment, les « émission[s] » sont souvent des « œuvre[s] » au

2012 SCC 68 (CanLII)

control of copyright owners, including broadcasters.

[70] Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. The value for signal regime would effectively overturn the s. 31 exception to the copyright owners' s. 3(1)(*f*) communication right. It would disrupt the balance established by Parliament.

[71] The recent legislative history of the *Copyright Act* supports the view that Parliament made deliberate choices in respect of copyright and broadcasting policy. The history evidences Parliament's intent to facilitate simultaneous retransmission of television programs by cable and limit the obstacles faced by the retransmitters.

[72] Leading up to the 1997 amendment to the *Copyright Act* (Bill C-32), under which s. 21 was introduced, broadcasters made submissions to the Standing Committee on Canadian Heritage seeking *signal* rights. They contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of their signals by others, including BDUs. The broadcasters, in fact, argued expressly against the narrow right that Parliament eventually adopted as s. 21(1)(*c*). See, e.g., submissions of CTV to Standing Committee on Canadian Heritage, "Re: Bill C-32" (August 30, 1996) (A.R., vol. VII, at p. 68); submissions of WIC Western International Communications Ltd. (1996) (A.R.,

sens de la *Loi sur le droit d'auteur*. Le régime de compensation pour la valeur des signaux aurait pour effet d'accorder aux radiodiffuseurs le droit de contrôler la retransmission simultanée des œuvres, alors que la *Loi sur le droit d'auteur* exclut expressément ce droit de contrôle dans le cas des titulaires du droit d'auteur, y compris les radiodiffuseurs.

[70] Je le répète, bien que l'exception écartant la violation du droit d'auteur prévue à l'art. 31 ne soit pas, à première vue, censée interdire à un autre organisme de réglementation d'imposer, directement ou indirectement, des conditions applicables à la retransmission d'œuvres, il est nécessaire d'aller au-delà de la lettre de cette disposition et de tenir compte de son objet, lequel consiste à établir un équilibre entre les droits des titulaires du droit d'auteur et l'intérêt du public à la diffusion des œuvres. Le régime de compensation pour la valeur des signaux aurait concrètement pour effet de réduire à néant l'exception prévue par l'art. 31 à l'égard du droit de communication reconnu aux titulaires du droit d'auteur par l'al. 3(1)*f*) et de rompre ainsi l'équilibre créé par le législateur.

[71] L'historique législatif récent de la *Loi sur le droit d'auteur* permet d'affirmer que le législateur a fait des choix délibérés en ce qui concerne le droit d'auteur et la politique de radiodiffusion. Cet historique témoigne en effet de la volonté du législateur de faciliter la retransmission simultanée des émissions de télévision par câble et de limiter les obstacles que les retransmetteurs doivent surmonter.

[72] Au cours de la période qui a précédé la modification, en 1997, de la *Loi sur le droit d'auteur* (projet de loi C-32), par l'insertion notamment de l'art. 21, des radiodiffuseurs ont présenté au Comité permanent sur le patrimoine canadien des mémoires dans lesquels ils réclamaient des droits sur les *signaux*. Les radiodiffuseurs soutenaient qu'on devait leur reconnaître le droit d'autoriser ou de refuser d'autoriser la retransmission de leurs signaux par d'autres personnes, y compris les EDR. En fait, les radiodiffuseurs s'opposaient expressément au droit limité que le législateur a finalement reconnu à l'al. 21(1)*c*). Voir, p. ex., mémoire de CTV au Comité permanent du patrimoine

2012 SCC 68 (CanLII)

vol. VII, at p. 15); submissions of the British Columbia Association of Broadcasters, "Bill C-32, the Copyright Reform Legislation" (August 28, 1996) (A.R., vol. VII, at p. 20); submissions of the Canadian Association of Broadcasters, "Clause by Clause Recommendations for Amendments to Bill C-32" (November 27, 1996) (A.R., vol. VII, at p. 77). In addition, although this section has not been amended since 1997, ongoing consultations between Parliament and the broadcasters show continued requests from the latter to include the right to authorize BDU retransmissions. See, e.g., submissions of CTVglobemedia, "Re: Government's 2009 Copyright Consultations" (September 11, 2009) (A.R., vol. IX, at pp. 35-37); Canadian Association of Broadcasters, "A Submission to the House of Commons Standing Committee on Canadian Heritage With Respect to A Statutory Review of the *Copyright Act*" (September 15, 2003) (A.R., vol. IX, at p. 28).

[73] Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended s. 21 in the fashion requested by the broadcasters. Parliament's silence is not necessarily determinative of legislative intention. However, in the context of repeated urging from the broadcasters, Parliament's silence strongly suggests that it is Parliament's intention to maintain the balance struck by s. 21 (see *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42, *per* Abella J.).

[74] The same purposeful balancing is evidenced in the legislative history of the s. 31 regime for the retransmission of *works*. The predecessor to the current s. 3(1)(*f*) guaranteed copyright holders an exclusive right to communicate works by *radio communication*. Jurisprudence interpreted the radio communication right as excluding transmissions by *cable*: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. Section 3(1)(*f*) was amended in 1988 to confer the exclusive right to "communicate the work to the public by telecommunication" to reflect the obligations entered

canadien, « Re : Bill C-32 » (30 août 1996) (d.a., vol. VII, p. 68); mémoire du WIC Western International Communications Ltd. (1996) (d.a., vol. VII, p. 15); mémoire de la British Columbia Association of Broadcasters, « Bill C-32, the Copyright Reform Legislation » (28 août 1996) (d.a., vol. VII, p. 20); mémoire de l'Association canadienne des radiodiffuseurs, « Clause by Clause Recommendations for Amendments to Bill C-32 » (27 novembre 1996) (d.a., vol. VII, p. 77). De plus, bien que cet article n'ait pas été modifié depuis 1997, il ressort des consultations en cours entre le Parlement et les radiodiffuseurs que ces derniers continuent de réclamer que la loi leur reconnaisse le droit d'autoriser les retransmissions par les EDR. Voir, p. ex., mémoire de CTVglobemedia, « Re : Government's 2009 Copyright Consultations » (11 septembre 2009) (d.a., vol. IX, p. 35-37); Association canadienne des radiodiffuseurs, « A Submission to the House of Commons Standing Committee on Canadian Heritage With Respect to A Statutory Review of the *Copyright Act* » (15 septembre 2003) (d.a., vol. IX, p. 28).

[73] Malgré les modifications successives apportées à la *Loi sur le droit d'auteur*, le Parlement n'a pas modifié l'art. 21 de la manière réclamée par les radiodiffuseurs. Le silence du législateur n'est pas nécessairement déterminant quant à son intention. Toutefois, compte tenu des demandes pressantes et répétées des radiodiffuseurs, ce silence tend fortement à indiquer qu'il voulait préserver l'équilibre établi par l'art. 21 (voir *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, par. 42, la juge Abella).

[74] Cette volonté de mise en équilibre ressort également de l'historique législatif du régime prévu à l'art. 31 en matière de retransmission des *œuvres*. La disposition qu'a remplacée l'actuel al. 3(1)*f*) garantissait aux titulaires du droit d'auteur le droit exclusif de transmettre leurs œuvres au moyen de la *radiophonie*. La jurisprudence a considéré que ce droit à la transmission par la radiophonie excluait les transmissions par *câble* : (*Canadian Admiral Corp. c. Rediffusion, Inc.*, [1954] R.C. de l'É. 382. L'alinéa 3(1)*f*) a été modifié en 1988 afin de conférer le droit exclusif de « communiquer au

2012 SCC 68 (CanLII)

into by Canada under the *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3 (see *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61-62; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 36-37, and McKeown, at para. 3:2(b)). The change from radio communication to telecommunication meant that cable companies were now liable for copyright infringement when they communicate copyright-protected works to the public.

[75] However, at the same time, Parliament specifically addressed the question of whether the simultaneous retransmission of works carried in local and distant television signals should require the consent of the copyright owner: it adopted the compulsory licence and exception regime by way of ss. 31 and 71-76 of the *Copyright Act* (*Canada-United States Free Trade Agreement Implementation Act*, s. 62). Studies on the same question had preceded this enactment; there, too, a major concern was that copyright owners "should not be permitted to stop retransmission because this activity is too important to Canada's communications system" (Standing Committee on Communications and Culture. *A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright* (1985), at p. 80 (A.R., vol. III, at p. 118); Government Response to A Charter of Rights for Creators (February 1986) (A.R., vol. III, at p. 127)).

[76] The value for signal regime would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*,

public, par télécommunication, une œuvre », et ce, pour tenir compte des obligations contractées par le Canada aux termes de l'*Accord de libre-échange entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique*, R.T. Can. 1989 nº 3 (voir *Loi de mise en œuvre de l'Accord de libre-échange Canada — États-Unis*, L.C. 1988, ch. 65, art. 61-62; voir également *Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, [2012] R.C.S. 283, par. 36-37, et McKeown, par. 3:2(b)). Par suite du remplacement du terme « radiophonie » par « télécommunication », les entreprises canadiennes de câblodistribution devaient désormais répondre de toute violation du droit d'auteur lorsqu'elles communiquaient au public des œuvres protégées par le droit d'auteur.

[75] Toutefois, à la même époque, le législateur s'est expressément penché sur la question de savoir si la retransmission simultanée d'œuvres portées par des signaux de télévision locaux ou éloignés devait être subordonnée à l'obtention du consentement du titulaire du droit d'auteur : il a adopté le régime de licences obligatoires et d'exception prévu à l'art. 31 et aux art. 71-76 de la *Loi sur le droit d'auteur* (*Loi de mise en œuvre de l'Accord de libre-échange Canada — États-Unis*, art. 62). Des études sur la même question avaient été publiées avant l'adoption de ce texte de loi; dans ces études aussi, on considérait qu'il s'agissait d'un enjeu important et on soulignait que les titulaires du droit d'auteur « ne doivent pas avoir le droit d'interdire la retransmission [d'œuvres], parce que cette activité revêt une trop grande importance dans le réseau de communications du Canada » (Comité permanent des communications et de la culture. *Une charte des droits des créateurs et créatrices : Rapport du Sous-comité sur la révision du droit d'auteur* (1985), p. 89 (d.a., vol. III, p. 118); Réponse du gouvernement au Rapport du Sous-comité sur la révision du droit d'auteur (février 1986) (d.a., vol. III, p. 127)).

[76] Le régime de compensation pour la valeur des signaux proposé par le CRTC aurait pour effet de redéfinir l'équilibre qu'a établi le législateur, dans la *Loi sur le droit d'auteur*, entre les intérêts respectifs des titulaires du droit d'auteur et des

2012 SCC 68 (CanLII)

it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*.

[77] I said earlier that I would come back to s. 31(2)(*b*) of the *Copyright Act*. The majority of the FCA concluded that there is no incoherence between the value for signal regime and the *Copyright Act* because of s. 31(2)(*b*) of the *Copyright Act*. This section provides that in order for the exception to copyright to apply, the retransmission must be "lawful under the *Broadcasting Act*". The majority appears to have thought this was sufficient to ground the CRTC's jurisdiction to implement the value for signal regulatory regime.

[78] In my respectful opinion, this provision cannot serve to authorize the CRTC acting under the *Broadcasting Act* to effectively amend the very heart of the balance of the retransmission regime set out in s. 31(2). Section 31(2)(*b*) is not a so-called Henry VIII clause that confers jurisdiction on the CRTC to promulgate, through regulation or licensing conditions, subordinate legislative provisions that are to prevail over primary legislation (see Sullivan, at pp. 342-43). Absent specific indication, Parliament cannot have intended by s. 31(2)(*b*) to empower a subordinate regulatory body to disturb the balance struck following years of studies. The legislative history does not lend support to this argument; indeed, the history confirms Parliament's deliberate policy choice in enacting the compulsory licence and exception, or user's rights, regime under s. 31(2). A general reference to "lawful under the *Broadcasting Act*" cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*.

[79] In any case, the conflict found between the value for signal regime and s. 21 is sufficient. It

utilisateurs. Comme ce régime est incompatible avec l'objet visé par la *Loi sur le droit d'auteur*, il échappe à la compétence conférée au CRTC par la *Loi sur la radiodiffusion* en matière de délivrance de licences et de réglementation.

[77] J'ai dit plus haut que je reviendrais sur l'al. 31(2)*b*) de la *Loi sur le droit d'auteur*. La CAF a conclu à la majorité que, en raison de l'al. 31(2)*b*) de la *Loi sur le droit d'auteur*, il n'y avait pas d'incohérence entre cette loi et le régime de compensation pour la valeur des signaux. Aux termes de l'alinéa en question, pour que s'applique l'exception écartant la violation du droit d'auteur, la retransmission doit être « licite en vertu de la *Loi sur la radiodiffusion* ». Les juges majoritaires semblent avoir pensé que cela suffisait afin de donner au CRTC compétence pour mettre en œuvre le régime réglementaire de compensation pour la valeur des signaux.

[78] À mon humble avis, la disposition en question ne permet pas au CRTC, lorsqu'il agit en vertu de la *Loi sur la radiodiffusion*, de modifier dans les faits le fondement même de l'équilibre établi par le régime de retransmission prévu au par. 31(2). L'alinéa 31(2)*b*) n'est pas ce qu'on appelle une « clause Henry VIII », qui conférerait au CRTC le pouvoir de promulguer — par voie de règlements ou de conditions assortissant des licences — des dispositions réglementaires qui auraient préséance sur des dispositions législatives (voir Sullivan, p. 342-343). À défaut d'indication précise, on ne peut présumer que le législateur entendait, par l'al. 31(2)*b*), habiliter un organisme de réglementation subalterne à perturber l'équilibre atteint après bien des années et bien des études. L'historique législatif n'appuie pas cet argument; il confirme plutôt la décision de principe délibérée qu'a prise le législateur lorsqu'il a édicté, au par. 31(2), le régime de licences obligatoires et d'exception écartant la violation du droit d'auteur, ou régime relatif aux droits d'utilisation. L'expression générale « licite en vertu de la *Loi sur la radiodiffusion* » ne saurait autoriser le CRTC, lorsqu'il agit en vertu de dispositions attributives de compétence générales, à écarter une prescription précise du législateur dans la *Loi sur le droit d'auteur*.

[79] En tout état de cause, le conflit constaté entre le régime de compensation pour la valeur des

2012 SCC 68 (CanLII)

could not be overcome even on a different reading of s. 31(2)(*b*) of the *Copyright Act*.

[80] There is one final point to be made. Section 89 of the *Copyright Act* provides:

> **89.** No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

The deliberate use of the words "this Act or any other Act of Parliament" rather than "this Act or any other enactment" means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body. "Act" and "enactment" are defined in s. 2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, where

> "Act" means an Act of Parliament;
>
> and
>
> "enactment" means an Act or regulation or any portion of an Act or regulation;

The definitions confirm that Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions.

[81] Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition. Sections 2 and 21 of the *Copyright Act* define copyright in a communication signal to include the sole right to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast. Authorizing simultaneous retransmission is then an aspect of copyright, although the right under the *Copyright Act* is limited to authorizing only specific defined entities, other broadcasters. In light of the legislative history discussed above, this limitation on copyright appears to be the result of a specific Parliamentary choice not to change the balance

signaux et l'art. 21 est suffisant. Ce conflit ne pourrait être surmonté, même si l'al. 31(2)*b*) de la *Loi sur le droit d'auteur* était interprété différemment.

[80] Il reste une dernière observation à formuler. Cette observation repose sur l'art. 89 de la *Loi sur le droit d'auteur*, qui est rédigé ainsi :

> **89.** Nul ne peut revendiquer un droit d'auteur autrement qu'en application de la présente loi ou de toute autre loi fédérale; le présent article n'a toutefois pas pour effet d'empêcher, en cas d'abus de confiance, un individu de faire valoir son droit ou un tribunal de réprimer l'abus.

L'emploi délibéré des mots « la présente loi ou de toute autre loi fédérale » au lieu de « la présente loi ou de tout autre texte » indique que le droit d'auteur revendiqué doit figurer dans une loi fédérale et non dans un règlement émanant d'un organisme de réglementation. Les mots « loi » et « texte » sont définis ainsi à l'art. 2 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21 :

> « loi » Loi fédérale.
>
> et
>
> « texte » Tout ou partie d'une loi ou d'un règlement.

Ces définitions confirment que le législateur ne voulait pas qu'un organisme de réglementation subalterne puisse créer un droit d'auteur au moyen de règlements ou de conditions d'attribution de licences

[81] Le régime de compensation pour la valeur des signaux aurait pour effet de créer, en contravention de l'art. 89, un nouveau type de droit d'auteur par voie de règlement ou de conditions d'attribution de licences. Les articles 2 et 21 de la *Loi sur le droit d'auteur* précisent que le droit d'auteur comporte le droit exclusif, à l'égard du signal de communication émis par le radiodiffuseur, d'autoriser un autre radiodiffuseur à retransmettre simultanément ce signal au public. Le fait d'autoriser la retransmission simultanée constitue donc un aspect du droit d'auteur, mais la *Loi sur le droit d'auteur* limite cette autorisation à des entités expressément définies, en l'occurrence d'autres radiodiffuseurs. Compte tenu de l'historique

2012 SCC 68 (CanLII)

struck in the *Copyright Act* between broadcasters and BDUs. The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

[82] My colleagues assert that there are functional differences between copyright and the proposed regulatory scheme. With respect, the differences that they point to do not alter the fundamental functional equivalence between the proposed regime and a copyright. Section 21 of the *Copyright Act* empowers broadcasters to prohibit the retransmission of their signals if certain conditions are met; the value for signal regime does exactly the same thing. My colleagues are correct that the CRTC cannot, through the value for signal regime, amend s. 21 of the *Copyright Act*. However that is precisely what the proposed regime does. Parliament could have imposed conditions that are the same, or similar to the value for signal regime in s. 21 in the same way it imposed limits in s. 31 on the copyright it granted in respect of retransmission of works, had it intended broadcasters to have such a right. Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created. Not calling it copyright does not remove it from the scope of s. 89. If that type of repacking was all that was required, s. 89 would not serve its intended purpose of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.

législatif examiné précédemment, cette restriction du droit d'auteur semble découler du choix précis du législateur de ne pas modifier l'équilibre établi dans la *Loi sur le droit d'auteur* entre les radiodiffuseurs et les EDR. Le régime de compensation pour la valeur des signaux créerait un nouveau droit permettant à son titulaire d'autoriser la retransmission de signaux (et, corollairement, d'interdire une telle retransmission si aucune entente n'est conclue au sujet de la compensation à verser), modifiant ainsi concrètement le droit d'auteur conféré par l'art. 21. Ce régime créerait donc un nouveau type de droit d'auteur, sans la loi fédérale requise par l'art. 89.

[82] Mes collègues affirment qu'il existe des différences fonctionnelles entre le droit d'auteur et le régime réglementaire proposé. Avec égards, les différences qu'ils relèvent ne modifient pas l'équivalence fonctionnelle fondamentale entre le régime proposé et un droit d'auteur. L'article 21 de la *Loi sur le droit d'auteur* habilite les radiodiffuseurs à interdire la retransmission de leurs signaux lorsque certaines conditions sont réunies; le régime de compensation pour la valeur des signaux fait exactement la même chose. Mes collègues ont raison de dire que le CRTC ne peut pas, par l'entremise du régime de compensation pour la valeur des signaux, modifier l'art. 21 de la *Loi sur le droit d'auteur*. Toutefois, c'est précisément ce que fait le régime proposé. Le législateur aurait pu, à l'art. 21, imposer des conditions identiques ou analogues à celles prévues par le régime de compensation pour la valeur des signaux, de la même façon qu'il a, à l'art. 31, imposé des limites au droit d'auteur qu'il a accordé relativement à la retransmission des œuvres, s'il avait voulu que les radiodiffuseurs disposent d'un tel droit. Le fait de qualifier le nouveau droit conféré aux radiodiffuseurs en vertu du régime de compensation pour la valeur des signaux d'ensemble de modifications d'ordre réglementaire n'a pas pour effet de changer le caractère véritable de ce droit. Le fait de ne pas l'appeler « droit d'auteur » ne le soustrait pas au champ d'application de l'art. 89. Si un simple changement d'appellation suffisait, l'art. 89 n'atteindrait pas son objectif, qui consiste à restreindre les droits d'auteur susceptibles d'être revendiqués à ceux accordés en application d'une loi fédérale.

2012 SCC 68 (CanLII)

IV. Conclusion

[83] The reference question should be answered in the negative. The appeal should be allowed with costs throughout.

The reasons of Deschamps, Abella, Cromwell and Karakatsanis were delivered by

[84] ABELLA AND CROMWELL JJ. (dissenting) — We have had the benefit of reading the reasons of Rothstein J. but, with respect, do not agree.

[85] Private local stations are licensed by the CRTC to acquire, create and produce television programming. They serve small geographic areas defined by the reach of their signals. According to the CRTC, local stations are key contributors to attaining the objectives for the Canadian broadcasting system.

[86] Local stations have recently experienced a financial crisis. The stations rely on advertising revenue to fund the cost of creating, acquiring and broadcasting high quality Canadian programming. Changes in the broadcasting business environment, however, have caused advertising revenues to rapidly decline. These changes include the development of direct-to-home satellite TV services and speciality television channels, and the widespread adoption of alternative media platforms.

[87] Currently, the local stations' over-the-air signals are picked up and retransmitted to a wider audience by cable service providers (known as broadcasting distribution undertakings, or "BDUs"). The BDUs retransmit these signals to their own subscribers for a fee. Under the current broadcasting regime, BDUs are not required to negotiate compensation with the local stations for retransmitting their signals to a local market. Instead, the CRTC requires the BDUs to provide local stations with

IV. Dispositif

[83] Il convient de répondre par la négative à la question faisant l'objet du renvoi. Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Version française des motifs des juges Deschamps, Abella, Cromwell et Karakatsanis rendus par

[84] LES JUGES ABELLA ET CROMWELL (dissidents) — Nous avons pris connaissance des motifs du juge Rothstein, mais, avec égards, nous ne pouvons y souscrire.

[85] La licence que le CRTC attribue aux stations locales privées leur permet d'acheter, de créer et de produire des émissions de télévision. Elles desservent des régions géographiques limitées, circonscrites par la portée des signaux qu'elles émettent. Selon le CRTC, les stations locales apportent une contribution essentielle à la réalisation des objectifs du système canadien de radiodiffusion.

[86] Les stations locales ont récemment été touchées par une crise financière. Elles dépendent des revenus publicitaires pour financer la création, l'acquisition et la radiodiffusion d'une programmation canadienne de haute qualité. Toutefois, des changements survenus dans le paysage commercial de la radiodiffusion se sont traduits par une chute des revenus publicitaires. Parmi ces changements, mentionnons la création des services de radiodiffusion directe par satellite des ondes télévisuelles, l'arrivée des chaînes spécialisées et l'adoption répandue d'autres supports médias.

[87] À l'heure actuelle, les signaux de télévision en direct émis par les stations locales sont retransmis à un large auditoire par les câblodistributeurs (les entreprises de distribution de radiodiffusion ou « EDR »). Les EDR retransmettent ces signaux à leurs propres abonnés moyennant le paiement de droits. Suivant le régime de radiodiffusion actuel, les EDR ne sont pas tenues de négocier avec les stations locales le versement d'une compensation pour la retransmission des signaux de

2012 SCC 68 (CanLII)

various benefits, including mandatory carriage to the station's local market, preferential channel placement, and substitution of the local stations' advertisements in place of those appearing on American stations transmitting the same program. The current regime also requires the BDUs to make financial contributions to the local stations; specifically, 1.5 percent of the BDUs' gross revenues must go to a local programming improvement fund.

[88] In 2010, the CRTC issued the *Broadcasting Regulatory Policy CRTC 2010-167* ("2010 Policy"), concluding that local stations' potential revenue streams under the existing regime needed to be expanded in order to ensure the viability of local programming. The new regime would supply local stations with funds beyond advertising revenues, by giving them the option to negotiate with the BDUs for compensation for all retransmissions of their signals. Where no agreement is reached, the local station would be entitled to prevent retransmission of its signal by the BDU. The BDUs already negotiate compensation with local stations for retransmitting their signals *outside* the station's local market, known as a "distant signal".

[89] The proposed regime is consistent with the market-based negotiations that increasingly prevail on other platforms, including discretionary pay and specialty services, video-on-demand and online and mobile streaming platforms. According to the CRTC, it is also consistent with its own approach of using market-based solutions when appropriate. Significantly, the CRTC has determined that the new regime is necessary to preserve local stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*, S.C. 1991, c. 11.

ces dernières à un marché local. Le CRTC oblige plutôt l'EDR à offrir à la station locale certains avantages, dont la distribution obligatoire de ses signaux dans le marché local de la station, l'alignement des canaux prioritaires et la substitution des publicités diffusées par les chaînes américaines qui transmettent l'émission par celles de la station locale. Sous le régime actuel, les EDR sont également tenues de verser une contribution financière aux stations locales — à savoir 1,5 p. 100 de leurs revenus bruts — à un fonds d'amélioration de la programmation locale.

[88] En 2010, le CRTC a publié la *Politique réglementaire de radiodiffusion CRTC 2010-167* (« Politique de 2010 ») dans laquelle il conclut à la nécessité d'assurer aux stations locales d'autres sources potentielles de revenus que celles prévues par le régime actuel afin de garantir la viabilité de la programmation locale. Dans le cadre du nouveau régime, les stations locales bénéficieraient, en plus des revenus tirés de la publicité, de la faculté de négocier avec les EDR des ententes leur assurant une compensation pour toute retransmission de leurs signaux. Faute d'entente, une station locale pourrait interdire la retransmission de ses signaux par une EDR. Les EDR négocient déjà avec les stations locales les droits payables à celles-ci pour la retransmission des signaux de ces dernières *hors* de leur marché local respectif, ce qu'on appelle le « signal éloigné ».

[89] Le régime proposé s'inspire du type de négociations basées sur le recours aux forces du marché qui caractérisent de plus en plus les autres supports, notamment les services facultatifs tels que les chaînes payantes et les chaînes spécialisées, la vidéo sur demande et les supports en ligne et mobiles permettant la lecture en continu. Selon le CRTC, le régime concorde également avec sa propre approche, qui consiste à adopter des solutions faisant appel aux règles du marché lorsque la situation s'y prête. Fait important, le CRTC a jugé que le nouveau régime est nécessaire pour assurer la survie des stations locales et la réalisation des objectifs de la politique de radiodiffusion énoncée au par. 3(1) de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11.

2012 SCC 68 (CanLII)

[90] While the CRTC concluded that the new regime was necessary to ensure the viability of local stations, it acknowledged concern in the 2010 Policy itself that the *Copyright Act*, R.S.C. 1985, c. C-42, might create a "potential impediment" to its jurisdiction to implement the regime (para. 165). Under ss. 18.3 and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, it therefore brought the following reference question to the Federal Court of Appeal:

> Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

[91] We agree with the majority of the Federal Court of Appeal that this question should be answered in the affirmative, and would therefore dismiss the appeal (2011 FCA 64, 413 N.R. 312). In our view, the new regime is merely an extension of the current regime, which places several conditions — including financial ones — on BDUs for the licence to retransmit local stations' signals. We also conclude that nothing in the *Copyright Act* creates a barrier to the CRTC's authority to implement the new regime.

Analysis

[92] The narrow reference question requires us to determine whether the CRTC has jurisdiction under the *Broadcasting Act* to implement the new regime. Read on its own, the *Broadcasting Act* appears to grant this jurisdiction, which raises the question of whether something in the *Copyright Act* demonstrates Parliament's intent to derogate from or attenuate this jurisdiction in order to satisfy another public interest. In other words, we must determine whether there would be an unavoidable conflict if the *Broadcasting Act* were read to confer on the CRTC the jurisdiction to implement the

[90] Bien qu'il ait conclu à la nécessité du nouveau régime pour assurer la viabilité des stations locales, le CRTC a néanmoins reconnu, dans sa Politique de 2010 même, que la *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42, risquait de créer un « obstacle » susceptible d'influer sur sa compétence relativement à la mise en œuvre du régime (par. 165). Par conséquent, il a renvoyé la question suivante devant la Cour d'appel fédérale, en vertu de l'art. 18.3 et du par. 28(2) de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7 :

> Le Conseil a-t-il la compétence, en vertu du mandat que lui confère la *Loi sur la radiodiffusion*, pour établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales?

[91] À l'instar des juges majoritaires de la Cour d'appel fédérale, nous estimons que cette question appelle une réponse affirmative et, en conséquence, nous sommes d'avis de rejeter l'appel (2011 CAF 64, 413 N.R. 312). Selon nous, le nouveau régime n'est simplement que le prolongement du régime actuel, lequel impose plusieurs conditions — y compris de nature financière — aux EDR en vue de l'obtention d'une licence de retransmission des signaux des stations locales. Nous concluons également que rien dans la *Loi sur le droit d'auteur* ne fait obstacle au pouvoir du CRTC de mettre en œuvre le nouveau régime.

Analyse

[92] La question précise qui nous est soumise dans le renvoi nous invite à décider si le CRTC a compétence, en vertu de la *Loi sur la radiodiffusion*, pour mettre en œuvre le nouveau régime. Considérée isolément, la loi en question semble conférer cette compétence, ce qui amène à se demander s'il n'y a pas, dans la *Loi sur le droit d'auteur*, quelque disposition révélant l'intention du législateur d'écarter ce pouvoir ou d'en atténuer la portée pour répondre à d'autres considérations d'intérêt public. Autrement dit, il nous faut décider si le fait de considérer que la *Loi sur la radiodiffusion* confère au CRTC la

2012 SCC 68 (CanLII)

regime. If so, this would suggest a less expansive reading of the CRTC's jurisdiction. An unavoidable conflict only occurs when two statutes directly contradict one another, in a way that applying one excludes the application of the other, or where their concurrent application could lead to unreasonable or absurd results: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47. Generally, the Court will favour an interpretation that avoids such a conflict: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. However, in our view, there is no conflict between the *Broadcasting Act* and the *Copyright Act* that would prevent reading the former as conferring on the CRTC the jurisdiction to implement the new regime.

[93] Analytically, the first question is whether the CRTC has jurisdiction to implement the proposed regime under the *Broadcasting Act*. The CRTC is granted a broad, flexible mandate to implement measures that further the broadcasting policy of Canada. Section 3(1) of the *Broadcasting Act* sets out the basic operative broadcasting policies. They primarily address the need to support local content in television and other programs in order to enrich Canada's cultural, political, social and economic environments. The provisions that confer powers on the CRTC — what Rothstein J. refers to as "jurisdiction-conferring" provisions — explicitly incorporate these policy objectives. Under s. 5(1) of the Act, the CRTC "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)". The CRTC possesses the jurisdiction to issue licences to participants in the Canadian broadcasting system. It can impose any conditions on these licences that it "deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)": s. 9(1)(*b*)(i); *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; see also *Canadian Radio-Television and Telecommunications Commission v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530, at p. 545. The CRTC may also make regulations

compétence pour mettre en œuvre le régime entraînerait un conflit de lois inévitable. Si c'est le cas, cela tendrait à suggérer une interprétation moins large des pouvoirs de cet organisme. Il y a conflit inévitable uniquement lorsque deux lois sont directement contradictoires et que l'application de l'une exclut l'application de l'autre, ou encore lorsque leur application concurrente donnerait lieu à un résultat déraisonnable ou absurde : *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 47. En règle générale, la Cour préconise une interprétation qui permet d'éviter ce genre de conflit : *R. c. Ulybel Enterprises Ltd.*, 2001 CSC 56, [2001] 2 R.C.S. 867, par. 30. À notre avis toutefois, il n'existe entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d'auteur* aucun conflit qui empêche de considérer que la première confère au CRTC la compétence pour mettre le nouveau régime en œuvre.

[93] Sur le plan de l'analyse, la première question consiste à se demander si le CRTC a compétence, en vertu de la *Loi sur la radiodiffusion*, pour mettre en œuvre le régime proposé. Cet organisme jouit d'un mandat large et souple, qui lui permet de prendre des mesures pour mettre en œuvre la politique canadienne de radiodiffusion. Le paragraphe 3(1) de cette loi énonce les principes directeurs fondamentaux en matière de radiodiffusion, lesquels s'attachent d'abord et avant tout au besoin de soutenir une programmation locale, télévisuelle ou autre, en vue d'enrichir la structure culturelle, politique, sociale et économique du Canada. Les dispositions qui confèrent des pouvoirs au CRTC — que le juge Rothstein appelle dispositions « attributives de compétence » — incorporent explicitement ces objectifs de politique. En effet, aux termes du par. 5(1) de la Loi, le CRTC « réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion ». Le CRTC a compétence pour attribuer des licences aux participants du système canadien de radiodiffusion. Il peut assortir ces licences des conditions « qu'il estime indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion » : al. 9(1)*b*); *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2; voir également *Conseil de la radiodiffusion et des télécommunications*

2012 SCC 68 (CanLII)

under s. 10(1)(*k*) of the Act "respecting such other matters as it deems necessary for the furtherance of its objects". Section 3(2) of the Act states that the Canadian broadcasting system is a single system, and that the objectives in s. 3(1) can best be achieved by regulation and supervision through "a single independent public authority": the CRTC.

[94] As "broadcasting undertaking[s]" under s. 2(1) of the Act, BDUs are part of the single broadcasting system that the CRTC must regulate and supervise pursuant to s. 5(1). BDUs do not have a freestanding right to retransmit local stations' programs: BDUs derive that right *only* from licences granted pursuant to s. 9 of the *Broadcasting Act*, subject to any conditions imposed under s. 9(1)(*b*)(i). The current conditions of the BDUs' licences to retransmit local stations' signals require them to provide the benefits noted earlier, which include payments to a fund for the local stations. The proposed regime would involve an extension or alteration of the conditions on BDUs' licences, requiring them to negotiate compensation directly with the local stations.

[95] The breadth of the CRTC's discretion to determine what measures are necessary to further Canada's broadcasting policy was acknowledged by this Court in *CKOY*. The issue was whether the CRTC had jurisdiction under the *Broadcasting Act* to enact a regulation which prohibited stations or networks from broadcasting telephone interviews without the participant's consent. Spence J., writing for the majority, observed that "Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created" (at p. 12, quoting with approval the Court of Appeal: (1976), 13 O.R. (2d) 156, at p. 162). He set out the test for

canadiennes c. CTV Television Network Ltd., [1982] 1 R.C.S. 530, p. 545. Le CRTC peut également, en vertu de l'al. 10(1)*k*) de la Loi, « prendre toute autre mesure qu'il estime nécessaire à l'exécution de sa mission ». Suivant le par. 3(2) de la même loi, le système canadien de radiodiffusion constitue un système unique, et la meilleure façon d'atteindre les objectifs énoncés au par. 3(1) consiste à en confier la réglementation et la surveillance à « un seul organisme public autonome » : le CRTC.

[94] En tant qu'« entreprise[s] de radiodiffusion » au sens du par. 2(1) de la Loi, les EDR font partie de ce système unique que le CRTC doit surveiller et réglementer en vertu du par. 5(1). Les EDR ne disposent pas d'un droit autonome de retransmission des émissions des stations locales : elles tiennent ce droit *uniquement* de la licence qui leur est attribuée conformément à l'art. 9 de la *Loi sur la radiodiffusion*, sous réserve des conditions dont cette licence est susceptible d'être assortie suivant l'al. 9(1)*b*). À l'heure actuelle, les licences autorisant les EDR à retransmettre les signaux des stations locales les obligent à accorder les avantages énumérés précédemment, notamment à contribuer à un fonds destiné à ces stations. Le régime proposé aurait pour effet d'ajouter aux conditions assortissant les licences des EDR, ou de les modifier, en contraignant ces dernières à négocier directement avec les stations locales le versement d'une compensation.

[95] L'étendue du pouvoir discrétionnaire dont dispose le CRTC pour déterminer les mesures nécessaires à la mise en œuvre de la politique canadienne de radiodiffusion a été reconnue par notre Cour dans l'arrêt *CKOY*. Dans cette affaire, il s'agissait de décider si le CRTC avait, en vertu de la *Loi sur la radiodiffusion*, compétence pour prendre un règlement interdisant à une station ou à un réseau de diffuser une conversation téléphonique sans le consentement du participant. S'exprimant au nom des juges majoritaires, le juge Spence a déclaré que « le Parlement a certainement voulu donner au Conseil une grande latitude dans l'exercice de son pouvoir réglementaire pour la mise en œuvre de la politique et des objets pour lesquels

2012 SCC 68 (CanLII)

determining the validity of the CRTC's regulations as follows:

> . . . the validity of any regulation enacted in reliance upon [the predecessor section to s. 10] must be tested by determining whether the regulation *deals with a class of subject referred to in s. 3* of the statute and . . . in doing so the Court looks at the regulation objectively. [Emphasis added; p. 11.]

[96] Spence J. concluded that because the particular regulation had a basis in several of the policies enumerated in s. 3 of the Act, including the need to provide a reasonably balanced opportunity for the expression of differing views, and to provide programming of a high standard, the regulation was authorized by the *Broadcasting Act*: pp. 12-14.

[97] In accordance with this approach, the proposed regime is within the CRTC's regulatory jurisdiction under the *Broadcasting Act*, since it is demonstrably linked to several of the policies in s. 3. In its 2010 Policy, the CRTC determined that the new regime was necessary to ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. In particular, the CRTC concluded that the regime was necessary to fulfill the policies stated in ss. 3(1)(*e*) and 3(1)(*f*):

> (*e*) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
>
> (*f*) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming . . . .

[98] Because the proposed regime was intended to save the financially troubled local stations, it is also linked to the policy set out in s. 3(1)(*s*):

il a été créé » (p. 12, citant en les approuvant les propos de la Cour d'appel : (1976), 13 O.R. (2d) 156, p. 162). Le juge Spence a énoncé en ces termes le critère permettant de statuer sur la validité d'un règlement pris par le CRTC :

> . . . pour déterminer la validité de règlements établis en vertu [de la disposition qu'a remplacée l'art. 10], il faut décider s'ils portent sur *une catégorie de sujets mentionnée à l'art. 3* de la Loi, et [. . .], ce faisant, le tribunal examine les règlements d'un point de vue objectif. [Italiques ajoutés; p. 11.]

[96] Le juge Spence a conclu que, comme le règlement en question reposait sur plusieurs des principes énoncés à l'art. 3 de la Loi, notamment la nécessité de fournir la possibilité raisonnable et équilibrée d'exprimer des vues différentes et d'offrir une programmation de haute qualité, la prise de ce règlement était autorisée par la *Loi sur la radiodiffusion* : p. 12-14.

[97] Suivant ce même raisonnement, le régime proposé en l'espèce respecte la compétence que la *Loi sur la radiodiffusion* reconnaît au CRTC en matière de réglementation, étant donné qu'il se rattache manifestement à plusieurs des principes établis à l'art. 3. Dans sa Politique de 2010, le CRTC a jugé que le nouveau régime est nécessaire pour assurer la réalisation des objectifs de la politique de radiodiffusion énoncés au par. 3(1) de la *Loi sur la radiodiffusion*, tout particulièrement ceux énumérés aux al. 3(1)*e*) et *f*), qui sont reproduits ci-dessous :

> *e*) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne;
>
> *f*) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation . . .;

[98] Comme le régime proposé a été conçu pour sauver les stations locales en difficultés financières, il se rattache également au principe énoncé à l'al. 3(1)*s*) :

2012 SCC 68 (CanLII)

(*s*) private networks and programming undertakings should, *to an extent consistent with the financial and other resources available to them*,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public. . . .

s) les réseaux et les entreprises de programmation privés devraient, *dans la mesure où leurs ressources financières et autres le leur permettent*, contribuer de façon notable à la création et à la présentation d'une programmation canadienne tout en demeurant réceptifs à l'évolution de la demande du public;

[99] Modern statutory interpretation looks to the objectives of the statute to construe the meaning of the words and the mandate. This had led to a long and accepted line of jurisprudence which has consistently interpreted the CRTC's jurisdiction to regulate and supervise Canadian broadcasting broadly. Reference has been made to the "very broad words" of the jurisdiction-conferring provisions in the *Broadcasting Act*, as well as the "embracive objects committed to the Commission under [the predecessor to s. 5(1)], objects which extend to the supervision of 'all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act'": *CKOY* at pp. 13-14, quoting Laskin C.J. in *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.

[99] Suivant les règles modernes d'interprétation législative, il faut tenir compte des objectifs de la loi pour déterminer le sens des mots et le mandat de l'organisme concerné. L'application de cette méthode a donné lieu à une jurisprudence abondante et reconnue, qui a invariablement interprété de façon large la compétence du CRTC en matière de réglementation et de surveillance de la radiodiffusion au Canada. Les tribunaux ont fait état dans ces décisions du libellé « très général » des dispositions attributives de compétence de la *Loi sur la radiodiffusion*, et de la « grande portée des matières confiées au Conseil par [la disposition qu'a remplacée le par. 5(1)], qui comprennent la surveillance de "tous les aspects du système de la radiodiffusion canadienne en vue de mettre en œuvre la politique de radiodiffusion énoncée dans l'art. 3 de la présente loi" » : *CKOY*, p. 13-14, citant les propos du juge en chef Laskin dans *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141.

[100] The Federal Court of Appeal has similarly and repeatedly indicated that the CRTC "has a very broad mandate under the *Broadcasting Act*", and "has been endowed with powers couched in the broadest of terms for 'the supervision and regulation of the Canadian broadcasting system'. . . with a view to implementing the broadcasting policy enunciated in section 3 of the Act": *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3 ("*T.W.U.*"), at para. 40; *Assn. for Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission*, [1981] 1 F.C. 524 (C.A.), at p. 530, leave to appeal refused, [1981] 1 S.C.R. v. Because of the CRTC's specialization and expertise, "Parliament has granted extensive powers for the supervision and regulation of the

[100] De même, la Cour d'appel fédérale a indiqué à maintes reprises que le CRTC « est investi d'une très vaste mission en vertu de la *Loi sur la radiodiffusion* » et « de pouvoirs définis en termes très larges pour assurer "la réglementation et la surveillance du système de la radiodiffusion canadienne" [. . .] en vue de mettre en œuvre la politique de radiodiffusion énoncée dans l'article 3 de la Loi » : *Syndicat des travailleurs en télécommunications c. Conseil de la radiodiffusion et des télécommunications canadiennes*, 2003 CAF 381, [2004] 2 R.C.F. 3 (« *S.T.T.* »), par. 40; *Assn. for Public Broadcasting in British Columbia c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1981] 1 C.F. 524 (C.A.), p. 530, autorisation d'appel refusée, [1981] 1 R.C.S. v. À cause de l'expertise spécialisée du CRTC, « le Parlement [lui] a confié [. . .] de vastes pouvoirs

2012 SCC 68 (CanLII)

Canadian broadcasting system to allow [the CRTC] to implement the broadcasting policy set out in s. 3 of the *Broadcasting Act* . . . . It is settled that the CRTC has broad discretion in exercising its powers to issue or revoke licences": *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266 (F.C.A.), at para. 2.

[101] The CRTC's broad jurisdiction derives from the fact that each of ss. 5(1), 9(1)(*b*)(i) and 10(1)(*k*) confer generally-worded powers, along with a discretion to use them as the CRTC deems appropriate to implement the objects set out in s. 3(1). Courts have consistently determined the validity of the CRTC's exercises of power under any of these provisions by applying the *CKOY* test: was the power used in connection with a policy objective in s. 3(1)? In *CKOY*, Spence J. dealt with the use of the regulation-making power, and noted that the section's "very broad words . . . authorize one enactment of regulations to further any policy outlined in the whole of s. 3" (p. 13). In *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174, Le Dain J.A., when he was in the Federal Court of Appeal, held that the same principle applies to the power to attach conditions to licences:

> What was said concerning the validity of a regulation under [the predecessor to s. 10(1)] applies equally in my opinion to the validity of a condition attached to a licence under [the predecessor to s. 9(1)]. That section begins, like [the predecessor to s. 10(1)], with the words "In furtherance of the objects of the Commission", and *empowers the Executive Committee to subject a broadcasting licence to such conditions related to the circumstances of the licensee as it "deems appropriate for the implementation of the broadcasting policy enunciated in section 3", an authority that is, if anything, even broader than that which is conferred by [the predecessor to s. 10(1)(k)].* [Emphasis added; p. 192.]

pour assurer la réglementation et la surveillance du système de radiodiffusion canadienne de façon à lui permettre de mettre en œuvre la politique de radiodiffusion énoncée dans l'article 3 de la *Loi sur la radiodiffusion* [. . .] Dans l'exercice de ses pouvoirs d'attribuer ou de révoquer une licence, il est établi qu'il jouit d'une grande discrétion » : *Société Radio-Canada c. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266 (C.A.F.), par. 2.

[101] La vaste compétence dont jouit le CRTC découle des pouvoirs que lui confèrent en termes généraux le par. 5(1) et les al. 9(1)*b*) et 10(1)*k*), ainsi que du pouvoir discrétionnaire dont il est investi d'employer ces pouvoirs de la manière qu'il estime indiquée pour la mise en œuvre des objectifs énoncés au par. 3(1). Les tribunaux ont systématiquement statué sur la validité de l'exercice par le CRTC des pouvoirs que lui accordent ces diverses dispositions en appliquant le critère établi dans l'arrêt *CKOY* : Est-il possible de rattacher l'exercice du pouvoir à l'un des objectifs énumérés au par. 3(1)? Dans cette affaire, le juge Spence s'est penché sur l'exercice du pouvoir de prendre des règlements et il a indiqué que le libellé « très général » de la disposition « autorise la promulgation de règlements visant à mettre en œuvre toute politique énoncée à l'art. 3 dans son ensemble » (p. 13). Dans l'arrêt *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174, le juge Le Dain, alors juge de la Cour d'appel fédérale, a conclu que le même principe s'applique au pouvoir d'assortir les licences de conditions :

> Ce qu'on a dit au sujet de la validité d'un règlement pris en vertu [de la disposition qu'a remplacée le par. 10(1)] s'applique également, à mon sens, à la validité d'une condition à laquelle est soumise une licence attribuée sous le régime [de la disposition qu'a remplacée le par. 9(1)]. Comme [la disposition qu'a remplacée le par. 10(1)], cet article commence par l'expression « Dans la poursuite des objets du Conseil », et *autorise le comité de direction à soumettre une licence de radiodiffusion aux conditions propres à la situation du titulaire que le comité « estime appropriées pour la mise en œuvre de la politique de radiodiffusion énoncée dans l'article 3 », pouvoir qui est même plus large que celui conféré par [la disposition qu'a remplacée l'al. 10(1)k].* [Italiques ajoutés; p. 192.]

2012 SCC 68 (CanLII)

In *T.W.U.*, Sexton J.A. reiterated that the *CKOY* test applies to the exercise of both the regulation-making and licence-condition powers. He held that

> the CRTC has broad power to impose conditions of license. *The only limitation on the conditions that the CRTC may impose is that it must deem the conditions "appropriate for the implementation of the broadcasting policy set out in subsection 3(1)."* [Emphasis added; para. 48.]

[102] Moreover, courts have thus far recognized that the mandate granted to the CRTC under the *Broadcasting Act* is both economic and cultural (*T.W.U.*, at para. 28), not "primarily cultural", as asserted by Justice Rothstein (at para. 32), and have upheld regulations and licensing conditions imposed by the CRTC in furtherance of economic objectives listed in the *Broadcasting Act*, but absent any specific grant of power.

[103] In *Canadian Broadcasting League*, as in the present case, at issue was the CRTC's power to direct the economic relationship between participants in the broadcasting system and, specifically, whether the CRTC could fix the installation fees and maximum monthly fees that a BDU could charge to its subscribers. Le Dain J.A. held that the CRTC could do so under *either* its licensing power or its regulation-making power, rejecting the argument that the CRTC lacked the power to regulate rates and fees because it was not expressly granted in the *Broadcasting Act*.

[104] The CRTC's jurisdiction to impose financial conditions on broadcast system participants was also upheld by the Federal Court of Appeal in *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada* (1996), 137 D.L.R. (4th) 561. The court held that the CRTC did not exceed its statutory mandate by requiring a pay-per-view licensee to share the revenues it earned

Dans *S.T.T.*, le juge Sexton de la Cour d'appel a rappelé que le critère établi dans *CKOY* s'applique à l'exercice tant du pouvoir de prendre des règlements que du pouvoir d'assortir les licences de certaines conditions. Il a tiré la conclusion suivante :

> . . . le CRTC dispose d'un pouvoir étendu d'imposer des conditions de licence. *La seule restriction faite aux conditions que le CRTC peut imposer réside dans le fait que celui-ci doit estimer les conditions « indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion . . . ».* [Italiques ajoutés; par. 48.]

[102] Qui plus est, les tribunaux ont reconnu jusqu'à présent au mandat confié au CRTC par la *Loi sur la radiodiffusion* un caractère à la fois économique et culturel (*S.T.T.*, par. 28), et non « principalement culture[l] », comme le prétend le juge Rothstein (par. 32), et ils ont confirmé la validité de règlements et de conditions établis par le CRTC en vue de favoriser la réalisation des objectifs économiques énumérés dans la *Loi sur la radiodiffusion*, malgré l'absence d'un pouvoir précis à cet égard.

[103] Tout comme dans la présente espèce, dans l'affaire *Ligue de la radiodiffusion canadienne* le litige portait sur le pouvoir du CRTC de régir les rapports économiques liant les participants du système de radiodiffusion et, particulièrement, sur la question de savoir si le CRTC était habilité à fixer les frais d'installation ainsi que les tarifs mensuels maximums qu'une EDR pouvait demander à ses abonnés. Le juge Le Dain de la Cour d'appel a conclu que le CRTC était habilité à le faire en vertu *soit* de son pouvoir d'attribuer des licences *soit* de son pouvoir de prendre des règlements, et il a rejeté l'argument selon lequel cet organisme n'avait pas compétence pour réglementer les tarifs et les frais du fait que ce pouvoir ne lui était pas conféré expressément dans la *Loi sur la radiodiffusion*.

[104] Le pouvoir du CRTC d'imposer des conditions financières aux participants du système de radiodiffusion a également été confirmé par la Cour d'appel fédérale dans l'affaire *Assoc. canadienne des distributeurs de films c. Associés de Viewer's Choice Canada*, [1996] A.C.F. n^{o} 894 (QL). La Cour d'appel a jugé que le CRTC n'avait pas outrepassé le mandat que lui confie la loi en obligeant

2012 SCC 68 (CanLII)

from the distribution of feature films in equal parts with the copyright holder and the licensed programming undertaking that assembled the pay-per-view content. According to the court:

> The reference to the film distribution industry as "an important element of the broadcasting system" *provides a clear link* to the Commission's objects in subsection 5(1) of the *Act* and the broadcasting policy in subsection 3(1). [Emphasis added; p. 565.]

A similar "clear link" exists in this case.

[105] And in *T.W.U.*, Sexton J.A. found that the CRTC could enact a regulation that essentially deregulated basic cable service rates in areas where there was sufficient competition to let market forces take over. He found that the CRTC had an obligation, based on the policy objectives in s. 3(1), to ensure that programming was provided at affordable rates, and could rely on market forces to fulfill that objective. Similarly, in this case, the CRTC seeks to implement a market-based negotiation scheme consistent with the policy objectives in s. 3(1).

[106] In each of these cases, the CRTC regulated an economic aspect of the Canadian broadcasting system by requiring revenue splitting, by setting rates for services, or by deregulating them. None of these forms of regulation was tied to a specific and express grant of power in the *Broadcasting Act*. In each case, the CRTC was found to have jurisdiction under either or both of its general powers to make regulations and impose conditions on licences.

[107] The conclusion that the proposed regime is within CRTC jurisdiction is consistent with this broad mandate, most recently upheld by this

le titulaire d'une licence de télévision à la carte à partager les revenus qu'il tirait de la distribution de longs métrages sur une base égale avec le titulaire du droit d'auteur et avec l'entreprise de programmation autorisée ayant assemblé la programmation offerte à la carte. Pour reprendre les propos du tribunal :

> Le renvoi à l'industrie de la distribution des films comme à « un élément important du système de la radiodiffusion » *établit un lien évident* avec la mission confiée au Conseil au paragraphe 5(1) de la *Loi* et la politique de radiodiffusion exposée au paragraphe 3(1). [Italiques ajoutés; par. 6.]

Nous sommes en présence d'un tel « lien évident » en l'espèce.

[105] De plus, dans *S.T.T.* le juge Sexton a conclu que le CRTC était habilité à prendre un règlement qui avait essentiellement pour effet de déréglementer les tarifs du service de câblodistribution de base dans les zones où la concurrence est suffisante pour laisser jouer les forces du marché. Selon le juge Sexton, le CRTC a, suivant les objectifs de politique énoncés au par. 3(1), l'obligation d'assurer la fourniture de la programmation à des tarifs abordables et il peut s'en remettre aux forces du marché pour atteindre cet objectif. De même, en l'espèce, le CRTC propose la mise en place d'un régime de libre négociation conforme aux objectifs prévus au par. 3(1).

[106] Dans chaque affaire mentionnée précédemment, le CRTC a réglementé un aspect économique du système canadien de radiodiffusion, tantôt en obligeant le partage des revenus, tantôt en fixant les tarifs des services ou en les déréglementant. Or, aucune de ces interventions du CRTC ne se rattachait à un pouvoir précis, expressément conféré par la *Loi sur la radiodiffusion*. Dans chaque instance, le CRTC s'est vu reconnaître la compétence nécessaire en vertu de son pouvoir général de prendre des règlements, de son pouvoir général d'assortir les licences de conditions, ou des deux.

[107] La conclusion selon laquelle le régime proposé relève de la compétence du CRTC est conforme à ce vaste mandat, lequel a été confirmé

2012 SCC 68 (CanLII)

Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. The issue was whether the CRTC could exercise the rate-setting authority it had under the *Telecommunications Act*, S.C. 1993, c. 38, to require local carriers to spend their deferral accounts by expanding broadband services and giving credits to consumers. This Court confirmed that the decision was entirely within the CRTC's mandate:

> . . . the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, *a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake*. . . .
>
> . . .
>
> . . . it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with *considerable scope in establishing and approving the use to be made of deferral accounts*. [Emphasis added; paras. 38 and 55.]

[108] This broad mandate to set rates in furtherance of Canada's telecommunications policy is analogous to the CRTC's broad mandate to set licensing conditions in furtherance of Canada's broadcasting policy as it has purported to do in the 2010 Policy. Both mandates involve "a polycentric exercise", necessitating a "considerable scope" of jurisdiction.

[109] Having determined that the *Broadcasting Act* would grant authority to the CRTC to implement the new regime, the question then is whether the regime creates an "unavoidable conflict" with

récemment par notre Cour dans l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764. Il s'agissait dans cette affaire de savoir si le CRTC pouvait exercer le pouvoir de tarification dont il dispose en vertu de la *Loi sur les télécommunications*, L.C. 1993, ch. 38, pour obliger les fournisseurs locaux à utiliser leur compte de report afin d'étendre le service à large bande et de verser un crédit aux consommateurs. La Cour a confirmé que la décision du CRTC relevait entièrement de son mandat :

> . . . les questions soulevées dans les présents pourvois ressortissent donc à l'essence même de l'expertise spécialisée du CRTC. Le fond du différend concerne en fait la méthode d'établissement des tarifs et l'affectation de certains fonds provenant de ces tarifs, *un exercice polycentrique que le législateur a confié au CRTC et pour lequel ce dernier possède une compétence particulière*. . .
>
> . . .
>
> . . . le vaste pouvoir discrétionnaire conféré au CRTC pour la détermination des tarifs justes et raisonnables exigés par l'art. 27, son pouvoir d'imposer à une entreprise, en vertu de l'art. 37, l'adoption de toute méthode comptable qu'il estime appropriée et l'obligation qui lui est faite par l'art. 47 de veiller à la réalisation des grands objectifs de la politique canadienne de télécommunication énoncés à l'art. 7 indiquent que la *Loi sur les télécommunications* lui donne une *latitude considérable pour établir les comptes de report et approuver l'utilisation qui en sera faite*. [Italiques ajoutés; par. 38 et 55.]

[108] Ce large mandat — à savoir l'établissement de tarifs pour favoriser la mise en œuvre de la politique canadienne de télécommunication — est analogue au large mandat qu'il s'est donné dans la Politique de 2010 — à savoir assortir les licences de certaines conditions pour favoriser la mise en œuvre de la politique canadienne de radiodiffusion. Ces deux mandats supposent un « exercice polycentrique », qui exige une compétence conférant « une latitude considérable ».

[109] Maintenant que nous avons jugé que la *Loi sur la radiodiffusion* accorde au CRTC le pouvoir de mettre sur pied le nouveau régime, il faut se demander si ce régime créerait avec la *Loi sur le*

2012 SCC 68 (CanLII)

the *Copyright Act* in a way that would invalidate this preliminary interpretive conclusion.

[110] The BDUs point to two unavoidable conflicts between the proposed regime and the provisions of the *Copyright Act*. First, they argue that the regime conflicts with s. 21(1)(*c*). This provision states that a "broadcaster" — which includes a local station — has the sole right "to authorize another broadcaster to retransmit [its signals] to the public". The definition of "broadcaster" in s. 2 of the *Copyright Act*, however, *excludes* BDUs, as entities whose "primary activity in relation to communication signals is their retransmission". Since BDUs are excluded from the definition, they argue that they need not be "authorize[d]" under s. 21(1)(*c*) at all. This provision therefore conflicts with the proposed regime, which not only gives local stations the right to authorize BDUs to retransmit their signals, but also gives them the right to block BDUs from retransmitting those signals altogether.

[111] In our view, there is no unavoidable conflict with s. 21(1)(*c*). There is nothing in either the definition of "broadcaster" or in s. 21(1)(*c*) of the *Copyright Act* that purports to immunize BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime.

[112] Section 21(1)(*c*) deals only with the extent to which local stations, as "broadcasters", have a copyright in their communication signals. It does not affect the licensing requirements under the *Broadcasting Act*. While BDUs do not need permission to retransmit signals under the *Copyright Act*, that does not mean they are free to retransmit

droit d'auteur un « conflit inévitable » ayant pour effet d'invalider notre conclusion interprétative préliminaire.

[110] Les EDR font état de deux conflits inévitables entre le régime proposé et les dispositions de la *Loi sur le droit d'auteur*. Premièrement, elles prétendent que le régime entre en conflit avec l'al. 21(1)*c*). Suivant cette disposition, un « radiodiffuseur » — terme qui s'entend notamment d'une station locale — a le droit exclusif « d'autoriser un autre radiodiffuseur à [. . .] retransmettre [ses signaux] au public ». Toutefois, les EDR sont expressément *exclues* de la définition de « radiodiffuseur » à l'art. 2 de la *Loi sur le droit d'auteur* en tant qu'entités « dont l'activité principale, liée au signal de communication, est la retransmission de celui-ci ». Comme elles sont exclues du champ d'application de la définition, elles font valoir qu'elles n'ont pas besoin d'être « autoris[ées] » par quiconque en vertu de l'al. 21(1)*c*). Par conséquent, cette disposition entrerait en conflit avec le régime proposé, lequel permet aux stations locales non seulement d'autoriser les EDR à retransmettre leurs signaux, mais également d'empêcher complètement la retransmission de ces signaux.

[111] À notre avis, il n'existe pas de conflit inévitable avec l'al. 21(1)*c*). Rien dans cette disposition de la *Loi sur le droit d'auteur* ou dans la définition de « radiodiffuseur » n'a pour effet de soustraire les EDR aux exigences établies par le CRTC en matière d'attribution de licences dans le cadre de son mandat relatif à la radiodiffusion. Les EDR tiennent leur droit de retransmettre des signaux uniquement des licences qui leur sont attribuées en vertu de l'art. 9 de la *Loi sur la radiodiffusion*, et elles doivent satisfaire aux conditions dont le CRTC a assorti leur licence, y compris celles prévues dans le régime proposé.

[112] L'alinéa 21(1)*c*) traite uniquement de l'étendue du droit d'auteur dont jouit une station locale, à titre de « radiodiffuseur », à l'égard de ses signaux de communication. Il n'a aucune incidence sur les exigences en matière d'attribution de licence établies en vertu de la *Loi sur la radiodiffusion*. Bien que les EDR soient libres de retransmettre des signaux sans

2012 SCC 68 (CanLII)

signals without permission under the *Broadcasting Act*.

[113] The second conflict alleged by the BDUs is with s. 31(2)(*d*) of the *Copyright Act*. The full provision states:

> **31.** . . .
>
> (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if
>
> (*a*) the communication is a retransmission of a local or distant signal;
>
> (*b*) the retransmission is lawful under the *Broadcasting Act*;
>
> (*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
>
> (*d*) in the case of the retransmission of a *distant signal, the retransmitter has paid any royalties*, and complied with any terms and conditions, fixed under this Act; and
>
> (*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).

[114] This section means that it is not an infringement of copyright if a retransmitter, like a BDU, is retransmitting local or distant signals, is retransmitting lawfully under the *Broadcasting Act*, and, if it is retransmitting a distant signal, has paid copyright royalties. The BDUs' main argument under this provision is that even though s. 31(2)(*a*) refers to *both* "local" and "distant" signals, s. 31(2)(*d*) limits royalty payments to distant signals only. This reference to *distant* signals in s. 31(2)(*d*), they say, conflicts with the proposed regime, which effectively creates royalties for local signals, which are generally the type of signals emitted by local stations.

permission en vertu de la *Loi sur le droit d'auteur*, cela ne signifie pas qu'elles sont également libres de le faire en vertu de la *Loi sur la radiodiffusion*.

[113] Le deuxième conflit invoqué par les EDR concerne l'al. 31(2)*d*) de la *Loi sur le droit d'auteur* :

> **31.** . . .
>
> (2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une œuvre au public par télécommunication si, à la fois :
>
> *a*) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;
>
> *b*) la retransmission est licite en vertu de la *Loi sur la radiodiffusion*;
>
> *c*) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;
>
> *d*) dans le cas de la retransmission d'un *signal éloigné, le retransmetteur a acquitté les redevances* et respecté les modalités fixées sous le régime de la présente loi;
>
> *e*) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3)*b*).

[114] Il ressort de cette disposition qu'il n'y a pas violation du droit d'auteur si un retransmetteur, par exemple une EDR, retransmet des signaux locaux ou éloignés, si la retransmission est licite en vertu de la *Loi sur la radiodiffusion* et, lorsqu'il s'agit d'un signal éloigné, si le retransmetteur a acquitté les redevances payables au titre du droit d'auteur. Le principal argument invoqué par les EDR sur le fondement de cette disposition consiste à dire que, même si l'al. 31(2)*a*) mentionne à la fois les signaux « locaux » et les signaux « éloignés », l'al. 31(2)*d*) limite à la retransmission des signaux éloignés uniquement l'obligation de payer des redevances. Selon les EDR, la mention des signaux éloignés dans cette dernière disposition entre en conflit avec le régime proposé, lequel exige le paiement de redevances pour la retransmission de signaux locaux, c'est-à-dire généralement le type de signaux qu'émettent les stations locales.

2012 SCC 68 (CanLII)

[115] This argument turns s. 31(2)(*d*) on its head. Even within the context of the *Copyright Act* alone, s. 31(2)(*d*) simply requires that BDUs pay a copyright royalty to copyright owners for retransmitting "distant signal[s]". Nothing in the plain meaning of this provision actually *prevents* a copyright royalty for retransmitting "local signal[s]". If Parliament had intended to prevent such royalties for local signals under any circumstances, it would have expressly said so.

[115] Leur argument fait dire à l'al. 31(2)*d*) quelque chose qu'il ne dit pas. Même interprété à la seule lumière de la *Loi sur le droit d'auteur*, cet alinéa requiert simplement que les EDR qui retransmettent des « signa[ux] éloigné[s] » versent des redevances aux titulaires des droits d'auteur sur ces signaux. Le sens de cette disposition est clair et rien dans celle-ci n'a pour effet d'*empêcher* concrètement que des redevances puissent être exigées, au titre du droit d'auteur, pour la retransmission de « signa[ux] loca[ux] ». Si le législateur avait voulu interdire de telles redevances en toute circonstance, il l'aurait dit expressément.

[116] But, despite the plain wording of s. 31(2)(*d*), the BDUs argue that it was Parliament's implicit intention to prevent royalties for the retransmission of local signals. They point to a number of reports, committee transcripts and submissions relating to the legislative history of the *Copyright Act*, which they claim demonstrate Parliament's consistent refusal to grant such royalties. With respect, these materials are of limited assistance. The fact that Parliament may have decided not to impose royalties on the retransmission of local signals for the benefit of copyright owners has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission licence under the *Broadcasting Act*. We therefore do not accept that s. 31(2)(*d*) of the *Copyright Act* creates an unavoidable conflict with the proposed regime.

[116] Toutefois, malgré le libellé clair de l'al. 31(2)*d*), les EDR font valoir que le législateur avait implicitement l'intention d'interdire les redevances pour la retransmission de signaux locaux. Elles invoquent à cet égard un certain nombre de rapports, transcriptions de délibérations de comités et mémoires relatifs à l'historique législatif de la *Loi sur le droit d'auteur* qui, selon elles, démontrent que le législateur a constamment refusé d'accorder de telles redevances. En toute déférence, ces documents n'ont qu'une utilité limitée. Le fait que le législateur ait pu décider de ne pas subordonner la retransmission de signaux locaux au versement de redevances aux titulaires du droit d'auteur sur ces signaux n'a aucun lien avec la question de savoir si les EDR peuvent être requises de verser une compensation aux stations locales pour une autre fin, à savoir pour satisfaire aux conditions assortissant leurs licences de retransmission en vertu de la *Loi sur la radiodiffusion*. Par conséquent, nous ne pouvons accepter l'argument selon lequel l'al. 31(2)*d*) de la *Loi sur le droit d'auteur* crée un conflit inévitable avec le régime proposé.

[117] The lack of a conflict between the proposed regime and s. 31(2)(*d*) is highlighted by s. 31(2)(*b*), which states that BDUs are only entitled to avoid copyright infringement for retransmitting signals where "the retransmission is lawful under the *Broadcasting Act*". We agree with the majority of the Federal Court of Appeal that s. 31(2)(*b*) demonstrates Parliament's clear intention that the conditions placed on BDUs under the *Broadcasting*

[117] L'absence de conflit ressort également de l'al. 31(2)*b*), qui précise que la retransmission de signaux ne viole pas le droit d'auteur tant que « la retransmission est licite en vertu de la *Loi sur la radiodiffusion* ». Nous souscrivons à la conclusion des juges majoritaires de la Cour d'appel fédérale selon laquelle l'al. 31(2)*b*) démontre l'intention claire du législateur de donner aux conditions imposées aux EDR en vertu de la *Loi sur la*

2012 SCC 68 (CanLII)

Act in furtherance of Canada's broadcasting policy are ranked ahead of the BDUs' statutory right to retransmit signals under s. 31(2) of the *Copyright Act*.

[118] The BDUs argue, however, that the language in s. 31(2)(*b*) is too broad to override the specific language in s. 31(2)(*d*) limiting royalties to those for "distant signals". They cite two cases to support their argument: *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140. Neither of these two cases deals with a conflict between statutes, and neither stands for the proposition that a single word in a provision — such as "distant" signal — can defeat an otherwise express and clear legislative intention. *Barrie Public Utilities* dealt only with whether the CRTC had jurisdiction to grant a right of access to a utility's power poles under s. 43(5) of the *Telecommunications Act*, and *ATCO* dealt with whether the Alberta Energy and Utilities Board had jurisdiction to order that proceeds from an asset sale be allocated to a utility's customers under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17.

[119] At the end of the day, the BDUs' argument is that the proposed regime somehow creates a new copyright. They argue that the exclusive right to authorize or block retransmission by BDUs, and the requirement that BDUs compensate local stations for retransmitting their signals, creates a copyright for local stations in the retransmission of their signals. According to the BDUs, this violates s. 89 of the *Copyright Act*, which states that "[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament". It also violates this Court's statement in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, that "copyright is a creature of statute and the rights

radiodiffusion pour la mise en œuvre de la politique canadienne de radiodiffusion priorité sur le droit légal de ces entreprises de retransmettre des signaux conformément au par. 31(2) de la *Loi sur le droit d'auteur.*

[118] Cependant, les EDR affirment que le libellé de l'al. 31(2)*b*) est trop général pour écarter le libellé explicite de l'al. 31(2)*d*), lequel limite le paiement de redevances aux seuls « signaux éloignés ». Elles invoquent deux arrêts au soutien de leur argument : *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476, et *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140. Or, aucun de ces arrêts ne porte sur un conflit de lois et ne permet d'affirmer que la seule présence d'un mot donné dans une disposition — par exemple « éloigné » — puisse écarter l'intention par ailleurs claire et expresse du législateur. Dans *Barrie Public Utilities*, il s'agissait uniquement de décider si le par. 43(5) de la *Loi sur les télécommunications* habilitait le CRTC à donner accès aux poteaux électriques d'une entreprise de services publics. L'affaire *ATCO* portait sur la question de savoir si l'office de l'énergie et des services publics de l'Alberta avait compétence pour attribuer le produit de la vente d'un bien aux clients d'un service public en vertu du par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17.

[119] En définitive, l'argument des EDR consiste à dire que le régime proposé crée en quelque sorte un nouveau type de droit d'auteur. Elles prétendent que le droit exclusif des stations locales d'autoriser ou d'interdire la retransmission de leurs signaux par les EDR, conjugué à l'obligation imposée à ces dernières de compenser les premières pour la retransmission de ces signaux, a pour effet de créer en faveur des stations locales un droit d'auteur sur la retransmission de leurs signaux. Selon les EDR, cette situation viole l'art. 89 de la *Loi sur le droit d'auteur*, lequel précise que « [n]ul ne peut revendiquer un droit d'auteur autrement qu'en application de la présente loi ou de toute autre loi fédérale ». Elle serait également incompatible avec la

2012 SCC 68 (CanLII)

and remedies provided by the *Copyright Act* are exhaustive" (para. 9).

[120] We do not see the proposed regime as giving local stations a copyright in the retransmission of their television signals. Section 2 of the *Copyright Act* defines "copyright" in the case of a communication signal as "the rights described in . . . section 21". The exhaustive definition of copyright in s. 21 leaves out the right to authorize retransmission by BDUs. We do not see the proposed regime as *amending* this definition, something it cannot in any event do, given s. 89, but as instituting a different type of regulation with respect to an aspect of broadcasting that is simply not included in the exhaustive statutory scheme of copyright.

[121] There are significant functional differences, as well. The copyright owner does not need to forego any other entitlements to claim a copyright. Instead, copyright automatically attaches to a communication signal, lasting for 50 years after the end of the calendar year in which it was broadcast: *Copyright Act*, s. 23(1)(*c*). The proposed regime, in contrast, gives local stations a limited power, and only *vis-à-vis* BDUs. The local stations have to forego their existing entitlements under the current regime in order to participate in the new regime. Moreover, the local stations' power to prevent BDUs from retransmitting their signals is conditional on a complete breakdown of negotiations and a resulting lack of agreement with the BDUs. There are additional conditions under the proposed regime that are not placed on copyright owners: for example, local stations must spend approximately 30 percent of any negotiated compensation they receive on Canadian programming, with 5 percent dedicated to "programs of national interest". Finally, unlike copyright, the new regime is renewable every three years and subject to ongoing regulatory oversight by the CRTC: 2010 Policy,

conclusion exprimée par la Cour dans l'arrêt *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, selon laquelle « le droit d'auteur tire son origine de la loi, et les droits et recours que prévoit la *Loi sur le droit d'auteur* sont exhaustifs » (par. 9).

[120] Nous ne considérons pas que le régime proposé confère aux stations locales un droit d'auteur à l'égard de la retransmission de leurs signaux de télévision. Aux termes de l'art. 2 de la *Loi sur le droit d'auteur*, le terme « droit d'auteur » s'entend, dans le cas d'un signal de communication, « du droit visé [. . .] à l'article 21 ». La définition exhaustive de ce terme à l'art. 21 ne prévoit pas le droit d'autoriser la retransmission de signaux par une EDR. Selon nous, le régime proposé n'a pas pour effet de *modifier* cette définition — effet qu'il ne peut avoir de toute façon, compte tenu de l'art. 89 —, mais d'instaurer un autre type de réglementation à l'égard d'un aspect de la radiodiffusion que le régime législatif exhaustif en matière de droit d'auteur n'encadre tout simplement pas.

[121] Il existe en outre des différences fonctionnelles importantes. Le titulaire du droit d'auteur n'est pas tenu de renoncer à un autre droit pour revendiquer le droit d'auteur. En effet, ce droit s'applique automatiquement au signal de communication pendant 50 ans suivant la fin de l'année civile au cours de laquelle il a été émis : *Loi sur le droit d'auteur*, al. 23(1)*c*). À l'inverse, le régime proposé confère un pouvoir limité aux stations locales, et ce, uniquement à l'égard des EDR. Les stations locales doivent renoncer aux droits offerts par le régime actuel pour participer au nouveau régime. Qui plus est, l'exercice par une station locale du pouvoir d'interdire la retransmission de ses signaux par une EDR est subordonné à l'échec total des négociations avec cette dernière et à l'absence d'entente. Le régime proposé impose d'autres conditions qui ne sont pas exigées des titulaires du droit d'auteur : par exemple, les stations locales doivent dépenser, au titre des émissions canadiennes, environ 30 p. 100 des revenus tirés des ententes négociées, dont 5 p. 100 au titre des « émissions d'intérêt national ». Enfin, contrairement au droit d'auteur, le régime proposé est renouvelable tous

2012 SCC 68 (CanLII)

paras. 51, 74-75 and 155-164. The proposed regime, therefore, is far from "functionally equivalent", as stated by the dissent in the Federal Court of Appeal (at para. 84), to giving local stations a full copyright in the retransmission of their signals.

[122] The regime aims to further the objectives found in s. 3(1)(*e*), (*f*) and (*s*), which call for each element of the Canadian broadcasting system to contribute to the creation and presentation of Canadian programming; call for broadcasting undertakings to make maximum use of Canadian creative and other resources in the creation and presentation of programming; and call for private networks, to the extent consistent with the resources available to them, to contribute to the creation and presentation of Canadian programming. The CRTC has every right to turn to market-based means of fulfilling these specific objectives of Canadian broadcasting policy. These objectives differ from the more general copyright objectives of "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator": *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30. Indeed, as discussed above, BDUs are already required to make financial contributions under the current regime, and they are already required to negotiate compensation with local stations for the retransmission of distant signals.

[123] In our view, therefore, there is no unavoidable conflict with the *Copyright Act* that would eliminate the CRTC's jurisdiction to implement the proposed regime.

[124] The BDUs also make policy arguments, submitting that giving local stations the ability to block their signals, as well as the extra compensation to local stations, will increase costs and

les trois ans et fait l'objet de la surveillance continue du CRTC : Politique de 2010, par. 51, 74-75 et 155-164. Par conséquent, les deux régimes sont loin d'être « fonctionnellement équivalents », comme le prétend le juge dissident de la Cour d'appel fédérale (par. 84), et le régime proposé n'a pas pour effet de reconnaître aux stations locales le plein droit d'auteur à l'égard de la retransmission de leurs signaux.

[122] Le régime vise à réaliser les objectifs énoncés aux al. 3(1)*e*), *f*) et *s*), dispositions qui, respectivement, invitent tous les éléments du système de radiodiffusion canadien à contribuer à la création et à la présentation d'une programmation canadienne, invitent les entreprises de radiodiffusion à faire appel au maximum aux ressources canadiennes, créatrices et autres, pour la création et la présentation de leur programmation et, enfin, invitent les réseaux privés à contribuer, dans la mesure où leurs ressources financières le leur permettent, à la création et à la présentation d'une programmation canadienne. Le CRTC a entièrement le droit de recourir à des mesures basées sur les règles du marché pour réaliser les objectifs précisés dans la politique canadienne de radiodiffusion. Ces objectifs diffèrent de ceux, plus généraux, que vise le droit d'auteur, soit « la promotion, dans l'intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et [. . .] l'obtention d'une juste récompense pour le créateur » : *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, [2002] 2 R.C.S. 336, par. 30. D'ailleurs, comme nous l'avons expliqué précédemment, les EDR sont déjà tenues de verser une contribution financière en vertu du régime actuel et de négocier avec les stations locales les sommes payables à celles-ci pour la retransmission de leurs signaux éloignés.

[123] Par conséquent, il n'existe à notre avis aucun conflit inévitable avec la *Loi sur le droit d'auteur* qui priverait le CRTC du pouvoir de mettre en œuvre le régime proposé.

[124] Les EDR invoquent également des considérations d'intérêt général. Elles font valoir que la faculté accordée aux stations locales de bloquer leurs signaux ainsi que la compensation supplémentaire

2012 SCC 68 (CanLII)

signal interruptions, ultimately hurting end consumers. We do not find this argument persuasive. First, retransmitting local signals is currently the *only* instance where a BDU can distribute signals without the broadcaster's prior consent. The CRTC has implemented mandatory negotiation-based schemes for other services, including specialty channels, pay-per-view and video-on-demand.

[125] More importantly, however, the new regime's potential success in achieving the broadcasting policy objectives is completely irrelevant to determining whether the CRTC has jurisdiction to implement it. Any question as to the wisdom of the regime is a question solely for the CRTC as the single broadcasting authority in s. 3(2) of the *Broadcasting Act*. As an expert body, the CRTC, not the courts, is in the best position to decide what measures are necessary to save local stations from going bankrupt. In any event, if for any reason the proposed regime proves unworkable in the future, the CRTC has both the authority and the necessary expertise to make the appropriate changes.

[126] We would therefore dismiss the appeal with costs.

APPENDIX

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

. . .

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network;

. . .

versée à ces dernières feront augmenter les coûts et le nombre d'interruptions de signaux, et qu'en définitive ce sont les consommateurs qui en souffriront. Cet argument ne nous convainc pas. Tout d'abord, à l'heure actuelle, la retransmission de signaux locaux est le *seul* cas où une EDR peut distribuer des signaux sans le consentement préalable du radiodiffuseur. Le CRTC a mis sur pied des régimes de négociation applicables à d'autres services, y compris les chaînes spécialisées, la télévision à la carte et la vidéo sur demande.

[125] Facteur plus important toutefois, la question de savoir si le nouveau régime permettra ou non la réalisation des objectifs de la politique de radiodiffusion n'a absolument aucune pertinence pour décider si le CRTC a compétence pour mettre ce régime en œuvre. Toute question concernant l'opportunité du régime relève uniquement du CRTC, en sa qualité de seul organisme chargé de régir la radiodiffusion aux termes du par. 3(2) de la *Loi sur la radiodiffusion*. En tant qu'organisme expert, le CRTC est mieux placé que les tribunaux judiciaires pour décider des mesures nécessaires pour sauver les stations locales de la faillite. Quoi qu'il en soit, si le régime proposé se révélait ultérieurement inapplicable pour une raison ou pour une autre, le CRTC possède tant la compétence que l'expertise nécessaire pour y apporter les changements qui s'imposent.

[126] Par conséquent, nous sommes d'avis de rejeter le pourvoi avec dépens.

ANNEXE

Loi sur la radiodiffusion, L.C. 1991, ch. 11

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« émission » Les sons ou les images — ou leur combinaison — destinés à informer ou divertir, à l'exception des images, muettes ou non, consistant essentiellement en des lettres ou des chiffres.

. . .

2012 SCC 68 (CanLII)

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

. . .

"program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

"programming undertaking" means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

. . .

3. (1) It is hereby declared as the broadcasting policy for Canada that

. . .

(*e*) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(*f*) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming . . .;

(*g*) the programming originated by broadcasting undertakings should be of high standard;

. . .

(*s*) private networks and programming undertakings should, to an extent consistent with

« entreprise de distribution » Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable.

. . .

« entreprise de programmation » Entreprise de transmission d'émissions soit directement à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, soit par l'intermédiaire d'une entreprise de distribution, en vue de leur réception par le public à l'aide d'un récepteur.

. . .

« entreprise de radiodiffusion » S'entend notamment d'une entreprise de distribution ou de programmation, ou d'un réseau.

. . .

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

. . .

e) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne;

f) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation . . .;

g) la programmation offerte par les entreprises de radiodiffusion devrait être de haute qualité;

. . .

s) les réseaux et les entreprises de programmation privés devraient, dans la mesure où leurs ressources

2012 SCC 68 (CanLII)

the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(*t*) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

. . .

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services

. . .

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

5. (1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(*a*) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

(*b*) takes into account regional needs and concerns;

(*c*) is readily adaptable to scientific and technological change;

financières et autres le leur permettent, contribuer de façon notable à la création et à la présentation d'une programmation canadienne tout en demeurant réceptifs à l'évolution de la demande du public;

t) les entreprises de distribution :

(i) devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes,

. . .

(iii) devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion . . .

. . .

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

5. (1) Sous réserve des autres dispositions de la présente loi, ainsi que de la *Loi sur la radiocommunication* et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion.

(2) La réglementation et la surveillance du système devraient être souples et à la fois:

a) tenir compte des caractéristiques de la radiodiffusion dans les langues française et anglaise et des conditions différentes d'exploitation auxquelles sont soumises les entreprises de radiodiffusion qui diffusent la programmation dans l'une ou l'autre langue;

b) tenir compte des préoccupations et des besoins régionaux;

c) pouvoir aisément s'adapter aux progrès scientifiques et techniques;

2012 SCC 68 (CanLII)

(*d*) facilitates the provision of broadcasting to Canadians;

(*e*) facilitates the provision of Canadian programs to Canadians;

(*f*) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and

(*g*) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

9. (1) Subject to this Part, the Commission may, in furtherance of its objects,

(*a*) establish classes of licences;

(*b*) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee

(i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and

(ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the programming contemplated by paragraphs 3(1)(*l*) and (*m*);

(*c*) amend any condition of a licence on application of the licensee or, where five years have expired since the issuance or renewal of the licence, on the Commission's own motion;

(*d*) issue renewals of licences for such terms not exceeding seven years and subject to such conditions as comply with paragraph (*b*);

(*e*) suspend or revoke any licence;

(*f*) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;

d) favoriser la radiodiffusion à l'intention des Canadiens;

e) favoriser la présentation d'émissions canadiennes aux Canadiens;

f) permettre la mise au point de techniques d'information et leur application ainsi que la fourniture aux Canadiens des services qui en découlent;

g) tenir compte du fardeau administratif qu'elles sont susceptibles d'imposer aux exploitants d'entreprises de radiodiffusion.

(3) Le Conseil privilégie, dans les affaires dont il connaît, les objectifs de la politique canadienne de radiodiffusion en cas de conflit avec ceux prévus au paragraphe (2).

9. (1) Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :

a) établir des catégories de licences;

b) attribuer des licences pour les périodes maximales de sept ans et aux conditions liées à la situation du titulaire qu'il estime indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion, et, dans le cas de licences attribuées à la Société, lui permettant, à son avis, d'offrir la programmation visée aux alinéas 3(1)*l*) et *m*);

c) modifier les conditions d'une licence soit sur demande du titulaire, soit, plus de cinq ans après son attribution ou son renouvellement, de sa propre initiative;

d) renouveler les licences pour les périodes maximales de sept ans et aux conditions visées à l'alinéa *b*);

e) suspendre ou révoquer toute licence;

f) obliger les titulaires de licences à obtenir l'approbation préalable par le Conseil des contrats passés avec les exploitants de télécommunications pour la distribution — directement au public — de programmation au moyen de l'équipement de ceux-ci;

2012 SCC 68 (CanLII)

(*g*) require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting; and

(*h*) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

. . .

10. (1) The Commission may, in furtherance of its objects, make regulations

(*a*) respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs;

(*b*) prescribing what constitutes a Canadian program for the purposes of this Act;

(*c*) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);

(*d*) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;

(*e*) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

(*f*) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;

(*g*) respecting the carriage of any foreign or other programming services by distribution undertakings;

(*h*) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;

(*i*) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct

g) obliger les titulaires de licences d'exploitation d'entreprises de distribution à privilégier la fourniture de radiodiffusion;

h) obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

. . .

10. (1) Dans l'exécution de sa mission, le Conseil peut, par règlement :

a) fixer la proportion du temps d'antenne à consacrer aux émissions canadiennes;

b) définir « émission canadienne » pour l'application de la présente loi;

c) fixer les normes des émissions et l'attribution du temps d'antenne pour mettre en œuvre la politique canadienne de radiodiffusion;

d) régir la nature de la publicité et le temps qui peut y être consacré;

e) fixer la proportion du temps d'antenne pouvant être consacrée à la radiodiffusion d'émissions — y compris les messages publicitaires et annonces — de nature partisane, ainsi que la répartition équitable de ce temps entre les partis politiques et les candidats;

f) fixer les conditions d'exploitation des entreprises de programmation faisant partie d'un réseau ainsi que les conditions de radiodiffusion des émissions de réseau et déterminer le temps d'antenne à réserver à celles-ci par ces entreprises;

g) régir la fourniture de services de programmation — même étrangers — par les entreprises de distribution;

h) pourvoir au règlement — notamment par la médiation — de différends concernant la fourniture de programmation et survenant entre les entreprises de programmation qui la transmettent et les entreprises de distribution;

i) préciser les renseignements que les titulaires de licences doivent lui fournir en ce qui concerne leurs émissions et leur situation financière ou, sous

2012 SCC 68 (CanLII)

and management of their affairs as the regulations may specify;

(*j*) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and

(*k*) respecting such other matters as it deems necessary for the furtherance of its objects.

Copyright Act, R.S.C. 1985, c. C-42

2. In this Act,

. . .

"broadcaster" means a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission;

. . .

"communication signal" means radio waves transmitted through space without any artificial guide, for reception by the public;

. . .

"copyright" means the rights described in

(*a*) section 3, in the case of a work,

(*b*) sections 15 and 26, in the case of a performer's performance,

(*c*) section 18, in the case of a sound recording, or

(*d*) section 21, in the case of a communication signal;

. . .

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

. . .

tout autre rapport, la conduite et la direction de leurs affaires;

j) régir la vérification et l'examen des livres de comptes et registres des titulaires de licences par le Conseil ou ses représentants;

k) prendre toute autre mesure qu'il estime nécessaire à l'exécution de sa mission.

Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« droit d'auteur » S'entend du droit visé :

a) dans le cas d'une œuvre, à l'article 3;

b) dans le cas d'une prestation, aux articles 15 et 26;

c) dans le cas d'un enregistrement sonore, à l'article 18;

d) dans le cas d'un signal de communication, à l'article 21.

. . .

« radiodiffuseur » Organisme qui, dans le cadre de l'exploitation d'une entreprise de radiodiffusion, émet un signal de communication en conformité avec les lois du pays où il exploite cette entreprise; est exclu de la présente définition l'organisme dont l'activité principale, liée au signal de communication, est la retransmission de celui-ci.

. . .

« signal de communication » Ondes radioélectriques diffusées dans l'espace sans guide artificiel, aux fins de réception par le public.

. . .

3. (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

. . .

2012 SCC 68 (CanLII)

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

and to authorize any such acts.

(1.1) A work that is communicated in the manner described in paragraph (1)(*f*) is fixed even if it is fixed simultaneously with its communication.

. . .

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(*a*) to fix it,

(*b*) to reproduce any fixation of it that was made without the broadcaster's consent,

(*c*) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

. . .

31. (1) In this section,

. . .

"new media retransmitter" means a person whose retransmission is lawful under the *Broadcasting Act* only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;

"retransmitter" means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

. . .

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

(1.1) Dans le cadre d'une communication effectuée au titre de l'alinéa (1)*f*), une œuvre est fixée même si sa fixation se fait au moment de sa communication.

. . .

21. (1) Sous réserve du paragraphe (2), le radiodiffuseur a un droit d'auteur qui comporte le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci :

a) de le fixer;

b) d'en reproduire toute fixation faite sans son autorisation;

c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;

d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas *a*), *b*) et *d*).

. . .

31. (1) Les définitions qui suivent s'appliquent au présent article.

. . .

« retransmetteur » Personne, autre qu'un retransmetteur de nouveaux médias, dont l'activité est comparable à celle d'un système de retransmission par fil.

« retransmetteur de nouveaux médias » Personne dont la retransmission est légale selon les dispositions de la *Loi sur la radiodiffusion* uniquement en raison de l'*Ordonnance d'exemption relative aux entreprises de radiodiffusion de nouveaux médias* rendue par le Conseil de la radiodiffusion et des télécommunications

2012 SCC 68 (CanLII)

"signal" means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(*a*) the communication is a retransmission of a local or distant signal;

(*b*) the retransmission is lawful under the *Broadcasting Act*;

(*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).

(3) The Governor in Council may make regulations

(*a*) defining "local signal" and "distant signal" for the purposes of subsection (2); and

(*b*) prescribing conditions for the purposes of paragraph (2)(*e*), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

canadiennes à l'Annexe A de son avis public 1999-197, tel que modifié de temps à autre.

« signal » Tout signal porteur d'une œuvre transmis à titre gratuit au public par une station terrestre de radio ou de télévision.

(2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une œuvre au public par télécommunication si, à la fois :

a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;

b) la retransmission est licite en vertu de la *Loi sur la radiodiffusion*;

c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;

d) dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;

e) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3)*b*).

(3) Le gouverneur en conseil peut, par règlement :

a) définir « signal local » et « signal éloigné » pour l'application du paragraphe (2);

b) fixer des conditions pour l'application de l'alinéa (2)*e*) et, le cas échéant, prévoir si elles s'appliquent à l'ensemble des retransmetteurs ou à une catégorie de ceux-ci.

Appeal allowed with costs throughout, DESCHAMPS, ABELLA, CROMWELL *and* KARAKATSANIS JJ. *dissenting.*

Solicitors for the appellant Cogeco Cable Inc.: *McCarthy Tétrault, Toronto.*

Solicitors for the appellants Rogers Communications Inc. and TELUS Communications Company: Fasken Martineau DuMoulin, Ottawa.

Solicitors for the appellant Shaw Communications Inc.: Davies Ward Phillips & Vineberg, Toronto.

Pourvoi accueilli avec dépens devant toutes les cours, les juges DESCHAMPS, ABELLA, CROMWELL *et* KARAKATSANIS *sont dissidents.*

Procureurs de l'appelante Cogeco Câble Inc. : McCarthy Tétrault, Toronto.

Procureurs des appelantes Rogers Communications Inc. et TELUS Communications Company : Fasken Martineau DuMoulin, Ottawa.

Procureurs de l'appelante Shaw Communications Inc. : Davies Ward Phillips & Vineberg, Toronto.

2012 SCC 68 (CanLII)

Solicitors for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.: Goodmans, Toronto.

Solicitors for the respondent Canwest Television Limited Partnership: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener: Canadian Radio-television and Telecommunications Commission, Gatineau.

Procureurs des intimées Bell Media Inc. (auparavant CTV Globemedia Inc.), V Interactions Inc. et Newfoundland Broadcasting Co. Ltd.: Goodmans, Toronto.

Procureurs de l'intimée Canwest Television Limited Partnership : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenant : Conseil de la radiodiffusion et des télécommunications canadiennes, Gatineau.

2012 SCC 68 (CanLII)

Tab 26

Toronto Hydro-Electric System Limited v. Ontario Energy Board

[Indexed as: Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)]

99 O.R. (3d) 481

2010 ONCA 284 (CanLII)

Court of Appeal for Ontario,
Feldman, Lang and MacFarland JJ.A.
April 20, 2010

Public utilities -- Ontario Energy Board -- Ontario Energy Board concerned about large dividends paid by electricity distributor to affiliate at time when capital was needed for reinvestment in aging infrastructure -- Board imposing, as condition of rate decision, requirement that distributor obtain approval of majority of its independent directors before declaring any future dividends payable to its affiliates -- Board not exceeding its jurisdiction by imposing that condition -- Decision reviewable on standard of reasonableness -- Decision reasonable.

THESL is an electricity distributor licensed and regulated by the Ontario Energy Board. It is a wholly owned subsidiary of THC. All of the shares of THC are owned by the City of Toronto. When THESL applied to the Board for approval of its distribution rates to be effective May 2006, the Board expressed a concern about large dividends paid by THESL to its affiliates at a time when capital was required for reinvestment in aging infrastructure. The Board imposed a duty on THESL to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. The Divisional Court allowed THESL's appeal, holding that the Board had no jurisdiction to impose the

condition and that the imposition of such a condition represented an unwarranted and unlawful restriction on the authority of the board of directors to declare a dividend. The Board appealed.

Held, the appeal should be allowed.

Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid legislative purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. The Ontario Energy Board's power in respect of setting rates is to be interpreted broadly. The Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B specifies that in carrying out its responsibilities, the Board shall be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity services. The Act also permits the Board in making an order, to impose such conditions as it co nsiders proper, and states that those conditions may be general or particular in application. It was apparent that as part of its rate-setting function, the Board was entitled to consider the history of THESL's dividend payments. That was part of the inquiry into whether and how to control outgoing cash-flows from THESL in order to ensure adequate capital. That line of inquiry went to the heart of the Board achieving its statutory objectives. The inquiry and the condition imposed were within the Board's jurisdiction.

The Board's decision to impose the impugned condition was reviewable on a standard of reasonableness. The Board's reasons provided an intelligible explanation for the condition. The reasons disclosed a concern relating to prices and the adequacy, reliability and quality of service and explained how the chosen [page482] remedy would help alleviate that concern. The Board was concerned because THESL was paying THC very large dividends even though increased capital spending was going to

2010 ONCA 284 (CanLII)

be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately have adverse effects on ratepayers. The Board also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts was to require that any dividend paid by THESL be approved by a majority of its independent directors. The decision was reasonable.

2010 ONCA 284 (CanLII)

Cases referred to

Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC 14,209 at 111, [1979] 2 A.C.W.S. 108; Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, 2007 SCC 15, 279 D.L.R. (4th) 1, 360 N.R. 1, J.E. 2007-670, 59 Admin. L.R. (4th) 1, 155 A.C.W.S. (3d) 7, EYB 2006-116801, 59 C.H.R.R. D/276, apld

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, 2006 SCC 4, 263 D.L.R. (4th) 193, 344 N.R. 293, [2006] 5 W.W.R. 1, J.E. 2006-358, 54 Alta. L.R. (4th) 1, 380 A.R. 1, 39 Admin. L.R. (4th) 159, 145 A.C.W.S. (3d) 725, distd

Other cases referred to

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684, 166 A.C.W.S. (3d) 384, 238 O.A.C. 343 (Div. Ct.); Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339, [2009] S.C.J. No. 12, 2009 SCC 12, 304 D.L.R. (4th) 1, 385 N.R. 206, 77 Imm. L.R. (3d) 1, 82 Admin. L.R. (4th) 1, EYB 2009-155418, J.E. 2009-481; Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC 220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33, 193 O.A.C. 180, 136 A.C.W.S.

(3d) 375 (C.A.); Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, 2003 SCC 20, 223 D.L.R. (4th) 577, 302 N.R. 1 , J.E. 2003-713, 257 N.B.R. (2d) 207, 48 Admin. L.R. (3d) 33, 31 C.P.C. (5th) 1, 121 A.C.W.S. (3d) 172; Natural Resource Gas Ltd. v. Ontario Energy Board, [2006] O.J. No. 2961, 214 O.A.C. 236, 149 A.C.W.S. (3d) 889 (C.A.); Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, [1997] S.C.J. No. 74, 149 D.L.R. (4th) 577, 216 N.R. 1, [1997] 8 W.W.R. 517, J.E. 97-1695, 158 Sask. R. 81, 50 Admin. L.R. (2d) 1, 30 C.C.E.L. (2d) 149, 37 C.C.L.T. (2d) 1, 73 A.C.W.S. (3d) 560; Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, [2009] O.J. No. 1872, 252 O.A.C. 188 (Div. Ct.); U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, [1988] S.C.J. No. 101, 95 N.R. 161, J.E. 89-141, 24 Q.A.C. 244, 35 Admin. L.R. 153, 89 CLLC 14,045 at 12372, 13 A.C.W.S. (3d) 23

Statutes referred to

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17 [rep. R.S.A. 2007, c. A-37.2, s. 83]

Business Corporations Act, R.S.O. 1990, c. B.16, s. 127(3)(d)

Electricity Act, 1998, S.O. 1998, c. 15, Sch. A, ss. 29, 142

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, ss. 1 [as am.], (1), [as am.], 23(1), 36(3), 44(1), 78 [as am.], (2) [as am.], (3) [as am.], 128(1) [page483]

Authorities referred to

Jones, David Phillip, and Anne S. de Villars, Principles of Administrative Law, 5th ed. (Toronto: Carswell, 2009)

Ontario Energy Board, Affiliate Relationships Code for Electricity Distributors and Transmitters (Toronto: Ontario Energy Board, 2003)

APPEAL from the order of the Divisional Court (Lederman, Kiteley and Swinton JJ.) (2008), 93 O.R. (3d) 380, [2008] O.J. No. 3904 (Div. Ct.) allowing an appeal from a decision of the Ontario Energy Board.

Glenn Zacher and Patrick G. Duffy, for appellant Ontario Energy Board.

2010 ONCA 284 (CanLII)

James D.G. Douglas and Morgana Kellythorne, for respondent Toronto Hydro-Electric System Limited.

The judgment of the court was delivered by

[1] MACFARLAND J.A.:-- This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ.; Lederman J. dissenting) dated September 9, 2008. The court declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

Overview

[2] Toronto Hydro-Electric System Limited ("THESL") is an electricity distributor licensed and regulated by the Ontario Energy Board ("OEB"). THESL is a wholly owned subsidiary of Toronto Hydro Corporation ("THC"). All of the shares of THC are owned by the City of Toronto (the "City").

[3] In 2004-2005, THC paid over $116 million to the City in the form of dividends and interest payments. THC funded a significant part of these payments through substantial annual increases in dividends from THESL and by charging THESL an above-market rate of interest on an inter-company loan. At the time THESL made the payments, it had not completed a capital plan for reinvestment in its aging infrastructure.

[4] When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its [page484] 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the City demanded substantial increases in dividends from THC, which, in turn, demanded increased

2010 ONCA 284 (CanLII)

dividends from THESL.

[5] The OEB is the regulator of Ontario's electricity industry and is statutorily mandated to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service". The OEB manages this mandate primarily by setting just and reasonable rates.

[6] In its decision, the OEB disallowed as a regulatory expense any interest charges above market rates and required a majority of THESL's independent directors to approve any future dividend payments. In reaching this decision, the OEB noted that if a utility like THESL was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which, in turn, could harm ratepayer interests by causing higher costs and degradation in services. THESL appealed this decision.

[7] In the Divisional Court, THESL argued that the OEB had no jurisdiction to impose the condition it did, either by statute or at common law, and further, that the imposition of such a condition represented an unwarranted and indeed unlawful restriction on the authority of the board of directors to declare a dividend.

[8] The majority in the Divisional Court accepted THESL's position on both bases advanced, allowed the appeal and set aside the part of the OEB decision that imposed the condition.

[9] The OEB argues that the majority of the Divisional Court panel failed to appreciate and distinguish the principles that govern regulated utilities like THESL, which operate as monopolies, from those that apply to private sector companies, which operate in a competitive market. The OEB submits that this distinction is critical because whereas the directors and officers of an unregulated company have a fiduciary obligation to act in the best interests of the company (which usually equates to the interests of the shareholders), a regulated utility must operate in a manner that balances the interests of the utility's shareholders against the interests of its

2010 ONCA 284 (CanLII)

ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

[10] For the reasons that follow, I would allow the appeal, set aside the order of the Divisional Court and restore the part of the rate decision that imposed the condition.

[11] The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends. [page485]

Analysis

[12] This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see Natural Resource Gas Ltd. v. Ontario Energy Board, [2006] O.J. No. 2961, 214 O.A.C. 236 (C.A.), at para. 18.

[13] The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B (the "Act"):

Boards objectives, electricity

1(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. [See Note 1 below]

[14] In short, the OEB is to balance the interests of

2010 ONCA 284 (CanLII)

ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

[15] The Electricity Act, 1998, S.O. 1998, c. 15, Sch. A requires a distributor of electricity to sell electricity to every person connected to the distributor's distribution system (s. 29). However, the distributor can only charge for the distribution of electricity in accordance with an order of the OEB. Section 78 of the Act provides in part:

> 78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the Electricity Act, 1998 except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> . . . . .
>
> (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity . . . and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the Electricity Act, 1998. [page486]

[16] In relation to its ability to make orders, the Act provides:

> 23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

[17] In order to determine the appropriate standard of review, the inquiry must begin with a consideration of the nature of the OEB's decision.

Avoiding the "jurisdiction" trap

[18] In recent years, administrative law has undergone a significant transformation. Ever since Dickson J. championed the notion of increased deference to specialized administrative tribunals in Canadian Union of Public Employees, Local 963 v.

2010 ONCA 284 (CanLII)

New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45 ("CUPE"), courts have sought to avoid labelling matters as jurisdictional where such a label might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, Bastarache and LeBel JJ. underlined the importance of CUPE in this regard, at para. 35:

> Prior to CUPE, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. CUPE marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

[19] Support for the CUPE conceptualization of jurisdiction is also found in the majority reasons of Abella J. in Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, at paras. 88-89:

> The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court -- its specialized expertise. It ignores Dickson J.'s caution in [CUPE] that courts "should not be alert to brand as

2010 ONCA 284 (CanLII)

jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".

If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own [page487] view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.

(Emphasis added; citations omitted)

[20] Genuine questions regarding the boundaries of administrative authority under statute do arise. Administrative bodies must be correct in answering these questions. It is crucial to distinguish, however, between these "true" matters of jurisdiction and the wider understanding of jurisdiction that Dickson J. rebuked in CUPE. This point was highlighted by Bastarache and LeBel JJ. in Dunsmuir, at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction. An

2010 ONCA 284 (CanLII)

example may be found in United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or vires. These questions will be narrow. We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

(Emphasis added; citations omitted)

[21] David Phillip Jones and Anne S. de Villars offer a helpful analysis of the difference between the "narrow" and "wide" meaning of jurisdiction in their text, Principles of Administrative Law, 5th ed. (Toronto: Carswell, 2009) at pp. 140-41:

In its broadest sense, "jurisdiction" means the authority to do every aspect of an intra vires action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors -- such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result -- which take place after the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction. [page488]

. . . . .

It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to exceed its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction.

(Italics in original; footnotes omitted)

2010 ONCA 284 (CanLII)

[22] Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in VIA Rail. At para. 91, she cited Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, [1997] S.C.J. No. 74, at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, [1988] S.C.J. No. 101, at p. 1087 S.C.R., where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

[23] Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (Dunsmuir, at para. 54), and Abella J.'s conclusion that "[a] tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (VIA Rail, at para. 92). It also accords with Jones and de Villars observation, at p. 146:

> [A] conscious and clearly-worded decision by the legislature to use a subjective or open-ended grant of power has the effect of widening the delegate's jurisdiction and, therefore, narrowing the ambit of judicial review of the legality of its actions.

[24] Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling

2010 ONCA 284 (CanLII)

statute includes a broad grant of open-ended power to achieve that purpose, the matter [page489] should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons -- on either a reasonableness or correctness standard -- but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its dec isions to be ultra vires. These principles are consistent with Abella J.'s reasoning in VIA Rail, at para. 96:

> It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction . . . in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

II. Broad powers of the OEB

[25] The case law suggests that the OEB's power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task.

[26] For example, in Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684 (Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate". In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

2010 ONCA 284 (CanLII)

> [T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." . . . the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the Act. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."
>
> . . . . .
>
> [T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As [page490] well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."
>
> The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner.

[27] The jurisdiction of the OEB was also reviewed in Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33 (C.A.). In Enbridge, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act,

2010 ONCA 284 (CanLII)

in paras. 27-28:

> [The appellants] say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. . . .
>
> In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. . . . Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

[28] A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, [2009] O.J. No. 1872, 252 O.A.C. 188 (Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in Dunsmuir. Rather, a reasonableness standard applied because the decision in the case -- whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement -- was squarely within the rate-setting authority of the OEB and went to [the] [page491] very core of the OEB's mandate. The cou rt noted the expansive content of the rate-setting power, at para. 17:

> An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this

2010 ONCA 284 (CanLII)

> case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the OEBA which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests.

(Citations omitted)

[29] The present appeal does not engage a "true" question of jurisdiction. As confirmed above, the Act is to be interpreted broadly. It is clear that the legislative intent of s. 78 of the Act is that the OEB have the principal responsibility for setting electricity rates. The Act specifies that in carrying out its responsibilities, the OEB shall be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity service. The Act also permits the OEB in making an order, to impose such conditions as it considers proper, and states that these conditions may be general or particular in application (s. 23(1)). Thus, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the OEB to engage in the impugned inquiry in the course of rate setting.

[30] Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An

2010 ONCA 284 (CanLII)

inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are insulated from review (see Part IV).
[page492]
III. The ATCO decision

[31] THESL argues that the Supreme Court of Canada's recent decision in ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4 militates in favour of reviewing OEB decisions using a correctness standard. ATCO involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17 set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

[32] Writing on behalf of three other justices, Bastarache J. divided the inquiry into two questions. The first question was whether the Board had the power pursuant to its enabling statutes to allocate the proceeds from the sale of the utility's asset to its customers when approving the sale. The second question was whether the Board was permitted to allocate the proceeds of the sale in the way that it did. Bastarache J. concluded that the first question was to be reviewed on a correctness standard and the second question was to be reviewed on a more deferential standard.

[33] This case is distinguishable from ATCO. The statutory grant of power in ATCO to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives

2010 ONCA 284 (CanLII)

are not vague, elastic and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the ATCO provision, the objectives in the Act require that the OEB protect the interests of both the customer and the utility.

[34] There are four other factors that support distinguishing ATCO from this case. First, the decision in ATCO reveals that Bastarache J. reasoned that ATCO was not a rate-setting case. He noted that the provision granting the power to impose conditions could not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the [page493] main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "are grounded in its main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system" (para. 7).

[35] Second, at para. 30, Bastarache J. determined that the Board's protective role -- safeguarding the public interest in the nature and quality of the service provided to the community by public utilities by ensuring that utility rates are always just and reasonable -- did not come into play. This factor pointed to a less deferential standard of review. In the present case, the OEB's "protective role" was central to the dividend condition.

[36] Third, Bastarache J. viewed the issue in ATCO as the Board's power to transfer proprietary rights in the assets of the utility to the customers. In this case, the dividend condition did not result in the transfer of proprietary rights.

[37] Fourth, in giving examples of conditions that could attach to the approval of a sale, Bastarache J. stated, at para. 77, that the Board "could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system". As will be

2010 ONCA 284 (CanLII)

explained, the OEB placed the condition on the payment of dividends to ensure that dividends would not be paid when there was insufficient capital for plant maintenance.

IV. Reviewing the exercise of OEB jurisdiction: The reasonableness standard

[38] Having determined that the OEB did not exceed its statutory grant of power, the question remains whether it could order that the declaration of a dividend requires the approval of the majority of THESL's independent directors. This question is reviewable on a reasonableness standard.

[39] Recently, a reasonableness standard was used by this court in Natural Resource Gas Ltd. v. Ontario Energy Board, supra. The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriansz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations [at paras. 7-10, 18-19, 23-24]:

> In two recent decisions, Graywood Investments Ltd. v. Toronto Hydro-Electric System, [2006] O.J. No. 2030 (C.A.) [page494] and Enbridge Gas Distribution Inc. v. Ontario (Energy Board), [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.
>
> In Enbridge, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".
>
> In Graywood, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):
>
> First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its

2010 ONCA 284 (CanLII)

> decisions are, therefore, entitled to substantial deference.
>
> In order to take this case outside the application of this general conclusion, [the distributor] must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in Graywood.
>
> . . . . .
>
> It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.
>
> The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction".
>
> . . . . .
>
> While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.
>
> Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness.

[40] The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision -- structuring a condition that will protect the long-term integrity of THESL's energy infrastructure -- falls

2010 ONCA 284 (CanLII)

squarely within the category of "mixed fact and law" with "policy considerations".

[41] One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation, the fact that corporate law principles are at play [page495] does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

V. Is the decision a reasonable one?

[42] At para. 47 of Dunsmuir, Bastarache and LeBel JJ. described the two inquiries involved in assessing the reasonableness of a decision:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(Emphasis added)

[43] The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process". The second

2010 ONCA 284 (CanLII)

inquiry is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law". Thus, the first inquiry deals with the justification process as articulated in the reasons for the decision and the second inquiry looks at the outcome. As noted in Dunsmuir, the reasonableness analysis will concern mostly the first inquiry.

(a) Justification, transparency and intelligibility

[44] The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, Iacobucci J., at para. 55, articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can [page496] stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

(Emphasis added; citations omitted)

[45] Further, as Abella J. explained in Via Rail, at para. 104:

> Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

[46] And as more recently noted by Binnie J. in Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339,

2010 ONCA 284 (CanLII)

[2009] S.C.J. No. 12, at para. 59:

> Reasonableness is a single standard that take its colour from the context. . . . [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

and, at para. 63:

> Dunsmuir thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court.

[47] The OEB's reasons provide an intelligible explanation for the condition. The reasons both disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern.

[48] Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in ATCO, at para. 3, "utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see Advocacy Centre for Tenants-Ontario. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of Advocacy Centre for Tenants-Ontario, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service". [page497]

[49] While THESL is incorporated, as is required by s. 142 of

2010 ONCA 284 (CanLII)

the Electricity Act, under the provisions of the [Ontario] Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"), it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons [(2008), 93 O.R. (3d) 380, [2008] O.J. No. 3904 (Div. Ct.)] in the court below, at para. 78:

> At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.

[50] The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

[51] The decision reveals that the OEB was concerned about the aging plant and the lack of necessary capital. At the hearing, it was argued that there appeared to be underinvestment in the physical plant over the past several years (para. 4.4.1). Evidence was presented that 30 to 40 per cent of the plant in service had exceeded its expected life (para. 4.5.3). The Board concluded that increased capital spending was required to address the issues of the aging plant (para. 4.7.1) and to maintain system reliability (para. 4.10.8).

2010 ONCA 284 (CanLII)

[52] However, despite the need for capital, the evidence was that there was a very dramatic increase in the dividend payouts in 2004 and 2005. As the OEB noted, at para. 6.4.1, "[t]he level of dividends appears to be greater than the net income of the utility over at least a two year period". At para. 6.4.4, the OEB explained why these events were of concern:

> The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating. [page498]

[53] In sum, the OEB was concerned because THESL was paying THC very large dividends even though increased capital spending was going to be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately, as the OEB explained, have adverse effects on ratepayers. Lederman J. effectively summarized these circumstances, at paras. 80 and 85:

> The setting of rates will accomplish little in terms of public protection if the revenue can be stripped out of the company without any controls.
>
> . . . . .
>
> The OEB had evidence before it that THESL was paying increased dividends and an above market rate of interest while it was under investing by about $60 million in its capital expenditures. The OEB noted that if a utility like THESL was to pay all its retained earnings to its shareholder, this could adversely impact its credit rating, which in turn, could cause higher costs and degradation in service to electricity consumers.

[54] The OEB also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts was to require that any dividend paid by THESL be approved by a majority of its independent

2010 ONCA 284 (CanLII)

directors.

[55] At the time of the hearing, the composition of the board of directors of THESL was identical to the THC. The reasons reveal that the OEB was very concerned about the relationships between THESL, THC and the City. For example, at para. 3.2.3, the OEB questioned the percentage of THC's costs recovered from THESL:

> It is readily apparent to the Board that allocating these costs based on gross revenues produces an unwarranted bias against the ratepayers. The revenues of the utility are inflated by the high cost of wholesale power. That is an ever increasing amount. Because these costs are increasing, it does not follow the utility's share of the overhead costs should be increasing. In short, there is no necessary relationship between the revenue share and the share of overhead cost.

[56] The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional $16 million per year, which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note, at para. 5.3.8, it is "apparent that the financing [page499] decisions are being made unilaterally by the City, which is the sole shareholder of the utility".

[57] With respect to dividends, as already noted, the OEB was concerned about the very dramatic increase in the dividend payouts in 2004 and 2005. At para. 5.3.18, the OEB stated:

> Nor is it any defence to say this is not a decision of the utility but is being made unilaterally by the City of Toronto. That is exactly the problem. In fact it could be argued that this is part of a pattern. The City has extracted extensive dividends from this utility in recent years. It is likely one of the rare occurrences in Canadian

2010 ONCA 284 (CanLII)

financial markets where the level of dividends exceeds the net income.

(Emphasis added)

[58] Moreover, the OEB was aware of a change in a shareholder direction and the payment of special dividends. These facts are referred to in para. 6.4.2:

> At one time, there was a shareholder direction that limited the dividend payout to 40% of the utility's income, but that was changed to 50% of consolidated income. Moreover, it appears that were special dividends over and above that amount.

[59] Thus, the OEB was of the opinion that one of the reasons for the THESL's unusual dividend payouts was the THC's, and ultimately the City's, control over THESL's decision making. The OEB explained, at paras. 6.4.5 and 6.4.6 of the decision:

> A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical. And none of the members of management are to be on the Board. This is an unusual situation.
>
> There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

[60] Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the Affiliate Relationships Code for Electricity Distributors and Transmitters ("ARC") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the ARC required that one

2010 ONCA 284 (CanLII)

third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates. [page500]

[61] Following this line of reasoning, the Board concluded, at paras. 6.4.7 to 6.4.9, that the condition was needed to balance the interests of both the customer and the shareholder:

> Given the unusual high level of dividend payout and the concern expressed by a number of parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.
>
> Much of the controversy in this case has been dominated by discussion about non arms length transaction between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders. The Board believes this is in keeping with the policy intent of Section 2 of the ARC.
>
> This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations.

(Emphasis added)

[62] For the reasons set out above, this was a reasonable decision.

(b) Acceptable outcomes

[63] To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". It is in this part of the analysis where, in my

2010 ONCA 284 (CanLII)

opinion, this court should address THESL's argument that the imposed condition violated corporate law.

[64] THESL argued at the Divisional Court, and argues before this court, that the OEB order was contrary to settled principles of corporate law that the directors of a public company cannot delegate their power to declare dividends. Section 127(3)(d) of the OBCA confirms this prohibition by expressly excluding any delegation of the board of directors' power to declare a dividend from the general rule permitting delegation to a managing director or committee of directors.

[65] The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act, which provides that "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails". [page501]

[66] The majority judgment below accepted THESL's argument, and found that the OEB had effectively delegated the power to declare dividends to the majority of the independent directors contrary to the OBCA and long-standing corporate law principles.

[67] In dissenting reasons, Lederman J. accepted the submission of the OEB -- that the order leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors.

[68] In the context of a regulated corporation, I agree with Lederman J. As he explained, at para. 81, "the OEB has crafted a reasonable and less intrusive remedy that balances the interests of THESL's shareholder and its ratepayers and is consistent with the 'regulatory compact'".

Conclusion

[69] For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an

2010 ONCA 284 (CanLII)

order in accordance with these reasons. In the circumstances, I would not order costs.

Appeal allowed.

Notes

Note 1: On September 9, 2009, three additional objectives were added to s. 1(1).

2010 ONCA 284 (CanLII)

Tab 27



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

Ontario Energy Board

Filing Requirements For
Electricity Transmission Applications

Chapter 2

Revenue Requirement Applications

February 11, 2016

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Table of Contents

Chapter 2 Filing Requirements for Revenue Requirement Applications 1

2.0 Introduction 1

2.1 General Requirements 3

2.1.1 Materiality Thresholds 6

2.2 Accounting Standards 6

2.2.1 Modified IFRS Application 7

2.2.2 Application under Accounting Standards for Not-for-Profit Organizations 7

2.2.3 USGAAP or ASPE Application 7

2.3 Exhibit 1 - Administrative Documents 8

2.3.1 Executive Summary 8

2.3.2 Customer Engagement 10

2.3.3 Financial Information 11

2.3.4 Administration 11

2.4 Exhibit 2 - Transmission System Plan 13

2.4.1 Asset Management Plan 14

2.4.2 Regional Considerations 14

2.4.3 Capital Expenditures 16

2.5 Exhibit 3 - Rate Base 17

2.5.1 Overview 17

2.5.2 Gross Assets – Property, Plant and Equipment and Accumulated Depreciation 19

2.5.3 Allowance for Working Capital 19

2.5.4 Customer Connection and Cost Recovery Agreements 20

2.5.5 Capitalization Policy 20

2.5.6 Capital Module 21

2.6 Exhibit 4 - Service Quality and Reliability Performance and Reporting 21

2.6.1 Proposed Scorecard 21

2.6.2 Reliability Performance 22

2.6.3 Compliance Matters 22
2.7 Exhibit 5 - Operating Revenue 22
2.7.1 Load and Revenue Forecasts 23
2.7.2 Accuracy of Load Forecast and Variance Analyses 23
2.7.3 Other Revenue 24
2.8 Exhibit 6 - Operating Costs 24
2.8.1 Overview 25
2.8.2 Summary and Cost Driver Tables 26
2.8.3 Program Delivery Costs with Variance Analysis 26
2.8.4 Employee Compensation 26
2.8.5 Shared Services and Corporate Cost Allocation 27
2.8.6 Purchase of Non-Affiliate Services 28
2.8.7 One-time Costs 28
2.8.8 Regulatory Costs 28
2.8.9 Charitable and Political Donations 29
2.8.10 Depreciation, Amortization and Depletion 29
2.8.11 Taxes or Payments In Lieu of Taxes (PILs) and Property Taxes 30
2.8.12 Z-Factor Claims 31
2.9 Exhibit 7 - Cost of Capital and Capital Structure 32
2.9.1 Capital Structure 33
2.9.2 Cost of Capital (Return on Equity and Cost of Debt) 33
2.9.3 Not-for-Profit Corporations 34
2.10 Exhibit 8 - Deferral and Variance Accounts 34
2.10.1 Disposition of Deferral and Variance Accounts 35
2.11 Exhibit 9 - Cost Allocation to Uniform Transmission Rate Pools: Charge Determinants 36
2.12 Exhibit 10 - Rate Design for Uniform Transmission Rates 37
2.12.1 Bill Impact Information 37
2.12.2 Setting the Uniform Transmission Rates 37

Chapter 2 Filing Requirements for Revenue Requirement Applications

2.0 Introduction

The filing requirements contained in this chapter outline the minimum information necessary for a transmission revenue requirement application. Applicants should review Chapter 1 of this document, which provides an overview of the OEB's expectations on certain generic matters, such as the completeness and accuracy of an application, the exploration of non-material items, and confidential filings.

On October 18, 2012, the OEB released its *Report of the Board, Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (the RRFE Report). While the RRFE Report related specifically to electricity distributors, the OEB stated that "[i]n due course, the OEB will provide further guidance regarding how the policies in this Report may be applied to transmitters." The changes to the filing requirements in this document provide the initial steps toward the integration of core RRFE concepts into the rate application process for transmitters.

In the RRFE Report the OEB provided electricity distributors with three rate-setting methods: 4th Generation Incentive Rate-setting (now called Price Cap IR), Custom Incentive Rate-setting and Annual Incentive Rate-setting Index. As a move toward greater adoption of an incentive- and performance-based rate setting framework for transmitters, the OEB has created two new transmission revenue plan options:

- A custom incentive-rate setting plan, which will consist of a transmitter-specific revenue trend for the plan term, which shall be not less than five years (Custom IR)
- An incentive-based revenue index plan of five years, comprising an initial application to establish a revenue requirement based on a single test year cost of service application, followed by incentive-based and indexed adjustments to revenue requirement for the balance of the term. Analogous to a Price Cap for distributors, this "Revenue Cap index" approach includes expectations for the development of an index, as well as productivity and stretch commitments. The OEB invites transmitters to propose and substantiate the appropriate method and commitments for these elements.

The OEB will not require all existing electricity transmitters to apply under Custom IR or a Revenue Cap index immediately. Transmitters continue to have the option, for their first application after these filing requirements are issued, to apply to have their revenue requirement set for one or two years through a cost of service application for those applicants where significant adjustments to business processes and planning activities would be required prior to embarking on a new five year rate plan. New entrants will be expected to select either a Custom IR or Revenue Cap index plan.

The OEB will nevertheless expect two elements of the RRFE policy to begin to be incorporated into all applications for transmission revenue requirements: enhanced reporting on customer engagement, and a proposed scorecard to measure performance. Performance monitoring and reporting are key elements in moving towards an outcomes-based regulatory framework.

In addition, the OEB will require evidence on asset condition, planning and prioritization of capital expenditures to be presented in a Transmission System Plan, consolidated into a dedicated exhibit in the application. The OEB will assess the fit between the applicant's plan and its stated objectives, and consider how the plan contributes to positive outcomes for electricity customers, in particular those outcomes that arise from the asset management decisions reflected in the applicant's Transmission System Plan. The OEB will also consider the planning and pacing proposals of the applicant and whether the test year requests are appropriately aligned with the Transmission System Plan, while at the same time recognizing and taking into consideration the division of network planning responsibilities in Ontario, the OEB's statutory objectives and relevant provincial policies.

Benchmarking is a key component of rate-setting for electricity distributors under the RRFE. Benchmarking evidence is required to support cost forecasts and system planning proposals, given the assistance it can provide in establishing the reasonableness of costs. However, the OEB recognizes that a transition period may better accommodate the gradual entrenchment of RRFE objectives and principles in transmission rate-setting over time. Therefore, where a transmitter is filing based on cost of service or the Revenue Cap index, if benchmarking evidence is not currently available, the transmitter must file in its application a strategy to acquire such evidence for its subsequent application.

The amount and quality of the evidence filed to support an application should be sufficient to demonstrate to the OEB that the revenue requirement(s) sought are reasonable and provide value for customers. A transmitter seeking approval of revenue

requirements under Custom IR or Revenue Cap will be expected to demonstrate that its planning has been sufficiently robust that the utility will be able to manage within the revenue set, given that actual costs and revenues will vary from forecast.

In recognition of the forecasting uncertainty involved in longer terms, the OEB has included in section 2.8.12 a provision for a "Z-factor" claim, similar to that for electricity distributors operating under multi-year rate plans.

In addition, the OEB will consider requests for a mechanism to fund significant incremental capital during the rate term from applicants proposing a Revenue Cap index. This will enable review during the cost of service application of the need and prudence of any significant, discrete projects coming into service over the plan term that are part of a transmitter's Transmission System Plan and which transmitters cannot manage through the revenue established through the index. Applicants must propose all criteria and parameters for approval of any capital module.

The OEB will require from transmitters applying for approval of revenue requirements under a Custom IR or Revenue Cap application a proposal to mitigate the potential for any significant earning by the transmitter above the regulatory net income supported by the approved return on equity, such as a capital variance account or an earnings sharing mechanism.

The use of the phrase "OEB-approved" in these filing requirements typically refers to the set of data used by the OEB as the basis for approving the most recent revenue requirements. It does not mean that the OEB, in fact, "approved" any of the data, but only that the final approved revenue requirement and uniform transmission rates were based on those data.

2.1 General Requirements

The basic format of an application for a revenue requirement must include the following exhibits:

Exhibit 1	Administrative Documents
Exhibit 2	Transmission System Plan
Exhibit 3	Rate Base
Exhibit 4	Service Quality and Reliability Performance and Reporting
Exhibit 5	Operating Revenue
Exhibit 6	Operating Costs
Exhibit 7	Cost of Capital and Capital Structure
Exhibit 8	Deferral and Variance Accounts
Exhibit 9	Cost Allocation to Uniform Transmission Rate Pools: Charge Determinants
Exhibit 10	Rate Design for Uniform Transmission Rates

Other exhibits may also be included in an application in support of, or to document, other proposals for which the applicant is seeking OEB review and approval.

The OEB has provided numerous appendices (Excel-based data spreadsheets) for electricity distributors, as part of the Filing Requirements for Electricity Distributors. These appendices allow a consistent review of application information from the various distributors. Appendices have not been provided as part of these filing requirements. However, transmitters may wish to review the appendices to Chapter 2 of the Filing Requirements for Electricity Distributors to further support their evidence by providing appendices that are applicable to their transmission applications.

The items outlined below are general requirements that are applicable throughout the application:

- Written direct evidence is to be included before data schedules.
- Average of the opening and closing fiscal year balances must be used for items in rate base.
- Total capitalization (debt and equity) must equate to total rate base.
- Data for the following years, at a minimum, must be provided:
  - Test year = prospective rate year
  - Bridge year = current year
  - Four most recent historical years (or number of years necessary to provide actuals back to and including the most recent OEB-approved test year, but not less than four years)
  - Most recent OEB-approved test year
- Custom IR applicants must include in their evidence forecasts for revenue, costs and inflation for each year of the proposed rate term, and benchmarking evidence supporting the cost forecasts.
- Documents are to be provided in bookmarked and text-searchable Adobe PDF format.
- Tables must also be provided in working Microsoft Excel spreadsheet format where available and practical.

If a transmitter updates its evidence throughout the proceeding, the transmitter must ensure that any models submitted in the original application are updated appropriately.

To assist applicants in applying using Revenue Cap or Custom IR proposals, the following chart outlines the basic components of the new revenue requirement-setting options:

Category	Revenue Cap index	Custom IR
Going-in rates	Determined in single forward test-year cost of service review	Determined in multi-year application review
Form	Index: Revenue Cap option	Custom Index
Coverage	Comprehensive	Comprehensive
Annual adjustment – inflation	To be proposed; any deviation from OEB inputs to be justified	Transmitter-specific revenue requirement trend for the plan term to be determined by the OEB, informed by: (1) the transmitter's forecasts (revenue and costs, inflation, productivity); (2) the OEB's inflation analysis; and (3) internal and external benchmarking to assess the reasonableness of the transmitter's forecasts
Annual adjustment – productivity	Productivity and stretch factor expected	
Benchmarking	Both internal (against own cost performance over time to demonstrate continuous improvement) and external (against other transmitters), including rationale for selected comparators	
Sharing of benefits	Stretch and/or productivity factor to be proposed	Case-by-case
Term	5 years (rebasing plus 4 years)	Minimum term of 5 years
Capital module	Option for capital factor proposals	N/A
Unforeseen events	Z-factor available	Z-factor available
Deferral and Variance Accounts	Status quo	Status quo + case-by-case
Performance Reporting and Monitoring	Draft scorecard, RRR filings & case-by-case	Draft scorecard, RRR filings & case-by-case

As indicated in the introduction, transmitters have the option, for their first application after these filing requirements are issued, to apply to have revenue requirement set for one or two years through a cost of service application.

2.1.1 Materiality Thresholds

The applicant must provide justification for changes from year to year to its rate base, capital expenditures, operations, maintenance and administration costs and other items above a materiality threshold. The materiality thresholds differ for each applicant, depending on the magnitude of the revenue requirement.

Unless a different threshold applies to a specific section of these filing requirements, the default materiality thresholds are as follows:

- $50,000 for a transmitter with a transmission revenue requirement less than or equal to $10 million
- 0.5% of transmission revenue requirement for a transmitter with a transmission revenue requirement greater than $10 million and less than or equal to $200 million
- $3 million for a transmitter with a transmission revenue requirement of more than $200 million

An applicant may provide additional details of items below the threshold if it determines that this would assist the OEB with its review of the application. Applicants are reminded that the onus is on the applicant to make its case and ensure that the OEB has the information it needs to properly assess and deliberate on the application.

2.2 Accounting Standards

This section provides information on the following accounting standards relevant to the filing of revenue requirement applications. The Canadian Accounting Standards Board has established a mandatory transition to International Financial Reporting Standards by January 1, 2015. On this basis, the following accounting standards may be applicable to transmitters for 2015 and beyond:

- International Financial Reporting Standards (IFRS)
- United States Generally Accepted Accounting Principles (USGAAP)
- Accounting Standards for Not-for-Profit Organizations
- Accounting Standards for Private Enterprise (ASPE)

The accounting standard that is used as the basis of the application must be clearly stated. Regardless of the accounting standard used in the application, the applicant must provide a summary of changes to its accounting policies made since the

applicant's last revenue requirement application (e.g. capitalization of overhead, capitalization of interest, depreciation, etc.). Revenue requirement impacts of any changes in accounting policies must be separately quantified.

2.2.1 Modified IFRS Application

Transmitters should refer to the following documents for guidance relating to the use of IFRS in application filings:

- *Report of the Board: Transition to IFRS;* dated July 28, 2009;
- *Addendum to Report of the Board: Implementing IFRS in an Incentive Rate Mechanism Environment*, dated June 13, 2011; and
- *Asset Depreciation Study for the Ontario Energy Board*, Kinectrics Inc. for distributors sponsored by the Board dated July 8, 2010.

For those applicants that have adopted IFRS for financial reporting purposes or will adopt IFRS for financial reporting purposes effective January 1, 2015 or earlier, revenue requirement applications must be filed on the basis of modified IFRS ("MIFRS").

2.2.2 Application under Accounting Standards for Not-for-Profit Organizations

For those transmitters that adopted Accounting Standards for Not-for-Profit Organizations for purposes of financial reporting, revenue requirement applications must be filed on the basis of this accounting standard.

2.2.3 USGAAP or ASPE Application

The OEB requires a utility that adopts USGAAP or ASPE, in its first revenue requirement application following the adoption of the new accounting standard, to provide the following:

- Evidence of the eligibility of the utility under the governing securities legislation to report financial information using that standard (if applicable)
- A copy of the authorization to use the standard from the corresponding Canadian securities regulator (if applicable)
- Evidence demonstrating the benefits and potential disadvantages to the utility and its ratepayers of using the alternate accounting standard for rate regulation

2.3 Exhibit 1 - Administrative Documents

The items identified in this Exhibit provide the background and summary to the application as filed and are grouped into four sections:

1) Executive Summary
2) Customer Engagement
3) Financial Information
4) Administration

2.3.1 Executive Summary

This section is the opportunity for the applicant to provide an overview of key elements of its application and its overall business strategy. A transmitter should provide the OEB with a broad overview of the utility, past and expected performance, and its plans for the future. The overview should include information about the transmitter's objectives and business plan, how these relate to what is being sought in the application and, where applicable, how they align with the objectives of the RRFE. The application should also describe whether and how the transmitter's objectives reflect customer feedback.

The Executive Summary must contain a brief summary of the following items in the application. Applicants must separately identify all proposed changes to revenue requirement that will have a material impact on customers, including any changes that may affect particular customer groups.

A. Revenue Requirement

- Revenue requirement requested for the test year(s)
- Increase/decrease ($ and %) from previously approved revenue requirement
- Schedule of main drivers of revenue requirement changes from the last OEB approved year

B. Budgeting Assumptions

- Economic overview (such as growth and inflation)

C. Load Forecast Summary

- Load growth (percentage change from last OEB approved)
- Brief description of forecasting method(s) used

D. Transmission System Plan

- Summary of the major drivers and elements of the transmitter's capital plan
- Details of the investment planning process, including asset condition assessment, identification and prioritization of capital investments, trade-offs with the operations, maintenance and administration expenditures
- Capital expenditures requested for the test year(s)
- Change in capital expenditures from last OEB approved ($ and %)

E. Rate Base

- Rate base requested for the test year(s)
- Change in rate base from last OEB approved ($ and %)

F. Performance and Reporting

- A proposed scorecard that could be used to measure and monitor the transmitter's performance including measures for all of the key RRFE objectives of public policy responsiveness, financial performance, operational effectiveness and customer focus.
- Demonstration of how the applicant has addressed the performance standards for transmitters as set out in Chapter 4 of the Transmission System Code.
- Discussion of any outstanding areas of non-compliance and the effect they have had on the application, including any relief sought.

G. Operations, Maintenance and Administration (OM&A) Expense

- OM&A for the test year(s) and the change from last OEB approved ($ and %)
- Summary of overall drivers and cost trends
- Inflation rates used for OM&A forecasts
- Total compensation for the test year(s) and the change from last OEB approved ($ and %)

H. Cost of Capital

- A statement as to whether or not the applicant is using the OEB's cost of capital parameters
- Summary and rationale of any deviations from the OEB's cost of capital methodology

I. Cost Allocation and Rate Design

- Summary of how costs are allocated to each of the three transmission rate pools

J. Deferral and Variance Accounts

- Accounts requested for disposition
- Total disposition and disposition period
- New deferral and variance accounts requested

K. Bill Impacts

- Summary of total bill impacts ($ and %) at the wholesale level (ie, change in the three uniform transmission rates, including an illustration of the impact on a typical customer connected directly to the transmission system that is not a distributor) and for typical retail customers (Residential at 800 kWh per month and General Service <50 kWh at 2000 kWh per month)

2.3.2 Customer Engagement

The RRFE contemplates an active role by distributors in customer engagement. The OEB expects that transmitters will initiate or continue customer engagement activities and provide a summary of those activities as part of the application.

The Transmission System Code (TSC) defines customer as a generator, consumer, distributor or unlicensed transmitter whose facilities are connected to or are intended to be connected to the transmission system. The TSC requires some communications and discussions with customers related to matters such as regional planning, connection procedures, testing and inspections, system performance and outages. The applicant's report should describe these and any other activities designed to engage all customers connected to the transmission system, including discussions related to investment planning and transmission rates and charges.

Transmitters should specifically discuss how their customers were engaged in order to determine their needs, what their needs are, and how the application has responded to any identified needs. Applicants must separately report on the needs of end-use load customers (as distinct from regulated distributors) served directly from the transmission system, and explain how the transmitter's application responds to the needs of these customers. Similarly, any discussion of the needs of generator customers should be presented separately.

A report of customer satisfaction surveys undertaken and results of these surveys should be provided. Information on planned future customer engagement activities should also be detailed in this section. Transmitters may find Appendix 2AC in the Distribution Filing Requirements helpful in structuring this evidence.

Transmitters are expected to file with the OEB their response to the matters raised in any letters of comment sent to the OEB related to the transmitter's application.

2.3.3 Financial Information

This section must include the following:

- Non-consolidated audited financial statements of the utility (excluding operations of affiliated companies that are not rate regulated) for which the application has been made, for the most recent three historical years (i.e. two years' statements must be filed).
  - Where the regulated entity conducts more than one activity regulated by the OEB, the transmitter shall disclose information separately about each of its operating segments in accordance with the Segment Disclosure provisions which corporate entities are encouraged to adopt by the Canadian Institute of Chartered Accountants Handbook.
  - If the most recent final audited financial statements are not available at the time of filing the application, the draft financial statements must be filed and the final audited financial statements must be provided as soon as they are available.
- Detailed reconciliation of the financial results shown in the Annual Reports/ Audited Financial Statements with the regulatory financial results filed in the application. The reconciliation must include:
  - The separation of non-utility businesses, for example the fixed assets
  - The identification of any deviations that are being proposed between the Annual Reports/Audited Financial Statements and the regulatory financial statements including the identification of any prior OEB approvals for such deviations that may exist
- Annual Report and management's discussion and analysis for the most recent year of the parent company, if applicable
- Rating agency report(s), if available
- Prospectuses, information circulars, etc. for recent and planned public debt or equity offerings

2.3.4 Administration

This section must include the following:

- Table of Contents
- Statement as to who will be affected by the application, including identification of

any specific customer or customer groups that may be significantly affected by a particular request or proposal

- Confirmation of the applicant's internet address for purposes of viewing the application and related documents
- Contact information. The primary contact for the application may be a person within the applicant's organization other than the primary licence contact (the primary contact's name, address, phone number, fax and email address must all be provided). The OEB will communicate with this person during the course of the application. After completion of the application, the OEB will revert to communication with the primary licence contact.
- Identification of any legal or other representation for the application
- The requested effective date(s)
- Bill impacts for each year of the term for a typical Ontario residential customer using 800 kWh per month and for an Ontario General Service <50kW customer using 2000 kWh per month, or as applicable
- Statement as to the form of hearing requested (i.e. written or oral) and an explanation as to the reasons for the applicant's preference
- List of specific approvals requested and relevant section of legislation. All approvals, including accounting orders (deferral or variance accounts) which the applicant is seeking, must be separately identified in this exhibit and clearly documented in the appropriate section of the application.
- A statement of the proposed length of the term, and brief description of the proposed method for establishing revenue requirement for each year of the term
- Changes in tax status (e.g. a change from a corporation to a limited partnership) must be disclosed
- Existing Accounting Orders
- A map of the applicant's assets and operations, showing where the utility operates within the province, and the communities serviced by the utility. A utility may provide more detailed geographic and/or engineering maps where these may be useful to understand parts of the application, such as a capital expansion or replacement program.
- Corporate and utility organizational structure, showing the main units and executive and senior management positions within the utility. Include any planned changes in corporate or operational structure (including any changes in legal organization and control) and rationale for organizational change and the estimated cost impact, including the following:
  - Corporate entities relationship chart, showing the extent to which the parent company is represented on the utility company board
  - The reporting relationships between utility management and parent company officials

- The Accounting Standard used and when it was adopted
- A statement identifying all deviations from the filing requirements, if any
- A statement identifying any changes to the methodologies used in previous applications and a description and rationale for the changes
- If an applicant is conducting non-utility businesses, it must confirm that the accounting treatment it has used has segregated all of these activities from its rate-regulated activities
- A clear indication of the way the applicant has satisfied any prior OEB Decisions or Orders and the impact on the current application (e.g. filing of a study as directed in a previous decision)
- All responses to matters raised in letters of comment filed with the OEB during the course of the proceeding

2.4 Exhibit 2 - Transmission System Plan

Exhibit 2 consists of a consolidated transmission system plan, including an asset management plan and regional planning considerations.

Transmitters may wish to refer to Chapter 5 of the Distribution Filing Requirements for further guidance on the content and structure of a Transmission System Plan.

The Transmission System Plan must include a summary of the investment planning process which includes:

- The strategic plan for the utility
- The overall strategy for investments
- The longer term economic and planning assumptions
- The asset management plan
- A description of how investments are prioritized and selected
- A discussion of transmission investments identified in a regional planning process
- Highlights of recent and proposed investments and their fit with the strategic plan
- A description of how the needs of customers and overall system planning policy objectives are being reflected, including any commitments stemming from the Long Term Energy Plan or the Conservation First policy, and consideration for the OEB's statutory objectives, including facilitating a smart grid and the connection of renewables
- The linkages and trade-offs between certain capital projects and ongoing OM&A

spending

2.4.1 Asset Management Plan

The transmitter must file a detailed asset management plan for its transmission assets. The plan should include the utility's asset management policy, strategy and objectives; an inventory and assessment of the condition of all capital assets whose net book value is material to the transmitter; and how this inventory informs the transmitter's plan for capital expenditures and plan for maintenance expenditures. The inventory should identify in which pool each class of asset belongs, and identify which of these are part of the bulk electricity system as defined by applicable North American Electric Reliability Corporation (NERC) standards. The transmitter shall identify any exemptions received from NERC, including any such requests that are planned or in progress, and a discussion of any associated costs in the event that the exemption is denied.

The asset management plan should demonstrate how these elements produce an integrated capital investment, asset maintenance and asset retirement plan that will drive the development of investment and maintenance for the test year(s) and beyond.

2.4.2 Regional Considerations

Planning transmission infrastructure in a regional context helps promote the cost effective development of electricity infrastructure in Ontario. Accordingly, these filing requirements provide that, where applicable, a transmitter shall file information on the regional planning process(es) in which it is a participant and information demonstrating that regional considerations have been appropriately considered and addressed in the development of the transmitter's plans.

For all applicable regions, the applicant shall therefore submit lead transmitter documentation in support of the application as contemplated in the TSC and the Distribution System Code.

1) Where a regional infrastructure planning process has been completed, the applicant shall submit a copy of the final Regional Infrastructure Plan that describes the investments in transmission and/or distribution facilities set out in the Plan. The applicant shall specifically identify any such investment(s), for which the applicant will be seeking approval.
2) Where regional planning is underway, but a Regional Infrastructure Plan has

not yet been completed for the applicable region, the applicant shall submit a letter from the Independent Electricity System Operator (IESO), identifying the status of the regional planning process, and the potential impacts on the applicant's investment plans.

3) Where the applicant's participation in a regional planning process is not required at this time, the applicant shall submit its needs assessment report documenting that regional planning is not required.

A transmitter may have infrastructure investments that span more than one region. The applicant should identify in the application where that occurs and the relationship between the applicable regional planning processes (including where the investment involves another lead transmitter).

2.4.2.1 Coordinated planning with third parties

For each region, to demonstrate that a transmitter has met the OEB's expectations in relation to coordinating infrastructure planning with customers, the lead transmitter, other transmitters or distributors, and the IESO (or other third parties where appropriate), a transmitter must provide a description of the consultation(s), including:

- The purpose of the consultation (e.g. regional planning process)
- Whether the transmitter initiated the consultation or was invited to participate in it
- The other participants in the consultation process (e.g. customers; distributors; other transmitters; IESO; municipalities)
- The nature and prospective timing of the final deliverables (if any) that are expected to result from or otherwise be informed by the consultation(s) (e.g. Regional Infrastructure Plan; Integrated Regional Resource Plan)
- An indication of whether and how the consultation(s) have or are expected to affect the transmitter's plans as filed

Where a final deliverable of the regional planning process is expected but not available at the time of filing, the transmitter must provide information indicating:

- The role of the transmitter in the consultation
- The status of the consultation process
- Where applicable, the expected date(s) on which final deliverables are expected to be issued

2.4.3 Capital Expenditures

The transmission applicant must provide an overall summary of capital expenditures over the past five historical years, which would include the bridge year, and five future years including the test year(s), showing capital expenditures, treatment of contributed capital and additions and deductions from Construction Work in Progress ("CWIP").

The following capital expenditure information should be provided by the applicant on a project specific basis, grouped appropriately. Where a program or initiative includes numerous similar projects across a portfolio of similar assets, the evidence can be presented on a program or portfolio basis.

- For projects or programs with a value greater than the materiality threshold and not subject to a leave to construct application:
  - Need, scope, and purpose of project or program, related customer attachments, load and capital costs, as well as any applicable cost-benefit analysis
  - A discussion of other capital and non-capital alternatives which were considered and rejected in favour of the proposed project or program
  - Detailed information on the priority of the project or program relative to other investments and risks of not proceeding with the project or program
  - For any sustainment or renewal investment, details on the condition or life expectancy of the asset(s) being improved through reinvestment
  - Detailed breakdown of starting dates and in-service dates for each project or program
- Drivers of capital expenditure increases for the test year(s)
- The basis for the estimated budget for the project or program (e.g. historical cost, preliminary engineering estimates, request for proposals)
- A summary of the evidence for any project that requires leave to construct approval under the OEB Act, where construction is to commence in a test year
- Identification of any project that has been undertaken in compliance with a condition included in the transmitter's licence as a result of a directive issued by the Minister of Energy to the OEB or has been declared a priority project by the Lieutenant Governor in Council

The following information about other capital expenditures should also be provided:

- Components of all other capital expenditures (those not already addressed above), including a reconciliation of all capital components to the transmitter's total capital budget

- Written explanation of variances, including that of actuals versus the OEB-approved amounts for the applicant's last OEB-approved revenue requirement application
- The proposed accounting treatment, including the treatment of the cost of funds, for investments spanning more than one year

The applicant must also include in the Transmission System Plan:

- Any cost benchmarking studies (internal and external) or utility cost comparisons conducted by or for the applicant to support the applicant's proposed expenditures. This requirement is mandatory for Custom IR applications. For other applicants, as a transitional measure, where no benchmarking studies are available, transmitters must detail their strategy to prepare or acquire benchmarking studies or cost comparisons for their subsequent rebasing application.
- For applicants filing a Custom IR or Revenue Cap application:
  - A description of quantifiable continuous improvement or efficiency gains that will be achieved over the term
  - The means by which those gains and savings will be achieved and the benefits assured for customers
  - A proposal to mitigate the potential for any significant earning by the transmitter above the regulatory net income supported by the approved return on equity, using such tools as a capital variance account or an earnings sharing mechanism

2.5 Exhibit 3 - Rate Base

This section must include the following:

1) Overview
2) Gross Assets – Property, Plant and Equipment and Accumulated Depreciation
3) Allowance for Working Capital
4) Capitalization Policy

2.5.1 Overview

For rate base, the applicant must include the opening and closing balances, and the average of the opening and closing balances for gross assets and accumulated depreciation. Alternatively, if an applicant uses a similar method such as calculating

the average in-service balance based on the average of monthly values, it must document the methodology used. Rate base shall also include an allowance for working capital.

At a minimum, the filed material in support of the requested rate base must include data for the historical actuals, bridge year (actuals to date and balance of year as budgeted), and test year(s).

Continuity statements and year-over-year variance analyses must be provided. Continuity statements must provide year-end balances and include interest during construction, and all overheads. Variance analyses must provide a written explanation for rate base-related material when there is a variance greater than the applicable materiality threshold.

If continuity statements have been re-stated for the purposes of the application, the utility must provide a thorough explanation for the restatement and also provide reconciliation to the original statements.

The following comparisons must be provided:

- Historical OEB-approved vs. historical actual (for most recent OEB- approved years)
- Historical actual vs. preceding historical actual (for the relevant number of years)
- Historical actual vs. bridge
- Bridge vs. test year(s)

The opening and closing balances of gross assets and accumulated depreciation that are used to calculate the fixed asset component of rate base must correspond to the respective balances in the fixed asset continuity statements. In the event that the balances do not correspond, the applicant must provide an explanation and reconciliation.

This reconciliation must be between or among the last actual year, bridge year and any test year(s) net book value balances reported on a fixed asset continuity schedule and the balances included in the rate base calculation. Examples of adjustments that would be made to the fixed asset continuity schedule balances for rate base calculation purposes are the removal of the amounts for work in progress and asset retirement obligations.

The information outlined in the fixed asset continuity schedule must be provided for each year, in both the application material and in working Microsoft Excel format.

2.5.2 Gross Assets – Property, Plant and Equipment and Accumulated Depreciation

The applicant must provide the following information:

- Breakdown by function (transmission plant, general plant, other plant) for required statements and analyses
- Detailed breakdown by major plant account for each functionalized plant item
  - For the test year(s), each plant item must be accompanied by a description.
- Detailed breakdown of the in-service capital additions for the test year(s)
- Continuity statements reconcilable to the calculated depreciation expenses (under Exhibit 4 – Operating Costs) and presented by asset account

2.5.3 Allowance for Working Capital

If a transmitter is proposing to include an allowance for working capital in its rate base, it must support this with a lead/lag analysis. A lead/lag study analysis for two time periods is required; namely:

- The time between the date customers receive service and the date that the customers' payments are available to the transmitter (the lag)
- The time between the date when the transmitter receives goods and services from its suppliers and vendors and the date that it pays for them (the lead)
  - Leads and lags are measured in days and are generally dollar-weighted. The dollar-weighted net lag (i.e. lag minus lead) days is then divided by 365 (366 in a leap year) and then multiplied by the annual test year cash expenses to determine the amount of working capital required for operations. This amount is included in the applicant's rate base determination.
  - For transmitters in Ontario, the lead/lag study should reflect the fact that the IESO provides the bulk of the revenue to the transmitter, with minimal contributions from other sources.

2.5.4 Customer Connection and Cost Recovery Agreements

When proposed capital expenditures are related to projects which require a contribution from a customer, the transmitter should show these amounts separately as an offset to rate base.

For any Customer Connection and Cost Recovery Agreements executed by transmitters with Ontario rate-regulated distributors that are due to be reviewed during the term as a result of reaching a fifth anniversary (or a 10th or 15th etc.) the applicant shall provide the number of agreements being reviewed and provide an aggregated estimate of the total expected true-up contributions, as well as any proceeds from a bypass agreement. Applicants shall also provide detail on the financial and regulatory accounting treatment of these proceeds.

2.5.5 Capitalization Policy

The transmitter must provide its capitalization policy, including changes to that policy since the last revenue requirement application filed with the OEB.

Regardless of the accounting standard used, if the transmitter has changed its capitalization policy since the last revenue requirement application, the transmitter must explain the reason for these changes and whether they are a result of adhering to an accounting requirement. The changes must be identified, (e.g. capitalization of indirect costs, etc.) and the causes of the changes must also be identified.

2.5.5.1 Capitalization of Overhead

Regardless of whether the applicant has filed the application under MIFRS, USGAAP, ASPE, or CGAAP, the applicant must provide information, depending on the accounting basis on which the application has been filed, regarding overhead costs on self-constructed assets.

2.5.5.2 Burden Rates

The transmitter must identify the burden rates related to the capitalization of costs of self-constructed assets. If the burden rates were changed since the last rebasing application, the applicant must identify the burden rates prior to and after the change.

2.5.6 Capital Module

Applicants proposing a Revenue Cap index may request a capital increment for discrete projects being placed in service after the rebasing year that:

- Are part of the Transmission System Plan
- Are intended to come into service during the index period
- Involve costs that the transmitter cannot manage through the revenue established through the index

The request must address proposed approval criteria (materiality, need, prudence) and the process for implementation of the recovery of the capital increment.

2.6 Exhibit 4 - Service Quality and Reliability Performance and Reporting

2.6.1 Proposed Scorecard

The OEB initiated the use of scorecards to facilitate performance monitoring and benchmarking of electricity distributors in 2013. Each transmitter must, in its first revenue requirement application following the issuance of these revised filing requirements, propose a scorecard that could be used to measure and monitor the performance of the electricity transmitter and, where appropriate, enable comparison between transmitters. The format should be similar to the scorecard developed for distributors (available on the OEB's website) and include measures for public policy responsiveness, operational effectiveness, customer focus and financial performance, but the applicant may propose other performance categories and measures that it believes would be meaningful for their operations as an Ontario transmitter. The proposed scorecard should provide for the inclusion of data for at least a five year period. Transmitters may propose measures for which five years of data are not yet available conditional on a plan and commitment to collect such data through the course of the plan.

In creating the scorecard, applicants may wish to consider the data they are already required to file under the TSC and the Reporting and Record Keeping Requirements (RRR).

Applicants may also choose to propose in their applications other performance

measures to be reported annually that are applicable to their individual business. The OEB will expect transmitters to report on performance metrics, such as cost control and project completion, if a multi-year term is approved.

2.6.2 Reliability Performance

All applicants, whether proposing a single or multi-year term, must document in their applications achieved reliability performance, using measures developed by the Canadian Electricity Association including, transmission frequency of delivery point interruptions and transmission duration of delivery point interruptions, unsupplied energy in minutes and transmission system unavailability (percentage of system unavailable). The applicant must also document how it has addressed the performance standards for transmitters as set out in Chapter 4 of the TSC.

The applicant should compare the results for its system performance to those of other systems both nationally and internationally, where available.

2.6.3 Compliance Matters

While most compliance matters are normally resolved outside of the revenue requirement application process, transmitters must discuss any outstanding areas of non-compliance which have had an effect on the application, including any relief sought through this application to resolve the non-compliance.

2.7 Exhibit 5 - Operating Revenue

This exhibit includes evidence on the applicant's forecast of customers, energy and load, service revenue and other revenue, and variance analyses related to these items.

The applicant must provide its customer, volume and revenue forecast, weather normalization methodology, and other sources of revenue in this exhibit. The applicant must include a detailed description of the methodologies and the assumptions used. Estimates must be presented excluding commodity revenues.

The information presented must include:

1) Load and revenue forecasts

2) Accuracy of load forecast and variance analyses
3) Other revenue

2.7.1 Load and Revenue Forecasts

The transmission load forecast is used to support the charge determinant load forecast for the three transmission rate pools: Network, Line Connection and Transformation Connection. The applicant must provide an explanation of the causes, assumptions and adjustments for the volume forecast. All economic assumptions and data sources used in the preparation of the load and customer count forecast, including the impact of conservation, must be included in this section, including when the forecast was prepared.

The applicant must also provide an explanation of the weather normalization methodology used. All economic models, econometric models, end-use models customer forecast surveys and load shape analyses must also be described and documented.

The applicant must provide a detailed CDM forecast, with impact of CDM shown on the load forecast for each of the three rate pools. The applicant must also indicate how the forecast reflects IESO CDM forecasts and targets in the load forecast.

The applicant's load forecast must also take into account the impact of forecast embedded generation on the transmission system load. The applicant must explain its assumptions and methodology.

2.7.2 Accuracy of Load Forecast and Variance Analyses

The applicant must demonstrate the historical accuracy of the load forecast for at least the past 5 years by providing the following, as applicable:

- Schedule of volumes (in kW for those rate pools that use this charge determinant), revenues, customer/connections count by rate pool and total system load in kWh) for:
  - Historical OEB-approved
  - Historical actual for the past 5 years
  - Historical actual for the past 5 years – weather normalized
  - Bridge year
  - Bridge year – weather normalized

- Test year(s)

The applicant must provide the following variance analyses and relevant discussion for volumes, revenues, customer/connections count and total system load:

- Comparison with the latest applicable provincial forecast(s) from the IESO, including a discussion of significant differences
- Historical OEB-approved vs. historical actual
- Historical OEB-approved vs. historical actual – weather normalized
- Historical actual – weather-normalized vs. preceding year's historical actual – weather-normalized (for the necessary number of years)
- Historical actual – weather normalized vs. bridge year – weather-normalized
- Bridge year – weather-normalized vs. test year(s)

All data used to determine the forecasts must be presented and filed in live MS Excel spreadsheet format.

2.7.3 Other Revenue

The applicant must provide the following information:

- Comparison of actual revenues for historical years to forecast revenue for bridge and test year(s), including explanations for significant variances in year-over-year comparisons
- How costing and pricing for other revenues is determined, any new proposed service charges, and/or changes to rates or new rules for applying existing charges
- Any revenue from affiliate transactions, shared services or corporate cost allocations. For each affiliate transaction the applicant must provide identification of the service, the nature of the service provided to affiliated entities, accounts used to record the revenue and the associated costs to provide the service

Revenues or costs (including interest) associated with deferral and variance accounts must not be included in other revenue.

2.8 Exhibit 6 - Operating Costs

Exhibit 6 includes information that summarizes the OM&A costs, depreciation expense

and taxes.

OM&A costs should be presented on an output/program-focused basis. This exhibit must include the following sections:

1) Overview
2) Summary and cost driver tables
3) Program delivery costs with variance analysis
4) Employee Compensation
5) Shared Services and Corporate Cost Allocation
6) Purchases of Non-Affiliate Services
4) Depreciation/amortization/depletion
5) Taxes, if applicable

2.8.1 Overview

The overview should provide a brief explanation (quantitative and qualitative) of the following:

- OM&A levels for the test year(s)
- Associated cost drivers and significant changes that have occurred relative to historical and bridge years
- Overall trends in costs
- Business environment changes
- Any cost benchmarking studies (internal and external) or utility cost comparisons conducted by or for the applicant. This requirement is mandatory for Custom IR applications.
- For applicants filing a Custom IR or Revenue Cap application, a description of the continuous improvement or efficiency gains that will be achieved over the term, and the means by which those gains and savings will be achieved and the benefits assured for customers.
- Inflation rate assumed: Each year the OEB will determine an inflation factor that applies to electricity distributors for Incentive Rate Setting (IRM) applications. If the transmitter has used an inflation factor different than this in forecasting its costs, it should provide a full explanation as to why the proposed inflation factor is more appropriate.

2.8.2 Summary and Cost Driver Tables

The applicant must include the following tables as part of its evidence:

- Summary of recoverable OM&A expenses
- OM&A cost drivers

Regardless of whether the applicant has filed the application under MIFRS, USGAAP, Accounting Standards for Not-for-Profit Organizations, or ASPE, the applicant must identify the overall change in OM&A expense in the test year(s) that is attributable to a change in capitalized overhead. The applicant must provide a variance analysis for the change in OM&A expense for the test year(s) in respect to each of the bridge year and historical years.

2.8.3 Program Delivery Costs with Variance Analysis

The applicant should provide details of costs in the following categories.

1. Employee compensation
2. Shared services and corporate cost allocation
3. Purchase of non-affiliate services
4. One-time costs
5. OEB costs
6. Charitable and political donations

2.8.4 Employee Compensation

The applicant must provide information on employee complement, compensation, and benefits for both management and union/non-union employees. Information on labour and compensation must include the total amount, whether expensed or capitalized. Applicants may wish to review Appendix 2K to the Filing Requirements for Distributors as a guide as to how this information should be presented.

Applicants must provide a description of their compensation strategy, and clearly explain the reasons for all material changes to head count and compensation and the outcomes expected from these changes. A complete explanation includes:

- Year over year variances with an explanation of contributing factors, inflation rates used for forecasts, and the plan for any new employees

- Basis for performance pay, goals, measures, and review processes for any pay-for-performance plans, including evidence of rational linkages between individual performance goals, company objectives and intended regulatory outcomes for the sector
- Any relevant studies conducted by or for the applicant (e.g., compensation benchmarking)

Applicants who are virtual utilities (i.e. utilities that have outsourced the majority of functions, including employees to affiliates) must also provide these details in relation to the employees who are doing the work of the regulated utility. The status of pension funding and all assumptions used in the analysis must be provided.

Where there are three or fewer employees in any category, the applicant must aggregate this category with the category to which it is most closely related. This higher level of aggregation must be continued, if required, to ensure that no category contains three or fewer employees.

The applicant must provide details of employee benefit programs, including pensions and other costs charged to OM&A for the last OEB-approved rebasing application, historical, bridge and test years. The most recent actuary report(s) must be included in the pre-filed evidence. What is disclosed in the tax section of the pre-filed evidence must agree with this analysis.

2.8.5 Shared Services and Corporate Cost Allocation

Shared services is defined as the concentration of a company's resources performing activities (typically spread across the organization) in order to service affiliates (including a parent company) with the intention of achieving lower costs and higher service levels.

The applicant must identify all shared services among the affiliated entities, including the extent to which the applicant is a "virtual" utility.

Corporate cost allocation is an allocation of costs for corporate and miscellaneous shared services from the parent company to the utility (and vice versa).

The applicant must provide the allocation methodology, a list of costs and allocators, and any third party review of the corporate cost allocation methodology used.

The applicant must provide details about each service provided or received for the historical (actuals), bridge and test years. Applicants must provide a reconciliation of the revenue arising from these transactions with the amounts included in other revenue in section 2.7.3.

Variance analyses, with explanations, are required for the following:

- Test year(s) vs. last OEB-approved
- Test year(s) vs. most current actuals

The applicant must identify any Board of Director-related costs for affiliates that are included in its own costs.

2.8.6 Purchase of Non-Affiliate Services

Utility expenses incurred through the purchase of services from non-affiliated firms must be documented and justified. An applicant must provide a copy of its procurement policy including information on such areas as the level of signing authority, a description of its competitive tendering process and confirmation that its non-affiliate services purchases are in compliance with it.

For any such transactions above the materiality threshold that were procured without a competitive tender, or are not in compliance with the procurement policy, the applicant must provide an explanation as to why this was the case, as well as the following information for historical (actuals):

- Summary of the nature of the product or service that is the subject of the transaction
- A description of the specific methodology used in determining the vendor (including a summary of the tendering process/cost approach, etc.)

2.8.7 One-time Costs

The applicant must identify one-time costs in the historical, bridge and test years and provide an explanation as to how the costs included in the test year(s) will not result in an over recovery of costs in future years.

2.8.8 Regulatory Costs

The applicant must provide a breakdown of the actual and anticipated regulatory costs, including OEB cost assessments and expenses for the current application such as

legal fees, consultant fees, costs awards, etc. The applicant must provide information supporting the level of the costs associated with the preparation and review of the current application.

2.8.9 Charitable and Political Donations

The applicant must file the amounts paid in charitable donations (per year) from the last OEB-approved rebasing application up to and including the test year(s). The recovery of charitable donations will generally not be allowed for the purpose of setting revenue requirement. If the applicant wishes to recover such contributions, it must provide detailed information for such claims.

The applicant must review the amounts filed to ensure that all other non-recoverable contributions are identified, disclosed and removed from the revenue requirement calculation. The applicant must also confirm that no political contributions have been included for recovery.

2.8.10 Depreciation, Amortization and Depletion

The applicant must provide details for depreciation, amortization and depletion by asset group for the historical, bridge and test years, including asset amount and rate of depreciation or amortization. This must tie back to the accumulated depreciation balances in the continuity schedule under rate base.

The applicant must identify any asset retirement obligations (AROs) and any associated depreciation or accretion expenses in relation to the AROs, including the basis and calculation of how these amounts were derived.

The OEB's general policy for rate setting is that capital additions would normally attract six months of depreciation expense when they enter service in the test year. This is commonly referred to as the "half-year" rule. The applicant must identify its historical practice and its proposal for the test year. Variances from this "half-year" rule, such as calculating depreciation based on the month that an asset enters service, must be documented with explanation.

The applicant must provide a copy of its depreciation/amortization policy, if available. If not, the applicant must provide a written description of the depreciation practices followed and used in preparing the application. Regardless of the accounting standard used in the application, the applicant must provide a summary of changes to its depreciation/amortization policy made since the applicant's last cost of service filing.

The applicant must ensure that the significant parts or components of each item of Property, Plant and Equipment are being depreciated separately. The applicant must

explain if it departs from this practice.

2.8.11 Taxes or Payments In Lieu of Taxes (PILs) and Property Taxes

The applicant must provide the information outlined below:

- Detailed calculations of income tax or PILs, as applicable, including derivation of adjustments (e.g., tax credits, CCA adjustments) for the historical, bridge and test years. Note: regulatory assets (and regulatory liabilities) must generally be excluded from PILs calculations both when they were created, and when they were collected, regardless of the actual tax treatment accorded those amounts.
- Supporting schedules and calculations identifying reconciling items
- Copies of most recent federal and provincial tax returns (non-utility tax items, if material, must be separated)
- Financial statements included with tax returns, if different from the financial statements filed in support of the application
- A calculation of tax credits (e.g., apprenticeship training tax credits, education tax credits). A Scientific Research and Experimental Development return, if filed, may contain confidential personal information of apprentices such as social insurance number, address, hourly rate, etc. which must be excluded from the filing.
- Supporting schedules, calculations and explanations for “other additions” and “other deductions” in the applicant’s PILs/tax model

Taxes other than PILs (e.g. property taxes) should be clearly identified where included.

2.8.11.1 Non-recoverable and Disallowed Expenses

There may be some expenses incurred by a transmitter that are deductible for general tax purposes, but for which recovery is partially or fully disallowed.

Where an expense incurred by a transmitter is non-recoverable in the revenue requirement (e.g. certain charitable donations) or disallowed for regulatory purposes, such amounts are generally excluded from the regulatory tax calculation.

2.8.11.2 Integrity Checks

The applicant must ensure the following integrity checks have been completed in its application and provide a statement to this effect, or an explanation if this is not

the case:

- The depreciation and amortization added back in the application's PILs/tax model agree with the numbers disclosed in the rate base section of the application.
- The capital additions and deductions in the UCC/CCA Schedule 8 agree with the rate base section for historic, bridge and test years.
- Schedule 8 of the most recent federal T2 tax return filed with the application has a closing December 31st historic year UCC that agrees with the opening bridge year UCC at January 1st. If the amounts do not agree, then the applicant must provide a reconciliation with explanations for the reasons.
- The CCA deductions in the application's PILs/tax model for historic, bridge and test years agree with the numbers in the UCC schedules for the same years filed in the application.
- Loss carry-forwards, if any, from the tax returns (Schedule 4) agree with those disclosed in the application.
- CCA is maximized even if there are tax loss carry-forwards.
- A statement is included in the application as to when the losses, if any, will be fully utilized.
- Accounting OPEB and pension amounts added back on Schedule 1 reconciliation of accounting income to net income for tax purposes, must agree with the OM&A analysis for compensation. The amounts deducted must be reasonable when compared with the notes in the audited financial statements, Financial Services Commission Ontario reports, and the actuarial valuations
- The income tax rate used to calculate the tax expense must be consistent with the utility's actual tax facts and evidence filed in the proceeding.

2.8.12 Z-Factor Claims

Transmitters who are operating under a Revenue Cap index or Custom IR may apply to recover material costs associated with unforeseen events that are outside the control of a transmitter's ability to manage, such as damage that is the result of a storm.

As with the policy applicable to distributors, transmitters must submit evidence that the costs incurred meet certain eligibility criteria:

- Causation: amounts must be clearly related to the Z-factor event, and outside of the base upon which revenue requirements were set. The application must demonstrate that the management of the transmitter could not have been able

to plan and budget for the event and that the harm caused by the extraordinary event is genuinely incremental to their experience or reasonable expectations.
- Materiality: the event must have a significant influence on the operations of the transmitter.
- Prudence: the amounts must have been prudently incurred. The transmitter's decisions to incur the amounts must represent the most cost-effective option for ratepayers.

To enable this process, a transmitter must also propose in its revenue requirement application a materiality threshold and explain the basis for it. At minimum, the threshold should exceed the OEB-defined materiality threshold set out in section 2.1.1 on a revenue requirement basis. Transmitters must also make the case that failure to recover the proposed threshold amount would have a significant influence on the operations of the transmitter.

As with the Z-factor policy applicable to distributors, a transmitter must also:

- Notify the OEB promptly of all Z-factor events. Failure to notify the OEB within six months of the event may result in disallowance of the claim.
- Record costs for which recovery will be sought
- Apply to the OEB for any cost recovery of amounts recorded in the deferral account. This will allow the OEB and any affected transmitter the flexibility to address extraordinary events in a timely manner. Subsequently, the OEB may review and prospectively adjust the amounts for which Z-factor treatment is claimed.
- Outline the manner in which it intends to allocate the incremental revenue requirement to the various rate pools, the proposed disposition period, the rationale for the selected approach and a discussion of the merits of alternative allocation methods
- Provide a detailed calculation of the incremental revenue requirement

Costs are to be recorded in Account 1572.

2.9 Exhibit 7 - Cost of Capital and Capital Structure

The OEB's general guidelines for cost of capital in rate regulation are currently provided in the *Report of the Board on Cost of Capital for Ontario's Regulated Utilities*, issued December 11, 2009 (2009 Report).

As per the 2009 Report, the OEB issues the cost of capital parameter updates for cost of service applications. Transmitters should use the most recent parameters as a placeholder, subject to an update if new parameters are available prior to the issuance of the OEB's decision for a specific transmitter's application.

If the applicant wishes to adopt the OEB's guidelines for the cost of capital, the application must clearly state this and confirm that the cost of capital parameters will be updated in accordance with the OEB's guidelines at the time of the OEB's decision.

Alternatively, the applicant may apply for a utility-specific cost of capital and/or capital structure. If the applicant wishes to take such an approach, it must provide appropriate justification and supporting evidence for its proposal.

Applicants requesting multi-year revenue requirement approvals must indicate whether they are proposing that the cost of capital be updated annually or fixed for all test years, and the reasons for that proposal.

2.9.1 Capital Structure

The elements of the deemed capital structure are shown below and must be presented with the appropriate schedules for current OEB-approved, historical actuals, bridge and test years:

- Long-term debt
- Short-term debt
- Preference shares
- Common equity

Any explanations of changes in actual capital structure are required including:

- Retirements of debt or preference shares and buy-back of common shares
- Short-term debt, long-term debt, preference shares and common share offerings

2.9.2 Cost of Capital (Return on Equity and Cost of Debt)

These requirements are outlined in the 2009 Report. The applicant must provide the following information for each year:

- Calculation of the cost for each capital component
- Profit or loss on redemption of debt and/or preference shares, if applicable
- Copies of any current promissory notes or other debt arrangements with affiliates
- Explanation of the applicable debt rate for each existing debt instrument, including an explanation on how the debt rate was determined and is in compliance with the policies documented in the 2009 Report
- Forecasts of new debt anticipated in the bridge and test years, including estimates of the applicable rate and any pertinent information on each new debt instrument (e.g. whether the debt is affiliated or with a third party, expected term/maturity, any capital project(s) that the debt funding is for, etc.)
- If the applicant is proposing any rate that is different from the OEB guidelines, a justification of forecast costs by item, including key assumptions

2.9.3 Not-for-Profit Corporations

In prior decisions, the OEB has determined that applicants which are not-for-profit corporations may apply using the OEB's deemed capital structure and cost of capital to the extent that the excess revenue is to be used for the purpose of meeting the applicant's need to build up or accumulate appropriate operating and capital reserves. The OEB has further stated that once the appropriate limits for these reserves have been achieved, it would expect such applicants to submit an application seeking an adjustment to revenue requirement.

2.10 Exhibit 8 - Deferral and Variance Accounts

The information outlined below is required whether or not the applicant is seeking disposition of any deferral and variance accounts:

- List of all outstanding deferral and variance accounts and sub-accounts. The applicant must provide a brief description of any account.
- A continuity schedule in Excel format for the period following the last disposition to the present, showing separate itemization of opening balances, annual adjustments, transactions, interest and closing balances.
- Interest rates applied to calculate the carrying charges for each regulatory deferral and variance account. The applicant must provide the rates by month or by quarter for each year.

- Explanation if the account balances in the continuity schedule differ from the account balances reported through the RRR and the audited financial statements.
- A proposal for an allocator based on the proposed cost driver(s) and included in the continuity schedule
- A statement as to any new accounts or sub-accounts that the applicant is requesting, and justification for each requested account or sub-account. This must correspond with information provided in Exhibit 1.
- A statement as to whether or not the applicant has made any adjustments to deferral and variance account balances that were previously approved by the OEB on a final basis. If this is the case, the applicant must provide explanations for the nature and amounts of the adjustments and include supporting documentation; under a section titled "Adjustments to Deferral and Variance Accounts".

In the event an applicant seeks an accounting order to establish a new deferral or variance account, the following eligibility criteria must be met:

- Causation - The forecasted expense must be clearly outside of the base upon which revenue requirement(s) were derived.
- Materiality – The forecasted amounts must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the transmitter. Otherwise they must be expensed in the normal course and addressed through organizational productivity improvements.
- Prudence - The nature of the costs and forecasted quantum must be reasonably incurred, although the final determination of prudence will be made at the time of disposition. In terms of the quantum, this means that the applicant must provide evidence demonstrating why the option selected represents the cost-effective option (not necessarily least initial cost) for ratepayers.

In addition, applicants must include a draft accounting order with a description of the mechanics of the account, including examples of general ledger entries, and the manner in which the applicant proposes to dispose of the account at the appropriate time.

2.10.1 Disposition of Deferral and Variance Accounts

The applicant must:

- Identify all accounts for which it is seeking disposition
- Identify any accounts for which the applicant is not proposing disposition and the reasons why
- Propose the method to be used for recovery or refund of balances that are proposed for disposition
- Provide a statement that the balances proposed for disposition before forecasted interest are consistent with the last Audited Financial Statements and provide explanations for any variances
- Provide an explanation for any variances greater than 5% between amounts proposed for disposition before forecasted interest and the amounts reported in the applicant's quarterly and annual RRR filings for each account
- Provide explanations even if such variances are below the 5% threshold if the variances in question relate to: (1) matters of principle (i.e. prior OEB decisions, and prior period adjustments); and/or, (2) the cumulative effect of immaterial differences over several accounts totaling to a material difference between what is proposed for disposition in total before forecasted interest and what is recorded in applicable filings
- Show all relevant calculations, including the rationale for the allocation of each account, the proposed billing determinants and the length of the disposition period

2.11 Exhibit 9 - Cost Allocation to Uniform Transmission Rate Pools: Charge Determinants

The applicant should identify the cost allocation methodology that is proposed to allocate costs to the three transmission rate pools: Network, Line Connection and Transformation Connection.

The applicant must outline the key steps taken to functionalize the assets in the functional categories including the criteria used to define each asset category and, how costs are apportioned to the functional categories and rate pools. Allocation factors for dual function assets must be explained.

The applicant must describe how the revenue requirement is allocated to the rate pools including allocation factors applied to each asset or groups of assets. The applicant must show how depreciation, return on capital, taxes and OM&A costs are assigned to the rate pools.

In some cases, another rate pool may be created (such as the Wholesale Meter

Pool, established by Hydro One Networks Inc.). Similar information must be provided for any assigning of costs to non-standard rate pools.

2.12 Exhibit 10 - Rate Design for Uniform Transmission Rates

2.12.1 Bill Impact Information

Each applicant must provide bill impact information including information on the dollar and percentage impact of the application on the average customer's total bill as well as the percentage impact on transmission rates.

The bill comparisons must be provided for typical customers and consumption levels. At a minimum, bill impacts must be provided for typical Ontario residential customers consuming 800 kWh per month and typical Ontario General Service customers consuming 2,000 kWh per month and having a monthly demand of less than 50 kW. Transmitters must also include bill impacts for a typical directly connected non-LDC customer.

2.12.2 Setting the Uniform Transmission Rates

Hydro One Networks Inc., or another transmitter designated by the OEB, shall, at the request of the OEB, provide information to allow the OEB to establish uniform transmission rates (UTR) for the province. The information filed must include the following:

- An overview of how the UTR are established in Ontario and how these rates are determined
- The revenue requirement and load forecast data (from each transmitter) that is used to compile the transmission charge determinants for each rate pool
- If applicable, the determination of the Export Transmission Service rates and the treatment of revenues generated through these rates

A table explaining and documenting the determination of the UTR, including:

- The previously approved revenue requirements and load forecast charge determinants for all other transmitters in the pool
- The OEB file number of each decision approving each revenue requirement and charge determinant
- The proposed revenue requirements and charge determinants as proposed in

the application

- The calculation of the UTR for each pool
- The transmission revenue allocator for each of the Ontario transmitters in the pool
- An explanation of any changes to terms and conditions of service and the rationale behind those changes if the changes affect the application of the rates

-End-

Tab 28

policy. AMPCO went further in arguing that Hydro should not reduce its accounts payable balances and consequently not incur a net increase of $8 million in interest expense.

803

IPPSO argued on the other hand that Hydro should pay its suppliers on a timely basis and not take advantage of its large size with respect to its suppliers. It submitted that Hydro would be abusing the public trust imposed on it if it were to delay its accounts payable payments.

804

The Board supports Hydro in its efforts to meet its accounts payable obligations in a more timely fashion. The Board concurs with IPPSO that Hydro has an obligation in this respect to its many suppliers, particularly those who rely heavily on Hydro for their business.

Was Page 11/1. See Image [OEB:113HF-0:163]

805

11. NET INCOME

806

11.1 Introduction

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This Chapter addresses the methodology which should be used to determine net income and recommends an appropriate level for 1988.

808

The Board rejects Hydro's argument that the law precludes consideration of Hydro's cost of equity capital in determining the appropriate level of net income. It also rejects Hydro's submission that to consider the cost of equity would go against government policy. It notes that return approaches to determining net income have been a recurring theme through numerous reports of previous task forces, boards, and commissions.

809

The Board recommends that the cost of Hydro's equity capital be a criterion in the determination of net income, and further, that an appropriate level of net income for 1988 is $515 million.

Was Page 11/2. See Image [OEB:113HF-0:164]

810

Like other corporations, Hydro's net income is the residual amount remaining after deducting all expenses from revenues, in accordance with the Corporation's accounting policies. However, more relevant to the ratemaking process, net income is a cost component of the price of electricity service in accordance with sections 75, 69, and 90(a) of the Power Corporation Act (the PCA) of Ontario. Net income is commonly also known in accounting terminology as profit. In finance and economics it is the amount paid through prices to cover the cost of all capital other than debt. All of these views of net income are interdependent, and none is contradictory of another.

811

According to Hydro, it determines the level of net income for ratemaking purposes by examining three criteria: the financial soundness of the utility; the availability of capital; and the size and pattern of rate increases. The Board has accepted the importance of financial soundness as a criterion. Although the Board has also agreed in principle with Hydro's criterion of the size and pattern of rate increases, it has strongly criticized Hydro for placing too much emphasis on it at the expense of financial soundness. Availability of capital has not been an issue in recent years.

812

In H.R. 15, the Board extended the concept of financial soundness beyond Hydro's focus on debt capital to include all capital including equity and, hence, to focus on net income as well as on interest costs. In the Board's view, financial soundness means not only that debt capital is secure and productively employed, but that equity capital is also secure and productively employed.

Was Page 11/3. See Image [OEB:113HF-0:165]

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This extension in H.R. 15 led the Board to examine Hydro's statutory mandate to price electricity at cost. The Board noted that net income is comprised solely of "costs" which are required by section 75 of the PCA to be recovered in rates. While noting the discretion which Hydro's Board of Directors has in setting net income, the Board strongly expressed the view that cost concepts should play a role in the determination of Hydro's net income. Cost concepts include relative relationships to the cost of other capital, such as debt, and also include equity-market-based concepts of the cost of Hydro's equity capital. Interest coverage ratios and rate smoothing considerations, used by Hydro to determine net income, are not cost concepts in accordance with the usual meaning of cost.

814

While accepting the importance of Hydro's other criteria, the Board recommended that Hydro's level of net income should be based also on the cost of Hydro's equity capital. In making this key recommendation last year, the Board quoted evidence adduced in H.R. 15 and previous hearings. It noted not only the statutory mandate, but also various economic benefits which would derive from keeping one's eye on the cost of equity capital. Not least of such benefits would be a sharper focus and discipline, on the part of Hydro's management, on costs.

Was Page 11/4. See Image [OEB:113HF-0:166]

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The Board also addressed other expressions of government policy beyond the PCA, including letters from the Treasurer of Ontario (the Treasurer) which were tabled in evidence. In the Board's view these expressions of government policy were consistent with the Board's interpretation of the PCA and compatible with the Board's view of the importance of recognizing net income as a legitimate cost of providing electricity service.

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Thus, for what were essentially reasons of equity and economic efficiency, the Board expressed the view in H.R. 15, and reaffirms it here, that net income should be determined on a basis which includes consideration of the cost of equity capital.

817

Hydro, in this year's proceeding, has opposed the determination of net income on the basis of the cost of equity capital.

818

Hydro has based its opposition on an argument that the law prohibits it from basing its determination of net income on the cost of equity capital, an argument that government policy prohibits such an approach, and an argument that resultant rate increases would be unfavourable.

819

The Board addresses the law concerning net income in Section 11.2 of this Chapter. Hydro's legal argument is based primarily on a questionable interpretation of history, which is in any event irrelevant, and on an interpretation of a court decision which this Board believes Hydro has misunderstood. On a matter of this importance the Board feels that Hydro should have produced an external independent legal opinion, instead of relying on in-house counsel. These arguments on the law have detracted from

considerations of public interest and economics. If this year's Report does not satisfactorily dispel the argument that there is a legal impediment to treating net income as a legitimate cost of capital, then Hydro and this Board will be at an impasse which would be better resolved.

Was Page 11/5. See Image [OEB:113HF-0:167]

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As well as the historical interpretation and the court case, Hydro also puts forward the argument, anticipated by the Board in H.R. 15, that if the PCA doesn't provide for a dividend, there cannot have been an intention to consider the cost of equity capital in setting rates. The Board's view continues to be that a dividend provision is not indicative of a legislative intention with respect to the cost of equity capital.

821

Nor is the need for such a dividend provision imminent. Hydro would do well to continue to retain earnings, improve its debt ratio, and put itself in a position where it could stand alone without the provincial guarantee of its debt. Depending on the outcome of the long-awaited DSOS, Hydro may require all of the earnings it can retain for many years to come, just as it would have needed such earnings in previous periods of capital growth and expansion, especially in the early years of its history. Although, ideally, the Board sees an ultimate need for a dividend provision, it understands that it may be a matter of prudent public policy not to provide for one until it is needed.

Was Page 11/6. See Image [OEB:113HF-0:168]

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The question of government policy with respect to net income is discussed in Section 11.3. In order to determine whether government policy is or is not opposed to using the cost of equity capital as one of the determinants of net income, Hydro held discussions with representatives of the Government of Ontario. Hydro says that no change in government policy with respect to net income has been indicated to it. The fact is that neither the Treasurer, the Minister, nor anyone else in the Government has considered it necessary to clarify government policy to this Board in the face of this Board's interpretation of it in H.R. 15.

823

Hydro also carried out an assessment of the financial impacts of applying "return on equity" concepts to the Corporation. In many respects this was an update of assessments which were carried out in the 1983 net income study filed in H.R. 12. The reasoning continues to be flawed and unpersuasive. Essentially, Hydro submits that the cost of equity approach should be rejected because it would result in higher rates and would provide more funds than Hydro requires to maintain financial soundness for raising debt. These matters are addressed further in Section 11.4.

824

In this year's proceeding the Board reviewed opinions expressed by earlier commissions, task forces, and boards. The concept that net income should be viewed as

Was Page 11/7. See Image [OEB:113HF-0:169]

825

a return to capital, and that steps should be taken to remove the effect of the government guarantee of Hydro's debt, are recurring themes. Excerpts from reports of earlier commissions, task forces, and boards are reviewed in Section 11.5 of this Chapter. Evidence on the record also indicated that certain prominent public utilities in other provincial jurisdictions follow a cost of equity approach in determining net income.

826

By resisting recommendations to price electricity to recover all of the costs which it faces, Hydro on the

one hand preserves its quasi-governmental role as an administrator of industrial policy through electricity rates, and on the other hand avoids the spending discipline which it would face if it had to price to recover all of its costs.

827

In carrying out its perceived quasi-governmental mandate, Hydro claims it distributes the benefits of its low costs (and the absence of potentially higher revenues) to its customers, based on their electricity consumption. Hydro should make a distinction between an Ontario resident's interest as a taxpayer and his or her interest as a consumer of electricity from Hydro. The Ontario resident would then no longer have to consume more, simply to receive his or her share of the "profit" or benefit from the Corporation.

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The government of this Province should be entitled to receive these benefits and distribute them as it sees fit, over a broader spectrum of programs than simple consumption of electricity.

Was Page 11/8. See Image [OEB:113HF-0:170]

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Although this Board clearly has a fundamental difference with Hydro in terms of business philosophy and the achievement of the public interest, it also has practical concerns about Hydro's ability to achieve its own financial targets. Table 11.1 shows that Hydro, in

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Table 11.1 Level of Net Income

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responding to the concerns of the Board and intervenors in both H.R. 14 and H.R. 15, raised its planned level of net income significantly over its initial proposal. It then failed in 1986, and expects to fail in 1987, by a large margin to achieve even the levels it sought in its original proposals.

Was Page 11/9. See Image [OEB:113HF-0:171]

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Clearly the concern is worth noting. This year both AMPCO and MEA, representing Hydro's major customer groups, recommended levels of net income in excess of the level proposed by Hydro. Rarely do customers of any other business tell the business that it should seek more profit. This is especially unusual since Hydro is a monopoly. The inference is that it is a monopoly which is more interested in behaving like government than in being business-like.

833

In Section 11.6, the Board then addresses the appropriate level of net income for 1988. It examines Hydro's interest coverage ratio approach to determining a target net income. It considers the cost of capital and net income evidence of Dr. Jenkins on behalf of Special Counsel, and Drs. Berkowitz and Booth on behalf of Energy Probe, corroborated in part by Mr. Cook of Dominion Securities on behalf of Hydro. It reviews other criteria and addresses any remaining arguments of intervenors. Lastly, it sets out its recommendations for determining net income and an appropriate level for 1988.

834

It is possible, with determination and commitment, for Hydro to adopt these recommendations with no significant additional increase in 1988 rates. On their own, the recommendations on net income could be implemented by accepting a small percentage point increase in rates annually over the next few years. To ensure customer acceptance, it should be emphasized that any such increase, if necessary at all, is to permit recovery of costs and to ensure that this generation's children do not have to bear costs which this

generation, through Hydro's management, has simply chosen to defer.

Was Page 11/10. See Image [OEB:113HF-0:172]

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Postponing the opportunity will make the adoption of this approach more difficult in the future, especially if the difference in required net income between the interest coverage approach and the cost of equity approach becomes large. If Hydro continues its interest coverage approach to determining net income, as it pays off its debt, and thereby reduces interest expense, there becomes less and less need for net income. This obtains in spite of the fact that both equity, and significant residual risks, remain. This result is absurd.

836

Based on a review of Hydro's interest coverage ratios, debt costs, borrowing capability, evidence on the cost of equity capital, and in light of the level,and pattern of Hydro's rate increases, the Board recommends a level of net income for 1988 of $515 million. This satisfies the minimum interest coverage criteria recommended by this Board in H.R. 15, and it begins a transition toward the establishment of net income levels which will cover the cost of Hydro's total capital.

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11.2 Definition, Authority and Discretion -- The Law

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Consistent with the definitions of "net income" from accounting, finance, and economics referred to above, net income is a cost component of the price of electricity service in accordance with sections 75, 69, and 90(a) of the PCA. Section 75 sets out the authority for Hydro to recover in rates "cost to the Corporation" and, without limiting the generality of that concept, "includes" among other items, certain appropriations of retained earnings, otherwise known as reserves. A primary test of whether there is authority under the PCA to recover a cost is whether or not it is a cost to the Corporation. Section 75 of the PCA, without limiting what may be a cost to the Corporation, enumerates certain items which are to be included as costs. Beyond the illustrative list of costs, the determination of what is a "cost to the Corporation" is to be at the discretion of Hydro's Board of Directors.

Was Page 11/11. See Image [OEB:113HF-0:173]

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Even within the illustrative list of costs, an analysis of clauses 75(c) and 75(d) clearly gives Hydro flexibility to exercise discretion in determining net income. This Board's interpretation of sections 75(c), 75(d), 69 and 90(a) of the PCA was set out on pages 14/4 to 14/7 of H.R. 15 and is reproduced as Appendix 11.1 to this Chapter.

840

The Board continues to hold the view, which it held in H.R. 15, that the cost of Hydro's equity capital is a cost to the Corporation, whether it is restricted to minimum reserve amounts under section 75 or is a larger amount in accordance with section 75, in either case determined at the discretion of Hydro's Board of Directors.

Was Page 11/12. See Image [OEB:113HF-0:174]

841

In this proceeding, Hydro has said that the Supreme Court of Canada decision in Hydro-Electric Commission of the Township of Nepean v. Ontario Hydro (1978), 92 D.L.R. (3d) 481 (Ont.H.C.J.); affirmed (1980), 107 D.L.R. (3d) 257 (Ont.C.A.); affirmed (1982), 132 D.L.R. (3d) 193 (S.C.C.), hereinafter referred to as Nepean, prevents the Corporation from charging a return on equity capital. Hydro must have been aware of this case in H.R. 15, but did not raise it. Furthermore, toward the end of the hearing and in argument, Hydro revised its position to say that the law would only prevent it from

charging a market return on equity capital.

842

Since Nepean did not deal with a cost to the Corporation, in the Board's view it is not relevant to this discussion. Rather, as described by MEA in its argument:

843

The Nepean decision involved a determination of the propriety of a redistribution scheme implemented by Ontario Hydro in 1966. Under the terms of the scheme, Ontario Hydro, in addition to a payment of a debt retirement charge under the statute, also gave credit to each municipality or utility for all of its past "equity" accumulated through debt retirement charges. That credit was to be given annually with interest at the rate of 4% and was called "return on equity". The 4% credit became a cost equal to the "return on equity" and the municipalities were credited with the "return on equity" and billed for the "cost of return". The two items were then shown on the Hydro billings, one as a debit and one as a credit. Ontario Hydro, therefore, did not gain or lose by the computation. [It was not a cost incurred], but the effect on the individual municipalities varied greatly in as much as certain municipalities that had acquired

Was Page 11/13. See Image [OEB:113HF-0:175]

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a larger "equity" in the system received a greater return than their share of the "cost of return". By contrast, newer, fast growing municipalities with small "equity" and rapidly rising power demands, were charged more for the "cost of return" than they received from the "return on equity". The older municipalities received a credit for the "equity" while the newer municipalities bore the cost of that credit in increased charges. By means of this scheme of charges and credits, Hydro was able to redistribute costs between the various municipalities. [Emphasis added]

845

Some of the terminology used by Hydro in the Nepean "scheme" was unfortunate in that, by attributing the common meaning to certain words when quoted out of their full context from the court decisions, misleading conclusions can be reached. The "equity" which was referred to in Nepean was hypothetical equity which the municipalities supposedly acquired in Hydro through purchasing electricity from Hydro at fair rates, and not the real equity capital of Hydro. "Return on equity" was a return on this hypothetical equity of the municipality in Hydro, and the "cost of return" was not a "cost to the Corporation" in accordance with section 75 of the PCA, but rather was an amount which, in sum, would offset the total of the returns on the hypothetical equity of the municipality in Hydro.

846

The courts went out of their way to use quotation marks when speaking about "equity", "return on equity", and "cost of return on equity", because these terms had specific meaning within the complicated redistributive scheme introduced in 1966 and were not to be confused with the usual financial concepts of return on, or cost of, a corporation's equity capital. The latter costs are not hypothetical, and if not recovered in rates (prices) of the Corporation, are a very real economic and financial loss to that capital. Mr. Justice Dickson, at page 200 of the Supreme Court of Canada decision said:

Was Page 11/14. See Image [OEB:113HF-0:176]

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The Act entitled Ontario Hydro to charge for the cost of supplying and delivering power to its subscribers. The "cost of return" was not a cost incurred by Ontario Hydro in connection with the delivery and supply of power. Rather, it was a levy designed to recognize payments which had been made in the past by certain municipalities. The whole return/cost system was based on a fiction. It involved Ontario Hydro playing the role of a corporate Robin Hood, taking from certain users and giving to others. As counsel for Nepean submits in his factum, the cost of supplying power would be identical, regardless

of whether the charges for "cost of return" were levied or not.

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As Mr. Justice Craig pointed out, there is no statutory basis for the position of Ontario Hydro. The whole concept of certain utilities building up "equity" in the assets of Ontario Hydro is a concept created by Ontario Hydro in its attempt to be "fair" to certain users. The statute gives Ontario Hydro certain limited rights. These rights enable it to charge for the cost of supplying power. Ontario Hydro cannot, however, take from one user and give to another because it sees this as "fair". Redistributive schemes are not within its authority.

849

In general, and similar to an approach which would be common for a public utility tribunal to follow in a rate case, Hydro first determines a forecast of total costs which are to be recovered from its customers. It then allocates those costs to various classes of customers.

Was Page 11/15. See Image [OEB:113HF-0:177]

850

In the redistributive scheme addressed in Nepean, Hydro was attempting to further allocate some of those costs in a discriminatory way to individual municipalities on the basis of rates they had paid to Hydro in the past, i.e., on the basis of contributions which differed greatly depending on whether a municipality was an old user or a new user on the Hydro system. A tribunal might well have simply said this was "undue discrimination" and, hence, was not "fair" The courts simply said that they could find no legislative authority within the Power Corporation Act for such a redistributive scheme.

851

Nepean does not address the question of whether or not Hydro is entitled to charge all customers, on a fair basis, a cost of equity capital. In fact, Hydro currently charges customers amounts which are properly categorized as costs of equity capital in accordance with clauses 75(c) and 75(d) of the PCA. When this was drawn to Hydro's attention in H.R. 16, Hydro said that the law only prevented the charging of a market-based cost of equity capital. Even in referring to the fictional return-on-equity/cost-of-return, Nepean says nothing about market-based concepts.

852

Hydro itself has for a number of years relied on concepts of costing net income which are important to debt markets, specifically through its emphasis on interest coverage ratios. If it were not possible to rely on the discretion which is given by the PCA to Hydro's Board of Directors, it would be arguably just as difficult to find specific legislative authority for Hydro's current practices of using interest coverage ratios as it is to find specific authority for other concepts of determining net income, market-based or otherwise. Hydro has no sound basis for asserting that it cannot use market-based concepts of the cost of equity capital to determine net income.

Was Page 11/16. See Image [OEB:113HF-0:178]

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In Part B of its Argument On Legal Issues (Legal Argument) Hydro began by redefining words like "capital". For example, it said:

854

It is assumed that 'capital' in Issue 1(a) refers to the notion of 'rate base' as used in regulation of private sector entities, being the value of assets used to provide service, or alternatively to the cost of financing those assets.

855

Rate bases come in many forms in the regulation of private sector entities. The NEB, for example, uses

both capital and asset rate bases and several varieties of the latter. Even assuming that Hydro had in mind an asset concept of rate base, it is unclear what Hydro meant by "the cost of financing those assets". If Hydro meant interest expense, the idea that interest expense could be considered a "rate base" definitely requires explanation.

856

Hydro further assumed that "'return' in the case of equity, refers to the market rate of return which could be the cost of long term debt plus an appropriate premium for risk". Hydro observed that the "opinion of the OEB solicitor Ms. C.L. Cottle, concerning this matter... has not specifically identified 'return' as representing a market rate or an opportunity cost". Not only has Hydro confused the two very distinct concepts of "return" and "rate of return", but it has ignored the fact that presumably Ms. Cottle did not discuss market-based costs of equity capital because Hydro placed no emphasis on it until late in the hearing. Ms. Cottle addressed the question of the cost of equity capital in a general manner similar to that of Hydro.

Was Page 11/17. See Image [OEB:113HF-0:179]

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Acknowledging that a return on equity or cost of equity can be calculated from its own financial statements, Hydro in its Legal Argument stated its position as follows: "it is precluded by law from including in the price of power either a market return to capital or, more specifically, a market return on equity capital". In the Board's view, it is clearly not precluded.

858

Up to a point, Hydro's interpretation of section 75, set out as follows, is similar to that set out by the Board in H.R. 15:

859

The funds collected in accordance with s.75(c) and (d) form the "Net Income" shown on the statement of operations. Net Income is an accounting term and is equivalent to the appropriation to the debt retirement reserve or the appropriation to and withdrawal from the reserve for stabilization of rates and contingencies. Under s.75(d), Hydro is given discretion to determine what net income should be, and has developed its net income policy to assist in making this determination.

Was Page 11/18. See Image [OEB:113HF-0:180]

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The Board would add, however, that although net income "includes" amounts in accordance with clauses 75(c) and 75(d), it may "include" other items if Hydro's Board of Directors determine they are costs to the Corporation.

861

Hydro also observed:

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While there is discretion in determining the amounts of those requirements, that discretion is in relation to, and therefore limited to being exercised within, the purposes of the relevant reserves or funds.

863

This Board notes that the purposes, as found, for example, in subsection 15(2), are very broad. Furthermore, "contingencies" itself is a very broad term and presumably could include: a major incident; or an unforeseen increase in any cost, such as "water rental rates" or a charge for the debt guarantee, or even a cash need arising from a change in legislation. The "purposes" are not limiting.

864

When discussing Nepean in argument, Hydro quoted Mr. Justice Estey for the majority in the Supreme Court of Canada decision where he said that nowhere in section 75 "is there anything approaching a precise legislative authorization for the 1966 scheme". The courts say that Hydro as a creature of statute, can only exercise those rights for which clear statutory authority can be found. As has been discussed earlier, the Board clearly believes that the 1966 scheme had nothing to do with Hydro recovering through rates a return on the Corporation's equity capital.

Was Page 11/19. See Image [OEB:113HF-0:181]

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Rather, it was a billing scheme of debits and credits whereby municipalities that have purchased large amounts of electricity over many years were credited with a return on equity which Hydro deemed them to have built up, and the cost of this credit, known as the "cost of return on equity" in the scheme, was charged to all customers. The quotation from Nepean would be clearly relevant if the issue were a redistributive scheme as addressed in Nepean. However, it is totally irrelevant to the question at hand, namely whether Hydro is entitled to charge, in its rates to recover the cost of equity capital to the Corporation, a "cost to the Corporation" over and above all other costs.

866

Similarly Hydro quoted Mr. Justice Estey where he discussed the discretion conferred by section 56. The Board would not disagree with Mr. Justice Estey that the discretion cannot be construed to be extended to authorize or support the post-1966 scheme of charges or credits. However, His Lordship did not address the question of whether or not such discretion would apply to a cost to the Corporation such as return on capital. In this Board's view it would. Nonetheless, there is no need to rely on section 56 since the authority and discretion under sections 75 and 15 are clearly sufficient.

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It is also worth noting that according to the Supreme Court of Canada in Nepean the redistributive billing scheme of Hydro introduced in 1966 was based on a "fiction". It dealt with returns which in no way could be said to be market returns. The returns were based on

Was Page 11/20. See Image [OEB:113HF-0:182]

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a fixed, somewhat arbitrary, 4 percent rate of return on the hypothetical equity built up by a municipality through paying just and reasonable rates for Hydro's electricity service. In other words, in support of its position that it cannot charge in rates for a market-based return on equity, Hydro has relied on Nepean which cannot be said to remotely deal with a market return on equity, even a market return on hypothetical fictional equity.

869

It bears repeating that, in this Board's view, the statutory authority for charging in rates for a return on Hydro's equity capital, be it market-based or not, is found in section 75. Even if the clauses (c) and (d) were not sufficient to provide authority, the list of items in the section is not limiting since the list of items is merely illustrative and is preceded by the word "including". The determinative issue is whether, within the meaning of section 75, the cost of equity capital is a "cost to the Corporation." This Board finds that it is.

870

In its argument, Hydro also expressed the view that "interest" mentioned in sections 13 and 15 is not return on equity. The Board is at a loss to understand this viewpoint. Sections 13 and 15 provide for interest on reserve accounts which are equity, and interest on equity, as archaic as the language may sound, can mean only one thing: return on equity.

871 The redistributive scheme in Nepean was a redistributive scheme among like persons, namely customers, specifically the municipalities. Hydro has said that a scheme to pay out dividends from earnings would also be a redistributive scheme analogous to the scheme examined in Nepean. This Board finds that viewpoint far-fetched. At best, rather than a redistributive scheme among like persons, it is a distributive scheme from customers, through the Corporation, to the residents of Ontario, and therefore clearly a concept different from that described in Nepean.

872 In summary, Nepean, on which Hydro relies, deals with a scheme to redistribute cost responsibility among customers of Hydro and does not deal with a cost to the Corporation. Net income is a cost to the Corporation. Therefore, Nepean is not relevant to the determination of the net income of Hydro.

873 Hydro further argues, "the ordinary understanding of the term 'return on equity' is profit. How can profit be a 'cost' for purposes of s.75?" Hydro has already acknowledged that its net income is a return on equity. It has simply argued that it should not be market-based. In other words, Hydro has acknowledged that the ordinary understanding of the term net income is profit, but has simply said that it is not a market-based concept of profit. It has already said elsewhere that it acknowledges that net income is a cost for purposes of section 75. Hence, if logic prevails, Hydro must understand how profit can "be a 'cost' for the purposes of s.75".

874 Hydro further submits, "Ms. Cottle has ignored in her argument the fact that there is no provision in the Power Corporation Act for a payout from the corporation". It then says, "If her approach regarding earning a return were to be accepted, there would be no permissible legislative use or payout for that return, leading to an ongoing accumulation of excess funds in Hydro". In the Board's view this is simply not so.

875 One "use" would be the repayment of the debt of Hydro. Another use would be to fund appropriate new construction. Both uses have existed since the inception of Hydro.

876 Hydro also makes reference to the accumulation of profit from the sale of power to municipal commissions as being "unnatural". There is nothing at all unnatural about it. Not only do all corporations normally accumulate profits, but certain other government-owned utilities do as well.

877 In concluding Part B of its Legal Argument, Hydro speaks of "actual" costs as if they do not include costs of capital. This is untenable. It also speaks of being "financially independent of Government". It cannot possibly be considered to be, unless and until it pays to government an appropriate fee for the guarantee of its debt and unless and until it recovers the cost of its equity capital. It is entirely within the discretion of Hydro's Board of Directors to do so.

878 Hydro also presented a historical background, Part A of its Legal Argument, which it submitted would preclude the legislative intention of charging a return on equity capital. It based this argument on facts which were not tested in the proceeding and which, to the extent they may be true, Hydro has interpreted in a questionable manner. The Board cannot find in this portion of the argument any support for Hydro's

position. The Board's analysis and comments on it are provided in the following paragraphs.

879

In describing this part of Hydro's Legal Argument, Special Counsel stated:

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Ontario Hydro has filed a response to the Board's enquiries which contains an extraordinary section apparently authored by Edward M. Morgan of the University of Toronto. Mr. Morgan gives his views and opinions about the historical circumstances giving rise to the creation of Ontario Hydro and its predecessors. There is no evidence before the Board to support many of the historical "facts" set out by the author. His sources appear to consist essentially of selected readings from Monopoly's Moment. while the historical perspective is important in interpreting statutes, the Board should be cautious when weighing Mr. Morgan's views of history and regulatory economics.

881

Special Counsel's caution is particularly important since section 75, which is at issue, begins by ruling out consideration of most of the legislative and contractual history prior to 1928:

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Notwithstanding anything in general or special Act past before the 3rd day of April, 1928, or

Was Page 11/24. See Image [OEB:113HF-0:186]

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in any contract entered into before the 3rd day of April, 1928, ...

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The inappropriateness of trying to create historical arguments appears also to have been in the mind of Mr. T. Campbell of Hydro. When speaking on the subject of "power at cost" during H.R. 16 he said:

885

Now we can go back and debate the history ... I won't go into that but I think this is an historic argument that was completed around 1912. And I don't think it is very helpful to the consideration of our -- the questions before us today.

886

I think it is not relevant to what we are discussing today nor the situation today. We have a law, we have public power and we have power at cost and there are great benefits to that.

887

The Board is of the view that the historical approach taken in Part A of Hydro's Legal Argument is also at times questionable in detail. The relevance to today's discussion of the return on equity of comments such as, "Whitney successfully asserted that the power of Niagara Falls 'should be free as air'" was left to the reader to infer. Such a statement might mean nothing more than that no water rental fees should be charged but all other costs would have to be covered. However, today water rental fees are charged. This historical observation is irrelevant.

888

The earliest quotation provided by Hydro concerning the mandate of the early hydroelectric commission was from Smith v. City of London (1909), 20 O.L.R. 133, at 151, and makes reference to "plant needful for the [generation], development, and transmission of electrical power in the Province" [emphasis added]. But consider that the reader was also told, "the initial idea seems to have been that by and large the provincial authorities would not enter the business of electricity [generation] itself" [emphasis added]. This appears contradictory, was not explained, and was not based on evidence adduced at the

hearing in any event.

Was Page 11/25. See Image [OEB:113HF-0:187]
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Hydro also said:

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The province put up the start-up capital for the construction of transmission lines, facilities and other works. Section 17 of the 1906 Act authorized the Lieutenant-Governor in Council to raise the money required for the Commission's purposes "by way of a loan on the credit of the Province of Ontario".

891

It would be helpful to know if this start-up capital was in the form of equity, debt, or something else.

892

Presumably, according to the Hydro argument, "Beck argued that non-profit public power was designed to produce a return in future economic development". Not only was this statement unsubstantiated, but also there was no attempt made to relate it to statutory provisions which were actually enacted.

893

The Board was also told that the first contract with the municipalities was such that every municipal corporation's annual rate included the price per horsepower assessed to that municipal corporation, 4 percent annually on their portion of the construction cost, an additional yearly charge above the 4 percent which was earmarked for debt retirement, plus the municipality share of line loss and operating, maintenance and insurance charges. The precise interpretation of these provisions and how it would help Hydro's case today concerning net income were not explained. Presumably the 4 percent annually on the municipality share of construction costs was essentially a return on total capital employed, and would have to pay both interest expense and the cost of equity. If this is so, it goes directly against the case Hydro is attempting to make.

Was Page 11/26. See Image [OEB:113HF-0:188]
894

Clearly, public money was involved in the start-up of Hydro, and it is likely that the use of provincial credit carried with it an opportunity cost. However, there was nothing in Hydro's historical summary to make it clear that Hydro was not pricing to recover the cost of the capital employed. Presumably, although it is not precisely explained, private enterprise with a degree of market dominance (if not outright monopoly power) would have charged more than Hydro charged. Hydro did say:

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it is evident that a provincial monopoly over the entire hydroelectric industry provided a formula for achieving rapid electrification of otherwise unprofitable regions of the province.

896

This implies cross-subsidization, but not necessarily failure at the corporate level to cover all costs. Presumably, private enterprise simply would not have served the unprofitable regions, and would have charged the profitable regions as much as it could. Public power, presumably, would serve all regions and would charge only as much as it should.

Was Page 11/27. See Image [OEB:113HF-0:189]
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Hydro also addressed the question, "what conclusions then can be drawn from the Corporation's historical evolution and statutory creation?" The first conclusion drawn was, "its [Hydro's] evolution is unique". Hydro did not say on what basis it reached this conclusion. The evolution of other utilities in other provinces or states was not presented. It then concluded that "it evolved out of municipal pressure

for a co-operative municipal electrical enterprise". It did not explain anywhere else in the argument or evidence where the notion of a co-operative comes from. Hydro also concluded that "the 1906 Act" created "a financially self-sustaining provincial enterprise". There was no evidence on this. In the Board's view, today's Hydro is not self-sustaining. Without restructuring substantially, it could not stand alone without the provincial guarantee of its debt. Presumably the Hydro of 1906 also required the credit support of the Province. If, on the other hand, the 4 percent return on construction costs, in contracts such as the one contract referred to above, was sufficient to ensure a financially self-sustaining enterprise, Hydro should have said so.

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Hydro's argument then said:

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Although originally Hydro may have been conceived in part to maintain provincial control in the face of private interests, that vision soon developed into a commitment to the

Was Page 11/28. See Image [OEB:113HF-0:190]

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continual supply of inexpensive energy throughout the province.

901

Notwithstanding that the preceding pages of Hydro's argument did not adequately lay the ground work for such a conclusion, it begs the question of the meaning of the word "inexpensive".

902

Clearly, it is conceded that public power has "distributive" benefits, and could be an effective method of extending "the most recent advances of the industrial revolution to a thinly populated, relatively non industrial area". However, this says nothing about whether or not all costs to the Corporation would be recovered then, or at some later period of time.

903

Hydro further argues, "the legislation founding Hydro was explicitly intended to incorporate 'power at cost' principles in preference to private sector pricing practices". This is readily conceded. Private sector pricing practices, typified by Sir Henry Pellatt and opposed by Sir Adam Beck, were thought to be those of a monopolist reaping profits in excess of the cost of capital. Public power would limit itself (as the statute requires) to recovering only "cost to the Corporation". There is no reason in Hydro's argument to support the view that public power would not seek to recover costs of capital, only that it would not seek to recover more than the "market" (or "economic" or "normal") cost of capital.

Was Page 11/29. See Image [OEB:113HF-0:191]

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At the same time as Sir Adam Beck and hit followers were accusing Sir Henry Pellatt and private enterprisers of wanting to charge more than cost, the private enterprisers were presumably viewing the government credit, and other assistance, as public subsidies. They were accusing public power of pricing under cost, thereby sacrificing economic efficiencies. While the Board finds sympathy with the policy choice of power at cost, it can find no evidence to conclude that there was never any intention to recover normal costs of capital. In fact, the concept of "interest" on the various Hydro equity accounts which was provided for by statute is consistent with normal concepts of capital productivity and maintenance.

905

The Board would also observe that the guarantees, usage of provincial credit, etc., which are associated with public power would permit the "deferral" of the recovery of the necessary and normal cost of capital much longer than private ownership would be prepared to tolerate. But deferral should not mean "never

recovering such costs", just as deficit budgeting does not mean that budgets will never balance. Nothing in the wording of the PCA says that cost of capital would never be recovered. Simply, the recovery of such cost in rates and revenues is determined at the discretion of the Hydro Board of Directors. In the final paragraph of Part A of its Legal Argument, Hydro concludes:

Was Page 11/30. See Image [OEB:113HF-0:192]

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The economic efficiency theory connoted by the "return on capital", or "return on equity capital" method of pricing is wholly contradictory to the "power of cost" principles which are embedded in the legislation under which Hydro was founded and under which it currently operates. As such, a finding that there is no legislative authority to include the cost of a "return on equity capital" should not be surprising.

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The first sentence of the quotation is a statement with which the Board certainly cannot agree. It is not supported by the wording of the legislation, nor by the historical facts presented here. Furthermore, it is not clear to what "finding" Hydro is referring. If Hydro is referring to Nepean, it "should not be surprising" to learn that the Board does not accept Nepean as being in any way relevant. If, on the other hand, Hydro was musing in general about a "finding" concerning "return on equity capital" which is in the nature of a cost to the Corporation, then the legislative authority clearly can be found in section 75 of the PCA.

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11.3 Government Policy

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The primary expression of government policy is found in statutes and regulations. In a matter such as net income, where considerable discretion is conferred by statue on Hydro's Board of Directors, it is appropriate to weigh other expressions of government policy.

Was Page 11/31. See Image [OEB:113HF-0:193]

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According to the preamble to the Memorandum of Understanding between Hydro and the Minister of Energy, it is government

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policy that the governing bodies of each of certain provincial agencies (including Ontario Hydro) should enter into a memorandum of understanding with the minister having responsibility for the agency or for the administration of the statute relating to the affairs of the agency.

912

The Memorandum of Understanding "does not supplant the provisions of any applicable legislation". However, "The Hydro Board agrees to carry out its responsibilities in harmony with Government policy", and "Policy communications between the Minister [of Energy] and the Hydro Board shall be in writing".

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The Memorandum also states:

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Ontario Hydro shall deal with the Government through the Treasurer of Ontario (the "Treasurer") and the Ministry of Treasury and Economics, (keeping the Minister of Energy informed on significant matters) to reach concurrence on all matters involving Ontario Hydro's financial arrangements, which could increase the Province of ontario's direct, indirect, or contingent liabilities or could otherwise have an effect on the finance and debt management policies of the Province of Ontario. Where such dealings affect

Government energy-related policy or affect other matters which are the responsibility of the Minister, Ontario Hydro shall consult with the Minister in conjunction with the Treasurer.

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Requests by Ontario Hydro for Orders-in-Council related to borrowings by Ontario Hydro or

Was Page 11/32. See Image [OEB:113HF-0:194]

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guarantees by the Province of Ontario of the liabilities and obligations of Ontario Hydro shall be made through the Treasurer, keeping the Minister of Energy informed.

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There is no direct mention of net income.

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In this year's proceeding Special Counsel provided an exhibit containing letters from the Treasurer of Ontario to Hydro, dating from April 1982. For the most part these letters relate to Hydro's borrowing. The letter from Mr. F. Miller of April 8, 1982, speaks of an "emerging capital availability problem" and a Hydro review of "spending and revenue plans in an effort to reduce or eliminate" the shortfall of borrowing requirements from availability. Hydro's response of July 12, 1982, essentially says Hydro is seeking more revenues through increased rates and has "embarked on a tough control strategy". The letter of July 23, 1982, from Mr. Miller says that the capital availability situation has become worse, and concludes that "Hydro must significantly reduce its spending intentions and borrowing requirements". The letter of Hydro of August 9, 1982, emphasizes the importance of "not having rate increases unduly restrained, if we are expected to make further reductions in borrowing". It also makes reference to the need to alter "certain government initiatives directed toward Hydro" which the letter does not name.

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Mr. Miller's letter to Hydro of March 11, 1983, was in response to a recommendation of the Board in H.R. 11.

Was Page 11/33. See Image [OEB:113HF-0:195]

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According to the letter, "The Ministries of Treasury and Economics and Energy reviewed Hydro's policies and policy framework surrounding the determination of the level of Hydro's borrowing and net income". With respect to net income policy framework, the Treasurer outlined three principles.

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Firstly, he said, "Hydro must earn sufficient net income to assure that its debt is self-supporting, given the presence of the Provincial guarantee". This Board understands this principle to specify a "floor", not a target. The concept of being self-supporting with support has been interpreted by Hydro to mean that the cash flow coverage of interest must not fall below one. As major capital projects come into service, and construction work in progress decreases, this "principle" could be met with negative net income, and the Board presumes that the Treasurer would not advocate this on an ongoing basis. This reinforces the Board's understanding that this first principle must be understood as a floor.

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Secondly, and perhaps most importantly, "The autonomy of the Hydro Board of Directors, as set forth in the legislation, should not be compromised in any Government policy advice or direction on the net income question." If the Government were to advise or direct Hydro not to base its net income on the cost of equity capital, such advice or direction would contravene this principle! On the other hand, this Board can accept the view that the setting of a "floor", on the basis of interest coverage as outlined in the first principle, does not compromise the autonomy of the Hydro Board of Directors.

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Thirdly, and again importantly, "The O.E.B. review process is useful and productive ... The precise level of net income which the O.E.B. recommends as an appropriate level in Ontario Hydro's revenue requirement should be determined by the O.E.B., generally without specific policy direction on this matter from government".

924

The Treasurer went on to say that he did not propose to alter significantly current policies regarding the determination of Hydro's net income and borrowing. His policy with respect to net income determination, was, as the Board understands it, to leave it to this Board to recommend and to the Hydro Board of Directors to decide. This is very different from Hydro's view that the Treasurer endorsed Hydro's method of determining net income. The Treasurer endorsed the framework, not the specific decision which Hydro has made within that framework. Furthermore, he endorsed the propriety of this Board expressing its view that Hydro's approach to determining net income is ill-advised. There is no over-riding government policy, nor if there were, could it, under existing legislation, mandate a solution to the apparent stalemate.

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There is no legislative mandate which requires Hydro to follow government policy directives. Such a mandate does exist in statutes governing some other government bodies. The Supreme Court of Canada in the Innisfil case (Township of Innisfil v. Township of Vespra et al. (1981), 123 D.L.R. 530), has made it clear that in the absence of such a statutory mandate, government policy may be considered in the decision-making, but it is not binding on the decision maker.

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Subsequent letters, until the letter of April 3, 1986, from Mr. R. Nixon, deal essentially with borrowing. The letter of April 3, 1986, was discussed at length in the H.R. 15 Report:

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Hydro takes the position that its approach to net income is in accordance with Government policy, specifically the directive in the Treasurer's letter to Mr. Campbell of April 3, 1986 and that, in satisfying the guidelines outlined in that letter, Hydro has arrived at an appropriate level of net income. Discussions during the proceeding have raised other questions about Hydro's "mandate" and its role in defining or implementing an "industrial strategy" for Ontario.

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As explained in the previous sections of this report, the Board holds the view that Hydro should look first to the Power Corporation Act for the mandate, and that Section 75 and related sections convey a concept that net income is a cost. Since net income is a residual amount remaining after deducting from revenues, all operating costs and costs of debt capital, the Board infers that net income is an amount which must go to pay the cost of Hydro's equity capital. Other evidence (specifically Exhibit 9.3.4, referred to earlier) persuades the Board that Hydro's equity capital has a cost and that it is not less than a cost of long-term debt.

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The Board views the Ontario Treasurer's letter as sound guidance for Hydro with respect to ensuring financial soundness, especially for evaluating debt-related matters. The Board understands the Treasurer to be telling Hydro to achieve its financial soundness targets, but not to be telling Hydro to ignore other ratemaking criteria which may apply (including any criteria which should be drawn from the statute). The Treasurer has told Hydro to take a long run view in meeting its targets and to use rate smoothing. The

Board wishes to emphasize that whatever "smooth" rates are, they are not necessarily "low" rates, although low rates, if appropriate, would no doubt be welcome.

930

Hydro witnesses also referred to the recent throne speech. In the throne speech, the Government "recognizes Hydro's importance to the competitiveness of Ontario industry". Hydro is recognized as an important element of industrial strategy (a resource to be emphasized). The throne speech also contains a statement to the effect that the Government intends to ensure that Hydro is a "responsive agent for economic development in the province". It outlines certain options Hydro will pursue, but nowhere does it say that its services should not be priced to reflect costs (at least at the corporation level), or that Hydro is to be used covertly as an instrument of social engineering.

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The issue of whether, in general, subsidies should come other than directly from government was not addressed in the throne speech and, until there is a clear directive to move away from cost-based pricing, this Board and Hydro should assume that that is not the Government's intention.

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With respect to any need on Hydro's part to keep rates low in order to avoid an "adverse impact on Hydro's customers and the economy" the MEA observed,

Was Page 11/37. See Image [OEB:113HF-0:199]

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Hydro's mandate of "power at cost" does not contain or imply a provision for keeping rates below what they would otherwise be on the basis of financial soundness, nor are subsidies (with the exception of the rural retail rate subsidy) part of Hydro's mandate. Such activities are in the realm of social policy making and are not, and should not be, part of Hydro's mandate.

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In the opinion of the Municipal Electric Association, the concern for the viability of a few companies, based on anecdotal evidence, has resulted in bulk power rates for all of Hydro's customers being set at a level that, over time, will undoubtedly erode the financial strength of the corporation. This is not an appropriate reason for Hydro to have rejected the net income recommendation of this Board in H.R. 14. Nor is it an appropriate reason for Hydro to continue to put off into the future its financial soundness objectives. All this has been done with a paucity of reliable data showing Hydro's approach to be neither necessary nor helpful.

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The Municipal Electric Association recognizes that reliable supply and competitive electricity prices are crucial to the Ontario economy. The Municipal Electric Association believes strongly, however, that Ontario Hydro ably fulfills both the reliability and competitive price criteria. A small change in rate levels will simply be of no consequence to the economic well being of this province.

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and, again,

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Hydro should not view itself as a tool of social policy; it is for government to determine how best to deal with particular economic and social issues.

Was Page 11/38. See Image [OEB:113HF-0:200]

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AMPCO, in its argument, expressed the following view:

939 An increasing emphasis appears to be placed by Hydro on it's being responsive to government policy. While this responsiveness has some merit in particular areas, AMPCO is concerned that this responsiveness is adding an unnecessary layer of costs on the organization, at a time it can ill afford any additional burden.

940 AMPCO also noted,

941 Neither the Treasurer of the Province nor his staff have been specific as to the level of Net Income to be achieved.

942 and later expressed the view,

943 AMPCO also considers that it would assist the Ontario Energy Board materially, to have officials from Treasury testify with respect to Ontario Hydro net income and borrowing from their perspective.

944 On the subject of the interpretation of government policy, Energy Probe observed,

945 Finally, Mr. Campbell points to the Treasurer's letter as if that is an end to the matter. In our respectful submission, to suggest that Ontario Hydro's net income plans are acceptable to government because they have not been objected to ignores the government's decision to have this Board offer its advice.

946 The Board has a duty to provide its views and recommendations to the Minister of Energy and it has seen nothing in the evidence to suggest that Government policy would be in conflict with good ratemaking principles which should be followed by Hydro.

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947 Conclusion

948 In the Board's opinion, Hydro has read more into expressions of Government policy than there is. For situations in which Government policy might imply deviations from otherwise normal ratemaking considerations for a public utility, such as may be the case for rural rate subsidization, Hydro should proceed cautiously, and preferably when it has support through the public review process.

949 This Board continues to understand the Treasurer to be endorsing certain criteria of financial soundness for the purpose of raising debt capital, but not to be telling this Board to ignore other criteria which it thinks are relevant.

950 This Board takes comfort from the fact that, as acknowledged by Hydro, the Board's views were well-known during discussions which Hydro has had with government officials since H.R. 15, and that neither the Treasurer, the Minister of Energy, nor any other branch of government has considered it necessary to clarify government policy in the face of this Board's interpretation of it quoted above.

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This Board has found no government policy which precludes Hydro's Board from examining the cost of equity capital when exercising its discretion to determine the appropriate level of net income.

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11.4 Net Income as a Cost of Hydro's Equity Capital

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Since, by statute, net income is a cost of providing service, the Board in H.R. 15 expressed concern at the fact that Hydro does not determine net income on the basis of cost concepts. Cost concepts would include relative relationships to the cost of other capital such as debt, and would also include equity-market-based concepts of the cost of Hydro's equity capital. Although the Board accepts that net income, derived by Hydro's interest coverage ratios or rate smoothing considerations (or by any means, for that matter), is still a "cost" under section 75, it does not consider such approaches to involve "cost concepts" in accordance with the usual meaning outside of the statute.

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The Board's views on basing net income on the cost of equity capital can be summarized as follows. Net income is the residual amount remaining after deducting from revenue all expenses including interest. It is to compensate equity capital. Net income is defined in the PCA as a cost to be recovered in rates and components (uses) of net income are specifically mentioned. The "cost" emphasis in the PCA leads us to infer that cost concepts should apply when Hydro's Board of Directors determines the magnitude of net income as a "cost to the Corporation". Beyond the statute, the Board believes that for reasons of equity (fairness) and of economic efficiency (including competitive considerations and financial soundness), Hydro should seek to recover the cost of equity capital in its prices over some reasonable time horizon.

Was Page 11/41. See Image [OEB:113HF-0:203]

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In summary, Hydro's responses to the Board's view, that net income should be based on the cost of equity, have been that to seek to do so is forbidden by law, against government policy, would mean higher rates and would provide more funds than Hydro needs (given its spending plans and its ability to borrow rather than raise prices). The previous two sections have dealt with and rejected Hydro's first two points. This section criticizes Hydro's net income study and updated analysis, and explains why higher rates and revenues are not valid reasons for rejecting the cost of equity as a basis for setting net income. This section also recapitulates some of the equity and economic efficiency rationale in support of using the cost of equity to determine net income.

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In H.R. 15, the Board examined Hydro's discount rate study (H.R. 15, Exhibit 9.3.4) as well as its most recent net income study (H.R. 12, Exhibit 8.10). The discount rate study put forward the concept that Hydro's equity capital has a cost. It chose an opportunity cost approach and assigned equity capital a cost equal to the forecast cost of debt plus a premium. Several opportunity cost approaches were discussed. In recognition of financial theory, the discount rate study asserted that the cost of equity capital cannot be less than the cost of debt.

Was Page 11/42. See Image [OEB:113HF-0:204]

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The discount rate study also supported the notion of costing capital within an optimal capital structure. It accepted for its purposes Hydro's forecast capital structure because, in the scenario it examined, the forecast capital structure was arguably within a reasonable range of being optimal. It did not treat scenarios with different (apparently sub-optimal) capital structures, equivalent to those which were used in the net income study filed in 1983. Evidence in H.R. 16 from Drs. Berkowitz and Booth and from Mr.

Cook of Dominion Securities suggests that if Hydro were required to stand alone as a public utility, without government assistance, the current capital structure, presumed optimal by Hydro's discount rate study, would be sub-optimal.

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The Board also commented on Hydro's interest capitalization rate study (H.R. 14, Exhibit 10.1.7), and criticized the logic of rejecting methods of valuing equity capital simply because the paper supporting claims to that capital is not in the form of issued shares.

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In its financial analysis this year, Hydro set out an assessment of the financial impacts of applying "return on equity" concepts to the Corporation. In many respects this was an update of assessments which were carried out in the 1983 net income study. In H.R. 15, the Board expressed serious concerns about the methodology and conclusions of the net income study. According to the updated results, if Hydro were to set rates to ensure that equity capital was as productive as debt capital, instead of giving away the productivity of equity in lower rates as continuation of its current practices would do, rate levels would be only 5 percent higher in real terms by 2006 than they would otherwise have been. If no dividends were paid and Hydro were to set rates so that equity capital would earn 3 percentage points more than debt (the "high scenario"), Hydro forecasts that rate levels would, by 2006, be a further 10 percentage points higher.

Was Page 11/43. See Image [OEB:113HF-0:205]

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The Board finds the high scenario unrealistic. At levels greater than an optimal level of equity, equity capital should receive compensation no greater than debt capital. At such an equity level, unless there is a reasonably foreseeable need for more equity capital on the horizon, it would make sense to consider paying out earnings. In fact, Hydro's analysis, together with the testimony of Hydro's witness, Mr. Cook of Dominion Securities, would suggest that an optimal equity ratio will be reached as soon as 1996, by which time the real impact on rates would only be of the order of 8 percent. Nonetheless, an examination of electricity bill comparisons provided by Hydro this year demonstrates that, even if rate levels were immediately adjusted upwards by the higher amounts shown in Hydro's high scenario analysis, Hydro's rates would still compare favourably with respect to other North American electricity rates were this comparison relevant.

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In summary, the Board rejects Hydro's claim that rate levels would increase to the extent claimed by Hydro, by the year 2006, if the cost of equity capital approach were introduced. More important the Board cannot reject an approach simply because it would lead to increased rates, given that it believes that current approaches result in rates that are too low.

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In response to Hydro's other concern, that the cost of equity capital approach would provide funds in excess of that needed to establish financial soundness for borrowing purposes, this Board believes that the excess funds should be used first to improve Hydro's equity ratio by paying down debt and borrowing less. Rather than striving to be financially self-supporting with the provincial guarantee of its debt, something that this Board finds contradictory, Hydro should strive to stand alone, able to support itself financially even if the provincial guarantee of its debt were removed.

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As optimal equity levels are approached, Hydro should begin to pay a dividend and this Board believes that the legislation should be changed to permit Hydro to do so. The need to pay a dividend is not

imminent, but the clear signal of government policy which would result from such a legislative change would be of benefit to all parties.

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In argument, Hydro quotes from its 1983 Net Income Study, "In contrast to investor-owned utilities, return on equity is not used by any of the government-owned utilities to determine net income targets". This is simply wrong inasmuch as there is clear evidence on the record in H.R. 16 that both Hydro Qubec and Alberta Government Telephones, to name but two such government-owned utilities, use return on equity to determine net income targets.

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If Hydro is neither prevented in law nor by government policy from basing its net income on the cost of equity capital and, if Hydro's other submissions as to why it should not do so are untenable, one should nonetheless explain why Hydro should base its net income on the cost of equity capital. In the Board's view the answers lie in terms of both equity (fairness) and economic efficiency.

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In H.R. 15, the Board set out intragenerational equity reasons why Hydro should reflect the cost of equity capital in rates. The Board held that to do otherwise would flow benefits to customers which rightly should flow to shareholder-like interests. The Board went to great length to distinguish shareholder-like interests from customer-like interests. In this year's proceeding Mr. T. Campbell acknowledged that the Province is essentially the shareholder of Hydro.

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Given that the Province is primarily funded by its taxpayers, the intragenerational equity problem boils down to equity between provincial taxpayers and customers of electricity. Witnesses for Hydro, as well as witnesses for intervenors, acknowledged that the interests of electricity customers and interests of taxpayers are different. In the Board's view, these interests are not properly balanced by Hydro's current approach of failing, over any time horizon, to include the full cost of equity capital in its rates. Essentially a "dividend" is flowed to electricity customers in the form of low electricity rates, and taxpayers wishing to reap these benefits can only do so by consuming more electricity.

Was Page 11/46. See Image [OEB:113HF-0:208]

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In practical terms the economic efficiency objective may simply boil down to behaving in a professional business-like way. As Special Counsel said:

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Simply stated, the issue is whether or not Hydro is to be run as though it were a private enterprise. The alternative is for Hydro to act as though it is an arm of government.

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On this question of economic efficiency the Board takes a practical view. Economic theory associates economic efficiency with pricing at marginal cost. Detractors usually focus on the difficulty of deciding which marginal costs to use or how to measure them. The Board does not set out to determine marginal costs per se. For one thing, the cost of capital is only a portion of the total cost of providing electricity.

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Traditional approaches to costing capital for a public utility determine the cost of capital based on competitive market practices. Debt costs when incurred are presumed to be incurred in a competitive market place, and thereafter to be locked-in as embedded costs of capital. The same is true for the cost of most preferred equity capital. The cost of common equity is determined from examining comparable data

for other companies in the light of capital structure considerations and risk to which the equity capital is exposed.

Was Page 11/47. See Image [OEB:113HF-0:209]

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It is certainly not clear that such an approach would determine annual allocations of cost which would strictly satisfy theories of economic efficiency. However, the approach is representative of accepted business practices.

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To the extent that Hydro adopts practices similar to other companies serving the energy market place, such a practice is arguably a second-best solution to the economic efficiency problem. To the extent the equity of Hydro receives compensation similar to equity in comparable corporations, this return may be thought of as an opportunity cost. Rather than relying extensively on economic theory, however, this Board simply holds the view that over reasonable time horizons, Hydro should adopt pricing strategies which comparable competitive firms of similar risk would adopt, or be required to adopt. Such firms would price to recover their costs of capital or would cease to invest and ultimately go out of business.

974

Although the cost of equity capital is a cost to the Corporation which Hydro's Board of Directors may determine for purposes of section 75 of the PCA, Hydro and some intervenors have referred to "power at cost" and have suggested that cost in that phrase should exclude profit (net income). "Power at cost" is a catchy phrase which this Board takes to mean prices will not be designed to produce the rapacious profits of the monopolistic "robber barons" of the early 1900s which were referred to by Mr. T. Campbell in both H.R. 14 and H.R. 15. It certainly does not mean, in the case of a publicly owned monopoly, that the cost of equity capital should be omitted from the price of electricity. This is a myth created by Hydro management, with no foundation in the wording of the statute. It permits Hydro to convey benefits, and to practice an industrial strategy, as though it were government.

Was Page 11/48. See Image [OEB:113HF-0:210]

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If not all of the equity compensation foregone is passed on in lower rates, the remainder must flow out of the Corporation in increased costs of operations. Hydro management should not only get out of the business of government, but its management should be subjected to the discipline of having to recover all of its costs. Examples cited by Mr. T. Campbell confirmed that, even if electricity were priced to recover all of its costs, electricity rates in Ontario would still be low.

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Recommendation 40

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Hydro should use a market-based concept of the cost of equity capital as one of the determinants of the appropriate level of net income.

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11.5 Return Concepts are Not New

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Arguments to base net income on cost of capital are not new. Special Counsel quoted from the report of Task Force Hydro (1973):

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It may be argued that a policy of increasing the rate of return and therefore the price of electricity runs

counter to Hydro's traditional "power at cost" policy. However, it should be recognized that if Hydro is operating efficiently then it is actually pursuing a "power below cost" policy. This has come about through not imputing an appropriate interest cost to funds generated internally. So in economic terms adoption of a rate of return policy does not violate the "power at cost" concept. (Exhibit 9.2.11, p. 26)

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Furthermore, Task Force Hydro noted that a rate of return approach appears to offer the only practical means of assessing Hydro's performance. Special Counsel submitted:

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the current practice of Hydro establishing what appear to be artificial and meaningless targets and never planning to achieve them, let alone doing so, does not lead to an easy, objective review of Hydro's financial performance.

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In H.R. 1 (1974), this Board stated that "the concept of a return is widely used, even by publicly owned enterprises and should be adopted by Hydro". The Board further noted:

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It is possible to overemphasize the importance of moderating the proposed financial policies in order to avoid public criticism of required rate increases. Underpricing of electrical

Was Page 11/50. See Image [OEB:113HF-0:212]

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energy can only lead to an excessive demand for it and, therefore, an increase in the already enormous capital requirements of the corporation. Therefore, the adoption of a policy that heads Hydro in the direction of earning a competitive rate of return is soundly based in economics and public policy. (H.R. 1, pp. 198-199)

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In H.R. 2 (1974), the Board again recommended that rate of return on equity should be used to determine net income (H.R. 2, p. 53).

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In H.R. 3 Part II (1976), the Board expressed its concern with Hydro's proposed methodology for evaluating its net income based upon a multiplier of the debt costs to ascribe a cost to equity. It noted that Hydro did not consider economic factors to a great enough extent when it considered the rate of return as only a secondary measure of performance (H.R. 3, p. 84).

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In 1980, the Royal Commission on Electric Power Planning (RCEPP) quoted views of its staff and/or consultants concerning a return on capital as a means of determining the planned net income level:

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Ontario Hydro's charter appears to give it the freedom, on one hand, to borrow to the limit of its capital availability to keep rate increases to a minimum, or, on the other hand, to price in keeping with private sector practices so that a socially preferred level of electricity demand is determined by competitive market forces. (Exhibit 9.2.7, p. 40)

Was Page 11/51. See Image [OEB:113HF-0:213]

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Further the report of the RCEPP set out the view that:

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Ontario Hydro's incremental capital expenditures may be said to be efficient from the province's perspective if they earn a rate of return that does not displace 'private sector investment opportunities'.

992 Hydro, in its Final Argument in this year's hearing, stated:

993 The Commission's recommendations on economic and financial factors (RCEPP, Volume 1, page xxii), indicate an interest in marginal cost pricing but do not deal with market return concepts applicable to net income.

994 Hydro infers, "If in fact, the Commissioners did consider return concepts, these concepts were rejected". In the Board's view, silence is silence; it is neither rejection nor affirmation.

995 In H.R. 11 (1982), the Board recognized the merit of determining net income on a "return on equity" basis and recommended it for Hydro's consideration (H.R. 11, pp. 97 and 105).

996 In H.R. 12 (1983), the Board stated, "it might be appropriate to reconsider the use of return on rate base at least as a check on a reasonable level of net income to charge present customers". In Special Counsel's submission at that time:

997 the Board accepted Hydro's net income policy which is currently in place as an improvement but did not suggest that it was at all optimal.

Was Page 11/52. See Image [OEB:113HF-0:214]

998 The Board stated that it "considers that Hydro's responsibilities transcend its mandate for recovery of cost and that insufficient consideration [in the new net income policy] has been given to competition (H.R. 12, p. 108).

999 In questioning the wisdom of trying to achieve economic efficiency through applying market-based cost concepts to net income, Hydro this year quoted from H.R. 5 (1979), "The Board therefore concludes that economic efficiency is not a valid pricing objective".

1000 It should be clear from the reports of the Board in H.R. 14 and H.R. 15 that recent panels of this Board do not subscribe to that view. As noted above, while economic efficiency may not be easily or precisely defined in most business situations, it is nonetheless a useful concept and a much-agreed-upon objective. In moving toward economic efficiency, in whatever manner, one aims to get as close as one practically can, and remembers that it is better to be approximately right than to be precisely wrong, misusers of the "theory of the second best" to the contrary.

1001 In Final Argument, Hydro quotes from testimony of officials of the Ministry of Treasury and Economics to the Select Committee on Energy (H.R. 15, Exhibit 1.3.4):

1002 Ontario Hydro's borrowing at its current levels does not, in our opinion, restrict Government's financial options, nor has it in the recent past. The financing operations of the two entities are separate and

distinct. Hydro's spending and borrowing are not reflected in the Ontario budget

1003

and

Was Page 11/53. See Image [OEB:113HF-0:215]

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... we see no evidence to suggest Hydro has been regarded as a burden on the rating over the last 10 years nor do we see any evidence to suggest it is likely to cause the perception of Hydro as a self-supporting utility to change over the period under which Darlington would be in construction.

1005

There was clear evidence in this and previous hearings that financing operations of the two entities are not separate and distinct. Hydro borrows on the basis of a guarantee of its debt by the Province of Ontario, and in financing its operations with U.S.-denominated debt relies directly on the Province of Ontario to borrow the funds which Hydro requires. In this year's proceedings Mr. Cook of Dominion Securities stated that although, in his opinion, the cost of Provincial borrowing is not increased by the presence of the guarantee of Hydro's debt, Hydro would, in the absence of such a guarantee, experience a higher cost of borrowing.

1006

Also, even though Hydro's spending and borrowing are not reflected in the Ontario budget, this Board nonetheless assumes that the government closely monitors and understands the relationships of Hydro's spending and borrowing to its own financial activities. This Board recalls, for example, provincial borrowing limits imposed in the mid-seventies by Mr. D. McKeough, the then Treasurer, which spelled out an allocation of the total provincial borrowing limits for Hydro. The Board is also aware of the concerns expressed by Mr. F. Miller and Mr. L. Grossman in 1982 concerning Hydro's borrowing requirements.

Was Page 11/54. See Image [OEB:113HF-0:216]

1007

Furthermore, with respect to the reference in the quotation to the perception of Hydro as a self-supporting utility, it would be a mis-statement to say that Hydro is a self-supporting utility. Financial markets are clearly aware of the guarantee of Hydro's debt. Furthermore in describing its corporate goal and the guidance from the Provincial Government, Hydro describes the Provincial Government guidance to be to "keep rates as low as possible while remaining financially self-supporting and operating without [direct] provincial support or subsidy" [emphasis added].

1008

Indirect provincial support or subsidy through, for example, a provincial guarantee of debt, or the absence of a demand from the province that equity capital be productive, may be direct, but it is very much support or subsidy nonetheless. A corporation or a utility whose prices reflect such support or subsidy can hardly claim to be financially self-supporting.

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11.6 The Appropriate Level of Net Income

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This section addresses the appropriate level of net income for 1988. It examines interest coverage ratios, considers the cost of capital and net income evidence of Dr. Jenkins on behalf of Special Counsel and Drs. Berkowitz and Booth on behalf of Energy Probe corroborated in part by Mr. Cook of Dominion Securities on behalf of Hydro, reviews other criteria, and addresses any remaining arguments of intervenors.

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Lastly, it sets out its recommendations for an approach to determining net income and an appropriate level of net income for 1988.

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11.6.1 Interest Coverage Ratios

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The financial soundness criterion in Hydro's current net income policy is based on the minima set out in Hydro's 1983 Net Income Study as follows:

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An overall interest coverage, based on a coverage of 1.05 to 1.10 on interest in rates and a coverage of 1.5 to 1.6 on capitalized interest, is generally consistent with past performance and the opinions of the investment dealers regarding appropriate financial performance.

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On this basis, Hydro's formula for the calculation of its target net income is as follows:

1016

Target Net Income = .05 Interest Charged to Operations + .50 of Interest Capitalized

1017

Based on the above formula, Hydro's net income target for 1988 is:

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$515 million = .05 (1987) + .50 (832)

1019

Hydro's planned level of net income for 1988, set at 80 percent of its net income target, is then:

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.8 (515) = $413 million

1021

As noted, in both categories, interest in rates and capitalized interest, Hydro selected coverage ratios at the bottom end of the ranges quoted above. In selecting these values in H.R. 12, Hydro stated:

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A combined coverage of 1.05/1.50 provides reasonable stability in financial results and a low level of variability in rate increases, although higher than in the other alternatives. It represents a moderate increase in financial soundness in the near term and maintains acceptable levels of soundness on the longer term.

1023

In this year's proceeding, MEA recommended the use of the upper limits of the ranges proposed in Hydro's 1983 Net Income Study. Thus, for the determination of the net income target it proposed the use of a combined coverage of 1.10/1.60. This results in a net income target for 1988 of $693 million. MEA stated that 100 percent of this target could not be met for 1988 and recommended that 80 percent of this target, or $550 million, would be an appropriate level of planned net income for 1988.

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The Board sees some merit in the recommendation of MEA, because not only is its suggested net income

target directionally consistent with a level of net income which would pertain if market based concepts of the cost of equity capital were used to develop net income, but also because it is directionally consistent with interest coverage ratios required by self-sustaining organizations to access debt markets.

Was Page 11/57. See Image [OEB:113HF-0:219]

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The Board would also point out that as noted above, Hydro's net income target is not intended as a strict requirement which the Corporation must meet. It is arbitrary and is, in any event, meaningless because of the existence of the provincial guarantee. Were it not for the provincial guarantee, interest coverage ratios would be but one of a number of criteria a lender would consider to evaluate Hydro's financial soundness. Other criteria would include the health of the provincial economy, and the ability of Hydro to obtain rate increases on a timely basis when required.

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11.6.2 Capital Availability

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It was Hydro's evidence in H.R. 16, as it has been in recent hearings, that capital availability causes no constraint on Hydro's borrowing program. In fact, Hydro did not perform a capital availability study for this year's hearing despite the large borrowing program (some $5 billion) which Hydro must undertake in the next 18 months.

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There is significant testimony supporting Hydro's ability to obtain access to capital. At one time in the mid-seventies, Hydro's annual borrowings were restricted by the Treasurer of Ontario. However, this was purportedly in reaction to a dramatic increase in the level of borrowing by Hydro and the Province, coupled with a volatile economic environment. It was Hydro's evidence this year, that due to the growth of the capital markets and reduced provincial and corporate capital requirements experienced in recent years, capital availability is not a concern to Hydro. This view was also supported by Hydro's expert witness, Mr. Cook, who testified, "Hydro could definitely borrow more in the Canadian market if they desire to."

Was Page 11/58. See Image [OEB:113HF-0:220]

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In summary, the Board has no reason to be concerned that Hydro will be faced with capital availability difficulties in the next few years.

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11.6.3 Level and Pattern of Rates

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As pointed out in Chapter 4 of last year's H.R. 15 Report, since 1982 Hydro has maintained an objective of keeping rate increases for the decade at or below the rate of inflation. Declining inflation rates at the end of this decade have made this objective more difficult to achieve.

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Last year the Board pointed out that the assumptions that went into the development of a strategy of a "no real rate increase in the 1980s" do not hold anymore. The Board further urged Hydro not to sacrifice financial soundness at the expense of keeping rates below the rate of inflation for the decade. The Board concluded:

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Rates should first be set based upon current costs and then moderated for other rate setting

considerations. Hydro's policy of linking rate levels to inflation levels violates this practice. When applying the ratemaking

Was Page 11/59. See Image [OEB:113HF-0:221]

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principles to the cost-based rate, it is not acceptable ratemaking to smooth rates based on an unsubstantiated future moderation of cost pressures. If Hydro wishes to achieve no real rate increase in the 1980s then it must do so through control of current costs rather than the sacrifice of other primary rate setting objectives.

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The Board recommended in H.R. 15 that Hydro set aside its objective of "no real rate increase in the 1980s" as rates should be based on current cost conditions, including an appropriate level of net income.

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Hydro responded to this recommendation by stating:

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Although the objective of "no real rate increase in the 1980's" will be difficult to achieve, and despite dramatically changed circumstances since its adoption, Hydro believes it remains an appropriate target towards which to strive. However, there should not be rigid adherence to this target at the expense of financial soundness, safety, or environmental protection.

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While exact cost levels cannot be predicted, Hydro's current estimates continue to indicate a moderation of future cost pressures.

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During this year's proceeding Hydro's senior management referred to a likely objective "to keep rates below the rate of inflation" for the 1990s as well. The Board urges Hydro to avoid letting this objective become a "binding" slogan, since it could result in sacrificing financial soundness and appropriate pricing policies as this Board has discussed them.

Was Page 11/60. See Image [OEB:113HF-0:222]

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Two years in a row this Board has pointed out that Hydro made an error in the early 1980s by committing that it would not let its rates rise above the rate of inflation in the decade. Hydro has not profited from its experience; it is already contemplating a similar unrealistic goal for the 1990s which, in the Board's view, will be as difficult to achieve as was the goal for the 1980s. Hydro's costs do not change in step with the changes in inflation. With the DSOS still pending, there was no evidence presented by Hydro to convince the Board that future cost pressures will be moderated. The next phase of system expansion, depending on the options selected, will dictate the impact that new cost pressures will have on rates.

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Recommendation 41

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The Board urges Hydro not to adopt rate policies which bind it for long periods of time and potentially through dramatic changes in economic activity. The Board recommends that no new such policies be adopted before an opportunity is given for public review and debate in the annual rate review proceedings.

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11.6.4 Costing Equity Capital

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Return on Capital Employed - Jenkins' Approaches

Was Page 11/61. See Image [OEB:113HF-0:223]

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According to Special Counsel, the essence of Dr. Jenkins' testimony is:

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in order to achieve the most efficient allocation of resources, proper pricing signals must be present. To arrive at these proper prices electricity must be costed properly. This would include a return on capital approach to the determination of the level of net income and a recognition of the cost of the Provincial guarantee and taxes not paid to the Province.

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Dr. Jenkins proposed that the Board implement these changes gradually (Tr. Vol. XXIX, p. 4054). He recommended that new additions to equity be transferred to the government and back to Hydro to the extent necessary but that funds be put back in the form of preferred shares with a cumulative dividend. He further recommended that the government of Ontario be responsible for all of Ontario Hydro's borrowing and simply charge a fee on top of the normal interest rate that would represent the cost of the government guarantee and a charge for the foregone taxes and other that would have been generated by that capital left in the capital market (Tr. Vol. XXIX, pp. 4054-4055).

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There was considerable disagreement about the order of magnitude of the rate increase which would result from Dr. Jenkins' proposals. Dr. Jenkins used price elasticity arguments to indicate a rate increase of approximately 15 percent by the year 2000 if the Board accepted his gradual approach. Hydro's own evidence indicates that by using a cost of equity approach the real increase in rates by the year 2006 would be of the order of 16 percent. The cost of capital evidence of Drs. Booth and Berkowitz would suggest rate increases which would not exceed Hydro's high scenario.

Was Page 11/62. See Image [OEB:113HF-0:224]

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Dr. Jenkins proposed that only new capital would need to attract a market cost of capital, and that old capital could be priced using Hydro's existing methods. In his view this would result in a phased-in rate increase of approximately one percentage point per year over a period of about 15 years. According to Special Counsel,

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Dr. Jenkins believes that the planners in Ontario Hydro would make their decisions year by year based on the economic cost of capital and would move to using less capital intensive techniques and generation in their entire operation. As a result, increases in rates would be offset by cost savings (Tr. Vol. XXIX, pp. 4066-4067).

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MEA observed that Hydro can make the right decisions based on having the appropriate discount rate without charging for cost of capital in rates. The Board would observe that, based on Hydro's evidence, the discount rate analysis is only used to find the least cost alternative, and not to ensure that net present values of capital alternatives exceed zero. Thus there is no assurance that economically viable capital decisions are being made within Hydro under the discount rate approach currently in use by Hydro.

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Dr. Jenkins testified that pricing to recover the cost of Hydro's capital would give consumers an appropriate signal with respect to consumption. The Board understands this to mean that Hydro's rates

would be priced in a manner similar to that of other utilities and over a longer time horizon similar to that of private corporations as well. Hence, electricity users would not see rates reduced by the absence of any essential cost component, and would not be induced to demand more than economically should be provided.

Was Page 11/63. See Image [OEB:113HF-0:225]

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Dr. Jenkins also testified that:

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it is his experience that public corporations, without proper incentives in place to discourage unnecessary spending, tend to find ways to spend excess cash that remains available to the corporation (Exhibit 9.2.4, p. 3).

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Special Counsel submitted that to avoid this "waste", either Hydro should not be allowed to recover "excess" net income in the first place, which he termed a "bare bones" approach; or, in the alternative, any net income "excess" to the real needs should be dividended to the owner.

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It is apparent from Special Counsel's argument that he doubted the effectiveness of the control of Hydro's borrowing, and doubted the willingness or ability of Hydro's management to control costs.

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Special Counsel advanced a "bare bones" approach as an alternative method of arriving at net income until a dividend provision is introduced. He suggested that this concept should amount to setting net income equal to the annual sinking fund requirement provision of section 75(d) of the PCA. In the Board's view this would be insufficient to accomplish Dr. Jenkins' objectives, even if limiting funds available to Hydro were an appropriate objective.

Was Page 11/64. See Image [OEB:113HF-0:226]

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In the Board's view, cost/spending control is better achieved through a sound planning and budget process and by strong relationships between senior executive rewards and budget and planning goals, than it is by stripping cash or other resources away from the control of such management. Accountability is a key to good management. Furthermore, the cash which the corporation doesn't receive through net income may come significantly through other components of target revenues, or may come from increased borrowings. The "bare bones" approach, if it is intended as a long-run policy to move assets to where they can be best employed, is laudable; but if it were to mean taking away one source of cash while leaving other sources with little control, it would probably be counterproductive. Dr. Jenkins' objectives are equally well met for the foreseeable future by tightly controlling Hydro borrowings, a responsibility which rests with the provincial Treasurer.

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Traditional Utility Approach - Berkowitz and Booth

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Drs. Berkowitz and Booth, on behalf of Energy Probe, filed evidence concerning net income in which they used a traditional utility approach. They determined a weighted cost of all capital supporting Hydro's investment in operations, formulated in the absence of the provincial debt guarantee and in the absence of income taxes.

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Drs. Berkowitz and Booth used a notional capital structure, arrived at by examining 16 privately owned and publicly-traded regulated Canadian utilities, containing debt, preferred equity, and common equity. The authors used various market-based concepts to arrive at their suggested costs for preferred and common equity, and obtained an overall weighted average cost of capital of 11.31 percent.

Was Page 11/65. See Image [OEB:113HF-0:227]

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The net asset rate base, against which they apply this weighted-cost rate, to produce a required return on capital employed in operations, is an estimate of the average value of assets used in operations in 1988 in the amount of $24.164 billion, derived from Hydro's financial forecast.

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They determine the overall required return on average capital, or "cost of capital", to be $2.733 billion for 1988. They observe that, of this, $2.018 billion is committed to servicing Hydro's actual debt, leaving $715 million as the amount which is appropriate to seek to recover through rates as net income.

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Since this return may appear low in light of decision from this Board in recent gas cases, it is worth noting that in a rate case for a utility regulated by the Board, these estimates would be carefully tested, and the Board would likely make adjustments to such estimates. In fact, given the role of judgment in arriving at an appropriate capital structure and cost rate for equity capital, this Board is of the view that a range of reasonableness could be established which would include the net income proposed by Drs. Berkowitz and Booth.

Was Page 11/66. See Image [OEB:113HF-0:228]

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Such refinements do not seem important in this proceeding, given the nature of the "transition" recommendations which follow. What is important is to establish the general principles and to demonstrate that an appropriate return on capital employed, an appropriate market-based cost of equity and, hence, an appropriate level of net income, can be determined.

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Drs. Berkowitz and Booth, like Dr. Jenkins, recognized the importance of changing rates gradually, i.e., of phasing-in any rate increases. Berkowitz and Booth said that Jenkins' concept of applying the cost of capital only to new capital was just one arbitrary way of phasing-in the rate impact. They would tend to phase-in the new approach over a shorter period of time, such as five years.

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Approaches Based on the Cost of Debt

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As acknowledged in evidence filed by Hydro in H.R. 15, the cost of equity exceeds the cost of new debt. If new debt costs 10 percent, then, based on Hydro's financial forecast of equity outstanding in 1988, Hydro's minimum alternative cost of equity capital would be at least $515 million and, hence, Hydro's planned level of net income should be at least that amount.

Was Page 11/67. See Image [OEB:113HF-0:229]

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11.6.5 Determination of Net Income - Findings

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As discussed above, Hydro proposed a net income of $413 million based on achieving 80 percent of the net income target which would result from meeting its interest coverage criteria of 1.05 times interest charged to operations and 1.50 times interest capitalized.

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Special Counsel argued that the correct approach would be to change the legislation to provide for a dividend and to base net income on the opportunity cost of capital. Based on his recommendation of a debt-guarantee-related fee of $51 million and the opportunity cost estimate of Drs. Berkowitz and Booth, this would result in a net income of $664 million. However, in the absence of a payout provision, Special Counsel argued for a "bare bones" approach which he submitted should meet the statutory provision for debt retirement. On this basis he proposed a net income of $350 million.

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As also noted above, based on a submission that interest coverages ratios be increased to 1.10 times interest charged to operations and 1.16 times interest capitalized, MEA proposed that Hydro's 1988 level of net income should be $550 million.

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AMPCO proposed that Hydro base its net income on the statutory provision for debt retirement for 1988 of $350 million, plus the shortfall of $105 million from 1987 and 1986, for a total net income for 1988 of $455 million.

Was Page 11/68. See Image [OEB:113HF-0:230]

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Energy Probe proposed a net income level of $715 million based on the opportunity cost of capital estimate of Drs. Berkowitz and Booth.

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In the Board's view, financial soundness for the purpose of debt financing requires that at a minimum Hydro achieve a target net income as determined by its interest coverage ratio tests, i.e., a minimum level of income of $515 million which corresponds to a level of interest coverage of 1.18, based on Hydro's estimates.

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If Hydro simply were required to earn on it equity what a long-term lender would require Hydro to pay for debt, approximately 10 percent, Hydro would require a net income of approximately $515 million.

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Recommendation 42

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In the Board's view Hydro's cost of equity capital exceeds $515 million and may be in the order of $700 million. The Board recognizes the importance of gradualism, or "smoothing", in changing rate levels. As such, the Board recommends a level of net income of $515 million for 1988.

Was Page 11/69. See Image [OEB:113HF-0:231]

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APPENDIX 11.1

1080

AN INTERPRETATION OF THE POWER CORPORATION ACT (SECTIONS 75(c), 75(d), 69 AND 90(a))

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In section 75, which deals with service to municipalities, subsection (c) provides for the repayment, through rates, of certain capital invested in assets of the Corporation. Subsection 75(d) provides for the establishment of various reserve accounts, such as for depreciation, reconstruction and repair of works, insurance, and stabilization of rates and contingencies.

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In order to build up these reserves, the Corporation is given discretion to provide amounts that are, in the opinion of the Corporation, sufficient for the purposes mentioned. Furthermore, the Corporation may credit to these reserve accounts, interest upon balances remaining from time to time. Such a provision would permit "returns" to maintain the value of the reserves in the face of inflation and would also permit returns to be recorded which are in the nature of a conventional "return on equity".

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Section 69 provides that electricity service may be supplied to any other person (such as to direct sales and rural customers) upon such terms and conditions as the Corporation considers proper. It also provides that any "net surplus" shall be applied for the purpose of stabilizing rates of the Corporation. This net surplus is determined by deducting from the revenue received from supply of power to such persons, all monies placed to the credit of the frequency standardization reserve account and an amount determined by the Corporation for costs and charges as enumerated in Section 75 for municipal utilities. By inference this net surplus could be positive or negative. Section 69(3) simply ensures that costs recovered elsewhere are not recovered a second time from municipal corporations. (Municipal corporations, in accordance with subsection 7(3), may be required to bear certain costs that have proved or may ultimately prove beneficial to them.)

Was Page 11/70. See Image [OEB:113HF-0:232]

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Section 90(a) provides that electricity may be supplied to a rural power district at rates which are forecast to fall short of recovering the costs of supplying such power, in which case the price payable for power by municipalities, and any other persons supplied with power by the Corporation, may be increased to recover the forecast shortfall.

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In summary then, net income of Hydro is a cost which, in accordance with subsections 75(c) and 75(d) of the Power Corporation Act (which subsections are incorporated by reference in Section 69), may be used for the repayment of capital and for the setting up of reserves which, when taken together, form equity capital of the Corporation. Not only is net income a cost, but it a cost which is to be determined at the discretion of the Board of Directors of Hydro.

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Furthermore, in establishing rates, in accordance with Section 90(a), Hydro "shall" deviate from cost in a way which is laid down very specifically for the provision of rural rate subsidization; and, in accordance with Section 69 "may" contract with any other person for the supply of power upon such terms and conditions as it considers proper; i.e. it may, as it considers proper, deviate from the cost provisions of Section 75 for direct sales and secondary sales.

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The Power Corporation Act clearly gives Hydro flexibility and wide ability to exercise discretion in determining net income.

Was Page 12/1. See Image [OEB:113HF-0:233]

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12. ACCOUNTING POLICY

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12.1 Nuclear Payback Agreement

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The Board has carefully monitored the issue of negative payback, which arose out of an agreement

Tab 29

CHAPTER 7: TAXES AND PILS

Chapter 7 of the 2006 Handbook explains how a distributor should calculate the amount of corporate income and capital tax expense to be included in its 2006 rates application. The Board will issue a 2006 regulatory tax calculation model that reflects the Board's conclusions, and distributors will use this model in their applications.

The following issues are addressed in this report:

- general principles
- true-up
- tax savings arising from non-recoverable or disallowed expenses, including purchased goodwill and charitable donations
- fair market value "bump"
- loss carry-forwards
- interest deduction
- sharing of tax exemptions
- undepreciated capital cost (UCC) and capital cost allowance (CCA)
- regulatory assets and liabilities
- CDM
- Smart Meters
- tax information disclosure

General principles

Stakeholders raised a number of issues in the area of general principles, many of which go to the objectives of setting the tax provision in rates. Where the term 'PILs' is used, the comments also apply to corporate taxes where the distributor pays taxes to the federal government.

The Draft Handbook indicates that the explanatory detail in the chapter may be removed in the final version of the chapter. However, Schools suggested that some background explanation should remain, so that readers can better understand the

changes from past practice and hence improve compliance. LPMA also proposed additional wording related to the "stand-alone" principle, under which ratepayers only bear the costs, risks and benefits arising from the provision of regulated services.

In the section on regulatory taxes payable method, the Draft Handbook contains the following: "The tax amount included in rates is based upon taxes expected to be actually payable as a result of operating the distribution-only business, rather than upon taxes calculated for accounting purposes." The Coalition of Issue Three Distributors (CITD) submitted that the references to "taxes payable expected to be incurred" and "taxes expected to be actually payable" should mean the amount the Board calculates for ratemaking purposes, not the amount the distributor will calculate on its tax return.

LPMA submitted that the wording in the section on prudent management of taxes should be revised to state that a distributors is "required and expected" (rather than "allowed and expected") to manage taxes prudently.

Conclusions

Taxes are an important component of the overall revenue requirement. The Board has four guiding principles when determining the allowance for taxes in 2006 rates:

- The tax rates and tax rules used in the tax model should reflect to the extent possible the actual rates and rules that will be applicable in 2006.
- The inputs to the calculation should be consistent with the other components of 2006 rates.
- Rates must be just and reasonable, and any substantial variation between taxes determined for regulatory purposes and actual taxes paid by the distributor must be justifiable.
- The tax model should be reasonably simple.

Practically speaking, the third and fourth principles balance the first and second principles. The second principle incorporates the concept of the "distribution-only" business, or "stand-alone" distributor, but that cannot be the Board's only consideration.

The Board notes the concerns expressed by stakeholders regarding the potential difference between the level of actual taxes paid and the level allowed in rates. The Board intends to continue to monitor actual taxes paid and taxes recovered through rates to determine whether modifications to the Board tax methodology, or its application in the Board tax model, are required for future years. This will include an analysis of the differences between these two amounts, and a determination of the reason(s) for any material difference.

The Report will now address the specific initial issues raised. The conclusions reflect the application of the general principles outlined above.

The Board will retain sufficient explanation in the Handbook so that distributors and other stakeholders can understand the Board's objectives in this area and to assist a distributor in making accurate filings. A lengthy section on the "stand-alone" principle will not be included. The Board has addressed the stand-alone concept throughout this chapter of the Report, and the issue is dealt with directly in the section on tax savings arising from disallowed expenses. The Board believes this is sufficient to aid the understanding of stakeholders at this time.

With respect to the prudent management of taxes, the Board expects a distributor to manage taxes prudently and will set rates accordingly, but the Board is not explicitly "allowing" or "requiring" it to do so. The Handbook will be adjusted accordingly.

The draft Handbook includes a section on "PILS tax administration and tax rulings", which states that "the applicant's initial 2006 tax payable filing must account for the tax effect of the ruling or policy", if that policy or ruling is inconsistent with the 2006 OEB Tax Model. The Board has determined that this will not be required as part of the application; rather, for purposes of the application, an applicant will only be required to disclose the new policy or ruling.

True-up

The Draft Handbook contains two alternatives for the determination and recovery of the variance between taxes paid and taxes included in rates, otherwise known as the "true-up". Alternative 1 provides a partial true-up for tax driven factors, and Alternative 2 provides a full true-up for tax driven and operations driven factors:

- Alternative 1: Each distributor shall establish a 2006 PILs/taxes variance account to capture the tax impact of the following differences:
    - any differences that result from a legislative or regulatory change to the tax rates or rules assumed in the 2006 OEB Tax Model
    - any difference that results from a change in, or a disclosure of, a new assessing or administrative policy of the Federal or Provincial tax authorities, if the Board has declared that such new or modified assessing or administrative policy is a change of general application that should be treated as if it were a change in tax rules
    - any difference in 2006 PILs that results from a tax re-assessment which is received by the distributor after its 2006 rate application is filed, and before May 1, 2007, and which relates to any tax year ending prior to May 1, 2006
- Alternative 2: A variance account will be set up for 2006 PILs/taxes. Any variance between actual taxes and forecast taxes should be credited or debited to this account, and should be cleared to ratepayers in the following year.

Toronto Hydro sponsored evidence by Mr. Krukowski and Mr. Erling of KPMG. Their conclusion was that the partial true-up is the most appropriate option because it results in less administrative burden, greater rate stability, and lower risk to distributors. They testified that with full true-up, the rate changes would magnify the earnings volatility arising from variations in revenue or expenses, and inappropriately pass the tax consequences to ratepayers.

Most distributors supported Alternative 1, in line with the KPMG recommendations. Schools, CME, LPMA, and VECC also supported the partial true-up.

Amongst distributors, only London Hydro and Niagara Erie Public Power Alliance (NEPPA) supported the full true-up. Enbridge and Union did not support any true-up.

There was also some discussion regarding the scope of the proposed true-up for prior year tax re-assessments and whether the wording in Alternative 1 accurately captured the intended effect. Stakeholders generally agreed that the intention was that the true-up of 2006 taxes relating to re-assessments of prior taxation years would deal only with the impact on 2006 taxes of those re-assessments.

In addition to changes in tax rates, rules and re-assessments, which are unambiguous, the partial true-up approach is also proposed to include "new or modified assessing or administrative policy" if the Board declares that the policy change is of general application and should be treated as a change in tax rules.

To paraphrase Schools, the issues with respect to this policy change provision are:

- How will the Board know that a change in policy has occurred?
- How will the Board determine whether such a change should be treated as being equivalent to a change in tax rules?

Schools submitted that changes are either communicated publicly through bulletins, circulars, and public rules or through individual audits or private rulings. In Schools' view, the Board should receive any public information directly and distributors should be directed to inform the Board of any changes which come to their attention, for example through an audit. Schools submitted that any changes that are published would be of general application and that the Board could assess any changes that arose through an audit. Schools acknowledged that this latter assessment could be complex.

Conclusions

The Board will adopt the partial true-up approach. The Board agrees that it would be inappropriate to adjust rates to account for tax differences arising from variations in

revenues or expenses. The Board also accepts that a partial true-up for changes in tax rates, rules, etc. represents a reasonable balance of risk between shareholders and ratepayers for items which are beyond the control of the distributor.

The Board will revise the wording in the Handbook related to the true-up for prior year tax re-assessments so that the description of what is in the variance account addresses the issue of opening balances directly and is consistent with the intention as expressed in the "Tax re-assessments" section.

With respect to changes in policy, the Board will narrow this adjustment provision, in order to reduce the amount of discretion required and the amount of regulatory process needed. The Handbook will be revised to include only those changes in tax policy that are published in the public tax administration bulletins or interpretations by relevant federal or provincial tax authorities. The approach proposed by Schools, which includes policy changes arising from individual audits, introduces a level of complexity and additional regulatory burden that is not warranted in the circumstances

Tax savings arising from non-recoverable or disallowed expenses, including purchased goodwill and charitable donations

There are a number of situations where the distributor may be entitled to tax deductions for expenses or other items that are not allowed for regulatory purposes. The Draft Handbook identifies a number of these situations:

- Non-recoverable or disallowed expenses
- The impact on Eligible Capital Expenses (or Cumulative Eligible Capital) related to disallowed expenses (Purchased Goodwill)
- Charitable donations

The treatment of the resulting tax savings in each of these situations is in dispute. The Draft Handbook sets out three alternatives in each case:

- The tax savings are shared between ratepayers and shareholders.
- The tax savings go to ratepayers.

- The tax savings go to the shareholder.

Schools sponsored evidence by Dr. Mintz of the C.D. Howe Institute. Dr. Mintz, a tax expert, testified that tax savings in the specified situations should flow to ratepayers. In his view, to do otherwise would result in:

- ratepayers subsidizing the disallowed expenses;
- incentives being created to inappropriately alter the distributors capital structure or expenses to maximize the tax benefits;
- delayed repayment of the stranded debt; and
- a departure from competitive market results, whereby any reductions in actual taxes paid result in lower prices to consumers.

The Coalition of Issue Three Distributors (CITD)[1] sponsored evidence by Ms. McShane. Ms. McShane, a regulatory expert, testified that the tax provision for a distributor should be determined on the basis of the following principles:

- Benefits follow costs: the party bearing the cost should receive the tax saving.
- Stand-alone utility: only the costs and risks related to the utility operations should be in the revenue requirement.
- No harm to ratepayers: a "minimum" condition that specifies that ratepayers must be no worse off.
- Level playing field among gas and electricity distributors.

Applying each of these principles, Ms. McShane concluded that the tax savings in the specified situations should flow to the shareholder.

CITD adopted the position of Ms. McShane; namely, that in applying the regulatory principles and the government's objective of a level playing field, the conclusion is that

[1] The Coalition of Issue Three Distributors includes Aurora Hydro Connections Limited, Barrie Hydro Distribution Inc., Cambridge and North Dumfries Hydro Inc., Chatham-Kent Hydro Inc., ENWIN Powerlines Ltd., Guelph Hydro Electric Systems Inc., Halton Hills Hydro Inc., Hydro One Networks Inc., Innisfil Hydro Distribution Systems Limited, Kitchener-Wilmot Hydro Inc., Newmarket Hydro Ltd., Orangeville Hydro Ltd., Orillia Power Distribution Corporation, Tay Hydro Electric Distribution Company Inc., Toronto Hydro-Electric System Limited, Waterloo North Hydro Inc., Westario Power Inc., Whitby Hydro Electric Corporation.

the tax savings should flow to distributor and thus to the shareholder(s), rather than to the ratepayer. CITD maintained that this was accepted regulatory practice, and reflected that the tax savings arise from costs that the ratepayer did not bear.

Hydro One, PowerStream and Toronto Hydro supported the submissions of the CITD and highlighted certain points:

- The fact that under current government policy PILs is being used to pay down the stranded debt is not relevant to how the amount of PILs to be paid should be calculated. The fact that the province allows an expense to be deductible for tax purposes is a matter of provincial tax policy, not ratemaking.
- A distributor would generally not incur a disallowed expense, and therefore passing on a tax saving to ratepayers, that did not occur, would increase the inequitable treatment.
- Schools' proposal implies that a distributor would undertake activities that violate the *Electricity Act*, the *Ontario Energy Board Act*, the Affiliate Relationships Code and the *Municipal Act,* and that the Board should address these violations indirectly through the tax calculation rather than directly.

LPMA supported the principles identified by Ms. McShane, and submitted that in a normal regulatory environment LPMA would support Ms. McShane's conclusions. However, LPMA submitted that tax savings should flow to ratepayers because PILs are used to pay down the former Ontario Hydro stranded debt. The tax savings are therefore a "cost" to ratepayers. LPMA goes on to apply Ms. McShane's regulatory principles to come to the opposite conclusion of Ms. McShane. In LPMA's view, any tax savings is a cost to ratepayers, without any benefit in those cases where the cost is disallowed. LPMA concluded that if the Board were to decide that tax savings from disallowed expenses were not to go to ratepayers, then the Board should inform the government as to the negative impacts on ratepayers and the level of debt.

Conclusions

The Board finds that tax savings arising from the specified situations will not be allocated to ratepayers. The regulatory principles identified by Ms. McShane are applicable in this situation. What is at issue is how those principles are to be applied and whether there are sufficient grounds to depart from them in these circumstances.

Schools has argued, in effect, for a departure from these established regulatory principles for four primary reasons:

- If the tax savings are not allocated to the ratepayer, then the ratepayer is effectively "subsidizing" the disallowed expenditure.
- If tax savings flow to shareholders, then the shareholder, because it is a non-taxable entity, will have an incentive to use the distributor as a "tax shelter" and to incur expenses or alter the distributor's capital structure inappropriately. For example, there would be an incentive to finance the distributor with 100% debt.
- In a competitive market, any reductions in tax paid would generally result in lower prices.
- PILs payments are used to pay down the stranded debt. If tax savings go to the shareholder, then rates will be set with a higher provision for taxes than will actually be paid. Ratepayers will repay a certain amount of the stranded debt through the regulatory tax calculation, but the full amount will not be remitted as PILs because of further deductions by the distributor. In effect, the ratepayers will have to pay twice.

The Board does not believe that any of these arguments supports a departure from standard regulatory practice and established regulatory principles.

With respect to the first point, the Board does not agree that if the tax savings are not allocated to the ratepayer, then the ratepayer is effectively "subsidizing" the disallowed expense. Schools argued that if the distributor incurs the disallowed expense, then it would be inappropriate for the tax benefit to flow to shareholders (by being excluded from the rates). However, Schools agreed that if the shareholder incurred the disallowed expense within another (tax paying) entity, then it would be appropriate for

the tax benefit to flow to the shareholder. Dr. Mintz also agreed with this. The Board finds this reasoning to be inconsistent with the claim that in one scenario the ratepayers are somehow "subsidizing" the shareholders; the level of taxes included in rates is the same in both scenarios. The issue remains as to whether the distributor has behaved appropriately in undertaking the disallowed expenses, and that issue is addressed under the next point.

With respect to the second point, the Board accepts that because municipalities are non-taxable, there may be an incentive to allocate expenses and adjust the capital structure of the distributor to maximize the tax advantages. However, there are limits on what actions can be taken. These limitations arise from various statutes, and are intended to ensure that customers are protected and the financial viability of the distributor is maintained.

Schools suggested that these limitations are not sufficient in the case of municipal distributors and maintained that preventing inappropriate behaviour by taking away the tax incentive is the "most elegant way to get the right result". The Board disagrees. The tax approach would require the Board to impute tax savings, which would then need to be adjusted if the expenditures did not occur. Alternatively, there would need to be an after-the-fact investigation of tax deductions to look for "disallowed" amounts. In the Board's view this is not "elegant". It is administratively complex, and still fails to get to the nub of the issue, which is the inappropriate behaviour. If a distributor engages in inappropriate activities, then the Board should address the matter directly.

Schools appeared to be particularly concerned about inappropriate social spending and capital structure changes. The Board is satisfied that section 71 of the *Ontario Energy Board Act* provides the requisite protection against inappropriate expenditures by a distributor. When the Board conducts its review of cost of capital and capital structure, it will consider in more depth the relationship between capital structure, interest expense and taxes and determine the appropriate regulatory framework. This issue is addressed further in the section on interest expense. The Board is satisfied that its provisions for

tax information disclosure, addressed later in this section, will allow for adequate monitoring of these issues.

With respect to the third point, the Board accepts the evidence of Dr. Mintz that in a competitive market tax reductions will tend to lead to lower prices, but does not agree with his conclusion that the tax savings of disallowed expenses should be passed on to ratepayers. Such an approach takes no account of the increased expenditures from which the tax savings arise. Presumably in a competitive market, if an entity incurs a cost from which a tax reduction is gained, the increased cost works its way into prices as well. A unilateral allocation of the tax savings to the ratepayers would seem to be an inappropriately simplistic application of the competitive market principle.

With respect to the fourth point, the Board does not agree that the link between PILs and the stranded debt is relevant. All tax revenues are used for some purpose, whether to fund programs or repay debt. To the extent tax deductions are allowed, there will necessarily be a reduction in funds available for those other purposes. The relationship between PILs and the stranded debt is no different. This conclusion is supported by the fact that the express purpose of PILs was to put municipal distributors on an equivalent basis with tax paying distributors. The fact that PILs payments are allocated to the stranded debt is a function of provincial policy and is not necessarily a permanent feature. Finally, the Board notes that PILs from distributors are not the only, or largest, source of funds currently paying down the stranded debt.

For all of these reasons, the Board rejects the proposal by Schools, and concludes that tax savings arising from disallowed expenses, including purchased goodwill and charitable donations, will not be allocated to ratepayers. Ratepayers have not paid for the expense through rates, and therefore are not entitled to the tax benefit.

Fair market value "bump"

The Ministry of Finance required the re-valuation of distributor assets to market value, effective October 1, 2001. This Fair Market Value Bump, or FMV Bump, adjusted the

value of distributors' Cumulative Eligible Capital or Undepreciated Capital Cost. No adjustments to rate base were made for regulatory purposes. There is a potential impact on the Cumulative Eligible Capital (or Eligible Capital Expenditures) deduction or the Capital Cost Allowance. With respect to the Cumulative Eligible Capital or Undepreciated Capital Cost, the issue is whether the tax savings arising from the FMV Bump should be shared between ratepayers and shareholders, allocated 100% to the ratepayers, or allocated 100% to the shareholder.

The positions and reasoning taken by each of the parties were largely the same for this issue as for the previous issue of tax savings arising from disallowed expenses.

CITD maintained that while no "cost" has been incurred, the tax savings would be subject to recapture if the assets are sold at fair market value, and therefore it is essentially a temporary benefit. Hydro One submitted that because the tax benefit is recaptured upon sale of the assets or change in tax status, ratepayers would have to compensate the distributor for that recapture if they are to benefit from the tax benefit. Schools essentially agreed that recapture of the benefit might occur and submitted that ratepayers should get the savings now, and that the Board should address the recapture at the time of the future transaction.

Conclusions

The Board finds that any tax savings resulting from the FMV Bump will be allocated to the ratepayers. It is true that the rates themselves are based on book value not market value, which suggests that under the stand-alone principle the FMV Bump should be disregarded. However, the shareholder has not incurred any cost related to the change in value for tax purposes (as CITD acknowledged), so the "benefits follow costs" principle is not applicable. In addition, the FMV Bump could be characterized as a change in the tax rules, and therefore would fall into the category of changes subject to true-up. Ms. McShane testified that the savings would be subject to recapture and Hydro One submitted that if the ratepayer benefits from the FMV Bump, it should also be liable for the recapture. The Board agrees that if the ratepayers benefit from this tax saving, then any subsequent recapture should be considered for recovery from

ratepayers as well. However, the Board has no evidence as to how frequently or to what extent this recapture will take place.

While the Board cannot address the recapture at this point, it can address the current tax savings. The Board has determined that the 2006 tax calculation will incorporate the impact of the FMV Bump. If at some point a related tax liability arises from a sale of assets or change in tax status, then the distributor will be able to apply to the Board for relief, at which point the issue will be determined. The Board notes that this approach will reduce the variance between actual taxes and the tax provision in rates, that it will not disadvantage the shareholder because the shareholder incurred no cost, and, if there is subsequent recapture, the distributor may apply to the Board for relief.

Loss carry-forwards

The Draft Handbook requires the distributor to take into account the potential reduction in actual taxes payable where a loss carry-forward is applicable.

Hydro One submitted that any loss carry-forward resulting from revenue or expense variations in prior years was irrelevant for the 2006 tax calculation. It argued that the ratepayer has not contributed to the prior loss and therefore is not entitled to the future tax savings. Hydro Ottawa made similar submissions.

Conclusions

The Board has no evidence before it to determine whether loss carry-forwards are the result of revenue or expense variations or whether the loss carry-forwards arise for other reasons that may be related to ratepayers. The Board notes that the consensus approach will reduce the variance between taxes collected in rates and actual taxes paid. The Board will adopt this approach in the Handbook. However, the Board has concluded that a projection of this factor to 2006 will not be required as this represents unnecessary complexity for purposes of 2006 rates.

Interest deduction

At issue is the amount of the interest to be deducted for the regulatory tax calculation. The Draft Handbook contains four alternatives:

- Deemed (recoverable) interest expense
- Actual interest expense
- The greater of deemed (recoverable) and actual interest expense
- Share of additional interest expense (above the deemed level)

Currently, taxes are determined using the deemed interest expense, but the Board has previously indicated its intention to true-up this component of taxes to reflect actual interest expense, and the difference is being captured in the variance account.

CITD supported the first alternative, namely the deemed interest expense used for ratemaking purposes. EDA, Hydro One, Toronto Hydro, ECMI, NEPPA, Union, and CME were all of the same view.

Schools supported the third alternative, namely that the greater of the deemed or actual interest expense should be used. It relied primarily on concerns about the incentive for a distributor or its shareholder to adjust the distributor's capital structure to minimize taxes. LPMA made similar submissions.

Conclusions

Under the stand-alone principle, the level of interest used in the tax calculation should be the same as the deemed level of interest included as a distribution expense in the revenue requirement. However, the Board agrees that the incentive may exist to alter the capital structure in a way that substantially benefits the shareholder in terms of reducing actual taxes paid. The resulting difference between taxes paid and taxes collected through rates may be of sufficient magnitude to call into question whether the resulting rates are just and reasonable.

Contrary to Schools submission, the Board does not agree that the best way to deal with this issue is through the tax calculation. The Board should consider whether

alternative capital structures (and associated tax implications) are appropriate, rather than just implement disincentives to deviate from the deemed capital structure. The Board's conclusion is that this issue should be dealt with comprehensively at the time of the capital structure and rate of return review (as described previously). As part of that review the Board will consider, among other things, the tax implications of various capital structure strategies and will determine the most appropriate overall approach for ratemaking purposes.

However, for purposes of 2006, the Board will continue the current treatment but refine it such that the tax calculation will be based on the greater of the deemed and actual 2004 interest expense, including the Tier 1 and 2 adjustments. Applicants will be required to file information regarding the actual debt ratio and interest cost.

Sharing of tax exemptions

The Draft Handbook states that the federal large corporation tax exemption and Ontario capital tax exemption will be prorated when multiple regulated entities are in the same corporate group. With respect to the prorating of any tax exemption between the distribution and non-distribution functions in the same legal entity, the Draft Handbook contains two alternatives: one alternative is to prorate; the other is not to prorate.

LPMA submitted that these tax exemptions should not be prorated amongst regulated entities within a corporate group. LPMA argued that to do so would violate the stand-alone principle, because if the distributor were stand-alone, then the full LCT exemption would apply. The result of the treatment in the Draft Handbook is that customers would face higher rates as a result of the corporate affiliates sharing the LCT exemption. Similarly, LPMA submitted that there should be no pro-rating of the exemptions between distribution and non-distribution functions.

Hydro One, Toronto Hydro, Union, CME and VECC all supported the pro-rating of the exemption between distribution and non-distribution functions.

Conclusions

The Board agrees that the stand-alone principle is applicable in this situation and that the federal large corporation tax and Ontario capital tax exemptions should be determined without a prorating between distribution and non-distribution functions. However, the exemptions will be prorated among regulated entities within the same corporate group. Although this is not a strict application of the stand-alone principle, it recognizes that there has been, and continues to be, consolidation among Ontario distributors. Given that those corporate structures are evolving and rate harmonization is not complete, the Board concludes that it is appropriate to recognize the shared nature of the resulting tax exemptions and that such an approach does not deviate from the intent of the stand-alone principle.

Undepreciated Capital Cost (UCC) and Capital Cost Allowance (CCA)

The Draft Handbook states that the CCA calculation in the OEB 2006 PILs model should be based upon 2004 actual UCC and the allowed Tier 1 and Tier 2 capital adjustments. The applicant is also to assume new additions in 2005 equal to 2004 capital expenditures. A similar approach is used to set the values for 2006. In effect, the UCC is inflated from 2004, based on additions in 2004 and the Tier 1 and Tier 2 adjustments, to create a proxy for 2006.

Hydro One submitted that the proposed adjustments would be inappropriate. In its view, the adjustments would result in the PILs calculation being based on a higher rate base amount than that used to determine the equity return and book depreciation. In its view, this would have the effect of reducing the shareholder's allowed equity return. Hydro One submitted that the base should be 2004 actuals plus any applicable Tier 1 and Tier 2 adjustments only.

Conclusions

The Board agrees that rate base and undepreciated capital cost (and therefore the capital cost allowance) should generally be determined on a consistent basis. The adjustments contained in the Draft Handbook could be characterized as a quasi-forward

test year approach. The Board concludes that these adjustments represent an unjustified inconsistency with the determination of the other components of the revenue requirement for applications based on an adjusted 2004 historical test year. The Board will adopt the more simplified approach of using 2004 actuals plus any Tier 1 and Tier 2 adjustments. This approach would not be applicable to those distributors filing on a forward test year basis.

Regulatory assets and liabilities

A PILs or tax provision is not needed for the recovery of deferred regulatory asset costs, because the distributors have deducted, or will deduct, these costs in calculating taxable income in their tax returns. The Handbook will reflect this treatment.

CDM and Smart Meters

The issue is how the 2006 regulatory tax calculation should take account of CDM and Smart Meters capital and operating expenditures. The Board addresses CDM in detail in Chapter 16 of this Report. To the extent incremental CDM and/or Smart Meter expenditures are approved, they will form Tier 1 adjustments and will be treated accordingly for purposes of taxes.

Tax information disclosure

The Draft Handbook requires the distributor to disclose the actual corporate taxes or PILs paid in 2006 and the amount collected in 2006 rates, with any differences greater than 10% to be explained in a future filing. At issue is whether a distributor that does not have a separate tax return for the distribution portion of the business should be exempted from this requirement.

Hydro One and ECMI supported the exemption. NEPPA argued that filing audited financial statements for the wires-only company might place unnecessary risk on a subsidiary business and that any filing, including supporting documentation, should be confidential.

Schools did not support the exemption and suggested that individual requests for exemption should be brought to the Board. The Board could then determine the appropriate means for disclosure.

Conclusions

The Board finds that the requirements will apply for all distributors. There must be transparency in the regulatory process. It remains open to a distributor to request an individual exemption, and the Board will consider such a request on its merits. It is also open to a distributor to request that tax information be kept confidential, and a determination would be made be the Board at the time the request is made.

Tab 30

Ontario Energy Board

EB-2009-0084

Report of the Board

on the Cost of Capital for Ontario's Regulated Utilities

December 11, 2009

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Table of Contents

EXECUTIVE SUMMARY ..... **I**

1 INTRODUCTION **5**

2 CONSULTATIVE PROCESS **7**
2.1 Overview 7
2.2 Approach to Developing Regulatory Policy 11

3 CONTEXT, BACKGROUND AND THE ROLE OF THE BOARD **15**
3.1 Fair Return Standard 15
3.2 The Cost of Capital in Theory and Practice 24

4 THE BOARD'S APPROACH **31**
4.1 Summary of Key Principles 31
4.2 Return on Equity 32
4.2.1 Need to Reset and Refine Existing ROE Formula 32
4.2.2 The Initial Set Up 34
4.2.3 The Formula-based Return on Equity 45
4.3 Capital structure 49
4.4 Debt Rates 50
4.4.1 Long-term debt 50
4.4.2 Short-term debt 55
4.5 Summary 59

5 IMPLEMENTATION **61**
5.1 Transition to Recommended Cost of Capital 61
5.1.1 Continued Migration to Common Capital Structure 61
5.2 Impact on Other Board Policies 62
5.2.1 Prescribed Interest Rates 62

6 ANNUAL UPDATE PROCESS AND PERIODIC REVIEW **63**
6.1 Annual Update Process 63
6.2 Periodic Review 64

APPENDIX A: SUMMARY ON THE FORMULA-BASED RETURN ON EQUITY GUIDELINES IN EFFECT IN THE 2009 RATE YEAR ..... **I**

APPENDIX B: METHOD TO UPDATE ROE ..... **V**

APPENDIX C: METHOD TO UPDATE THE DEEMED LONG-TERM DEBT RATE ..... **VIII**

APPENDIX D: METHOD TO UPDATE THE DEEMED SHORT-TERM DEBT RATE ..... **IX**

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Executive Summary

Earlier this year, the Board initiated a consultative process to assist the Board in reviewing its cost of capital policies. The consultative process began in February 2009 and has culminated in this policy report of the Board. All materials in relation to this consultation are available on the Board's web site.

The Board affirms its view that the Fair Return Standard frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal. Meeting the standard is not optional; it is a legal requirement. Notwithstanding this obligation, the Board notes that the Fair Return Standard is sufficiently broad that the regulator that applies it must still use informed judgment and apply its discretion in the determination of a rate regulated entity's cost of capital. The Board also confirms other key principles with respect to its cost of capital policy.

The Board has analyzed submissions, discussions at the consultation and the final written comments of participants to the consultation with these general principles in mind. In light of the information and supporting empirical analysis provided in consultation with stakeholders, the following refinements to the Board's policies with regard to the cost of capital are set out in this report.

1. Need to Reset and Refine Existing Return on Equity Formula: The Board will continue to use a formula-based equity risk premium approach. Also, the Board is of the view that the Long Canada Bond Forecast (the "LCBF") continues to be an appropriate base upon which to begin the return on equity calculation. However, in order to ensure that on an ongoing basis changing economic and financial conditions are adequately and appropriately accommodated in the Board's formulaic approach for determining a utility's equity cost of capital, the Board has determined that its current formula-based return on equity approach needs to be reset and refined.

- Reset the Formula: The formula needs to be reset to address the difference between the allowed return on equity arising from the application of the formula and the return on equity for a low-risk proxy group that cannot be reconciled based on differences in risk alone. Based on the equity risk premium recommendations derived from multiple approaches that were provided by all participants in this consultation, the Board has determined that an initial equity risk premium of 550 basis points is appropriate for the purposes of deriving the initial return on equity to be embedded in the Board's reset and refined return on equity formula. This includes an implicit 50 basis points for transactional costs. Consequently, assuming a forecast long term government of Canada bond yield of 4.25%, the initial return on equity to be embedded in the Board's reset and refined return on equity formula will be 9.75% (i.e., 4.25% + 550 basis points = 9.75%).

- Refine the Formula: The formula also needs to be refined to reduce its sensitivity to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity. First, the Board views the determination of the LCBF adjustment factor to be an empirical exercise, and as such, based on the empirical analysis provided by participants in conjunction with the consultation, the Board is of the view that the LCBF adjustment factor should be set at 0.5. Second, based on the analysis provided by participants to the consultation, the Board concludes that there is a statistically significant relationship between corporate bond yields and the cost of equity, and that a corporate bond yield variable should be incorporated in the return on equity formula. The Board has determined that it will use a utility bond spread based on the difference between the Bloomberg Fair Value Canada 30-Year A-rated Utility Bond index yield and the long Canada bond yield and that the utility bond spread reflected will be subject to a 0.50 adjustment factor, consistent with the empirical analyses provided by participants to the consultation.

2. Refine Long-term Debt Guidelines and Approach to Determine Rate: The determination of the cost of long-term debt was not a primary focus of the consultation and the Board notes that the comments made by participants in the consultation largely

supported the continuation of the Board's existing policies and practices. However, in the report the Board formalizes certain approaches to reflect recent determinations regarding long-term debt costs. Further, the deemed long-term debt rate will be estimated including the A-rated utility bond index yield consistent with refinement to the return on equity formula.

3. Refine Approach to Determine Deemed Short-term Debt Rate: The determination of the cost of short-term debt also was not a primary focus of the consultation. However, to better reflect utility short-term debt costs, the Board has determined that the spread over the Bankers' Acceptance rate used to derive the deemed short-term debt rate should be based on real market quotes for issuing spreads over Bankers' Acceptance rates for the cost of short-term debt.

The Board will apply the methods set out in this report annually to derive the values for the return on equity and the deemed long-term and short-term debt rates for use in cost of service applications. If the application of these methods produces numerical results that, in the view of the Board, raise doubt that the Fair Return Standard is met, the Board may then use its discretion to begin a consultative process. Also, the Board has determined that a review period of five years provides an appropriate balance between the need to ensure that the formula-generated return on equity continues to meet the Fair Return Standard and the objective of maintaining regulatory efficiency and transparency. Accordingly, the Board intends to conduct its first regular review in 2014.

The remainder of this Report sets out in greater detail the Board's policy as summarized above, as well as the considerations underlying the different elements of the Board's approach.

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1 Introduction

The Ontario Energy Board (the "Board") adopted a formula-based approach using the Equity Risk Premium ("ERP") method for determining the fair rate of return on common equity for Ontario natural gas utilities in March, 1997. Application of the approach was extended to the electric utilities when the Board's regulatory oversight expanded to include the electricity sector in 1999. The Board's current approach for determining the cost of capital is set out in the *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors*, dated December 20, 2006 (the "December 20, 2006 Report").

Earlier this year, the Board initiated a consultative process to assist the Board in reviewing its cost of capital policies. The consultative process, detailed below, began in February 2009 and has culminated in this policy report of the Board. All materials in relation to this consultation are available on the Board's web site.

This report sets out the Board's updated approach to cost of capital and the methods that the Board will use to annually update the cost of capital parameters for all rate-regulated utilities. Specifically, this report refines the Board's policies regarding the cost of capital in the following five ways: (i) resetting and refining the return on equity ("ROE") formula; (ii) refining long-term debt guidelines and the approach to determining the deemed long-term debt rate; (iii) refining the approach to determining the deemed short-term debt rate; and (iv) setting out an annual review process to be used by the Board in conjunction with each application of the methodology to ensure that the results meet the Fair Return Standard ("FRS"); and (v) developing a framework within which to conduct a periodic review of the Board's cost of capital policies.

Organization of this Report

This report is organized as follows: The consultative process is detailed in Chapter 2. Important principles in the regulation of cost of capital are discussed in Chapter 3. The Board's policy for and analysis of cost of capital are outlined in Chapter 4. Certain

implementation considerations are identified in Chapter 5, and the annual update process and provision for periodic review of the cost of capital policies are addressed in Chapter 6. A summary of the formula-based ROE guidelines in effect in the 2009 rate year is provided in Appendix A. The new methods that the Board will use to annually update the cost of capital parameters as set out in this report are contained in the Appendices.

2 Consultative Process

On February 24, 2009, the Board issued a letter which set out its determination on the values for the ROE and the deemed long-term and short-term debt rates for use in the 2009 rate year cost of service applications. These cost of capital parameter values were calculated based on the methodologies and formulae set out in the December 20, 2006 Report. In that letter, the Board advised participants that it would be initiating a review of its current policy regarding the cost of capital.

2.1 Overview

Initial Consultation

On March 16, 2009, the Board initiated a consultation process to help it to determine whether current economic and financial market conditions warrant an adjustment to any of the cost of capital parameter values (i.e., the ROE, long-term debt rate, and/or short-term debt rate) set out in the Board's February 24, 2009 letter. The consultation was initiated, in part, by (i) the fact that the difference between the cost of equity and the cost of long-term debt values determined by the Board for the 2009 Cost of Service Applications was only 39 basis points (8.01% and 7.62%), versus a difference of 247 basis points in 2008; and (ii) concern that the Board did not have a sufficiently robust approach within which to exercise its discretion to adjust any or all of the values produced by the application of the methodology. The Board indicated that the objective of the consultation was to test whether the values produced, and the relationships among them, are reasonable in the current economic and financial market conditions, and to allow the Board to determine if, when and how to make any appropriate adjustments to any of the values.

Cost of Capital Review

In light of stakeholders' comments, the Board determined not to vary the 2009 parameter values for 2009 rates. In its June 18, 2009 letter setting out this determination, the Board explained that it was not persuaded that there was a sufficient basis to do so, in a timely manner. Nevertheless, the Board determined that further examination of its policy regarding the cost of capital was warranted to ensure that, on a going forward basis, changing economic and financial conditions are accommodated if required. Therefore, the Board advised that it would proceed with a review of its policy regarding the cost of capital. The Board indicated that any changes to the policy made as a result of this review would apply to the setting of rates for the 2010 rate year.

The Board set an issues list to form the basis of its review which took into account the stakeholder comments received in response to the Board's March 16, 2009 letter and other information that the Board considered relevant (the "Issues List"). This Issues List was posted to the Board's web site on July 30, 2009. Appended to the Issues List were: a summary of stakeholder options in response to the Board's March 16, 2009 letter; and a list of references to documents germane to the consultation.

The Issues List

In the cover letter to the Issues List, the Board affirmed its view that the FRS constitutes the over-arching principle for setting the cost of capital, which is one input into the setting of rates. The Board also set the scope for the consultation as follows. First, that the consultation would deal only with the means by which the Board determines the cost of capital. The actual effect, if any, on specific utilities' revenue requirements as a result of any updated policies arising from this consultation and the determination of just and reasonable rates would not be addressed in this process, but in future rate proceedings. Second, that historically, the Board has found the ERP approach to be pragmatic and efficient given the Ontario market structure and the number of utilities that the Board regulates. The Board concluded that an ERP approach remains the most appropriate in the current circumstances. However, the Board decided to review the application and the derivation of the current ERP approach to determine if it is sufficiently robust to guide the

Board's discretion in applying the FRS. And third, the Board stated that the application of the FRS would be central to the consultation.

The Board identified three areas where further information was needed:

- Potential adjustment to the established cost of capital methodology (i.e., based on the ERP approach) to adapt to changes in financial market and economic conditions;
- Determination of reasonableness of the results based on a formulaic approach for setting cost of capital parameter values; and
- Board discretion to adjust those results, if appropriate.

The Board received written comments from stakeholders identifying their views and positions on the listed issues and held a Stakeholder Conference to provide a forum for discussion of the substantive matters contained in the Board's Issues List.

The Stakeholder Conference

The Stakeholder Conference was held over a three day period, September 21, 22 and October 6, 2009.

The Board identified the objectives of the stakeholder conference as follows:

- To allow participants and their respective experts to clarify and elaborate on their written comments;
- To provide participants with an opportunity to explore in some depth the rationale and merits of alternatives supported by other participants and their respective experts; and
- To help the Board gain, through the presentations and an interactive exchange with participants and their respective experts, a clearer understanding of the positions of participants and of significant issues and areas of concern.

At the start of the Stakeholder Conference, a Capital Markets Panel provided participants with a comprehensive overview of capital markets conditions. The Panel was comprised of practicing capital markets individuals, representing investor, equity analyst, and bond market perspectives. Representatives from Sun Life Financial, TD Securities Inc., Scotia Capital, and Macquarie Capital Markets participated on the Capital Markets Panel. Panel members addressed matters such as:

- What the capital markets have been through, where they are today, and set out key indicators or variables that are of interest prospectively;
- Overall availability of capital and the cost of that capital (both debt and equity);
- Access to bank credit/debt/equity, the absolute cost of debt, spread, term availability, and covenants;
- Spreads that have been and are being observed and under what conditions; and
- Activity that has been and/or is evident in the market in terms of funds flow into the market and between asset classes.

Following the Capital Markets Panel discussion, the following individuals provided presentations to participants and the Board at the Stakeholder Conference:

- Dr Laurence D. Booth, Professor, University of Toronto (consultant for the Building Owners and Managers Association of the Greater Toronto Area, the Consumers Council of Canada, Canadian Manufacturers and Exporters, Industrial Gas Users Association, London Property Management Association, and the Vulnerable Energy Consumer's Coalition);
- Mr. Donald A. Carmichael, Independent Consultant (consultant for Enbridge, Fortis Ontario Inc., and Toronto Hydro-Electric System Limited);
- Mr. James M. Coyne, Senior Vice President, Concentric Energy Advisors (consultant for Enbridge, Hydro One Networks, Inc. and the Coalition of Large Distributors [Enersource Hydro Missisauga Inc., Horizon Utilities Corporation, Hydro Ottawa Limited, PowerStream Inc., Toronto Hydro-Electric System Limited and Veridian Connections Inc.]);

- Mr. John Dalton, Power Advisory LLC (consultant for Great Lakes Power Transmission);
- Ms Kathleen McShane, President, Foster Associates (consultant for Electricity Distributors Association);
- Dr Lawrence P. Schwartz, Consulting Economist (consultant for Energy Probe Research Foundation); and
- Dr. James Vander Weide, Research Professor of Finance and Economics, Duke University, The Fuqua School of Business (consultant for Union Gas).

Subsequent to the Stakeholder Conference and in light of the presentations made by participants and discussions at the conference, the Board received final written comments from participants. The Board indicated in its October 5, 2009 letter to participants that following the receipt of final written comments, it would review all of the materials, including Stakeholder Conference transcripts and all of the written comments in making its determination, and that the Board aimed to issue its report in December.

2.2 Approach to Developing Regulatory Policy

In their final comments to the Board, several participants expressed concern regarding the potential scope of outcomes arising from this consultation. In a joint submission, the Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition and the Canadian Manufacturers and Exporters describe their understanding that the consultation was intended to have a limited scope, and pointed to several statements made by the Board regarding the scope of the consultation. In summary, the submission states: "[i]n these circumstances, we suggest that the possible outcomes of this consultation are limited to a Board report which evaluates whether any of the information presented during the course of the consultative is sufficient to call into question the continued appropriateness of any element of the Board's current cost of capital methodology."[1] The School Energy Coalition filed a similar submission, stating: "[t]he primary purpose of this part of the consultation, as

[1] Final Comments on behalf of the Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition and the Canadian Manufacturers and Exporters. October 30, 2009. p. 3.

noted by the Board in a number of communications, and reiterated at the stakeholder conference, is to help understand whether the current approach to cost of capital has sufficient robustness to be relied on by the Board in all circumstances."[2]

Although the Board appreciates the perspectives of these participants about their expectations, it does not agree that the scope of the consultation was limited in the fashion that they suggest. The Issues List set out a comprehensive set of issues that set the scope for this consultation. Amongst the issues are the following: How should the Board establish the initial ROE for the purpose of resetting the methodology? Does the current approach used by the Board to calculate the ERP remain appropriate? If not, how should the ERP be calculated?[3]

In response to a letter it received on August 13, 2009 from Mr. Robert Warren, sent on behalf of the Consumers Council of Canada, the Vulnerable Energy Consumers Coalition and the London Property Management Association, the Board again invited participants to provide any information they felt appropriate in responding to the questions on the Issues List:

> Stakeholders are asked to provide in their written comments answers to the questions identified in the Board's Issues List. To help the Board in its review, the Board invites stakeholders to include in their written comments some analytical support and detailed information to identify their views and support their positions in response to the Board's questions.[4]

It is the Board's view, therefore, that the policies determined by the Board in this report are within the scope of the consultation. The Board has benefitted from the materials and submissions received from the participants. This information contributes to the substantive foundation upon which the Board will base its policies. The Board does not believe that the

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[2] Final Comments on behalf of the School Energy Coalition, p. 2.
[3] Ontario Energy Board. Letter to Participants re: Consultation on Cost of Capital – Issues List, Attachment B: Issues for Discussion at Stakeholder Conference. July 30, 2009. Questions 10 and 13.
[4] Ontario Energy Board. Letter to Mr. Robert B. Warren re: Consultation on Cost of Capital (Board File No.: EB-2009-0084). August 20, 2009.

extensive body of information before it would be materially improved by a hearing process, as was suggested by some participants.

Courts have long recognized that duties of procedural fairness such as the requirement of a hearing apply to adjudicative decisions and decisions affecting specific rights, interests and privileges. Where a board is engaged, as here, in the development of a policy guideline, courts have held that it falls to the board to decide on the method of consultation to be employed - as long as the legislative requirements, if any, are met. There also is abundant precedent for this approach within the Board's practice, and it is neither unusual nor improper to develop a guideline through a consultative process.[5]

The final "product" of this process, of course, is a Board policy. This was not a hearing process, and it does not - indeed cannot - set rates. The Board's refreshed cost of capital policies will be considered through rate hearings for the individual utilities, at which it is possible that specific evidence may be proffered and tested before the Board. Board panels assigned to these cases will look to the report for guidance in how the cost of capital should be determined. Board panels considering individual rate applications, however, are not bound by the Board's policy, and where justified by specific circumstances, may choose not to apply the policy (or a part of the policy).

[5] The Board's current methodology for setting electricity rates through the incentive regulation mechanism, for example, was established through a consultative/guideline process.

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3 Context, Background and the Role of the Board

In competitive markets, the outputs of the goods and services of the economy and the prices for these outputs are determined in the market place, in accordance with consumers' preferences and incomes, as well as producers' minimization of cost for a given output. In such a market, the outcome is the efficient allocation of resources, including capital, and social welfare is maximized.

However, in some situations, markets fail to achieve such efficient outcomes. Market failure refers to situations in which the conditions required to achieve the market-efficient outcome are not present. Common examples of market failure are the existence of significant externalities, the exercise of market power by a small number of producers or buyers, natural monopolies, and information asymmetry between producers and their customers.

Electric transmission and distribution companies and natural gas distribution utilities are natural monopolies and are subject to rate regulation in Ontario by the Ontario Energy Board. In this context, the purpose of rate regulation, among other things, is to create or emulate an efficient market solution that cannot otherwise be achieved due to the presence of one or more market failures. As it relates to a rate regulated entity's cost of capital, the role of the regulator is to determine, as accurately as possible, the opportunity cost of capital to ensure that an efficient amount of investment occurs in the public interest for the purpose of setting utility rates.

3.1 Fair Return Standard

On July 30, 2009 the Board issued a letter and its Issues List for the then planned stakeholder consultation. In that letter, the Board communicated its view that the FRS constitutes the over-arching principle for setting the cost of capital, which is one input into the setting of rates. There are a number of key messages in this statement.

First, as set out by the Federal Court of Appeal, the cost of capital to a utility "is equivalent to the aggregate return on investment investors require in order to keep their capital invested in the utility and to invest new capital in the utility."[6]

Second, the Federal Court of Appeal also stated:

> … even though cost of capital may be more difficult to estimate than some other costs, it is a real cost that the utility must be able to recover through its revenues. If the… [Board] does not permit the utility to recover its cost of capital, the utility will be unable to raise new capital or engage in refinancing as it will be unable to offer investors the same rate of return as other investments of similar risk. As well, existing shareholders will insist that retained earnings not be reinvested in the utility.[7]

Thirdly, the Board is of the view that the process to determine the cost of capital aligns the private interest of the utility and its shareholders with the public interest, and notes that the Federal Court of Appeal said:

> … in the long run, unless a regulated enterprise is allowed to earn its cost of capital, both debt and equity, it will be unable to expand its operations or even maintain its existing ones…This will harm not only its shareholders, but also the customers it will no longer be able to service. The impact on customers and ultimately consumers will be even more significant where there is insufficient competition in the market to provide adequate alternative service.[8]

The determination of a utility's cost of capital must meet the FRS. The FRS is a legal concept, and has been articulated in three seminal court determinations as set out below:

1. In *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia* et. al. 262 U.S. 679 (1923), the FRS is expressed to include concepts of comparability, financial soundness and adequacy:

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[6] TransCanada PipeLines Limited v. National Energy Board et al. [2004] F.C.A 149. Para. 6.
[7] Ibid. Para. 12.
[8] Ibid. Para. 13.

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

2. In *Northwestern Utilities Limited v. City of Edmonton*, [1929] S.C.R. 186, the FRS concept was described as follows:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise, which will be net to the company, as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

3. In *Federal Power Commission v. Hope Natural Gas* 320 U.S. 591 (1944), the Court expresses that "balance" is achieved in the ratemaking process, and outlines three elements of a fair return:

> The rate-making process under the act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests…the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock…By that standard, the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

The FRS was further articulated by the National Energy Board in its RH-2-2004 Phase II Decision as:

> A fair or reasonable return on capital should:
>
> - be comparable to the return available from the application of invested capital to other enterprises of like risk (the comparable investment standard);
> - enable the financial integrity of the regulated enterprise to be maintained (the financial integrity standard); and
> - permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (the capital attraction standard).[9]

In its letter of July 30, 2009, the Board noted that the National Energy Board's articulation of the FRS is consistent with the principled approach described on page 2 of the Compendium to the Board's March 1997 *Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities* (the "1997 Draft Guidelines") and the policies set out in the Board's December 20, 2006 Report.

The Board is of the view that the FRS frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal. Meeting the standard is not optional; it is a legal requirement. As set out by Enbridge in their final comments, the Supreme Court of Canada has "described this requirement that approved rates must produce a fair return as an 'absolute' obligation."[10] Notwithstanding this mandatory obligation, the Board notes that the FRS is sufficiently broad that the regulator that applies it must still use informed judgment and apply its discretion in the determination of a rate regulated entity's cost of capital.

Informed by the comments made by stakeholders in the context of this consultation and the relevant jurisprudence, the Board offers the following observations about the application of the FRS.

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[9] National Energy Board. RH-2-2004, Phase II Reasons for Decision, TransCanada PipeLines Limited Cost of Capital. April 2005. p. 17

[10] *British Columbia Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia et al [1960] S.C.R. 837*, at p. 848.

First, the Board notes that the FRS expressly refers to an opportunity cost of capital concept, one that is prospective rather than retrospective.

Second, the Board agrees with the National Energy Board which stated that "[i]t does not mean that in determining the cost of capital that investor and consumer interests are balanced."[11] Further, the Board notes that the Federal Court of Appeal was clear that the overall ROE must be determined solely on the basis of a company's cost of equity capital and that "the impact of any resulting toll increase is an irrelevant consideration in that determination. This does not mean however, that any resulting increase in tolls cannot be considered by a tribunal in determining the way in which a utility should recover its costs."[12] The Federal Court of Appeal also stated that:

> It may be that an increase is so significant that it would lead to "rate shock" if implemented all at once and therefore should be phased in over time. It is quite proper for the Board to take such considerations into account, provided that there is, over a reasonable period of time, no economic loss to the utility in the process. In other words, the phased in tolls would have to compensate the utility for deterring the recovery of its cost of capital.[13]

Third, all three standards or requirements (comparable investment, financial integrity and capital attraction) must be met and none ranks in priority to the others. The Board agrees with the comments made to the effect that the cost of capital must satisfy all three requirements which can be measured through specific tests and that focusing on meeting the financial integrity and capital attraction tests without giving adequate consideration to comparability test is not sufficient to meet the FRS.

Fourth, a cost of capital determination made by a regulator that meets the FRS does not result in economic rent being earned by a utility; that is, it does not represent a reward or payment in excess of the opportunity cost required to attract capital for the purpose of

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[11] National Energy Board. Reasons for Decision. Trans Quebec & Maritimes Pipelines Inc. RH-1-2008. March 19, 2009. p. 6.
[12] *TransCanada PipeLines Ltd. v. National Energy Board, 2004 FCA 149*, para. 35-36.
[13] *TransCanada PipeLines Ltd. v. National Energy Board, 2004 FCA 149*, para. 43.

investing in utility works for the public interest. Further, the Board reiterates that an allowed ROE is a cost and is not the same concept as a profit, which is an accounting term for what is left from earnings after all expenses have been provided for. The Board notes that while cost of capital and profit are often used interchangeably from a managerial or operational perspective, the concepts are not interchangeable from a regulatory perspective.

Fifth, there was considerable discussion in the consultation about utility bond ratings. The ability of a utility to issue debt capital and maintain a credit rating were generally put forth by stakeholders in the consultation as a sufficient basis upon which to demonstrate that a particular equity cost of capital and deemed utility capital structure meet the capital attraction and financial integrity requirements of the FRS. The Board is of the view that utility bond metrics do not speak to the issue of whether a ROE determination meets the requirements of the FRS. The Board acknowledges that equity investors have, as the residual, net claimants of an enterprise, different requirements, and that bond ratings and bond credit metrics serve the explicit needs of bond investors and not necessarily those of equity investors.

Finally, the Board questions whether the FRS has been met, and in particular, the capital attraction standard, by the mere fact that a utility invests sufficient capital to meet service quality and reliability obligations. Rather, the Board is of the view that the capital attraction standard, indeed the FRS in totality, will be met if the cost of capital determined by the Board is sufficient to attract capital on a long-term sustainable basis given the opportunity costs of capital. As the Coalition of Large Distributors commented:

> [t]he fact that a utility continues to meet its regulatory obligations and is not driven to bankruptcy is not evidence that the capital attraction standard has been met. To the contrary, maintaining rates at a level that continues operation but is inadequate to attract new capital investment can be considered confiscatory. The capital attraction standard is universally held to be higher than a rate that is merely non-confiscatory. As the United States Supreme Court put it, 'The mere fact that a rate is non-confiscatory does not indicate that it must be deemed just and reasonable'.[14]

[14] Final Comments of the Coalition of Large Distributors. October 26, 2009. pp. 5-6.

The Role of the Comparable Investment Standard

Continued investment in network utilities does not, in itself, demonstrate that the FRS has been met by a regulator's cost of capital determination, and in particular, whether the determination of the equity cost of capital meets the requirements of the FRS. This is a particular challenge – how does the regulator determine when investment capital is not allocated to a rate regulated enterprise? These decisions are typically made within the utility/corporate capital budgeting process and rarely, if ever, broadly communicated to stakeholders. The Board notes that acquisition and divestiture activities of regulated utilities are not definitive in this regard, one way or the other, and notes that there are many reasons why investors are willing to acquire or desirous of selling utility assets, notwithstanding their view of whether an allowed ROE meets the FRS.

The primary tool available to the regulator to rectify this lack of transparency is the comparable investment standard. By establishing a cost of capital, and an ROE in particular, that is comparable to the return available from the application of invested capital to other enterprises of like risk, the regulator removes a significant barrier that impedes the flow of capital into or out of, a rate regulated entity. The net result is that the regulator is able, as accurately as possible, to determine the opportunity cost of capital for monies invested in utility works, with the ultimate objective being to facilitate efficient investment in the sector.

There are a number of specific issues relating to the comparable investment standard that the Board considers are relevant in the context of this cost of capital policy.

First, "like" does not mean the "same". The comparable investment standard requires empirical analysis to determine the similarities and differences between rate-regulated entities. It does not require that those entities be "the same".

Second, there was a general presumption held by participants representing ratepayer groups in the consultation that Canadian and U.S. utilities are not comparators, due to differences in the "time value of money, the risk value of money and the tax value of

money."[15] In other words, because of these differences, Canadian and U.S. utilities cannot be comparators. The Board disagrees and is of the view that they are indeed comparable, and that only an analytical framework in which to apply judgment and a system of weighting are needed. The analyses of Concentric Energy Advisors and Kathy McShane of Foster Associates Inc. are particularly relevant in this regard, and substantially advance the issue of establishing comparability to meet the requirements of the FRS. Further, the Board notes that in the consultation session on October 6, 2009, Dr. Booth stated that it is "absolutely possible" to form a sample from a risky universe that is low risk and compare it to the universe or the population of Canadian utilities.[16] All participants agreed.

The Board notes that Concentric did not rely on the entire universe of U.S. utilities for its comparative analysis. Rather, Concentric carefully selected comparable companies based on a series of transparent financial metrics, and the Board is of the view that this approach has considerable merit. Commenting on Concentric's analysis, Union Gas noted that no one else in the consultation performed this kind of detailed analysis of U.S. comparators.[17] The use of a principled, analytical, and transparent approach to determine a low risk comparator group from a riskier universe for the purpose of informing the Board's judgment was supported by various participants in the consultation.

The PWU commented that the position taken by Dr. Booth on the question of the comparability of US utility returns is not based on an appropriate empirical foundation.[18] The PWU further commented that:

> On the other hand, it is the view of the PWU that the analysis produced by Concentric, as summarized in one of their charts presented at the conference, represents a far more comprehensive analysis of the key characteristics of distribution utilities in Ontario vs. a North American

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[15] Professor L.D. Booth. Written Comments on behalf of Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition, the Industrial Gas Users Association, the Canadian Manufacturers & Exporters (CME), the London Property Management Association and the Building Managers and Owners Association of the Greater Toronto Area. September 8, 2009. p. 25.
[16] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. October 6, 2009. Comments of Dr. Booth at p. 60. Lines 24-26.
[17] Written Comments of Union Gas Limited. October 30, 2009. p. 14.
[18] Final Comments of the Power Workers' Union. October 30, 2009. p. 3.

> proxy group. Differences and similarities were thoroughly considered before arriving at the conclusions that based on a careful selection of like companies, a proxy group which includes US distribution utilities adheres to the Comparable Investment Standard. Moreover, Concentric was better suited to complete such as an analysis, having recognized expertise in the risks faced by both Ontario and US electricity distributors.[19]

Dr. Vander Weide indicated that since Canadian utility bonds tend to have more covenants than US utility bonds, they would receive a slightly higher credit rating. The PWU observed that it the slight variance in ratings can be attributed to specific features of debt instruments, rather than fundamental differences in the underlying business or regulatory risks faced by the utilities. This observation was also made by Ms. Zvarich of Sun Life Financial, who presented evidence that Canadian utility bonds generally have more restrictive covenants than U.S. utility bonds.[20]

The Board is of the view that the U.S. is a relevant source for comparable data. The Board often looks to the regulatory policies of State and Federal agencies in the United States for guidance on regulatory issues in the province of Ontario. For example, in recent consultations, the Board has been informed by U.S. regulatory policies relating to low income customer concerns, transmission cost connection responsibility for renewable generation, and productivity factors for 3rd generation incentive ratemaking.

Finally, the Board agrees with Enbridge that, while it is possible to conduct DCF and CAPM analyses on publicly-traded Canadian utility holding companies of comparable risk, there are relatively few of these companies. As a result, the Board concludes that North American gas and electric utilities provide a relevant and objective source of data for comparison.

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[19] Final Comments of the Power Workers' Union. October 30, 2009. p. 6.
[20] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. September 21, 2009. Comments of Ms. Zvarich at pp. 24 -25.

3.2 The Cost of Capital in Theory and Practice

The Cost of Capital

The Ontario Energy Board has been engaged in the rate regulation of utilities for many years. Over this extended period, the Board notes that there continues to be any of a number of misconceptions about the cost of capital concept, particularly what the cost of capital is and why it is an important consideration.

The Board is of the view that the following points articulated by Dr. Bill Cannon in his presentation at CAMPUT's 2009 Energy Regulation Conference on July 3, 2009, are principally relevant to defining and understanding the cost of capital concept.

> At its simplest, the cost of capital is the minimum expected rate of return necessary to attract capital to an investment. The rate of return includes the income received during the time the investment is held plus any capital gain or loss, realized or accruing during this period, all as a percentage of the initial investment outlay.
>
> The cost of capital can be viewed from both: (a) a company or utility perspective; and (b) from the investor's or capital provider's perspective. From the company's perspective, the cost of capital is the minimum rate of return the company must promise to achieve for investors on its debt and equity securities in order to preserve their market values and, thereby, retain the allegiance of these investors.
>
> [There is interest] in the cost of capital…because all utilities – private or public – at some time… must raise financial capital to pay for investments, and both fairness and practical considerations dictate that the private and/or government investors who provide these capital funds must be adequately compensated. Raising capital is a competitive process. Private investors are under no obligation to buy a particular utility's securities, and government-owned utilities must compete with other government spending priorities. A utility will be able to secure new capital and replace maturing securities only if investors believe that they will be adequately rewarded for providing new capital funds. That required reward, in turn, must compensate the investors for a least two things: (1) for postponing the consumption of the goods and services that they might otherwise have enjoyed had they not made the investment; and (2) for exposing their funds to the risk that they may not

> get all their money back or not get it back as promptly as they anticipated. The reward demanded by investors is therefore a necessary cost of doing business from the utility's point of view, just as much as the cost of labour or fuel.
>
> From the viewpoint of investors as a group, however, the cost of capital can be defined more clearly and operationalized as "the expected rate of return prevailing in the capital markets on alternative investments of equivalent risk and attractiveness." There are four concepts embedded in this operational definition:
>
> First, it is *forward-looking*. Investment returns are inherently uncertain and the ex post, actual returns experienced by investors may differ from those that were expected ahead of time. The cost of capital is therefore an *expected* rate of return.[21]
>
> Second, it reflects the *opportunity cost* of investment. Investors have the opportunity to invest in a wide range of investments, so the expected rate of return from a given utility-company investment must be sufficient to compensate investors for the returns they might otherwise have received on foregone investments.
>
> Third, it is *market-determined*. This market price - expressed as the expected return per dollar of invested capital - serves to balance the supply of, and demand for, capital for the firm.
>
> And, fourth, it reflects the *risk* of the investment. It reflects the expected returns on investments in the marketplace that are exposed to equivalent risks. Another way of expressing this principle is to say that the cost of capital depends on the *use* of the capital – or, more precisely, the risk associated with the use of the funds – and not on the *source* of the funds.

In Ontario, utilities regulated by the Board in the gas and electricity sectors are structured to operate as commercial entities. As such, the rate setting methodologies used by the Board apply uniformly to all rate-regulated entities regardless of ownership. The determination of rate-regulated entities' cost of capital is no exception. It follows that the opportunity cost of capital should be determined by the Board based on a systematic and empirical approach that applies to all rate-regulated utilities regardless of ownership. The Board sees no

[21] The word "expected" is used in the statistical sense (i.e., the probability-weighted rate of return). It does not refer to a "hoped for" or "most likely" rate of return.

compelling reason to adopt different methods of determining the cost of capital based on ownership.

The Equity Risk Premium Approach

As previously indicated, the Board has determined that the ERP approach remains the most appropriate approach in the current circumstances. The ERP approach is one of four main approaches that are traditionally used by experts during regulatory cost of capital reviews to establish a fair ROE: (1) the comparable earnings approach; (2) discounted cash flow approach; (3) the capital asset pricing model; and (4) ERP approach. These methods are all used in varying degrees to formulate and/or test an opinion regarding a fair return to investors.[22] The Board's current formulaic approach is a modified Capital Asset Pricing Model methodology and ERP approach.

Each of these four main approaches has well documented strengths and weaknesses. Notwithstanding the known weaknesses of these differing approaches, the Board agrees with Ms. McShane when she states: "each of the various types of tests brings a different perspective to the estimation of a fair return. No single test is, by itself, sufficient to ensure that all three requirements of the fair return standard are met."[23]

Through the consultative process which began in February 2009 and has culminated in this report, the Board has been informed by a number of ex-post analytical approaches, including analysis of experienced ERPs on investments in Canadian utility stocks. The Board observes from these analyses that the ROE produced by various approaches can be expressed as an absolute ROE number or as an ERP over a risk-free rate. Also, the Board agrees that expressing the ROE in terms of a premium above the long-term Canada bond yield does not mean that the initial ROE needs to be estimated by using a single test or a number of tests that might be defined as ERP tests.

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[22] Ontario Energy Board. Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities. March 1997. p. 2.
[23] McShane, K., Foster Associates, Inc. Written comments on behalf of the Electricity Distributors Association. September 8, 2009. p. 2.

A Formulaic Approach

The Board has used a formula-based methodology to determine the rate of ROE since 1998. The advantages identified in the 1997 Draft Guidelines remain appropriate today and include:

- Simplification of the hearing process;
- Is relatively free from conflicting interpretation and is readily understood by all participants;
- Reduces the need for complex, annual risk assessments, while still reflecting major changes in the capital markets; and
- Is capable of producing a rate of return that approximates the result which would have been produced through the traditional process.[24]

The Board also notes that a formula-based approach:

- Is transparent, resulting in predictable and consistent outcomes, and meets the needs of stakeholders broadly, particularly those in the capital market; and
- Is a practical necessity in Ontario, given the large number of rate regulated entities.

The Board also acknowledges that a formula-based ROE methodology and mechanical approaches in general, have a number of disadvantages, as identified in the 1997 Draft Guidelines:

- Establishing the initial parameters of the generic formula will have a profound influence on the potential success or failure of the process. Over time, these parameters and adjustment factors will have a cumulative or compounding effect on the

[24] Ontario Energy Board. Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities. March 1997. p. 7.

results of the formulaic ROE mechanism. The use of an inappropriate initial ROE will either inflate or understate subsequent rate determinations;

- The present formulaic ROE generally relies predominantly on the ERP method to the exclusion of other methods;
- Adjustment for the impact of timing differences for utilities with different year-ends is a challenge; and
- The Board's ability to make discretionary adjustments to a utility's return for the purpose of creating incentives for particular behaviours or sending signals to the marketplace may be restricted. [25]

Notwithstanding these concerns, the Board is of the view that it is appropriate to continue to use a formulaic approach to determine the equity cost of capital and that the overall advantages of the approach outweigh potential disadvantages.

An Empirical Foundation

The essential elements of a formulaic approach must be empirically derived – the initial ROE, implied ERP and the adjustment factor are determined by the Board based on empirical analysis. It is essential that sufficient empirical analysis be provided periodically to ensure that assumed relationships are not misspecified. This includes the construction and application of a framework to evaluate the degree of comparability between rate regulated natural gas distribution and electricity distribution and transmission utilities in Canada and the United States.

To be clear, the approach to be used by the Board in setting the essential elements of a formula-based rate of ROE (i.e., base ROE, formula terms and adjustment factors) will be based on "economic theory and empirically derived from objective, data-based analysis."[26] As such, it is not sufficient for a formulaic approach for determining ROE to produce a

[25] Ibid. p. 7.
[26] Ontario Energy Board. Report of the Board on 3rd Generation Incentive Regulation. July 14, 2008. p. 19

numerical result that satisfies the FRS on average, over time. The Board is of the view that each time a formulaic approach is used to calculate an allowed ROE it must generate a result that meets the FRS, as determined by the Board using its experience and informed judgment.

This principle is supported by the *Hope* decision, which states: "Under the statutory standard of 'just and reasonable' it is the result reached not the method which is controlling…"[27]

[27] Federal Power Commission v. Hope Natural Gas 320 U.S. 591 (1944). p. 602

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4 The Board's Approach

4.1 Summary of Key Principles

As discussed previously, the Board confirms the following key principles with respect to its cost of capital policy. The Board has analyzed submissions, discussions at the consultation and the final written comments of participants to the consultation with these general principles in mind.

1. **Fair Return Standard.** All three requirements – comparable investment, financial integrity and capital attraction – must be met and none ranks in priority to the others. It is not sufficient for a formulaic approach for determining ROE to produce a numerical result that satisfies the FRS on average, over time. The Board is of the view that each time a formulaic approach is used to calculate an allowed ROE; it must generate a number that meets the FRS, as determined by the Board using its experience and informed judgment.

2. **The overall ROE must be determined solely on the basis of a company's cost of equity capital**. It does not mean that in determining the cost of capital that investor and consumer interests are balanced. The opportunity cost of capital should be determined by the Board based on a systematic and empirical approach that applies to all rate-regulated utilities regardless of ownership. The Federal Court of Appeal was clear that the overall ROE must be determined solely on the basis of a company's cost of equity capital and that the impact of any resulting toll increase is an irrelevant consideration in that determination.

3. **Efficient amount of investment.** As it relates to a rate regulated entity's cost of capital, the role of the regulator is to determine, as accurately as possible, the opportunity cost of capital to ensure that an efficient amount of investment occurs in the public interest for the purpose of setting utility rates.

4. **Predictability, transparency, and stability**. The approach adopted by the Board to determine the opportunity cost of capital should result in an environment where outcomes are predictable and consistent so that investors, utilities and consumers are better able to plan and make decisions.

5. **Systematic and empirically-based approach**. The methodology used by the Board to determine the cost of debt and equity capital should be a systematic approach that relies on economic theory and is empirically derived from objective, data-based analysis. For example, in establishing comparability, it is possible to build a low-risk sub-set from a higher risk universe using an empirically based approach.

6. **Minimize the time and cost of administering the framework.** Costs imposed on all participants, including the regulated entity and the regulator, should not exceed the benefits available. This objective could be met through a simple process that reflects the concerns of interested participants and reduces the formal process requirements.

4.2 Return on Equity

4.2.1 Need to Reset and Refine Existing ROE Formula

In order to ensure that on an ongoing basis changing economic and financial conditions are adequately and appropriately accommodated in the Board's formulaic approach for determining a utility's equity cost of capital**, the Board has determined that its current formula-based ROE approach needs to be reset and refined**. As previously indicated, **the Board will continue to use a formula-based ERP approach**. However, informed by the discussion at the consultation and the written comments of participants generated by the consultation, as well as its own analysis, the Board has concluded that the formula needs to be reset to address the difference between the allowed ROE arising from the application of the formula and the ROE for a low-risk proxy group that cannot be reconciled based on differences in risk alone. The formula also needs to be refined to reduce its

sensitivity to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity.

The Board's current approach to estimating the cost of equity has been in effect for 12 years. The Board notes that in the 1997 Draft Guidelines, the Board stated that "it is persuaded that there exists a non-linear relationship between interest rates and the ERP." [28] The existing formula approximates this relationship using a linear specification. The Board is of the view that it is unreasonable to conclude that the current formula correctly specifies this relationship, based on the passage of time, changes in financial and economic circumstances generally, and the empirical analyses provided by participants to the consultation and the discussion at the consultation itself. However, the Board is of the view that its current formulaic approach for determining the equity cost of capital should be reset and refined, not otherwise abandoned or subject to wholesale change.

The events that unfolded earlier this year that triggered this review effectively illustrated that the Board's approach needs to be refined to reduce the sensitivity of the formula to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity. The Board concludes that the current approach could be more robust and better guide the Board's discretion in applying the FRS. The Board notes that while the current formula today produces results similar to that in 2008, it does not address the observed behaviour of the formula during the financial crisis – lowering the allowed ROE when the amount and price of risk in the market was increasing.

The view expressed by some participants in the consultation that the Board must wait to be provided with evidence from a regulated utility in Ontario of financial hardship due to the current allowed ROE before its adapts its policies to better reflect market realities is not consistent with the Board's approach.

The Board is of the view that resetting and refining the current formula-based ERP approach maintains the transparency, predictability and stability associated with the current

[28] Ontario Energy Board. Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities. March 1997. p. 31.

approach, and avoids sudden changes in regulatory policy to address potentially transitory capital market conditions. [29]

The Board has been informed by the numerous approaches used by various participants to the consultation to determine whether the formula continues to produce results that meet the FRS. The sum of the elements supporting the Board's decision to reset and refine its formulaic ROE is independent of the recent financial crisis and whether or not the crisis has abated.

4.2.2 The Initial Set Up

Use of Multiple Tests

The Board's current formulaic approach for determining ROE is a modified Capital Asset Pricing Model methodology, and in his written comments, Dr. Booth recommended that this practice be continued. Dr. Booth recommended that "the Board base its fair ROE on a risk based opportunity cost model, with overwhelming weight placed on a CAPM estimate"[30].

This view was not shared by other participants in the consultation, who asserted that the Board should use a wide variety of empirical tests to determine the initial cost of equity, deriving the initial ERP directly by examining the relationship between bond yields and equity returns, and indirectly by backing out the implied ERP by deducting forward-looking bond yields from ROE estimates.

Participants argued from a number of different perspectives that a variety of methods should be used to develop the ERP:

- "The Board should not limit itself to one specific method of calculating an ERP; rather it should consider the results produced by multiple approaches in order to

[29] Written Comments of the Industrial Gas Users Association, October 30, 2009, p. 2.
[30] Ibid. p. 20.

generate a range of reasonable results from which it may select an appropriate ERP. This process requires the exercise of informed judgment"[31].

- "The Board established the initial risk premium for the Formula, in its decision for Consumers Gas in EBRO 495, by considering an array of risk premium estimates put forward by experts and selecting a risk premium within the range of results presented. The risk premiums put forth by experts were either the result of directly measuring the historical relationship between bond yields and equity returns; or alternatively, by deriving an implied risk-premium, by backing-out forward looking bond yields from ROE estimates produced by using other methodologies, i.e., DCF, CAPM, or Comparable earnings.

  Multiple approaches for determining ROE provide greater assurance that the end result will be just and reasonable, as conditions that may bias results could be detected or mitigated by considering alternative results."[32]

- "The Board should consider comparable utilities' rates of return and a minimum spread to long-term debt rates, as well as resetting the reference rate".[33]

- "The Board should establish the initial ROE by looking at the best available evidence on the utilities' required return. This evidence should include results of various cost of capital methodologies…The Board would be remiss to predetermine a single methodology for establishing the initial allowed ROE without reviewing alternative methods for determining cost of equity." [34]

- "We propose that the Board, in reviewing cost of capital, would hear the evidence of the various experts with their different views of the ERP result, but would also look at

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[31] Concentric Energy Advisors. Written Comments on behalf of Enbridge Gas Distribution, Hydro One, and the Coalition of Large Distributors, September 8, 2009. September 8, 2009. p. 59.
[32] Ibid. p. 47.
[33] Written Comments of the Power Workers' Union. September 8, 2009. p. 6.
[34] Dr. J. H. Vander Weide. Written Comments on behalf of Union Gas. pp. 7-8.

other ways in which the market directly speaks about returns…they (the examples provided) and many other examples – are ways in which the market communicates the returns for investment comparable to utility investments. These sources are therefore useful in testing whether the results of various ERP or other market studies of cost of capital are realistic." [35]

- "If the utility is not a stand-alone entity and/or does not have traded shares, then the Board has no alternative but to look at total rates of return earned by investors in a relevant sample of companies." [36]

- "Expressing the ROE in terms of a premium above…long-term Canada bond yield… does not mean that the initial ROE need be estimated solely using a test or tests that might be defined as ERP tests." [37]

  "No single model is powerful enough to produce 'the number' that will meet the fair return standard. Only by applying a range of tests along with informed judgment can adherence to the fair return standard be ensured." [38]

- "…use of multiple tests. The tests all measure different factors that should be considered in setting a fair return on equity that is consistent with the comparable investment standard, the financial integrity standard and the capital attraction standard. The OEB should not rely on a single method or test." [39]

The Board agrees that **the use of multiple tests to directly and indirectly estimate the ERP is a superior approach to informing its judgment than reliance on a single methodology**. In particular, the Board is concerned that CAPM, as applied by Dr. Booth, does not adequately capture the inverse relationship between the ERP and the long

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[35] Written Comments of the School Energy Coalition. September 2009. pp. 2-3.
[36] Written Comments of Energy Probe Research Foundation. September 8, 2009. p. 14.
[37] McShane, K., Foster Associates, Inc. Written Comments on behalf of the Electricity Distributors Association. September 8, 2009. p. 2.
[38] Ibid. p. 23.
[39] Written Comments of Ontario Power Generation Inc. September 8, 2009. p. 3.

Canada bond yield. As such, the Board does not accept the recommendation that it place overwhelming weight on a CAPM estimate in the determination of the initial ERP.

Setting the Initial Equity Risk Premium

The Board is of the view that the initial ERP should be reset to address the difference between the allowed ROE arising from the application of the formula and the ROE for a low risk proxy group that cannot be reconciled based on differences in risk alone.

Therefore, based on the ERP recommendations provided by all participants in this consultation the **Board has determined that an initial ERP of 550 basis points** is appropriate for the purposes of deriving the initial ROE to be embedded in the Board's reset and refined ROE formula. This includes an implicit 50 basis points for transactional costs.

Consequently, **assuming a forecast long term government of Canada bond yield of 4.25%, the initial ROE to be embedded in the Board's reset and refined ROE formula will be 9.75%** (i.e., 4.25% + 550 basis points = 9.75%).

The Board has assessed the various empirical tests and recommendations submitted by participants and translated each of the recommended approaches as an ERP assuming a forecast long term government of Canada bond yield of 4.25%, where appropriate, as summarized in Table 1.

The empirical tests of each of the participants to the consultation are also described below. Although the Board maintains its view that each of the tests has empirical strengths and weaknesses, the diversity of approaches tabled and discussed in the consultation was helpful. As a result, the Board has given each test weight in the process to establish the initial ERP to be embedded in the Board's formula.

Table 1: Summary of Participant Recommendations

Direct/Indirect Equity Risk Premium	Low	Medium	High
Dr. L.D. Booth			
CAPM (Adjusted Using CoC Formula to Reflect 4.25% GOC, 0.75 Adj)	3.31%	3.31%	3.31%
Average Dr. L.D. Booth	**3.31%**	**3.31%**	**3.31%**
Concentric Energy Advisors			
DCF Analysis for Low-Risk Proxy Group (US Gas, Elec, Cdn)	6.03%	6.78%	7.83%
CAPM Analysis for Low-Risk Proxy Groups (US Gas, US Elec, Cdn)	4.58%	4.72%	4.86%
ERP Econometric Model (Average Gas and Electric)	6.35%	6.35%	6.35%
Average Concentric Energy Advisors	**5.65%**	**5.95%**	**6.35%**
J. Dalton - Power Advisory LLC			
ERP Econometric Model #1 and ERP Econometric Model #2	6.05%	6.45%	6.85%
Average J. Dalton - Power Advisory	**6.05%**	**6.45%**	**6.85%**
K. McShane - Foster Associates			
New Formula for Calculating Allowed ROE (NEB Initial Formula Metrics)	6.38%	6.38%	6.38%
Illustrative method	5.75%	5.75%	5.75%
Average: K. McShane	**6.07%**	**6.07%**	**6.07%**
Dr. J.H. Vander Weide			
Experienced Equity Risk Premium	4.30%	5.50%	6.60%
2008 Awarded ROEs Vs. Avg 2008 US LT T-Bills - Gas	6.16%	6.16%	6.16%
2006-8 Awarded ROEs Vs. Avg 2006-8 US LT T-Bills - Gas	5.61%	5.61%	5.61%
2008 Awarded ROEs Vs. Avg 2008 US LT T-Bills - Electric	6.26%	6.26%	6.26%
2006-8 Awarded ROEs Vs. Avg 2006-8 US LT T-Bills - Electric	5.71%	5.71%	5.71%
Forecast $E(R_e)$ = DCF Expected Return - LT Treasury Yield			
Gas	6.19%	6.19%	6.19%
Electric	6.21%	6.21%	6.21%
Regression - Ex-ante ERP (Above) with YTM LT Treasury Yields			
Gas (Modified to use Canadian LT GOC bond)	6.97%	6.97%	6.97%
Electric (Modified to use Canadian LT GOC bond)	7.33%	7.33%	7.33%
DCF Analysis for Value Line Utility Companies			
Gas	7.81%	7.81%	7.81%
Electric	8.71%	8.71%	8.71%
Average: Dr. J.H.Vander Weide	**6.48%**	**6.59%**	**6.69%**
Average ERP All Submissions	**5.51%**	**5.67%**	**5.85%**

Analyses of Dr. J. H. Vander Weide

Dr. Vander Weide performed a number of empirical analyses. The average experienced ERP on an investment in Canadian utility stocks from data on returns earned by investors in Canadian utility stocks compared to interest rates on long-term Canada bonds was approximately 5.50 percent, as set out below:

Comparable Group	Period of Study	Average Stock Return	Average Bond Yield	Risk Premium
S&P/TSX Utilities	1956 - 2008	11.84%	7.54%	4.3%
BMO CM Utilities Stock Data Set	1983 - 2008	14.31%	7.66%	6.6%
Average				**5.5%**

Source: Written comments of Dr. J.H. Vander Weide. Page 14.

He also provided information on recent allowed ROEs for U.S. utilities which demonstrated implicit ERPs:

	Natural Gas Distribution		Electric Utilities	
	2008	2006 - 2008	2008	2006 - 2008
Average U.S. ROE Awarded (%)	10.4	10.3	10.5	10.4
Spread to OEB September 2009 Long Bond Estimate of 4.25%	6.15	6.05	6.25	6.15
Spread to Average Long-Term Canada Bond Yield in 2008 of 4.06%	6.34	NA	6.44	NA
Spread to Average Long-Term Canada Bond Yield in 2006 to 2008 of 4.21%	NA	6.09	NA	6.19
Spread to Average Long-Term U.S. Treasury Bill Yield in 2008 of 4.24%	6.16	NA	6.26	NA
Spread to Average Long-Term U.S. Treasury Bill Yield in 2006 to 2008 of 4.69%	NA	5.61	NA	5.71

Sources: Government of Canada Bond Yields: Bank of Canada; U.S. Long-Term Treasury Bill Yields: U.S. Department of Treasury

Further, forecast expected required returns by investors were calculated by Dr. Vander Weide by deducting the long-term Treasury bond yield from the DCF expected return (Exhibit 5, Dr. Vander Weide) over the period September 1999 to February 2009. This calculation produced an average ERP of 621 basis points for electric utilities and an average expected ERP of 619 basis points for natural gas utilities (Exhibit 6, Dr. Vander Weide) over the period June 1998 to February 2009.

However, regressing the relationship between the *ex ante* risk premium and the yield to maturity on long-term U.S. Treasury bond produced an ERP equation of:

- ERP = 12.10 – 1.123 x I_B for Electric Utilities. Assuming an estimated Canadian Long-Term Bond yield of 4.25%, the Ex-Ante expected ERP is 7.33% and an ROE of 11.58%; and

- ERP = 10.26 – 0.773 x I_B for Natural Gas Distribution Utilities. Assuming an estimated Canadian Long-Term Bond yield of 4.25%, the Ex-Ante expected ERP is 6.97% and an ROE of 11.22%.

Finally, Dr. Vander Weide conducted a DCF Analysis for Value Line Natural Gas Companies that resulted in an estimated ROE of 11.5% (Exhibit 9, Dr. Vander Weide) or an ERP of approximately 7.81%, using the average February 2009 long-term composite Treasury bond yield of 3.69%. His DCF Analysis for Value Line Electric Companies (Exhibit 8, Dr. Vander Weide) resulted in an estimated ROE of 12.4% or an ERP of approximately 8.71%, assuming the same long-term composite Treasury bond yield.

Analysis of Kathy McShane of Foster Associates Inc.

Ms. McShane proposed a new formula for calculating the allowed ROE: ROE_{New} = Initial ROE + 50% (Change in Forecast GOC Bond Yield) + 50% (Change in Corporate Bond Yield Spread), which reflects the analysis provided in her comments.

Ms. McShane also demonstrated that using her recommended approach for 2009, based on the NEB formula contained in RH-2-94 Decision, the ROE would have been 10.73%[40], equal to an ERP of 638 basis points and assuming a forecast GOC yield of 4.35% for 2009.

[40] McShane, K., Foster Associates Inc. Written Comments on behalf of the Electricity Distributors Association. Schedule 4.

For illustrative purposes in her analysis, she linked a forecast long-term Canada bond yield of 4.5% and a corporate bond yield spread of 175 basis points to an ROE of 10%. Implied in this ROE is an ERP of 550 basis points.

Analysis of Power Advisory LLC

Power Advisory evaluated a range of different model specifications in an effort to come up with a formula that will yield more reasonable results than the existing formula under a range of different credit and financial market conditions.[41] Two models performed the best in terms of standard econometric considerations (i.e., goodness of fit, highly significant parameter values, and plausible statistical relationships)[42]:

1. ROE = 7.008% + (US Corp BAA Bond Yield with 6 month lag x 0.5356); and
2. ROE = 7.451% + (US Gov 30 Year Bond yield with 6 month lag x 0.5122) + (VIX index value with 6 month lag x 0.0077).

Using current values for these variables produces ROE estimates of 10.5% to 11.3%. Using Canadian values in these models results in ROE estimates of 10.3% to 11.1%. The implied ERP using the results of the models run using a forecast long-term government of Canada bond yield of 4.25% is 605 basis points to 685 basis points.

Analysis of Concentric Energy Advisors

Concentric's overall recommended ROE for natural gas distribution utilities, assuming a 40% deemed equity capital structure is 10.5% and for electric transmission and distribution utilities is 10.3%, also assuming 40% deemed equity. The implied ERP assuming a 4.25% forecast GOC bond yield is 625 basis points and 605 basis points, for natural gas and electric transmission and distribution, respectively. These recommendations are supported by multiple analytical approaches; each calculated using data for a specific proxy group for

[41] Power Advisory LLC. Written Comments on behalf of Great Lakes Power Transmission LP. September 8, 2009. p. 16.
[42] Ibid. p. 17.

the natural gas and electric transmission and distribution utilities established by Concentric.[43]

The results of Concentric's DCF analysis are presented in the table below[44].

Proxy Group	**Low**	**Mean**	**High**
U.S. Natural Gas Distribution Utilities	9.70%	10.44%	11.57%
U.S. Electric Distribution Utilities	10.08%	10.96%	12.09%
Canadian Utilities	9.97%	10.60%	11.47%
Average	9.92%	10.67%	11.71%
Implied ERP at 4.25% forecast LT GOC Yield	5.67%	6.42%	7.46%
Implied ERP Including 50 basis points Flotation Costs	**6.17%**	**6.92%**	**7.96%**

The results of Concentric's CAPM analysis are presented in the table below. The results reflect a Market Risk Premium of 586 basis points, which is supported by material provided in Appendix F (page F-10) and Exhibit Concentric-06 of their written comments.

Proxy Group	**Low**	**Mean**	**High**
U.S. Natural Gas Distribution Utilities	9.05%	9.18%	9.32%
U.S. Electric Distribution Utilities	8.54%	8.68%	8.82%
Canadian Utilities	7.80%	7.95%	8.10%
Average	8.46%	8.61%	8.75%
Implied ERP at 4.25% forecast LT GOC Yield	4.21%	4.36%	4.50%
Implied ERP Including 50 basis points Flotation Costs	**4.71%**	**4.86%**	**5.00%**

The results of Concentric's ERP analysis are presented in the table below and are explained in detail in Appendix F of their written comments.

[43] Concentric Energy Advisors. Written Comments on behalf of Enbridge Gas Distribution, Hydro One, and the Coalition of Large Distributors. September 8, 2009. Appendix C.
[44] Ibid. p. F-6.

Concentric's ERP regression formula is as follows: ROE = Constant = U.S. Gov 30-year Bond • x_1 + Moody's Utility A-rated Spread • x_2 + % Generation • x_3 + Natural Gas Dummy Variable • x_4.[45]

	U.S. Natural Gas Distribution Proxy Group	**U.S. Electric Distribution Proxy Group**
Constant	7.634	7.634
U.S. Government 30-year Bond Yield	0.428 x 4.18	0.428 x 4.18
Moody's Utility A-rate Spread (July 2009)	0.310 x 1.56	0.310 x 1.56
% Generation	0.008 x 0.00	0.008 x 49.76
Natural Gas Dummy (Electric = 0,Gas = 1)	0.384 x 1.00	0.384 x 0.00
Authorized ROE	10.29%	10.30%
Implied ERP at 4.25% forecast LT GOC Yield	6.04%	6.05%
Implied ERP Including 50 basis points Flotation Costs	**6.54%**	**6.55%**

The tables below summarize Concentric's recommended ROEs prior to any adjustment for changes in leverage:[46]

U.S. Electric T & D Utilities	**Low**	**Mean**	**High**
DCF	10.08%	10.96%	12.09%
CAPM	8.54%	8.68%	8.82%
Average	9.31%	9.82%	10.46%
Differential between Vertically Integrated and T&D Utilities	(0.40%)	(0.40%)	(0.40%)
Return before Leverage and Flotation Cost Adjustments	8.91%	9.43%	10.06%
Flotation Cost Adjustment 0.50%	0.50%	0.50%	0.50%
Benchmark T&D ROE	9.41%	9.93%	10.56%
Benchmark T&D Equity Ratio	46.32%	46.32%	46.32%
Implied ERP using 4.25% forecast LT GOC Yield	5.16%	5.68%	6.31%

U.S. Natural Gas Distribution Utilities	**Low**	**Mean**	**High**
DCF	9.70%	10.44%	11.57%
CAPM	9.05%	9.18%	9.32%
Return before Leverage and Flotation Cost Adjustments	9.37%	9.81%	10.45%
Flotation Cost Adjustment 0.50%	0.50%	0.50%	0.50%
Benchmark Natural Gas Distribution ROE	9.87%	10.31%	10.95%
Benchmark Natural Gas Distribution Equity Ratio	44.47%	44.47%	44.47%
Implied ERP using 4.25% forecast LT GOC Yield	5.62%	6.06%	6.70%

Adjusting for leverage that is higher than the benchmark equity ratio, i.e., deemed equity of 40%, the recommended ROEs increase to 10.5% for natural gas distribution and 10.3% for electric transmission and distribution, representing implied ERPs of 625 basis points and 605 basis points, respectively.

[45] Ibid. p. F-14.
[46] Ibid. p. F-16.

Analysis of Dr. Booth

Dr. Booth recommended a fair ROE of 7.75%. This number is based on the following key assumptions.[47]

First, a market risk premium of 5.0%. However, Dr. Booth noted that many of his peers believe it to be 6.0%. Second, beta is estimated to be 0.5. Dr. Booth indicated that he "is not using the current beta coefficient"[48]; i.e., the beta of 0.5 used to derive the recommended ERP of 325 (assuming a 4.50% long-term government of Canada bond yield) is not supported by Dr. Booth's recent beta estimates, where beta is less than 0.5. Thirdly, Dr. Booth also noted that the range of fair return cost of equity estimates could vary by 0.50%. His unadjusted estimate of a fair return was 7.00% and he noted that the estimates of his colleagues would be 7.50%. He therefore added 0.25% to his estimate to "split this difference", resulting in his ROE recommendation of 7.25%. Finally, Dr. Booth added 0.50% for issuance costs, bringing his fair recommended return to 7.75%.

The Board notes that in the course of the consultation, Dr. Booth indicated that he would be prepared to recommend "fixing ROE at 8.5% or 8.75% over the business cycle, for say, a five-year period."[49] Dr. Booth did not support this estimated ROE with empirical analysis, and as such, there is no principled basis upon which the Board can rely on Dr. Booth's recommendation of 8.5% or 8.75%.

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[47] Professor L.D. Booth. Written Comments on behalf of Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition, the Industrial Gas Users Association, the Canadian Manufacturers & Exporters, the London Property Management Association and the Building Managers and Owners Association of the Greater Toronto Area. September 8, 2009. p. 40.
[48] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. October 6, 2009. p. 100. Lines 12 and 13.
[49] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. October 6, 2009. p. 98. Lines 10 – 12.

4.2.3 The Formula-based Return on Equity

4.2.3.1 Long Canada Bond Forecast

The Board is of the view that the LCBF continues to be an appropriate base upon which to begin the ROE calculation. In particular, the Board is of the view that the sensitivity of the allowed ROE to changes in government of Canada bond yields arising from monetary and fiscal conditions that do not reflect changes in utility cost of equity will be addressed, in part, by the use of multiple methods to determine the initial ERP or ROE in the formula. The Board also agrees with Ms. McShane's comment that the LCBF provides an important forecast component to the formula[50] and with the Industrial Gas Users Association's comment that "there is an intrinsic logic to using the same parameter to adjust ROE as was used to set the ROE in the first place."[51]

4.2.3.2 Long Canada Bond Forecast Adjustment Factor

In its 1997 Draft Guidelines, the Board determined that the difference between the LCBF for the current test year and the corresponding rate for the immediately preceding year should be multiplied by a factor of 0.75 to determine the adjustment to the allowed ROE.[52] In that same document, however, the Board noted that there was a significant difference of opinion concerning the relationship between interest rates and the ERP and that ratios contained in the evidence from generic rate of return proceedings in other Canadian jurisdictions ranged from 0.5:1 to 1:1.[53] Moreover, the Board notes that the selection of the 0.75 adjustment factor is described in the 1997 Draft Guidelines as "admittedly somewhat arbitrary."[54]

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[50] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. September 22, 2009. Ms. McShane's presentation, pp. 161-162;
[51] Final Written Comments of the Industrial Gas Users Association. October 30, 2009. p. 10.
[52] Ontario Energy Board. Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities, March 1997. p. 31.
[53] Ibid.
[54] Ibid. p. 32.

The Board views **the determination of the LCBF adjustment factor to be an empirical exercise, and as such, based on the empirical analysis provided by participants in conjunction with the consultation, the Board is of the view that the LCBF adjustment factor should be set at 0.5**. The Board notes that four participants in this consultation empirically tested the relationship between government bond yields and ROE:

- Dr. Vander Weide determined that when the yield to maturity on long-term government bonds increases by 100 basis points, the allowed ERP tends to decrease by approximately 55 basis points, and when the yield to maturity on long-term government bonds decreases by 100 basis points, the allowed ERP tends to increase by approximately 55 basis points.[55]

- Kathy McShane of Foster Associates, Inc. submitted that a regression analysis used to estimate the relationship between government bond yields and the utility cost of equity indicates that the ROEs increased (decreased) by approximately 50 basis points for every one percentage point increase (decrease) in long-term government bond yields.[56]

- Concentric Energy Advisors also conducted a regression analysis in which the litigated ROEs of U.S. LDC utility returns demonstrated an elasticity factor to government bond yields of 0.45. This implies that the risk premium should have actually increased by approximately 0.55 for each percentage point drop in the government bond yield (as opposed to the 0.25 implied by the current formula).[57]

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[55] Dr. J.H. Vander Weide. Written Comments on behalf of Union Gas. September 8, 2009. p. 21.
[56] K. McShane. Foster Associates, Inc. Written Comments on behalf of the Electricity Distributors Association. September 8, 2009. p. 26.
[57] Concentric Energy Advisors. Written Comments on behalf of Enbridge Gas Distribution, Hydro One, and the Coalition of Large Distributors. September 8, 2009. pp. 41-42.

- John Dalton of Power Advisory also used a regression analysis to determine that the ERP changes by less than 50% of the change in the long-term government bond rate.[58]

The Industrial Gas Users Association also stated that it sees some merit in further consideration of adjusting downwards to 0.5 the coefficient for application of changes in long Canada bond yields to ROE.

4.2.3.3 Additional Term – Changes in Utility Bond Spread

The Board is of the view that the sensitivity of the formula to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity is addressed, in part, by using multiple methods to determine the initial ERP and ROE in its formulaic ROE approach and by reducing the LCBF adjustment factor to 0.5 from 0.75. The Board also is of the view, however, that **the specification of the relationship between interest rates and the ERP in the formula would be improved by the addition of a further term to the formula**.

In particular, the Board is of the view that there is a relationship between corporate bond yields and the equity return, and the Board agrees with Dr. Booth, who stated, with respect to corporate bond spreads, that "this is not to say that spreads have no information about required risk premium."[59] The Board notes that three participants to the consultation conducted empirical analysis to specify the relationship between corporate bond yields and the equity return:

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[58] Power Advisory LLC. Written Comments on behalf of Great Lakes Power Transmission LP. April 17, 2009. p. 15.

[59] Professor L.D. Booth. Written Comments on behalf of Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition, the Industrial Gas Users Association, the Canadian Manufacturers & Exporters (CME), the London Property Management Association and the Building Managers and Owners Association of the Greater Toronto Area. September 8, 2009. p. 29.

- Concentric demonstrated by using a regression analysis that there is a statistically significant relationship between ROE and corporate bond yields and specified that the sensitivity of allowed returns to corporate bond yields is about 0.45 to 0.55[60]. Concentric also demonstrated empirically that Treasury bonds have been more volatile than corporate bonds since January 1997.

- Kathy McShane of Foster Associates tested the relationship between corporate bond yields and the utility cost of equity. She determined the cost of equity using two approaches: first, by using approved returns on equity for utilities not governed by formulas as a proxy for the utility cost of equity, and second, by relying on a time series of utility costs of equity developed by using the discounted cash flow approach against which yields on utility bonds can be compared[61]. By using regression analysis, Ms. McShane determined that allowed ROEs have increased (decreased) by approximately 45 basis points for every one percentage point increase (decrease) in the A rated utility bond yield. Similarly, the DCF cost of equity increased (decreased) by approximately 55 basis points for every one percentage point increase (decrease) in long-term A rated utility bond yields.[62]

- John Dalton from Power Advisory LLC conducted an econometric analysis, which established that the relationship between ROE and U.S. corporate BAA bond yields with a six month lag is approximately 0.53.[63]

Based on the analysis provided by participants to the consultation, the Board concludes that **there is a statistically significant relationship between corporate bond yields and the cost of equity, and that a corporate bond yield variable should be incorporated in the ROE formula**. The Board notes that the presence of a corporate bond yield variable in its

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[60] Concentric Energy Advisors. Written Comments on behalf of Enbridge Gas Distribution, Hydro One, and the Coalition of Large Distributors. September 8, 2009. pp. 53–55.
[61] K. McShane. Foster Associates, Inc. Written Comments on behalf of the Electricity Distributors Association. September 8, 2009. p. 25.
[62] Ibid. p. 26.
[63] Power Advisory LLC. Written Comments on behalf of Great Lakes Power Transmission LP. September 8, 2009. p. 17.

current ROE formula would have served to increase the allowed ROE during the recent credit crisis, which, in the Board's view, would have been directionally correct.[64]

The Board has determined that it is appropriate to use a corporate yield variable that is reflective of the borrowing costs of Canadian utilities, one that is well-understood and is based on an established index from a recognized source. **The Board has** accordingly **determined that it will use a utility bond spread based on the difference between the Bloomberg Fair Value Canada 30-Year A-rated Utility Bond index yield and the long Canada bond yield.** This is further described in Appendix B.

The Board agrees with the comment of Ms. McShane that separating the LCBF and the utility bond spread variables, as opposed to using one corporate bond yield variable that would implicitly incorporate the LCBF, provides transparency as it shows "what part is causing the ROE to move in either direction."[65]

The Board also determines that the utility bond spread reflected in the reset and refined formulaic ROE approach will be subject to a 0.50 adjustment factor, consistent with the empirical analyses provided by participants to the consultation.

4.3 Capital structure

The Board's current policy with regard to capital structure for all regulated utilities continues to be appropriate. As noted in the Board's draft guidelines, capital structure should be reviewed only when there is a significant change in financial, business or corporate fundamentals. [66] The Board's current policy is as follows:

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[64] Written Comments of the Electricity Distributors Association. September 8, 2009. Schedule 4.
[65] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. Ms. McShane's presentation, p. 161.
[66] Ontario Energy Board. Ontario Energy Board Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities. March 1997. p. 2

- The Board has determined that a split of 60% debt, 40% equity is appropriate for all electricity distributors. [67] Capital structure was not a primary focus of the consultation and the Board notes that the comments made by participants in the consultation largely supported the continuation of the Board's existing policy.

- For electricity transmitters, generators, and gas utilities, the deemed capital structure is determined on a case-by-case basis. The Board's draft guidelines assume that the base capital structure will remain relatively constant over time and that a full reassessment of a gas utility's capital structure will only be undertaken in the event of significant changes in the company's business and/or financial risk. [68]

4.4 Debt Rates

4.4.1 Long-term debt

The determination of the cost of long-term debt was not a primary focus of the consultation and the Board notes that the comments made by participants in the consultation largely supported the continuation of the Board's existing policies and practices.

While the Board agrees with this approach, it is important to note that the determination of the cost of long-term debt has typically received significant interest in the processes to establish electricity distribution and, to a lesser extent, electricity transmission rates. In contrast to the difficulty establishing the utility cost of equity that arises from a lack of transparency, the issues associated with the determination of a utility's long-term debt cost arise from different factors, including the relatively short period of time since the corporatization of electricity distribution and transmission utilities, the relatively short history of rate regulation by the Board, and the presence of significant amounts of affiliate debt.

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[67] Ontario Energy Board. Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors. December 20, 2006. p. 5
[68] Ontario Energy Board. Compendium to Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities. March, 1997. p. 30

Natural gas distributors

The Board has a long history of determining the cost of long-term debt for natural gas distributors. Based on this experience and in the absence of any material comments in the consultation suggesting otherwise, the Board is of the view that **the current policy of using the weighted cost of embedded debt should continue**. Consistent with the current practice, in a forward test year rate application the onus is on the applicant utility to forecast the amount and cost of new long-term debt. These values are then factored into the estimated cost of existing long-term debt for the purpose of setting regulated natural gas distribution rates. Debt instruments and debt rates are subject to a prudence review in an application for rates. However, it is the Board's policy that the total estimated cost of debt should be a close proxy for the actual long-term debt cost incurred by the natural gas utility in the rate year.

OPG's prescribed rate-regulated baseload generation

Consistent with the Board's practice in OPG's 2008 Cost of Service application, considered under Board file number EB-2007-0905, the Board is of the view that **OPG's cost of long-term debt should be set in a manner similar to that adopted for natural gas distributors**.

Electricity transmitters

Consistent with the Board's current practice as set out in various Decisions and Orders arising from rate applications by electricity transmitters, the Board is of the view that **an electricity transmitter's cost of long-term debt should be set in a manner similar to that adopted for natural gas distributors**.

Electricity distributors

In the 2000 Electricity Distribution Rate Handbook, the Board adopted deemed long-term debt rates and deemed capital structures that varied based on the size of utility rate base.

The deemed long-term debt rates applied regardless of a utility's actual cost of debt and actual capitalization. This deemed approach reflected the ongoing corporatization of the sector and the fact that many electricity distribution utilities had no debt.

The *2006 Electricity Distribution Rate Handbook*, issued by the Board on May 11, 2005, documented an evolution of the treatment of long-term debt for electricity distributors. While the size-related capital structure and (updated) deemed debt rates were retained, the handbook outlined that long-term debt costs could also reflect the cost of embedded debt. The cost of affiliate debt was also capped by the deemed debt rate at the time of issuance.

In April of 2006, Board Staff undertook research, commissioned expert advice and consulted with stakeholders on the methods for setting the cost of capital and 2nd Generation Incentive Rate Making. These consultative activities culminated in the December 20, 2006 Report. In that report, the Board provided additional guidance on the treatment of long-term debt, and emphasized that while there should be increased reliance on actual or embedded debt costs, the need for a deemed debt rate that would continue to apply (either in itself or as a ceiling on affiliate debt) was recognized.

In distribution utility rate applications heard by the Board since the issuance of the December 20, 2006 Report, the Board has made determinations on the treatment of long-term debt that not only reflect the 2006 guidelines, but are based on the record before it in each application. The Board has also been informed by the findings made in relation to completed applications. **The Board is of the view that it is appropriate for this cost of capital policy to reflect the current practices of the Board with respect to determining the cost of long-term debt based on recent Board decisions**.

The following guidelines on the treatment of long-term debt are intended to provide more certainty for applicants and all participants in general. **The Board wishes to emphasize that the long-term debt guidelines relating to electricity distribution utilities are expected to evolve over time and are expected to converge with the process used by the Board to determine the amount and cost of long-term debt for natural gas distributors**. The Board recognizes that there is still a need for the deemed long-term debt rate, however its usage should become more limited in application. The Board wishes to

reiterate that the onus is on the distributor that is making an application for rates to document the actual amount and cost of embedded long-term debt and, in a forward test year, forecast the amount and cost of new long-term debt to be obtained during the test year to support the reasonableness of the respective debt rates and terms.

The following guidelines are relevant with respect to the determination of the amount and cost of long-term debt for electricity distribution utilities.

The Board will primarily rely on the embedded or actual cost for existing long-term debt instruments. The Board is of the view that electricity distribution utilities should be motivated to make rational decisions for commercial "arms-length" debt arrangements, even with shareholders or affiliates.

In general, the Board is of the view that the onus is on the electricity distribution utility to forecast the amount and cost of new or renewed long-term debt. The electricity distribution utility also bears the burden of establishing the need for and prudence of the amount and cost of long-term debt, both embedded and new.

Third-party debt with a fixed rate will normally be afforded the actual or forecasted rate, which is presumed to be a "market rate". However, the Board recognizes a deemed long-term debt rate continues to be required and this rate will be determined and published by the Board. **The deemed long-term debt rate will act as a proxy or ceiling for what would be considered to be a market-based rate by the Board in certain circumstances**. These circumstances include:

- For affiliate debt (i.e., debt held by an affiliated party as defined by the Ontario *Business Corporations Act, 1990*) with a fixed rate, the deemed long-term debt rate at the time of issuance will be used as a ceiling on the rate allowed for that debt.

- For debt that has a variable rate, the deemed long-term debt rate will be a ceiling on the rate allowed for that debt. This applies whether the debt holder is an affiliate or a third-party.

- The deemed long-term debt rate will be used where an electricity distribution utility has no actual debt.

- For debt that is callable on demand (within the test year period), the deemed long-term debt rate will be a ceiling on the rate allowed for that debt. Debt that is callable, but not within the period to the end of the test year, will have its debt cost considered as if it is not callable; that is the debt cost will be treated in accordance with other guidelines pertaining to actual, affiliated or variable-rate debt.

- A Board panel will determine the debt treatment, including the rate allowed based on the record before it and considering the Board's policy (these Guidelines) and practice. The onus will be on the utility to establish the need for and prudence of its actual and forecasted debt, including the cost of such debt.

Deemed Long-term Debt Formula for Electricity Distributors

While the Board is of the view that greater reliance should be placed on embedded debt, including forecasts of the amount and cost of new debt expected to be incurred during the test year, the Board recognizes that there is a continuing need for a deemed long-term debt rate.

While there were no specific suggestions for how the deemed long-term debt rate should be calculated, **the Board sees merit in modifying the formula in a manner consistent with the changes adopted for the ROE adjustment formula**.

Specifically, the Board considers that **the deemed long-term debt rate for the test year should be an estimate based on the long (30-year) Government of Canada bond yield forecast plus the average spread between an A-rated Canadian utility bond yield and 30-year Government of Canada bond yield for all business days in the month three (3) months in advance of the (proposed) effective date for the rate changes**. This change is only in the source of the data, in the following ways:

- The 30-year A-rated Canadian utility bond yield data from Bloomberg will replace the BBB/A-rated Canadian Corporate bond yield series that was obtained from PC Bond, an affiliate of TSX.[69]

- The monthly average of business daily data will be used, instead of the weekly data used previously.

The changes are due to the data availability, and to transparency and cost. Both Bloomberg and PC Bond corporate bond series are proprietary and available on subscription bases. Using the same A-rated Canadian utility bond yield series from Bloomberg will reduce costs and work and increase transparency of the calculations. The Board does not consider the changes in methodology will have any material impact on the calculated deemed long-term debt rate. The Board also notes that this methodology was supported by LPMA and BOMA in their final written comments.[70]

Appendix C provides a detailed description of the methodology for calculating the deemed long-term debt rate.

4.4.2 Short-term debt

Natural gas distributors

For rate regulated natural gas distributors, short-term debt is used for an unfunded portion to true-up the deemed capitalization to the utility's actual capitalization. As the variance between actual and deemed capital structures is generally small, the unfunded portion is typically a small fraction of total capitalization for rate-setting purposes.

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[69] The PC Bond data was, prior to mid-2007, produced by Scotia Capital Inc., and publicly available from Statistics Canada and the Bank of Canada.
[70] Written Comments of the London Property Management Association and the Building Managers and Owners Association of the Greater Toronto Area. October 30, 2009, p. 32

In a Cost of Service application, the applicant natural gas distributor forecasts the cost of short-term debt for the test year, and this is subject to review. The Board notes that no participant questioned the Board's policy and practice for natural gas distributors, and **has determined that it is appropriate to continue with this approach.** With the development of a new deemed short-term debt rate for use in the electricity transmission and distribution sector, the Board notes that it and other participants may take into consideration the deemed short-term debt rate, as discussed below and documented in Appendix D.

OPG's prescribed rate-regulated baseload generation

Consistent with the Board's practice in OPG's 2008 Cost of Service application (EB-2007-0905), **the Board is of the view that OPG's cost of short-term debt should be set in a manner similar to that adopted for natural gas distributors.**

Electricity transmitters and distributors

Prior to the issuance of 2008 rates, short-term debt was not factored into electricity distribution and transmission rate-setting. In the December 20, 2006 Report, the Board adopted a deemed short-term debt rate that would apply to a deemed 4% of the capital structure. The formula for the deemed short-term debt rate was established as the average 3-month Bankers' Acceptance rate plus a 25 basis point spread, determined three months in advance of the effective date for rates. The short-term debt rate, and deemed 4% component of the capital structure was introduced in Cost of Service applications for 2008 distribution rates.

In the consultation, certain electricity distributors commented that they are unable to borrow at rates as predicted by the current deemed short-term debt formula. [71,72] These electricity

[71] Written Comments of FortisOntario Inc. September 10, 2009. p. 8, bullet at bottom of page. FortisOntario Inc. indicates that a high-grade utility would be Bankers' Acceptance + 175 basis points, for smaller operating company entities, it would be Bankers' Acceptance + 250-275 basis points

distributors have documented that the cost of short-term debt is much higher and depends on market conditions and on the rating of a distributor. The concern was not with using the Bankers' Acceptance rate, but primarily with the spread over Bankers' Acceptances. The suggestion was that the Board should obtain estimates of the spread from major Canadian banks, and add this to the average Bankers' Acceptance rate as calculated for rate-setting. To lessen the burden, it was suggested that this spread be calculated annually in January of the year, and used as needed. The Board could obtain quotes from banks more frequently if market conditions warranted it.

The Board is of the view that this approach to establishing the deemed short-term debt rate has merit. **The Board thus will adopt the following approach to determining the deemed short-term debt rate:**

- In mid-January of each year, the Board will contact major Canadian banks to obtain estimates of the spread of a typical short-term loan for an R1-low utility over the 3-month Bankers' Acceptance rate. The selection of R1-low is to reflect the fact that most distributors currently going to market would fall in that category; only Toronto Hydro Electric Systems Limited and Hydro One Networks Inc. would be R1-Mid or R1-High. Up to six quotes will be obtained. Ideally, the high and low estimates will be discarded to reduce the influence of outliers, and the average spread will be calculated. In the event that less than four quotes are obtained, the average spread will be calculated without discarding high and low estimates. The identity of the banks providing quotes will be protected.

- For the month three months in advance of the effective date for rates, the average 3-month Bankers' Acceptance rate should be calculated based on data for all business days in the month. To this will be added the average spread calculated above, giving the deemed short-term debt rate for rate-setting purposes.

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[72] Ontario Energy Board. Transcript of Consultation Process on Cost of Capital Review. October 6, 2009, p.144, l. 20 to p. 146, l. 22. Also, p. 148, l. 19 to p. 149, l. 15.

Full documentation on the deemed short-term debt rate methodology is provided in Appendix D.

In its final comments, LPMA/BOMA submitted that the current formula should be retained, but the spread increased from 25 basis points to 50 basis points, on the basis of recent economic history.[73] The Board has determined that distributors and other participants provided sufficient documentation that the spread over bankers' acceptance rates with which they can borrow short-term debt is much higher than the 25 basis points currently used, or even the 50 basis points proposed by LPMA/BOMA. Further, LPMA/BOMA's proposal could possibly need review in the future. The Board is of the view that its adopted approach, while entailing some more work by the Board to obtain the spread quotes from the banks each year, is more flexible and will provide more reasonable estimates of the cost of short-term debt in each year.

[73] Written Comments of the London Property Management Association and the Building Managers and Owners Association of the Greater Toronto Area. October 30, 2009. p, 31.

4.5 Summary

The key elements of the Board's cost of capital policy are summarized in the following table.

Table 2: Components of the Board's Cost of Capital Policy

Capital structure	• 60% debt (56% long-term and 4% short-term) and 40% equity for electricity distributors. • Gas distributors, electricity transmitters and OPG will continue with approved capital structures.
Short-term debt rate	• Once a year, in January, obtain real market quotes from major banks, for issuing spreads over Bankers Acceptance rates for the cost of short-term debt. • The short term rate will be calculated as the average Bankers' Acceptance for the month 3 months in advance of the effective date for the rates, plus the spread for the year calculated above.
Long-term debt rate	• The deemed long-term debt rate will be based on the Long Canada Bond Forecast plus an average spread with an A-rated long-term utility bond yield). • Third-party embedded/actual debt with fixed rates, terms and maturity will get the actual rate. • Affiliate embedded/actual debt with fixed rates, terms and maturity will get the lower of actual and deemed debt rate at time of issuance. • Utility provides forecasts of new debt for a forward test year, where possible. New third-party debt will be accepted at the negotiated market rate. If a forecasted new rate is not available (i.e., due to timing), the deemed long-term debt rate may apply. • For new affiliated debt, the deemed long-term debt rate will be a ceiling on the allowed rate. The onus will be on the utility to demonstrate that the applied for rate and terms are prudent and comparable to a market-based agreement and rate on arms-length commercial terms. • Variable-rate debt will be treated like new affiliated debt. • Renegotiated or renewed debt will be considered new debt. • Where a utility has no actual debt, the deemed long-term debt rate shall apply.
Common equity return	• Refined formula-based ROE will be calculated as the base ROE + 0.5 X (change in Long Canada Bond Forecast from base year) + 0.5 X (change in the spread of (A-rated Utility Bond Yield – Long Canada Bond Yield) from the spread in the base year). This includes an implicit 50 basis points for transactional costs. • The ROE (and the short-term and long-term debt rates) will be based on data for the month 3 months in advance of the effective date for rates. • Reset formula for 2010: The base ROE in the refined formula will be calculated for 2010 as Long Canada Bond Forecast rate plus an ERP of 550 basis points, and reflects multiple, empirically supported, estimates provided in consultation which led to this report.

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5 Implementation

5.1 Transition to Recommended Cost of Capital

The policy set out in Chapter 4 of this report will come into effect for the setting of rates, beginning in 2010, by way of a cost of service application.

The Board's "Minimum Filing Requirements for Natural Gas Distribution Cost of Service Applications" and the Board's "Filing Requirements for Transmission and Distribution Applications" are sufficient for the purposes of implementing the policies set out in this report. Those requirements include information to be filed in support of a utility's proposed cost of capital in a cost of service application. There is no need for additional filing requirements. The onus is on an applicant to adequately support its proposed cost of capital, including the treatment of and appropriate rates for debt instruments. The Board notes that this is being done in cost of service applications. However, the Board wishes to point out the increased emphasis that it is placing on applicants to support their existing and forecasted debt, and the treatment of these in accordance with the guidelines, or to support any proposed different treatment.

5.1.1 Continued Migration to Common Capital Structure

The Board will continue to include an adjustment to rates in 2010, as applicable, as outlined in its December 20, 2006 Report, in order to transition electricity distributors to the single deemed capital structure of 60% debt and 40% equity.

With 2010 rates, most electricity distributors will have completed the transition to the deemed capital structure of 60% debt (56% long-term and 4% short-term) and 40% equity. However, some distributors have not completed the transition. The Board will deal with the transition to the common deemed capital structure for these distributors when they file applications for rates.

5.2 Impact on Other Board Policies

5.2.1 Prescribed Interest Rates

The deemed short-term debt rate and the prescribed interest rate for deferral and variance accounts use closely related methodologies. Distributors commented that changes to the deemed short-term debt rate should be reflected in the prescribed interest rate. Further, there was acknowledgement that any new formula for the prescribed interest rate for deferral and variance accounts, used to calculate carrying charges on balances, would apply to both credit and debit balances. The Board agrees. While the policy in this report does not cover the prescribed interest rates, the Board intends to initiate a review of its approach to calculating the prescribed interest rate to align it with the approaches set out in this report.

6 Annual Update Process and Periodic Review

6.1 Annual Update Process

The Board will apply the methods set out in this report annually to derive the values for the ROE and the deemed long-term and short-term debt rates for use in cost of service applications.

If the application of these methods produces numerical results that, in the view of the Board, raise doubt that the FRS is met, the Board may then use its discretion to begin a consultative process to determine whether circumstances warrant an adjustment to the formulaic approach, in general, or to any of the cost of capital parameter values specifically. The Board also may, at its discretion and based on the circumstances at the time, use the previous year's formula-generated values on an interim basis until its final determination is made following the consultative process.

Stakeholders proposed a variety of tests and approaches that could be used to supplement the Board's annual review of the cost of capital parameters. The Board is of the view that any tests or approaches used to assess the reasonableness of the cost of capital parameters should be consistent with the formulaic ROE adjustment mechanism adopted. Accordingly, the Board will not attempt to annually derive the ROE using CAPM, DCF or other cost of capital methodologies to assess the reasonableness of the formula-generated ROE. The Board notes that participants are free to perform such calculations and ask the Board to review the formula when they feel it is appropriate.

For the purposes of assessing the reasonableness of results on an annual basis, the Board will examine the values produced by the Board's cost of capital methodology, and the relationships between them, in the context of the economic and financial conditions of the day. Further and consistent with the 1997 Draft Guidelines, the Board will review its approach as conditions arise that may call into question its validity. Further, parties may ask the Board to review its cost of capital policies when they feel it is appropriate or the

Board may do so on its own initiative. In either case it will be the Board's decision as to the time for a review. Finally, the Board may request the presentation of other tests or require some weighting for other tests should the Board want to assure itself that its approach does not lead to perverse results and is directionally in line with other market indicators. [74]

6.2 Periodic Review

The Board has determined that it will periodically review its formulaic ROE adjustment mechanism. The use of any formulaic approach to approximate a change in the ROE is bound to be imperfect and any such imperfection may, over time, result in cumulative or compounding effects such that the application of it may not continue to meet the FRS.

The Board notes that the time period for a review suggested by stakeholders varied from 3-5 years, with Energy Probe suggesting that "4-5 years is probably too short."[75]
The Board has determined that a review period of five years provides an appropriate balance between the need to ensure that the formula-generated ROE continues to meet the FRS and the objective of maintaining regulatory efficiency and transparency. Accordingly, the Board intends to conduct its first regular review in 2014 and any changes to the policy made as a result of that review would apply to the setting of rates for the 2015 rate year.

At the time of the review, the Board will provide guidance to stakeholders through, for example, an issues list similar to that issued on July 30, 2009, and the relevant period over which to estimate the risk-free rate. This latter approach will promote the use of a common basis to derive cost of capital estimates, increasing their direct comparability.

The periodic review will not necessarily result in a resetting of the base ROE or refining of the adjustment factors and/or terms of the formula. The Board will seek the views of

[74] Ontario Energy Board. Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities. March 1997. p. 2.
[75] Written Comments of Energy Probe Research Foundation, September 8, 2009, p. 12.

stakeholders on the need to reset the ROE and the need to revise the formula. If the Board is satisfied that its approach remains appropriate, the base ROE and the formula will remain unchanged and the review will conclude.

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Appendix A: Summary on the Formula-Based Return on Equity Guidelines in Effect in the 2009 Rate Year

The Board's existing formula-based approach using the equity risk premium ("ERP") method for determining the fair rate of return for natural rate regulated natural gas utilities is set out in its 1997 *Draft Guidelines on a Formula-Based Return on Common Equity.* The 1997 *Draft Guidelines* were first applied in the EBRO 495 proceeding which set fiscal 1998 rates for the Consumers' Gas Company Ltd. The Board's December 2006 *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* reaffirmed the continued use of this approach for electricity distribution utilities subject to a number of minor modifications, as described below.

Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Natural Gas Utilities:

The 1997 Draft Guidelines, have two phases: an initial setup and an ongoing adjustment mechanism.

Initial Set-Up

Step 1: Establish the forecast of the long Government of Canada yield for the test year

The forecast yield of long-term Government of Canada bonds is established for the test year by taking the average of the 3 and 12 months forward 10-year Government of Canada bond yield forecasts, as stated in the most recent issue of Consensus Forecasts, and adding the average of the actual observed spreads between 10 and 30-year Government of Canada bond yields, for each business day in the month corresponding to the most recent Consensus Forecast issue.

Step 2: Establish implied risk premium

A utility's test year ROE will consist of the projected yield for 30-year long Canada bonds plus an appropriate premium to account for the utility's risk relative to long Canada bonds. The primary methodological approach to be used in evaluating the appropriate risk premium should be the ERP test.

The ERP test is designed to measure the cost of equity capital from the capital attraction perspective. It relies on the assumption that common equity is riskier than debt and that investors will demand a higher return on shares, relative to the return required on bonds, to compensate for that risk. The premium required by an investor to assume the additional risk associated with an equity investment is taken to be the difference between the relevant debt rate, usually the yield on long-term government bonds, and some estimate of the stock's cost of equity. The recommended cost of equity value under the ROE approach is therefore usually computed as the sum of the test-period forecast for the government yield

and the utility-specific risk premium the analyst has estimated based on historical ROE evidence and forward-looking considerations.

The Adjustment Mechanism

Once the initial ROE has been set for each of the utilities, a procedure must be put in place to automatically adjust the allowed ROE for each utility to account for changes in long Canada yield expectations. The timing of the adjustment mechanism process for each utility will be consistent with its fiscal year-end.

Step 1: Establish the forecast long Canada rates

The formula-based ERP approach annually adjusts a utility's allowed ROE based on changes in forecast long-term Government of Canada bond yields. Each year the process outlined in Step 1 of the initial setup phase will be repeated and an updated, consensus-based forecast of 30-year long-Canada bond yields will be obtained. The current test year rate forecast will then be compared to the previous test year forecast.

Step 2: Apply adjustment factor

The difference between the forecast long Canada rate calculated in Step 1 and the corresponding rate for the immediately preceding year should be multiplied by a factor of 0.75 to determine the adjustment to the allowed ROE. This adjustment will then be added to the utility's previous test year ROE and the sum should be rounded to two decimal points.

Term of the Rate of Return Formula

The rate of return formula should be reviewed as conditions arise that may call into question its validity. Parties may ask the Board to review the formula when they feel it is appropriate or the Board may do so on its own initiative. In either case it is the Board's decision as to the time for a review.

The Board may request the presentation of other tests or require some weighting for other tests in the formula should the Board want to assure itself that the ERP formula approach does not lead to perverse results and is directionally in line with other market indicators.

December 20, 2006 *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors*:

Since 1999, the cost of capital for electricity distributors has been governed by the Board's Decision with Reasons in proceeding RP-1999-0034. This decision established a size-related capital structure for distributors and set the return on equity at 9.88%.[76] In the December 20, 2006 Report, the Board determined that the current approach to setting ROE would be maintained. The ROE will continue to be determined based on the Long Canada

[76] Ontario Energy Board. Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors. December 20, 2009. p. 3.

Bond Forecast plus an ERP. The approach is a modified Capital Asset Pricing Model method and includes an implicit 50 basis points for transaction costs. At that time, the Board also adopted deemed equity of 40% for all distribution utilities.

In the December 20, 2006 Report, the Board clarified the starting point to be used for each annual update and determined that it is appropriate to use the ROE calculated at that time as the starting point. This figure was 9.35%, as per the Board's determination in Hydro One Network Inc.'s RP-1998-0001 Decision. The Board indicated that it will use 9.35% as the starting point for the update. As a result of the December 20, 2006 Report, the ROE for any period would be:

$ROE_t = 9.35\% = 0.75 \times (LCBF_t - 5.50\%)$

Where:

- The ROE is set three months in advance of the effective date for the rate change. Therefore, for May 1 rate changes the ROE will be based on January data.

- The Long Canada Bond Forecast ($LCBF_t$) for any Period is the average of the 3-month and 12-month forecasts of the 10-year Government of Canada bond yield as published in Consensus *Forecasts* at time t *plus* the average of the actual observed spreads between 10 and 30-year Government of Canada bond yields, for each business day during the month corresponding to the *Consensus Forecasts* at time t.

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Appendix B: Method to Update ROE

With the release of this report, the Board is resetting and refining its formulaic approach for determining a utility's Return on Equity ("ROE") applicable to the prospective test year. The formula has been reset to address the difference between the allowed ROE arising from the application of the formula and the rate of ROE for a low risk proxy group that cannot be reconciled based on differences in risk alone. The formula has been refined to reduce the sensitivity of the approach to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in utility cost of equity.

The formula as set out in this report includes (a) a term to reflect the change in the Long Canada Bond forecast ("LCBF") and (b) a term to reflect the change in the spread between A-rated Utility bond yields over the Long Canada Bond yield.

The adjustment factor for the LCBF term is set at 0.5. The adjustment factor for the A-rated Utility bond term is set at 0.5. The methodology for calculating the Long Canada Bond forecast is the same as that set out in the Board's December 20, 2006 Report.

The base for the ROE adjustment formula is set at 9.75%. The corresponding base LCBF is 4.25% and the spread in 30-year A-rated Canadian utility bonds over the 30-year benchmark Government of Canada bond yield is 1.415%.

While there is a change in the base numbers and the adjustment formula, the general approach for calculating the updated ROE is the same as that set out in the Board's December 20, 2006 Report.

The ROE for the prospective test year (ROE_t) will be calculated by the following adjustment formula:

$$ROE_t = BaseROE + 0.5 \times (LCBF_t - BaseLCBF) + 0.5 \times (UtilBondSpread_t - BaseUtilBondSpread)$$

Where:

- $LCBF_t$ is the Long Canada Bond Forecast for the test year, and is calculated as:

$$LCBF_t = \left[\frac{{}_{10}CBF_{3,t} + {}_{10}CBF_{12,t}}{2} \right] + \left[\frac{\sum_i ({}_{30}CB_{i,t} - {}_{10}CB_{i,t})}{I} \right]$$

  Where

  - ${}_{10}CBF_{3,t}$ is the 3-month forecast of the 10-year Government of Canada bond yield as published in Consensus Forecasts three (3) months in advance of the implementation date for rates;

- o ${}_{10}CBF_{12,t}$ is the 12-month forecast of the 10-year Government of Canada bond yield as published in Consensus Forecasts three (3) months in advance of the implementation date for rates;
- o ${}_{30}CB_{i,t}$ is the benchmark bond yield rate for the 30-year Government of Canada bond at the close of day i of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada [**Cansim Series V39056**];
- o ${}_{10}CB_{i,t}$ is the benchmark bond yield rate for the 10-year Government of Canada bond at the close of day i of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada [**Cansim Series V39055**]; and
- o I is the number of business days for which Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates.

- $UtilBondSpread_t$ is the average spread of 30-year A-rated Canadian Utility bond yields over 30-year Government of Canada bond yields over all business days in the month three (3) months in advance of the implementation date for rates, and is calculated as

$$UtilBondSpread_t = \frac{\sum_i ({}_{30}UtilBonds_{i,t} - {}_{30}CB_{i,t})}{I}$$

Where:

- o ${}_{30}UtilBonds_{i,t}$ is the average 30-year A-Rated Canadian Utility bond yield rate, from Bloomberg L.P., for business day i of the month that is three (3) months in advance of the implementation date for rates [**Series C29530Y**];
- o ${}_{30}CB_{i,t}$ is the benchmark bond yield rate for the 30-year Government of Canada bond at the close of day i of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada [**Cansim Series V39056**]; and
- o I is the number of business days for which Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates.

As noted above, based on September 2009 data, the base ROE is set at 9.75% and the corresponding *BaseLCBF* is 4.25% and *BaseUtilBondSpread* is 1.415%. Thus the ROE adjustment formula is specified as:

$$ROE_t = 9.75\% + 0.5 \times (LCBF_t - 4.25\%) + 0.5 \times (UtilBondSpread_t - 1.415\%)$$

The ROE for any period will be rounded and expressed as a percentage with two decimal places (i.e., XX.XX%).

As for other cost of capital parameters, data will be for the month that is three months prior to the effective date for the new rates. For example, for rates effective May 1, January data will be used to calculate the updated ROE. This means is that *Consensus Forecasts* published in the month of January, and Bank of Canada and Bloomberg L.P. data for all business days during the month of January will be used to calculate the updated ROE.

The necessary data are available shortly after the end of the month, and thus poses no undue delays for rate-setting.

The use of the ROE will be in accordance with the policy described in section 4.2 of this report.

Appendix C: Method to Update the Deemed Long-term Debt Rate

The Board will use the Long Canada Bond Forecast plus an average spread of A-rated Corporate Utility bond yields over the actual Long Canada Bond yield to determine the updated deemed long-term ("LT") debt rate.

This approach is consistent with the methodology adopted in the December 20, 2006 Report, to represent a fair market rate for a long-term debt instrument in the test period. The only change is the source of the corporate bond yields, which is now the A-rated Corporate Utility bond index yield obtainable from Bloomberg L.P.

Consistent with the approach used in prior guidelines, the *2006 Electricity Distribution Rate Handbook* and the December 20, 2006 Report, the ROE and the deemed long-term debt rates are based on the same forecast of the risk-free rate. For certainty, the Long Canada Bond Forecast ($LCBF_t$) used in the ROE formula will be used in the calculation of the deemed LT rate.

The deemed LT debt rate ($LTDR_t$) will be calculated as follows:

$$LTDR_t = LCBF_t + \frac{\sum_i ({}_{30}UtilBonds_{i,t} - {}_{30}CB_{i,t})}{I}$$

Where:

- $LCBF_t$ is the Long Canada Bond Forecast for the prospective test year, as defined in Appendix B for the calculation of the ROE;
- ${}_{30}UtilBonds_{i,t}$ is the average 30-year A-Rated Canadian Utility bond yield rate, from Bloomberg L.P., for business day *i* of the month that is three (3) months in advance of the implementation date for rates **[Series C29530Y]**;
- ${}_{30}CB_{i,t}$ is the benchmark bond yield rate for the 30-year Government of Canada bond at the close of day *i* of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada **[Cansim Series V39056]**; and
- I is the number of business days for which Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates.

As for other cost of capital parameters, data will be for the month that is three months prior to the effective date for the new rates. For example, for rates effective May 1, January data will be used to calculate the updated deemed LT debt rate.

The use of the deemed LT debt rate will be in accordance with the policy described in section 4.4.1 of this report and based on the evidentiary record in the particular application.

Appendix D: Method to Update the Deemed Short-term Debt Rate

The Board will use a new methodology to estimate the deemed short-term ("ST") debt rate, consisting of the average 3-month Bankers' Acceptance rate as published by the Bank of Canada plus a forecasted average spread of short-term debt issuances over 3-month Bankers' Acceptance rates for R1-low Canadian utilities.

This is a change over the previous methodology, specifically in the spread above the Bankers' Acceptance rate which previously was fixed at 25 basis points. The new methodology will use spread forecasts obtained from Canadian prime banks to better reflect the short-term rates that utilities can obtain short-term financing for.

The calculation of the deemed ST debt rate will be done through a two-step process.

1. Annual calculation of the average spread over 3-month Bankers' Acceptance Rates

Once a year, in January, the average spread of short-term debt issuances over 3-month Bankers' Acceptance rates will be obtained by Board staff contacting major Canadian banks. Up to six quotes will be obtained to calculate the average spread to be used during the calendar year. Ideally, the high and low estimates will be discarded to reduce the influence of outliers, and the average spread will be calculated. In the event that less than four quotes are obtained, the average spread will be calculated without discarding high and low estimates.

If market conditions materially change, the Board could decide that the average spread may need to be updated at some point other than January.

2. Calculation of the Deemed Short-Term Debt Rate

The deemed short-term debt rate ($STDR_t$) for the prospective test year will be calculated as:

$$STDR_t = \frac{\sum_i BA_i}{I} + AnnSpread_t$$

Where:

- BA_i is the 3-month Bankers' Acceptance Rate for day i in the selected month, as published by Statistics Canada and the Bank of Canada [**Cansim Series V39071**];

- I is the number of business days for which published Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates; and
- $AnnSpread_t$ is the average annual spread in short-term debt issuances for an R1-low utility over 3-month Bankers' Acceptance rates for the test year *t*, calculated in step 1 above.

As for other cost of capital parameters, data will be for the month that is three months prior to the effective date for the new rates. For example, for rates effective May 1, January data will be used to calculate the updated deemed ST debt rate.

The use of the deemed ST debt rate will be in accordance with the policy described in section 4.4.2 of this report.