EB-2018-0171

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF motions by Hydro One Inc. and Orillia Power Distribution Corporation pursuant to Rule 8 and Rules 40 through 42 of the Ontario Energy Board's Rules of Practice and Procedure for an order or orders to vary the OEB's EB-2016-0276 Decision and Order dated April 12, 2018

APPLICANT'S COMPENDIUM
(SUBMISSIONS ON THRESHOLD QUESTION)

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

Charles Keizer
Tel: 416.865.7512

Jonathan Myers
Tel: 416.865.7532

Lawyers for the Applicant

TABLE OF CONTENTS

TAB 1

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

DECISION AND ORDER

EB-2016-0276

HYDRO ONE INC.

ORILLIA POWER DISTRIBUTION CORPORATION

Application for approval to purchase Orillia Power Distribution Corporation

BEFORE: Ken Quesnelle
Presiding Member and Vice-Chair

Christine Long
Member and Vice-Chair

Cathy Spoel
Member

April 12, 2018

TABLE OF CONTENTS

1 INTRODUCTION AND SUMMARY

This is the Decision of the Ontario Energy Board (OEB) regarding an application filed by Hydro One Inc. (Hydro One).

On September 27, 2016, Hydro One filed an application requesting the OEB's approval to acquire all of the shares of Orillia Power Distribution Corporation (Orillia Power).

As part of the proposed share acquisition, Hydro One and Orillia Power requested approval for several related proposals, including: (a) a one percent reduction in Orillia Power's residential and general service customers base distribution rates for the first five years of the proposed ten year deferred rebasing period, from the closing of the transaction; (b) transfer of Orillia Power's rate order to Hydro One; (c) transfer of Orillia Power's distribution system to Hydro One; (d) cancellation of Orillia Power's electricity distributor licence; and (e) amendment of Hydro One's electricity distributor licence. The OEB assigned the application file number EB-2016-0276.

Section 86 of the *Ontario Energy Board Act, 1998*[1](the Act) requires that the OEB review applications for a merger, acquisition of shares, divestiture or amalgamation that result in a change of ownership or control of an electricity transmitter or distributor and approve applications which are in the public interest.

In accordance with its ordinary practice, the OEB has applied the no harm test in assessing this application. The OEB denies Hydro One's application to acquire the shares of Orillia Power as the OEB is not satisfied that the no harm test has been met. Consequently, the related approval requests made as part of the share acquisition application are also denied.

[1] S.O. 1998, c.15 Schedule B

2 THE APPLICATION

Hydro One filed an application under section 86(2)(b) of the Act for approval to acquire all of the shares of Orillia Power (MAAD application).

As part of the proposed share acquisition, Hydro One and Orillia Power requested the OEB's approval for related transactions/proposals:

- Inclusion of a rate rider in Orillia Power's 2016 OEB approved rate schedule, under section 78 of the Act, to give effect to a 1% reduction in base electricity distribution rates for residential and general service customers until 2022
- Transfer of Orillia Power's rate order to Hydro One, under section 18 of the Act
- Transfer of Orillia Power's distribution system to Hydro One, under section 86(1)(a) of the Act
- Cancellation of Orillia Power's electricity distribution licence, under section 77(5) of the Act
- Amendment of Hydro One's electricity distribution licence, under section 74 of the Act
- A proposed Earnings Sharing Mechanism(ESM) which would guarantee a sharing of $3.4 million of overearnings with Orillia Power customers
- Use of an Incremental Capital Module during the selected ten year deferred rebasing period
- Continued tracking of costs to the deferral and variance accounts currently approved by the OEB for Orillia Power and disposition of their balances at a future date
- Use of United States Generally Accepted Accounting Principles for Orillia Power financial reporting
- Application of Hydro One's Specific Service Charges to Orillia Power's customers
- A new deferral and variance regulatory account for ESM cost tracking

Process

The OEB issued a Notice of Application and Hearing on November 7, 2016, inviting intervention and comment.

The OEB approved the intervention requests of School Energy Coalition (SEC), the Vulnerable Energy Consumers Coalition (VECC), the Consumers Council of Canada (CCC), and Mr. Frank Kehoe. The OEB also determined that these intervenors are eligible to apply for an award of costs in this proceeding under the OEB's *Practice Direction on Cost* Awards.

The OEB provided for interrogatories and submissions on the application.

In the submissions filed, some intervenors raised concerns related to Hydro One's rate proposals and revenue requirements for previously acquired utilities (Norfolk, Haldimand, and Woodstock) contained in Hydro One's concurrent distribution rate application[2], filed on March 31, 2017. These intervenors submitted that the customers of these former utilities are expected to experience significant rate increases once the deferral period expires, and it is not therefore the case that these customers experienced "no harm". Although the distribution rates application did not include Orillia Power (because the deferral period would not end until after the term of that application), intervenors were concerned that if the current application is approved a similar fate would befall Orillia Power's customers once its deferral period ended. OEB staff observed that the proposed rates suggest large distribution rate increases for some customers of these acquired utilities once the deferred rebasing period elapses.

In its reply argument, Hydro One submitted that there is a reasonable expectation, based on underlying cost structures, that the costs to serve acquired Orillia Power customers following the consolidation will be no higher than they otherwise would have been.

Having reviewed the evidence and the submissions of parties, the OEB issued Procedural Order No. 6, on July 27, 2017, in which it determined that the hearing of the MAAD application would be adjourned until the OEB rendered its decision on Hydro One's rate application. The OEB found that Hydro One should defend its cost allocation

[2] EB-2017-0049

proposal in the distribution rate application prior to the OEB determining if the Orillia Power acquisition is likely to cause harm to any of its current customers.

Hydro One and Orillia Power each filed a Notice of Motion requesting a review and variance of Procedural Order No. 6. In a decision[3] (Motions Decision), issued on January 4, 2018, the OEB granted the motions and referred the matter back to the OEB panel on the MAAD application for re-consideration.

In Procedural Order No. 7 issued on February 5, 2018, the OEB determined that it would re-open the record of the MAAD application. The OEB ordered Hydro One to file further material, in the form of evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the impact on Orillia Power customers.

Submissions were filed by Hydro One and Orillia Power on February 15, 2018.

[3] EB-2017-0320

3 REGULATORY PRINCIPLES

3.1 The No Harm Test

The OEB applies the no harm test in its assessment of consolidation applications[4],as described in The *Handbook to Electricity Distributor and Transmitter Consolidations* (Handbook) issued by the OEB on January 19, 2016.

The OEB considers whether the no harm test is satisfied based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives. If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application.

The statutory objectives to be considered are those set out in section 1 of the Act:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

   1.1 To promote the education of consumers.

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.

3 To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario.

4 To facilitate the implementation of a smart grid in Ontario.

5 To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

While the OEB has broad statutory objectives, in applying the no harm test, the OEB has focused on the objectives that are of most direct relevance to the impact of the proposed transaction; namely, price, reliability and quality of electricity service to

[4] The OEB adopted the no harm test in a combined proceeding (RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257) as the relevant test for determining applications for leave to acquire shares or amalgamate under section 86 of the Act and it has been subsequently applied in applications for consolidation.

customers, and the cost effectiveness, economic efficiency and financial viability of the consolidating utilities.

The OEB considers this an appropriate approach, given the OEB's performance-based regulatory framework, the Renewed Regulatory Framework for Electricity Distributors (RRFE)[5], which was set up to ensure that regulated distribution companies operate efficiently, cost effectively and deliver outcomes that provide value for money for customers. One of these outcomes is operational effectiveness, which requires continuous improvement in productivity and cost performance by distributors and that utilities deliver on system reliability and quality objectives.

Ongoing performance improvement and performance monitoring are underlying principles of the RRFE. The OEB has established performance standards to be met by distributors, ongoing reporting to the OEB by distributors, and ongoing monitoring of distributor achievement against these standards by the OEB. These metrics are used by the OEB to assess a distributor's services, such as frequency of power outages, financial performance and costs per customer.

The OEB assesses applications for consolidation within the context of the RRFE. The OEB is informed by the metrics that are used to evaluate a distributor's performance in assessing a proposed consolidation transaction. All of these measures are in place to ensure that distributors meet expectations regardless of their corporate structure or ownership.

[5] Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach

3.2 OEB Policy on Rate-Making Associated with Consolidation

To encourage consolidations in the electricity sector, the OEB has put in place policies on rate-making that provide consolidating distributors with an opportunity to offset transaction costs with savings achieved as a result of the consolidation.

The OEB's 2015 Report[6] permits consolidating distributors to defer rebasing for up to ten years from the closing of the transaction. The extent of the deferred rebasing period is at the option of the distributor and no supporting evidence is required to justify the selection of the deferred rebasing period. Consolidating entities, must, however, select a definitive timeframe for the deferred rebasing period.

The 2015 Report sets out the rate-setting mechanisms during the deferred rebasing period, requiring consolidating entities that propose to defer rebasing beyond five years to implement an ESM for the period beyond five years to protect customers and ensure that they share in increased benefits from consolidation.

The Handbook clarifies that rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction unless there is a rate proposal that is an integral aspect of the consolidation, e.g. a temporary rate reduction. Rate-setting for a consolidated entity will be addressed in a separate rate application, in accordance with the rate setting policies established by the OEB.

[6] EB-2014-0138 Report of the Board on Rate-making Associated with Distributor Consolidation, March 26, 2015

4 DECISION ON THE ISSUES

4.1 Application of the No Harm Test

Price, Cost Effectiveness and Economic Efficiency

Hydro One submitted that Orillia Power's customers will benefit from the proposed transaction through a: (i) reduction of 1% in the base distribution delivery rates for Orillia Power's residential and general service customers in years 1 to 5; (ii) rate increase of less than inflation in years 6 to 10 (inflation less a productivity stretch factor); and (iii) $3.4 million being paid to Orillia Power customers, a result of the guaranteed ESM.[7]

Hydro One provided a forecast ten year cost structure analysis, that compared overall expected savings based on Orillia Power, remaining as a stand-alone distribution utility (status quo) to having Orillia Power integrated with Hydro One's existing operations.

Hydro One projected that the consolidation would result in overall ongoing operating, maintenance and administration (OM&A) cost savings of approximately $3.9 million per year and reductions in capital expenditures of approximately $0.6 million per year. Cost savings are anticipated from elimination of redundant administrative and processing functions in the following areas: financial, regulatory, legal, executive and governance, human resources, and information technology; as well as economies of scale from a larger customer base such that costs for processing systems like billing, customer care, human resources and financial are spread over a larger group of customers.[8]

Hydro One asserted that geographic contiguity (Hydro One's existing service area being situated immediately adjacent to Orillia Power's service area) allows for economies of scale to be realized at the field or operational level through more efficient scheduling of operational and maintenance work and dispatching of crews over a larger service area. Hydro One also asserted that more efficient utilization of work equipment (e.g. trucks and other tools), leads to lower capital replacement needs over time and more rational and efficient planning and development of the distribution system.[9]

In the submissions filed, parties questioned Hydro One's submissions.

[7] Application, Exh A/T1/S1, p.4
[8] Application, Exh A/T1/S1, pages 2, 11-13
[9] Application, Exh A/T1/S1, p.10

SEC argued that approval for the proposed transaction should be denied, stating that the no harm test will not be met in this case. SEC submitted that Hydro One has shown no credible evidence that it will be able to generate any savings by acquiring Orillia Power and that there will be cost increases for Orillia's customers after the deferral period.[10] SEC argued that there were no cost savings for the customers of Norfolk, Haldimand and Woodstock, noting the rates proposed for customers of these previously acquired utilities rise significantly after the end of the deferral period as shown in Hydro One's distribution rate application. SEC submitted that the rates of Orillia's customers are likely to rise in a similar manner.

CCC submitted that Hydro One has provided no evidence in this proceeding to support the argument that the transaction meets the no harm test. CCC referenced Hydro One's distribution rate application, stating that Hydro One has proposed a new rate class for Norfolk, Haldimand and Woodstock that has the rates of the customers in those areas rising significantly. CCC submitted that Hydro One has provided no guarantee that when the deferral period ends, the rates for Orillia Power's customers will reflect the costs to serve these customers. CCC submitted that unless Hydro One can convince the OEB that the benefits of this transaction (a 1% rate reduction, a rate freeze and up-front ESM savings) to Orillia Power's customers outweigh the expected rate increases at the end of the deferral period, the transaction should not be approved.[11]

VECC submitted that it accepts that the application meets the no harm test with respect to price although the benefits to Orillia Power customers are not as significant as claimed. VECC argued that the no harm test with respect to price can only be satisfied if the rates eventually charged to former Orillia Power customers are reflective of Hydro One's cost to serve them and submitted that the OEB should set out this expectation as it has done with other consolidation applications filed by Hydro One.[12]

OEB staff submitted that the evidence provided by Hydro One supports the claim that the proposed transaction can reasonably be expected to result in overall cost savings and operational efficiencies but that these operational and cost efficiencies may not necessarily translate to lower distribution rates for customers of the acquired entity after the deferred rebasing period has ended. OEB staff observed that the rates proposed for previously acquired utilities in Hydro One's distribution rate application suggest large

[10] SEC Submissions, p. 4,6
[11] CCC Submissions, p.3
[12] VECC Submissions

distribution rate increases for some customers of these acquired utilities once the deferred rebasing period elapses.[13]

Hydro One responded to VECC's submissions stating that it is Hydro One's intention to apply rates to Orillia Power's customers that reflect the cost of serving those customers at that time.

In response to SEC's assertions, Hydro One stated that it has provided evidence that the proposed transaction results in the lowering of cost structures to operate the existing Orillia Power service territory. In its reply submissions, Hydro One provided a cost structure analysis for the period 2015-2022 reflecting that the cost structures of Norfolk, Haldimand and Woodstock are lower than they would have been absent the consolidation transactions. Hydro One argued that the evidence provided in its distribution rate application shows that costs have declined consistent with the projections made in the consolidation application for each of the three previously acquired distributors. Hydro One submitted that there is a reasonable expectation, based on underlying cost structures, that the costs to serve acquired Orillia Power customers following the consolidation will be no higher than they otherwise would have been.[14]

Orillia Power argued that the evidence filed in this case supports a finding that efficiencies will be gained and lower costs will be realised as a result of the proposed acquisition and that any reference to Hydro One's rate application is irrelevant to the issues before the OEB in this application. Orillia Power submitted that this acquisition is an illustration of the types of ratepayer benefits envisioned by the Ontario Distribution Sector Review Panel in its report on the benefits of distributor company consolidations.

In Procedural Order No. 7, the OEB ordered Hydro One to file further material, in the form of evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the impact on Orillia Power customers.

No new evidence was filed. Submissions were filed by Hydro One and Orillia Power. Hydro One submitted that, based on the projected Hydro One cost savings forecast for the 10 year period following the transaction, Hydro One can definitively state that the overall cost structures to serve the Orillia area will be lower following the deferred rebasing period in comparison to the status quo. Hydro One submitted that at the time of rebasing, Hydro One will adhere to the cost allocation and rate design principles, in

[13] OEB Staff Submissions, p.7
[14] Hydro One Final Argument, May 5, 2017 pages 2-5

place at such time in the future, ensuring that the costs allocated to Orillia Power customers fairly and accurately reflect the new lower cost structure to serve all customers.[15] Orillia Power supported the submissions of Hydro One.

OEB Findings

In reviewing a proposed transaction, the OEB examines the long term effect of the consolidation on customers.

The Handbook clarified the OEB's expectations with respect to price:

> "A simple comparison of current rates between consolidating distributors does not reveal the potential for lower cost service delivery. These entities may have dissimilar service territories, each with a different customer mix resulting in differing rate class structure characteristics. For these reasons, the OEB will assess the underlying cost structures of the consolidating utilities. As distribution rates are based on a distributor's current and projected costs, it is important for the OEB to consider the impact of a transaction on the cost structure of consolidating entities both now and in the future, particularly if there appear to be significant differences in the size or demographics of consolidating distributors. A key expectation of the RRFE is continuous improvement in productivity and cost performance by distributors. The OEB's review of underlying cost structures supports the OEB's role in regulating price for the protection of consumers.
>
> Consistent with recent decisions,[16] the OEB will not consider temporary rate decreases proposed by applicants, and other such temporary provisions, to be demonstrative of "no harm" as they are not supported by, or reflective of the underlying cost structures of the entities involved and may not be sustainable or beneficial in the long term. In reviewing a transaction the OEB must consider the long term effect of the consolidation on customers and the financial sustainability of the sector.
>
> To demonstrate "no harm", applicants must show that there is a reasonable expectation based on underlying cost structures that the costs to serve

[15] Hydro One Cost Structure Submissions, February 15, 2018, pages 2,6
[16] EB-2013-0196/EB-2013-0187/EB-2013-0198
EB-2014-0244

> acquired customers following a consolidation will be no higher than they otherwise would have been. While the rate implications to all customers will be considered, for an acquisition, the primary consideration will be the expected impact on customers of the acquired utility".[17]

One of the key considerations in the no harm test is protecting customers with respect to the prices they pay for electricity service. Although the Handbook states that "rate setting" following a consolidation will not be considered as part of a section 86 application, that does not mean the OEB will not consider the costs that acquired customers will have to pay following an acquisition (both in the short term and the long term). Indeed the Handbook is clear that the underlying cost structures and the rate implications of those cost structures will be a key consideration.

As stated in the Handbook and confirmed in decisions made on previous Hydro One acquisitions[18], the OEB does not consider temporary rate decreases to be on their own demonstrative of no harm as they are not supported by, or reflective of the underlying cost structures of the entities involved and may not be sustainable or beneficial in the long term.

The OEB's primary concern is that there is a reasonable expectation that underlying cost structures for the acquired utility are no higher than they would have been had the consolidation not occurred. Although the OEB accepts that the acquisition will lead to some savings on account of eliminating redundancies, that does not necessarily mean that Hydro One's overall cost structure to serve Orillia's customers will be no higher than Orillia's underlying cost structure would have been absent the proposed acquisition.

The experience of the three acquired utilities in Hydro One's current distribution rates case is informative. In the MAADs proceedings in which Hydro One acquired these utilities, Hydro One pointed to savings that would be realized through the acquisition. Although these savings may well have occurred, they do not appear to have resulted in overall cost structures (and therefore rates) for customers of the acquired utilities that are no higher than they would have been, once the deferral period ended and their rates were adjusted to account for Hydro One's overall costs to serve them. Material filed in the Hydro One current distribution rates case shows that some rate classes are

[17] Handbook, pages 6-7
[18] EB-2013-0196/EB-2013-0187/EB-2013-0198
EB-2014-0244
EB-2014-0213

expected to experience significant and material increases.[19] While the OEB has not approved these requested rates, this panel takes notice of the proposed rate increases which Hydro One states are reflective of the costs to service the acquired customers, and are inclusive of the "savings" that Hydro One states were realized.

The OEB recognizes that Orillia was not part of Hydro One's distribution rates filing, and that it is not certain that its customers' experiences would be the same. Because of this uncertainty, the OEB provided Hydro One the opportunity to file further evidence on what it expects the overall cost structure to be following the deferral period and to explain the impact on Orillia's customers. Hydro One did not file further evidence. Hydro One's submissions simply restated its expectation that based on the projected Hydro One cost savings forecast for the 10 year period following the transaction, the overall cost structures to serve the Orillia area will be lower following the deferred rebasing period in comparison to the status quo. The OEB is of the view that it would have been reasonable to see a forecast of costs to service Orillia customers beyond the ten year period and an explanation of the general methodology of how costs would be allocated to Orillia ratepayers after the deferral period. Hydro One takes the position that this information is not known. The OEB recognizes that any forecast of cost structures and cost allocation 10 years out would include various assumptions and could not be expected to be 100% accurate. However, the OEB has highlighted its concern and its need to better understand the implications of how Orillia customers will be impacted by the consolidation beyond the ten year period. In the absence of information to address that OEB concern, the OEB cannot reach the conclusion that there will be no harm.

As discussed above, the OEB is not satisfied that a list of forecast cost savings from the acquisition automatically results in overall cost structures for the customers of the acquired utility that are no higher than they would be without the consolidation. Hydro One has failed to make the case that the OEB can be assured that the underlying cost structures would be no greater than they would have been absent the acquisition.

The OEB is therefore not satisfied that the no harm test has been met, and on this basis the application is denied.

[19] Hydro One Final Argument, Attachment 1

Reliability and Quality of Electricity Service

Hydro One submitted that it will endeavour to maintain or improve reliability and quality of electricity service for all of its customers.

Hydro One provided a comparison of reliability statistics from 2013-2015 claiming that Hydro One customers in the vicinity of the City of Orillia experienced a level of service in terms of duration and frequency of interruptions comparable to the level experienced by Orillia Power customers. Hydro One submitted that it anticipates that reliability will improve with the combination of pre-existing Hydro One and former Orillia Power resources optimized for the broader Orillia area.[20]

Hydro One also provided a comparison of Hydro One's and Orillia Power's performance on various dimensions of service quality.[21]

Hydro One's interrogatory responses indicated that of the fifteen Orillia Power direct staff positions, nine positions will be absorbed by Hydro One while six positions will be eliminated. Hydro One submitted that the associated work will be picked up by other (more centralized) units in Hydro One.[22]

Hydro One indicated that it intends to construct a new operations centre within the City of Orillia to consolidate operations between Hydro One's pre-existing Orillia operating centre and Orillia Power's operating centre. Hydro One submitted that Orillia Power's current facility is undersized with no expansion potential and is not ideally located to serve the expanded service area. The current Hydro One operations centre is considered too small and inflexible to meet the operating needs of the company.

Hydro One stated that the need for a new operations centre would still exist if this transaction was not contemplated. Hydro One argued that consolidation of the operation centres will not impact service quality or reliability and will be more operationally and cost efficient.[23]

VECC submitted that Hydro One's evidence does not clearly demonstrate that the no harm will be satisfied. VECC submitted that the SAIDI and SAIFI statistics are inconclusive as to whether Hydro One's reliability performance is better or worse.

[20] Application, Exh A/T2/S1/p.7
[21] Application, Exh I/T3/S17 c)
[22] OEB Staff IR 8 and VECC IR 12
[23] OEB Staff IR 5 e)

VECC expressed concerns with Hydro One's anticipated reductions in direct staff positions and how it would impact reliability. VECC submitted that there is no evidence that, based on Hydro One's spending plans, reliability for former Orillia Power customers will improve in the future or even that current levels of reliability will be maintained for former Orillia Power customers.

VECC submitted that the comparison of the service quality metrics demonstrates that Orillia Power's current performance exceeds Hydro One's in almost every category suggesting that service quality for Orillia Power's customers could decline as a result of the application.[24]

CCC asserted that Hydro One has filed no compelling evidence that Orillia Power's reliability will be maintained or improved as a result of the transaction. CCC submitted that Orillia Power's service quality metrics are generally better than Hydro One[25] indicating that Orillia Power's customers will have a lower quality of service under Hydro One ownership.

OEB staff submitted that, based on the evidence provided, Hydro One can reasonably be expected to maintain the service quality and reliability standards currently provided by Orillia Power.

OEB staff submitted that with respect to Hydro One's proposed construction of a new operations centre, the OEB should, in making its decision, specifically note that it is not approving the construction of this operation centre as part of this proceeding as the OEB will review whether this is a prudent expenditure in a future rate application. OEB staff also submitted that the OEB examine the cost/benefit of the new operations centre and whether other options were explored in the future rate application.

In reply submissions, Hydro One submitted that the differences in the SAIDI and SAIFI results can likely be attributed to differences in geography and asset characteristics. For instance, Hydro One's local service territory is still more rural relative to the Orillia Power's service territory, and approximately 30% of Orillia Power's service territory is served by an underground distribution system. Hydro One reasserted that despite these differences, its reliability results were relatively similar to Orillia Power for both SAIDI and SAIFI.

[24] VECC Submissions
[25] Application, Exh I/T3/S17

Hydro One argued that Orillia Power customers' reliability levels are protected through the OEB's codes and licence requirements. With respect to the service quality metrics comparison, Hydro One submitted that its results are relatively similar to those of Orillia Power for the majority of the measures and that for the two measures for which Hydro One's results are below Orillia Power's (telephone accessibility and telephone call abandon rates), Hydro One's results are still compliant with the OEB-prescribed standards.

Hydro One reaffirmed that it will maintain Orillia Power's existing reliability and quality of service levels as it will have to continue to have regional operations in the Orillia area, consisting of both existing Orillia Power staff and Hydro One staff.

OEB Findings

The Handbook sets out that in considering the impact of a proposed transaction on the quality and reliability of electricity service, and whether the no harm test has been met, the OEB will be informed by the metrics provided by the distributor in its annual reporting to the OEB and published in its annual scorecard. The Handbook also sets out that utilities are expected to deliver continuous improvement for both reliability and service quality performance to benefit customers following a consolidation and will be monitored for the consolidated entity under the same established requirements.[26]

The OEB is satisfied based on the evidence before it, that it can be reasonably expected that Orillia Power's quality and reliability of service would be maintained following a consolidation. The fact that the consolidated entity is required to report on reliability and quality of service metrics in its annual filings confirms to the OEB that any reduction in service quality would become apparent and would be addressed therefore reducing any risk of harm.

Financial Viability

Hydro One has agreed to purchase the shares of Orillia Power at a price of $41.3 million, consisting of a cash payment of approximately $26.4 million and the assumption

[26] Handbook, p. 7

of short and long term debt of approximately $14.9 million. The 2015 net book value of Orillia Power's assets is $22.5 million.

Hydro One submitted that the premium paid will not be recovered through rates and will not impact any future revenue requirement. Hydro One also stated that the proposed transaction will not have a material impact on Hydro One's financial position as the price is less than 1% of Hydro One's net fixed assets.

Hydro One submitted that it expects to incur incremental transaction costs of approximately $3 million for legal, advisory and tax costs for the completion of the transaction and costs associated with the necessary regulatory approvals. In addition, Hydro One expects to incur $5 to $6 million in integration costs, which includes up-front costs to transfer the customers into Hydro One's customer and outage management systems. Hydro One confirmed that all of these costs will be financed through productivity gains associated with the transaction and will not be recovered through rates

OEB staff submitted that the applicants' evidence demonstrates that no adverse impact on the applicants' financial viability is anticipated.

OEB Findings

The Handbook sets out that the impact of a proposed transaction on the acquiring utility's financial viability for an acquisition, or on the financial viability of the consolidated entity in the case of a merger will be assessed.

The OEB's primary considerations in this regard are:

- The effect of the purchase price, including any premium paid above the historic (book) value of the assets involved
- The financing of incremental costs (transaction and integration costs) to implement the consolidation transaction

The OEB does not find that there will be an adverse impact on Hydro One's financial viability as a result of its proposals for financing the proposed acquisition transaction.

4.2 Other Approval Requests

As part of the proposed share acquisition, Hydro One and Orillia Power requested the OEB's approval for related transactions/proposals:

- Inclusion of a rate rider in Orillia Power's 2016 OEB approved rate schedule, under section 78 of the Act, to give effect to a 1% reduction in base electricity distribution rates for residential and general service customers until 2022
- Transfer of Orillia Power's rate order to Hydro One, under section 18 of the Act
- Transfer of Orillia Power's distribution system to Hydro One, under section 86(1)(a) of the Act
- Cancellation of Orillia Power's electricity distribution licence, under section 77(5) of the Act
- Amendment of Hydro One's electricity distribution licence, under section 74 of the Act
- Proposed ESM which guarantees a sharing of $3.4 million of overearnings with Orillia Power customers
- Use of an Incremental Capital Module during the selected ten year deferred rebasing period
- Continued tracking of costs to the deferral and variance accounts currently approved by the OEB for Orillia Power and disposition of their balances at a future date
- Use of United States Generally Accepted Accounting Principles for Orillia Power financial reporting
- Application of Hydro One's Specific Service Charges to Orillia Power's customers
- A new regulatory account for ESM cost tracking

OEB Findings

As the OEB is denying Hydro One's application for the proposed share acquisition transaction, the requests set out above, which are applicable only in the event that the proposed transaction were to be approved are also denied.

5 CONCLUSION

The OEB denies Hydro One's application to acquire the shares of Orillia Power as the OEB is not satisfied that the no harm test has been met. Consequently, the additional related approval requests made as part of the application are also denied.

The OEB finds that the applicants bear the onus of satisfying the OEB that there will be no harm.

In reviewing a proposed consolidation transaction, the OEB examines both the short term and the long term effect of the consolidation on customers.

The OEB has determined that it is reasonable to expect that the underlying cost structures to serve acquired customers following a proposed consolidation will be no higher than they otherwise would have been.

It is the OEB's expectation that future rates paid by the acquired customers will be based on the same cost structures used to project the future cost savings in support of this application.

Hydro One has not demonstrated that it is reasonable to expect that the underlying cost structures to serve the customers of Orillia Power will be no higher than they otherwise would have been, nor that they will underpin future rates paid by these customers.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The application filed by Hydro One Inc. to acquire all of the issued and outstanding shares of Orillia Power Distribution Corporation is denied. All related approval requests made as part of the application are also denied.

2. The applicants shall pay the OEB's costs of and incidental to, this proceeding immediately upon receipt of the OEB's invoice.

DATED at Toronto April 12, 2018

ONTARIO ENERGY BOARD

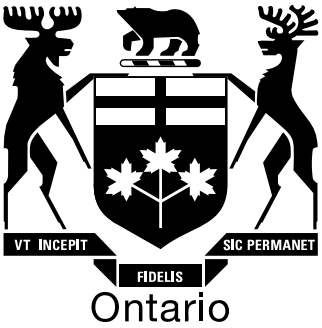
Original Signed By

Kirsten Walli
Board Secretary

TAB 2

Ontario Energy Board

Commission de l'Énergie de l'Ontario



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

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

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

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

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

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

Findings

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

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

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

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

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

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

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

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

TAB 3

2016 ONSC 7810
Ontario Superior Court of Justice (Divisional Court)

Rogers Communications Partnership v. Ontario (Energy Board)

2016 CarswellOnt 19727, 2016 ONSC 7810, 274 A.C.W.S. (3d) 229

ROGERS COMMUNICATION PARTNERSHIP, TELUS COMMUNICATIONS COMPANY, QUEBECOR MEDIA INC. and ALLSTREAM INC. (Appellants) and THE ONTARIO ENERGY BOARD and HYDRO OTTAWA LIMITED (Respondents)

Molloy J., Dambrot J., Varpio J.

Heard: September 29, 2016
Judgment: December 14, 2016
Docket: Toronto 141/16

Counsel: Jennifer McAleer, Leslie Minton, for Appellants
M. Philip Tunley, Pam Hrick, for Respondent, Ontario Energy Board
Fred D. Cass, for Respondent, Hydro Ottawa Limited

Subject: Public
Related Abridgment Classifications
Administrative law
VI Discretion of tribunal under review
VI.5 Fettered discretion
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.c Practice and procedure
IV.5.c.ii Judicial review
IV.5.c.ii.A Jurisdiction of board
Public law
IV Public utilities
IV.5 Regulatory boards
IV.5.c Practice and procedure
IV.5.c.ii Judicial review
IV.5.c.ii.C Procedural fairness
Headnote
Public law --- Public utilities — Regulatory boards — Practice and procedure — Judicial review — Procedural fairness
Hydro company applied to increase rate that it was permitted to charge to various carriers for attaching their wireline communications equipment to hydro company poles — Carriers argued that Ontario Energy Board should revisit methodology and assumptions underlying last decision setting pole attachment rate — Board determined that it would deal with application based on existing methodology, without hearing evidence or argument on reasonableness of that methodology, while commencing comprehensive policy review on province-wide pole attachment rate including review of methodology — Board granted application and approved increase in rate — Carriers applied for judicial review — Application dismissed — While carriers were prevented from eliciting evidence as to appropriate methodology, which could be characterized as denial of right to be heard on relevant issue, deference had to be afforded Board in determining scope of duty of procedural fairness owed — Board did not refuse to reconsider prior methodology but rather recognized

need to review and modify methodology — All Board did was determine appropriate procedure and timing for deciding new methodology — Board decided that this was policy decision with broad ramifications that should be undertaken as province-wide review with all stakeholders, including carriers, having opportunity to participate — Board was enhancing rather than circumventing procedural fairness, and proceeded promptly with province-wide — Board was in best position to determine when and how to make major policy decision — Board did not breach procedural fairness by telling carriers that time and place for them to challenge prior methodology was within broader policy review, rather than in particular application — Board imposed fair process, respecting rights of all parties to be heard and applied that process consistently.

Administrative law --- Discretion of tribunal under review — Fettered discretion

Hydro company applied to increase rate that it was permitted to charge to various carriers for attaching their wireline communications equipment to hydro company poles — Carriers argued that Ontario Energy Board should revisit methodology and assumptions underlying last decision setting pole attachment rate — Board determined that it would deal with application based on existing methodology, without hearing evidence or argument on reasonableness of that methodology, while commencing comprehensive policy review on province-wide pole attachment rate including review of methodology — Board granted application and approved increase in rate — Carriers applied for judicial review — Application dismissed — Board developed prior methodology for determining through broad consultative process — It was completely reasonable for Board to have done so and to apply that methodology consistently throughout province — This did not constitute fettering of discretion — It was always open to Board to vary methodology, and it had now undertaken that very process in its ongoing policy review — Consistently applying methodology until new methodology had been devised could not be characterized as fettering discretion — Board was not required to constantly re-invent wheel by revisiting methodology and starting from point zero in every single case.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Judicial review — Jurisdiction of board

Hydro company applied to increase rate that it was permitted to charge to various carriers for attaching their wireline communications equipment to hydro company poles — Carriers argued that Ontario Energy Board should revisit methodology and assumptions underlying last decision setting pole attachment rate — Board determined that it would deal with application based on existing methodology, without hearing evidence or argument on reasonableness of that methodology, while commencing comprehensive policy review on province-wide pole attachment rate including review of methodology — Board granted application and approved increase in rate — Carriers applied for judicial review — Application dismissed — It was not unreasonable for Board to have made decision without addressing deficiencies in methodology — Board determined it would be appropriate to continue applying methodology, developed through broad consultative process, until it was replaced or modified by new methodology developed in same matter — This is broad policy issue, about which Board was far more knowledgeable and well-positioned to decide than this court — Board's decision was reasonable, supported by cogent, policy-based reasons — Board's choice to make decision final, rather than on interim basis pending policy review, was rational and supported by evidence and reasons provided by Board — Board's conclusion that there should only be five per cent adjustment to rate to reflect power-specific fixtures on poles, rather than 15 per cent sought by carriers, was reasonable and supported by evidence and Board's rational reasons.

Table of Authorities

Cases considered by *Molloy J.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — followed

Canada (Minister of Citizenship and Immigration) v. Khosa (2009), 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 82 Admin. L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, 304 D.L.R. (4th) 1, (sub nom. *Canada (Citizenship & Immigration) v. Khosa*) [2009] 1 S.C.R. 339 (S.C.C.) — referred to

Forest Ethics Advocacy Assn. v. National Energy Board (2014), 2014 FCA 245, 2014 CarswellNat 4233, 465 N.R. 152, 2014 CAF 245, 2014 CarswellNat 6533, [2015] 4 F.C.R. 75 (F.C.A.) — considered

Khela v. Mission Institution (2014), 2014 SCC 24, 2014 CarswellBC 778, 2014 CarswellBC 779, 368 D.L.R. (4th) 630, 64 Admin. L.R. (5th) 171, 9 C.R. (7th) 1, 455 N.R. 279, 307 C.C.C. (3d) 427, 2014 CSC 24, (sub nom. *Khela v. Mission Institution (Warden)*) 599 W.A.C. 91, (sub nom. *Mission Institution v. Khela*) [2014] 1 S.C.R. 502,

(sub nom. *Mission Institution v. Khela*) 306 C.R.R. (2d) 66, (sub nom. *Khela v. Mission Institution (Warden)*) 351 B.C.A.C. 91 (S.C.C.) — followed

Knight v. Indian Head School Division No. 19 (1990), [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010, 43 Admin. L.R. 157, 83 Sask. R. 81, 106 N.R. 17, 1990 CarswellSask 146, 1990 CarswellSask 408, D.T.E. 90T-475 (S.C.C.) — followed

London (City) v. Ayerswood Development Corp. (2002), 2002 CarswellOnt 4301, 34 M.P.L.R. (3d) 1, 167 O.A.C. 120 (Ont. C.A.) — referred to

Moreau-Bérubé c. Nouveau-Brunswick (2002), 2002 SCC 11, 2002 CarswellNB 46, 2002 CarswellNB 47, (sub nom. *Moreau-Bérubé v. New Brunswick (Judicial Council)*) 209 D.L.R. (4th) 1, 36 Admin. L.R. (3d) 1, (sub nom. *Nouveau-Brunswick (Conseil de la magistrature) v. Moreau-Bérubé*) 281 N.R. 201, (sub nom. *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé*) 245 N.B.R. (2d) 201, (sub nom. *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé*) 636 A.P.R. 201, [2002] 1 S.C.R. 249, 2002 CSC 11 (S.C.C.) — considered

Prassad v. Canada (Minister of Employment & Immigration) (1989), [1989] 3 W.W.R. 289, 36 Admin. L.R. 72, 7 Imm. L.R. (2d) 253, 93 N.R. 81, 57 D.L.R. (4th) 663, [1989] 1 S.C.R. 560, 1989 CarswellNat 128, 1989 CarswellNat 693 (S.C.C.) — referred to

Re:Sound v. Fitness Industry Council of Canada (2014), 2014 FCA 48, 2014 CarswellNat 395, 455 N.R. 87, 2014 CAF 48, 2014 CarswellNat 2858, 120 C.P.R. (4th) 287, 72 Admin. L.R. (5th) 1, [2015] 2 F.C.R. 170 (F.C.A.) — considered

APPLICATION by carriers for judicial review of Ontario Energy Board's decision approving increase in rate that hydro company was permitted to charge carriers for their use of its poles.

***Molloy J.*:**

A. INTRODUCTION

1 The Ontario Energy Board ("OEB" or "the Board") issued an Order on February 25, 2016 approving an increase in the rate Hydro Ottawa Limited ("Ottawa Hydro") was permitted to charge to various carriers in order to attach their wireline communications equipment to Hydro Ottawa poles (known as a "pole attachment rate"). The appellants are all carriers affected by the 2016 Order. They participated in the hearing before the OEB and opposed the increased pole attachment rate sought by Hydro Ottawa. As a result of the 2016 Order, the pole attachment rate was set at $53 per pole, per year, effective January 1, 2016 and continuing indefinitely.

2 The 2016 Order was the first change to the pole attachment rate since 2005, at which time the rate was set at $22.35 per year for each attacher on a pole. Prior to 2005, cable companies (such as the appellants) rented space on power poles under private contract with the local electricity distributor (such as Hydro Ottawa). In 2003, the Canadian Cable Television Association applied to the OEB requesting a province-wide uniform rate for access to power poles. That application culminated in the OEB issuing an order on March 7, 2005 which, among other things:

(a) accepted that it was in the public interest that there be a province-wide pole attachment rate, which should apply as a condition of all licences granted to local electricity distributors;

(b) established a methodology for calculating the rate, based on an equal sharing approach to common costs;

(c) assumed for purposes of the calculation that on average there would be 2.5 entities attaching to a pole, among whom those common costs would be shared; and

(d) permitted local electricity distributors to apply for a rate modification based on their own costing.

3 The 2005 pole attachment rate was used uniformly throughout the province for over a decade. The only variation sought was by Toronto Hydro, which application resulted in a 2015 settlement approved by the OEB with a new pole attachment rate of $42 per pole per year.

4 In the course of the application leading to the 2016 rate change, the appellants sought to persuade the OEB to revisit some of the methodology and assumptions underlying the March 2005 rate order.

5 However, the OEB determined that it would deal with the Hydro Ottawa application based on the 2005 methodology and would not hear evidence or argument on the reasonableness of that methodology. The OEB determined that it would conduct a comprehensive policy review with respect to the province-wide pole attachment rate, which would include a review of the methodology and components for determining the rate. That process commenced in November 2015 and was still underway as of the date of the argument in this court. Because that process was ongoing, the OEB held that it would base the Hydro Ottawa rates on the 2005 methodology.

B. THE ISSUES

6 The appellants submit that the OEB, having acknowledged that the 2005 methodology used to set the pole attachment rate needed to be reviewed, erred by setting rates for Hydro Ottawa based on that outdated and flawed methodology. Further, the appellants characterize this error as a breach of procedural fairness, arguing that the OEB did not give the appellants an opportunity to be heard on the central issue before it; the proper method for determining a just and reasonable rate.

7 Alternatively, the appellants submit that the OEB fettered its discretion and erred in law and jurisdiction by applying the 2005 methodology. The appellants argue that it is neither reasonable nor possible for the OEB to set a fair rate by using a methodology that the Board acknowledged to require reassessment, while at the same time refusing to consider the appellant's evidence and argument as to what would be a proper methodology.

8 In addition, the appellants argue that the OEB committed a further breach of procedural fairness by striking their reply record, thereby denying them the right to be heard on the issues raised therein.

9 Alternatively, the appellants submit that the effect of relying on the old methodology is to improperly remove the burden of proof that should be on Hydro Ottawa to establish a fair rate.

10 In addition, the appellants specifically challenge the reasonableness of the OEB's decision to assign a value of 5% of common costs for equipment on the pole solely for the use of Hydro Ottawa. The appellant argues that this value is arbitrary and therefore unreasonable.

11 Finally, and most significantly, the appellants submit that it was unreasonable for the OEB to have made a final order in this situation, as opposed to an interim one. Counsel conceded in argument that if the OEB had characterized its order as interim, the appellants would not have brought this application.

PROCEDURAL FAIRNESS

Standard of Review

12 With respect to issues of procedural fairness and natural justice, some courts have held there is no standard of review. Rather, once the scope of the duty of procedural fairness is established, the tribunal is simply obliged to observe it. As stated by the Supreme Court of Canada in *Moreau-Bérubé c. Nouveau-Brunswick* [1] (at para. 74):

> The [procedural fairness] issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

13 In other cases, courts have held that the standard of review for issues of procedural fairness is correctness. For example, the Supreme Court of Canada stated in *Khela v. Mission Institution* [2] that the "standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'."

14 In my view, how this is characterized does not impact the analysis. The first step for the reviewing court is to decide whether the tribunal is required to observe principles of procedural fairness for the decision at issue and to then determine the scope of the duty owed. The tribunal is required to have complied with the scope of the duty identified by the court, which is essentially the same thing as saying the tribunal must be correct in its application of procedural fairness.

15 In determining the scope of the duty, the relevant factors to be taken into account were described by the Supreme Court's 1999 decision in *Baker*[3] and have been consistently applied ever since. Although these are acknowledged not to be exclusive factors, the following should be taken into account:

(i) the nature of the decision being made and the process followed to make it;

(ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(iii) the importance of the decision to the individual or individuals affected;

(iv) the legitimate expectations of the person challenging the decision; and

(v) the choices of procedure made by the agency itself.

16 The first four of these factors point to a requirement that the OEB provide the highest degree of procedural fairness. The fifth factor demonstrates that the OEB itself has adopted procedures for hearings that reflect a high standard of procedural fairness. Further, this factor has particular significance in the circumstances of this case.

17 The Supreme Court of Canada held in *Knight v. Indian Head School Division No. 19*[4] that a tribunal is the master of its own procedure; a principle that has been widely-applied in the jurisprudence. It is natural, therefore, that a tribunal's choice of procedures is a factor in determining the precise scope of procedural fairness in proceedings before it. As noted by Stratas J.A. in *Forest Ethics Advocacy Assn. v. National Energy Board*[5] (in reference to the National Energy Board, a tribunal very similar in nature to the OEB):

> The Board has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, how and to what extent. It also has considerable experience and expertise in ensuring that its hearings deal with the issues mandated by the Act in a timely and efficient way.

18 Thus, although the standard of review for procedural fairness is correctness, in determining the scope of procedural fairness for a particular procedural decision by a tribunal, there is a degree of deference. Evans J.A. in *Re:Sound v. Fitness Industry Council of Canada*,[6] described it this way (at para. 42):

> In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

Application to this Case

19 The OEB's decision with respect to which methodology to use in setting rates is not easily characterized as being procedural as opposed to substantive. On the one hand, the OEB chose to apply the existing methodology rather than implementing changes to it — a decision that could be said to be substantive, within its area of expertise, and subject to a reasonableness standard. On the other hand, it cannot be denied that the methodology to be used to

determine a rate is a relevant factor in setting that rate and the appellants were prevented from eliciting evidence as to the appropriate methodology — a decision that could be characterized as a denial of the right to be heard on a relevant issue; a fundamental tenet of procedural fairness.

20 However, in my opinion, this dichotomy is easily reconciled in this case by affording appropriate deference in determining the scope of the duty of procedural fairness owed by the OEB in this situation. The OEB did not refuse to reconsider the 2005 methodology. On the contrary, it recognized the need to review and modify it. All the OEB did was determine the appropriate procedure and timing for deciding the new methodology. The Board decided that this was a policy decision with broad ramifications and should be undertaken as a province-wide review with all stakeholders, including the appellants, having an opportunity to participate. In that way, the Board was providing the broadest participation rights possible, rather than making a decision in one geographic area which could have ramifications for other areas of the province and affect others who had no opportunity to be heard. Seen this way, the Board was enhancing, rather than circumventing, procedural fairness. Further, the Board did not simply avoid the issue of methodology. It proceeded promptly and the province-wide review was already underway prior to the issuance of the Board decision now before this Court.

21 The OEB is in the best position to determine when and how to make a major policy decision such as this one. It is also in the best position to decide the potential impact of making a decision in one sector that could affect others without a broader consultation. In deciding its own procedure for how it would revisit the 2005 methodology, the OEB is drawing on its core expertise and is entitled to deference. Within that broader consultation, principles of procedural fairness will still apply.

22 I do not consider the OEB to have breached procedural fairness by telling the appellants in this case that the time and place for them to challenge the 2005 methodology is within the broader policy review, rather than in this particular hearing dealing only with Hydro Ottawa.

23 The other alleged procedural fairness breach relates to reply submissions delivered by the appellants. The Board conducted pre-hearing consultations to work out an appropriate procedure and schedule for submissions. No provision was made for reply submissions. Given that the whole procedure and all of the issues were known to the parties, a procedure that does not include an opportunity for reply is not, *per se*, a breach of procedural fairness. When the appellants attempted to file reply submissions based on its assertions that four new issues had been raised, the Board ruled that three of these issues had been raised earlier and the appellants were therefore not prejudiced by not having an opportunity to file reply submissions. With respect to the fourth point, the Board held that this point would not be dealt with in its decision and reply submissions were therefore not necessary. The Board noted that permitting a reply by these applicants would require granting the same right to all parties, thereby delaying and extending the proceedings for no good reason. The Board therefore determined that it would not take the reply submissions into account in making its decision.

24 The Board imposed a fair process, respecting the rights of all parties to be heard, and it applied that process consistently. These are issues upon which the Board is entitled to deference, as master of its own procedure. I find no breach of procedural fairness.

FETTERING DISCRETION AND BURDEN OF PROOF

25 The OEB decided that it would have a broad consultative process to set the methodology for determining rates. That is how the 2005 methodology was developed. It was completely reasonable for the Board to have done so, and to apply that methodology consistently throughout the province. That does not constitute fettering of discretion. It was always open to the Board to vary the 2005 methodology and, indeed, it has undertaken that very process in its ongoing policy review. Consistently applying a methodology until a new methodology has been devised cannot be seen to change the burden of proof, nor can it be characterized as fettering discretion. The Board is not required to constantly re-invent the wheel by revisiting the methodology and starting from point zero in every single case.

26 I see no merit to this argument. By proceeding in this way, the Board acted reasonably and did not breach procedural fairness.

REASONABLENESS

Applying the 2005 Methodology

27 The appellants also argued that it was unreasonable for the OEB to have made a decision in this case without addressing the deficiencies in the 2005 methodology. I disagree. The OEB engaged in a broad consultative process before setting the 2005 methodology. The Board determined that it would be appropriate to continue applying that methodology until such time as it was replaced or modified by a new methodology developed in the same manner. This is a broad policy issue, about which the OEB is far more knowledgeable and well-positioned to decide than is this court. Deference is required. The Board's decision was a reasonable one, supported by cogent, policy-based reasons. There is no basis to interfere.

Interim or Final Nature of the Order

28 Having determined to defer any changes to the 2005 methodology until after the broad Policy Review, the OEB invited the parties to provide submissions as to whether its decision in this case should be on an interim basis pending that Policy Review. In due course, the parties made submissions on the point and the Board held that its decision would be final, rather than interim. Having considered those submissions, the Board ruled that its order in this case would be prospective in its effect, rather than interim. The Board held that this was consistent with the stance taken in other OEB decisions involving new policies. The Board found that the new pole attachment rate should be prospective as of January 1, 2016 to provide rate certainty to the third-party wireline attachers and revenue certainty to Hydro Ottawa. These are relevant and important considerations, in keeping with the OEB's mandate to govern the industry fairly in the interests of consumers as well as industry participants. Certainly, a compelling argument could also be made for an interim order. However, the option chosen by the OEB is a rational outcome and is supported by the evidence and reasons provided. There is no basis for finding it to be unreasonable.

The Common Costs Analysis

29 Finally, the appellants object to the OEB's finding that there should only be a 5% adjustment to the rate in order to reflect power-specific fixtures on the poles that are of no benefit to third party attachers such as the appellants. The appellants had argued before the Board that a 15% adjustment should have been made and submitted to this Court that the Board's decision to make only a 5% adjustment was arbitrary, not based in the evidence and unreasonable.

30 In its reasons, the Board referred to the submissions of the parties as to which of the two adjustment rates should apply. The Board also referred to the evidence provided by Hydro Ottawa as to the actual configuration of its assets (using brackets rather than crossarms in its distribution system construction), which was evidence canvassed at the technical conference. Based on this, the Board concluded that the 5% adjustment rate was more appropriate.

31 This was a finding of fact open to the Board on an issue squarely within its area of expertise. It is a reasonable finding, supported by evidence, for which the Board provided rational reasons.

32 There is no basis for this Court to interfere.

CONCLUSION

33 Accordingly, this application is dismissed. If the parties are unable to agree on costs, written submissions may be forwarded through the Divisional Court office, on a timetable to be agreed upon by counsel, with all submissions to be filed by no later than January 30, 2017.

***Dambrot J.*:**

I agree.

***Varpio J.*:**

I agree.

Application dismissed.

Footnotes

1 *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.); see also *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859, 167 O.A.C. 120, 34 M.P.L.R. (3d) 1 (Ont. C.A.).

2 *Khela v. Mission Institution*, [2014] 1 S.C.R. 502, 2014 SCC 24 (S.C.C.) at para. 79; see also *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12 (S.C.C.) at para. 43

3 *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.)

4 *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at 685; see also *Prassad v. Canada (Minister of Employment & Immigration)*, [1989] 1 S.C.R. 560 (S.C.C.) at 568-569

5 *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para. 72

6 *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (F.C.A.)

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Dash c. Canada (Ministre de la Justice) | 2017 QCCA 321, 2017 CarswellQue 1274, 137 W.C.B. (2d) 143, EYB 2017-276731 | (C.A. Que, Feb 23, 2017)

1999 CarswellNat 1124
Supreme Court of Canada

Baker v. Canada (Minister of Citizenship & Immigration)

1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, J.E. 99-1412

Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998
Judgment: July 9, 1999
Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

Counsel: *Roger Rowe* and *Rocco Galanti*, for Appellant.
Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for Respondent.
Sheena Scott and *Sharryn Aiken*, for Interveners The Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees.
John Terry and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.
Barbara Jackman and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights
Related Abridgment Classifications
Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.b Duty of fairness
Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.c Procedural rights at hearing
III.1.c.i Opportunity to respond and make submissions
Administrative law
III Requirements of natural justice
III.1 Right to hearing

III.1.c Procedural rights at hearing
III.1.c.vi Reasons for decision
Administrative law
III Requirements of natural justice
III.2 Bias
III.2.c Personal bias
III.2.c.ii Apprehended
Administrative law
IV Standard of review
IV.3 Reasonableness
IV.3.a Reasonableness simpliciter
Administrative law
VI Discretion of tribunal under review
VI.1 General principles
Immigration and citizenship
II Admission
II.4 Application for temporary resident or immigrant visa
II.4.d Inland applications
II.4.d.ii Application of humanitarian and compassionate considerations
II.4.d.ii.G Miscellaneous
Immigration and citizenship
II Admission
II.4 Application for temporary resident or immigrant visa
II.4.e Best interests of child
Immigration and citizenship
II Admission
II.5 Appeals and judicial review
II.5.b Judicial review
II.5.b.i Jurisdiction
Immigration and citizenship
VI Appeals to Federal Court of Appeal and Supreme Court of Canada
VI.4 Certification of questions by Federal Court Trial Division
VI.4.i Procedure
Statutes
II Interpretation
II.5 Extrinsic aids
II.5.d Statutes on same subject (in pari materia)

Headnote

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Inland applications — Application of humanitarian and compassionate considerations

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified regarding whether immigration authorities are required to treat best interests of child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Junior immigration officer's notes constituted decision and demonstrated reasonable apprehension of bias — Officer appeared to have drawn conclusions based not on evidence but on fact that applicant was single mother with several children and was diagnosed with mental illness — Failure to give serious consideration to interests

of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision — Reasons also failed to give sufficient weight or consideration to hardship that might be caused to applicant if returned to country of origin.

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Best interests of child

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power under s. 114(2) of Act requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Interests of children were minimized in manner inconsistent with Canadian humanitarian and compassionate tradition and Minister's guidelines — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Certification of questions by Federal Court Trial Division

Section 83(1) of Immigration Act does not require Federal Court of Appeal to address only certified question — Once question has been certified, then Federal Court of Appeal may consider all aspects of appeal lying within its jurisdiction.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness

Duty of fairness is flexible and variable and depends on context of particular statute and rights affected — Participatory rights within that duty ensure that administrative decisions are made using fair and open procedure appropriate to decision being made and its statutory, institutional, and social context with opportunity for those affected by decision to put forward their views and evidence fully and have them considered by decision-maker — Factors for determining requirements of duty include nature of decision being made and process followed in making it, nature of statutory scheme and terms of statute pursuant to which body operates, importance of decision to individuals affected, legitimate expectations of person challenging decision, and choices of procedure made by agency itself — Other factors may also be important when considering aspects of duty of fairness unrelated to participatory rights — Duty of fairness applies to humanitarian and compassionate applications under Immigration Act.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness applies to H & C decisions — There was no legitimate expectation that specific procedural rights would be accorded above those normally required by duty of fairness — H & C application is different from judicial decision because it involves exercise of considerable discretion, requires consideration of multiple factors, and is exception to general principles of of Canadian immigration law — Duty of fairness requires that applicant and those whose important interests are affected by decision in fundamental way have meaningful opportunity to present evidence relevant to their case and have it fully and fairly considered — Lack of oral hearing or notice of such hearing does not violate procedural fairness — Opportunity to produce full and complete written documentation was sufficient.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness requires written explanation for decision where decision has important significance for individual or where there is statutory right of appeal — Profound importance of H & C decisions to those affected militates in favour of requiring reasons to be provided — Requirement was satisfied by provision of junior immigration officer's notes — Individuals are entitled to fair procedures and open decision-making but in administrative context, this transparency may occur in various ways.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant alleged that there was reasonable apprehension of bias — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed — Procedural fairness requires decision to be made free from reasonable apprehension of bias by impartial decision-maker — Duty applies to all immigration officers playing role in decision-making — Immigration decisions require sensitivity and understanding by decision-makers — There must be recognition of diversity, understanding of others and openness to difference — Immigration officer's notes gave impression that conclusion may have been based not on evidence but on fact that applicant was single mother with several children and had been diagnosed with psychiatric illness — Reasonable and well-informed members of community would conclude that reviewing officer did not approach case with impartiality appropriate to decision made by immigration officer.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Review of substantive aspects of discretionary decisions is to be approached within pragmatic and functional framework given difficulty in making rigid classifications between discretionary and non-discretionary decisions — Relevant factors include expertise of tribunal, nature of decision being made, language of provision and surrounding legislation, whether decision is polycentric, intention revealed by statutory language, and amount of choice left by Parliament to decision-maker — Discretion must be exercised in accordance with boundaries imposed in statute, principles of rule of law, principles of administrative law, fundamental values of Canadian society, and principles of Canadian Charter of Rights and Freedoms.

Administrative law --- Discretion of tribunal under review — General principles

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power conferred by section requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Admission — Appeals and judicial review — Judicial review — Jurisdiction

"Reasonableness simpliciter » is standard of review of discretionary decision under s. 114(2) of Immigration Act and s. 2.1 of Immigration Regulations determining whether humanitarian and compassionate considerations warrant exemption from requirements of Act — Considerable deference should be given to immigration officers exercising powers conferred by Act, given fact-specific nature of inquiry, its role in statutory scheme as exception, fact that decision-maker is Minister

of Citizenship and Immigration, and considerable discretion given by wording of statute — However, lack of privative clause, existence of judicial review, and nature of decision as individual rather than polycentric suggest that standard is not as deferential as "patent unreasonableness".

Statutes --- Interpretation — Extrinsic aids — Statutes in pari materia

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether, given that Immigration Act does not expressly incorporate language of Canada's international obligations under International Convention on the Rights of the Child, federal immigration authorities must treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Values in international human rights law assist in statutory interpretation and judicial review — Convention's values recognize importance of being attentive to children's rights and best interests when making decisions relating to and affecting their future — Convention's principles place special importance on protections for children and on consideration of their interests, needs, and rights — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children and did not consider them important factor in decision — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion.

Étrangers, immigration et citoyenneté --- Admission — Demande de visa à titre de visiteur ou immigrant — Demande effectuée sur le territoire — Demande pour des motifs d'ordre humanitaire

Requérante est entrée au Canada en 1981 et a subvenu à ses besoins pendant 11 ans avant d'être diagnostiquée comme souffrant de schizophrénie avec paranoïa, et d'obtenir de l'assistance sociale — Après l'ordonnance de déportation, l'agent d'immigration a refusé d'exercer le pouvoir discrétionnaire prévu au par. 114(2) de la Loi sur l'immigration, fondé sur des motifs d'ordre humanitaire — Demande de contrôle judiciaire de la requérante a été rejetée — Requérante a formé un pourvoi — Question a été certifiée quant à savoir si les autorités de l'immigration devaient traiter le meilleur intérêt des enfants comme la principale considération au moment d'évaluer la demande de la requérante en vertu du par. 114(2) de la Loi — Pourvoi de la requérante à l'égard de la question certifiée a été rejeté — Requérante a formé un pourvoi — Pourvoi accueilli — Question a reçu une réponse affirmative — Notes de l'agent de l'immigration constituaient une décision et démontraient une crainte raisonnable de partialité — Agent semble avoir tiré des conclusions non fondées sur la preuve mais sur le fait que la requérante était monoparentale, qu'elle avait plusieurs enfants et qu'elle était atteinte d'une maladie mentale — Omission de considérer sérieusement le meilleur intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire, sans tenir compte de la déférence à laquelle la décision de l'agent devrait avoir droit — Loi sur l'immigration, L.R.C. 1985, c. I-2, par. 114(2).

The applicant entered Canada as a visitor in 1981 and continued to remain in the country. She had four Canadian-born children. She supported herself illegally for 11 years before being diagnosed as paranoid schizophrenic. She subsequently collected welfare and underwent treatment at a mental health centre. In 1992 she was ordered deported. An immigration officer refused discretionary action under s. 114(2) of the *Immigration Act* based on humanitarian and compassionate grounds.

In dismissing the applicant's application for judicial review, the motions judge found that the *Convention on the Rights of the Child* did not apply and was not part of domestic law. The motions judge also found that the evidence showed the children were a significant factor in the decision-making process. The motions judge certified a question as to whether the immigration authorities were required to treat the best interests of the child as a primary consideration in assessing an applicant under s. 114(2) of the Act, given that the Act did not expressly incorporate the language of Canada's international obligations with respect to the Convention.

On appeal of the certified question, the court held that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation. The Convention could not be interpreted to impose an obligation upon the government to give primacy to the interests of the children in deportation proceedings. Finally, because the doctrine of legitimate expectations does not create substantive rights, and because a requirement that the best interests

of the children be given primacy by a decision-maker under s. 114(2) of the Act would be to create a substantive right, the doctrine did not apply.

The applicant appealed.

Held: The appeal was allowed.

Per L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring): The Convention did not give rise to a legitimate expectation that when the decision on the applicant's humanitarian and compassionate grounds application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. The Convention is not the equivalent to a government representation about how such applications will be decided.

The lack of an oral hearing did not constitute a violation of the requirements of procedural fairness. The opportunity, which was accorded for the applicant or her children to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness.

The duty of procedural fairness required a written explanation for the decision, which was done. The junior immigration officer's notes constituted the decision and were provided to the applicant. However, the notes demonstrated a reasonable apprehension of bias. The notes appeared to link the applicant's mental illness, her training as a domestic worker and the fact that she had eight children in total to the conclusion that she would, therefore, be a strain on the social welfare system for the rest of her life. The conclusion drawn was contrary to the psychiatrist's letter, which stated that with treatment she could remain well and return to being a productive member of society. The statements gave the impression that the junior officer may have been drawing conclusions based not on the evidence before him, but on the fact that she was a single mother with several children, and had been diagnosed with a psychiatric illness.

The failure to give serious consideration to the interests of the applicant's children constituted an unreasonable exercise of discretion, notwithstanding the important deference that should be given to the immigration officer's decision. The reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause the applicant, given that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from some of her children. Attentiveness and sensitivity to the importance of the rights of the children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for a humanitarian and compassionate decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

Per Iacobucci J. (Cory J. concurring): The certified question should be answered in the negative. An international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until it has been incorporated into domestic law by way of implementing legislation. The primacy accorded to the rights of children in the Convention is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

La requérante est entrée au Canada en 1981 avec le statut de visiteur et y est restée par la suite. Elle a donné naissance à quatre enfants au Canada. Elle a illégalement subvenu à ses besoins pendant 11 ans, soit jusqu'au moment où l'on a diagnostiqué qu'elle souffrait de schizophrénie paranoïaque. Elle a par la suite touché de l'aide sociale et a suivi un traitement dans un établissement de santé. En 1992, une mesure d'expulsion a été prise contre elle. Un fonctionnaire de l'immigration a refusé d'exercer le pouvoir discrétionnaire qui lui était conféré par l'art 114(2) de la *Loi sur l'immigration* et qui était fondé sur des motifs d'ordre humanitaire.

En rejetant la requête en révision judiciaire de la requérante, la juge saisie de la requête a conclu que la *Convention relative aux droits de l'enfant* ne s'appliquait pas et que ses dispositions ne faisaient pas partie du droit interne canadien. Elle a également conclu qu'il ressortait de la preuve que les enfants avaient constitué un facteur important dans le cadre du processus décisionnel. La juge s'est également prononcée sur la question de savoir si, dans le cadre de l'examen d'une requête faite en vertu de l'art. 114(2) de la Loi, les autorités en matière d'immigration étaient tenues de considérer le meilleur intérêt des enfants comme constituant un élément primordial, même si la Loi n'incorporait pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention .

En se prononçant sur l'appel de la décision portant sur la question certifiée, la Cour d'appel a estimé que la Convention ne pouvait avoir d'effet juridique au Canada, puisqu'elle n'avait pas été intégrée dans la législation nationale. La Convention

ne pouvait être interprétée comme imposant au gouvernement l'obligation d'accorder priorité à l'intérêt des enfants dans le cadre des procédures d'expulsion. Enfin, compte tenu que la doctrine de l'attente légitime ne crée pas de droits matériels et qu'imposer à un décideur l'obligation d'accorder la primauté au meilleur intérêt des enfants en vertu de l'art. 114(2) de la Loi serait de nature à créer un droit matériel, la doctrine était inapplicable.

La requérante a formé un pourvoi à l'encontre de la décision.

Held: Le pourvoi a été accueilli.

Le juge L'Heureux-Dubé (les juges Gonthier, McLachlin, Bastarache et Binnie y souscrivant) : La Convention n'a pas créé chez la requérante l'attente légitime que sa demande fondée sur des motifs d'ordre humanitaire et de compassion donnerait lieu à des droits procéduraux particuliers plus étendus que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, qu'une décision favorable serait rendue ou que des critères particuliers seraient appliqués. La Convention ne constituait pas l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes doivent être tranchées.

L'absence d'audience ne contrevenait pas aux exigences imposées en vertu de l'équité procédurale. La possibilité qui avait été donnée à la requérante ou à ses enfants de produire toute la documentation écrite se rapportant à tous les aspects de sa requête satisfaisait aux exigences relatives aux droits de participation imposées en vertu de l'obligation d'agir équitablement.

L'obligation d'équité procédurale exigeait que les motifs écrits de la décision soient fournis, ce qui a été fait. Les notes de l'agent subalterne constituaient les motifs de la décision et elles ont été fournies à la requérante. Les notes donnaient toutefois lieu à une crainte raisonnable de partialité. Elles semblaient relier les troubles mentaux de la requérante, sa formation comme domestique et le fait qu'elle avait au total huit enfants à la conclusion qu'elle constituerait, par conséquent, un fardeau pour le système d'aide sociale jusqu'à la fin de ses jours. La conclusion tirée allait à l'encontre de la lettre du psychiatre qui indiquait qu'à l'aide d'un traitement, l'état de la requérante pouvait s'améliorer et qu'elle pourrait redevenir un membre productif de la société. Ces notes donnaient l'impression que l'agent subalterne avait tiré ses conclusions, non pas en se fondant sur la preuve qu'il avait devant lui, mais plutôt sur le fait que la requérante était une mère célibataire avec plusieurs enfants et sur le fait qu'elle était atteinte de troubles psychiatriques.

Le défaut de prendre sérieusement en compte l'intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire et ce, malgré le degré élevé de retenue qu'il convient d'observer à l'égard de la décision de l'agent d'immigration. Les motifs n'accordaient pas un poids et une considération suffisants au préjudice qu'un retour en Jamaïque pouvait causer à la requérante compte tenu qu'elle avait vécu pendant 12 ans au Canada, qu'elle était malade, qu'elle ne pourrait probablement pas recevoir des soins en Jamaïque et qu'elle serait inévitablement séparée de certains de ses enfants. L'attention et la sensibilité manifestées à l'égard de l'importance des droits des enfants, à leur meilleur intérêt et au préjudice qu'ils pourraient subir en raison d'une décision rejettant la requête sont les éléments essentiels d'une décision qui doit être prise de façon raisonnable. Même si, dans le cadre des demandes de contrôle judiciaire, il convient de faire preuve de retenue à l'égard des décisions des agents d'immigration rendues en vertu de l'art. 114(2), leurs décisions ne peuvent être maintenues lorsque la façon dont la décision a été rendue et l'approche adoptée sont contraires aux valeurs humanitaires.

Le juge Iacobucci (le juge Cory y souscrivant) : Une réponse négative devrait être donnée à la question certifiée. Une convention internationale ratifiée par le pouvoir exécutif du gouvernement n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables. La primauté accordée aux droits des enfants par la Convention n'est d'aucune pertinence tant et aussi longtemps que ses dispositions n'ont pas été intégrées dans une loi adoptée par le Parlement.

Annotation

There is a lot of clarification material resulting from this unusual decision. One article entitled the "Shame of Shah" is presently being engrossed by the editor. I say "shame" because of the extraordinary encroachment on the Canadian notion of fairness created by the Federal Court of Appeal in *Muliadi v. Canada (Minister of Employment & Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 F.C. 205 (Fed. C.A.), and which was so casually proclaimed by the Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)* (1994), 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (Fed. C.A.). It was for the Supreme Court of Canada in *Baker* to lead the way in disposing of this negative virus manifested in *Shah*. If we are going to have an *Immigration Act* inviting applications with signposts such as

"Humanitarian and Compassionate," it follows that there is not a limited duty of fairness. The *Shah* dictum of the three Court of Appeal judges was unceremoniously and quickly dumped by the Supreme Court of Canada, but not before this backward looking case was approved without hardly a murmur of dissent in more than a hundred cases that were to follow *Shah*. That is its shame. For if so noble a doctrine of fairness is said to exist by the Supreme Court, how is it that no one else could see it? What limitations were imposed on the juridical eyes and conscience of our jurists not to possess a similar vision that to the Supreme Court was so evident?

One of the corollary aspects of this case is that: where there is no fairness, it allows bias, prejudice and unfairness to creep in. Look at the findings of the Supreme Court of Canada in *Baker* at para. 48:

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or the weighing of the particular circumstance of the case *free from stereotypes* . . . His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status.

[Emphasis mine]

The learned L'Heureux Dubé J. goes on to deal with the appropriate test of a choice of three when dealing with applications under s. 114(2) of the *Immigration Act*, and the test is reasonableness simpliciter.

She goes on to find that it must be reasonable to deal with the interests of the children of the applicant and that they are nowhere dealt with by the decision-makers. She states, at para. 65:

. . . I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer . . .

and later, at para. 76:

Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow the appeal.

Another matter arising out of *Baker* now being argued by justice lawyers is that the reasons and, indeed, the CAIPS notes can now be read in from the record as evidence. Justice lawyers are using any argument to avoid the making of an affidavit in judicial review applications and thus exposing immigration officers to cross-examination.

This matter was convincingly and clearly dealt with by the Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 F.C. 165, 40 F.T.R. 239 (note) (Fed. C.A.).

However, since the notes of Lorenz and the CAIPS notes were read by the court in the *Baker* case, can it be said that the law in *Wang* is now being overruled? I would submit not.

In a judicial review application, under the rules, an applicant can call for the record, and indeed it is often so done. This is not unlike productions required by parties, which occur in a superior court of a province. In such cases, when called upon under the rules, a defendant, or indeed a plaintiff, must submit to production and make an affidavit that the documents produced are totally those that are within the possession and power of the litigant to produce.

However, the productions are not evidence for the party producing such documentation, as he must prove the documents that are produced by him and not otherwise admitted. But this does not prevent the other party from producing and putting such documents into evidence, as these productions from the opponents' point of view constitute an admission.

Therefore, an applicant can put in such record as he requires without proving anything, but this does not mean that the respondent can call up such record as he requires, as evidence of the contents therein. It must be provided by affidavit of one who has personal knowledge.

Moreover, if the document is one that is necessary for the respondent to call into evidence and he fails to do so, then there is an adverse inference to be taken that, had he called the evidence in the ordinary way, it would not have been in his favour.

Commentaire

Cette décision particulière clarifie plusieurs éléments. Un article intitulé « La honte de Shah » est en voie de rédaction par l'éditeur. Je dis « honte » à cause de l'empiètement extraordinaire sur la notion canadienne d'équité créée par la Cour fédérale d'appel dans la cause *Muliadi c. Canada (Ministre de l'Emploi & de l'Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 C.F. 205 (C.A. féd.) et qui fut suivie sans retenue par la Cour d'appel dans *Shah c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1994] 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (C.A. féd.). Il revenait à la Cour suprême du Canada, dans *Baker*, de disposer de ce virus négatif établi dans l'affaire *Shah*. Si nous avons une *Loi sur l'immigration* invitant les demandes en affichant des motifs « humanitaires et de compassion », il s'ensuit qu'il n'existe pas de limite à l'équité. La maxime de *Shah* établie par trois juges de la Cour d'appel fut écartée rapidement et sans cérémonie par la Cour suprême du Canada, mais pas avant que ce jugement, qui représentait un pas en arrière, n'ait été appliqué dans une centaine de cas, sans même provoquer un murmure de dissidence. C'est là sa honte. Puisque cette noble doctrine de l'équité fut reconnue par la Cour suprême du Canada, comment se fait-il que personne d'autre ne l'ait reconnue? Quelle limite fut imposée sur la perception et la conscience juridique de nos juristes pour qu'ils ne possèdent pas une vision qui semble si évidente à la Cour suprême du Canada?

Un des aspects corollaires de cette cause est : lorsqu'il n'y a pas d'équité, cela fait place aux préjugés, à l'arbitraire et à l'injustice. Lisons cet énoncé du par. 48 de l'arrêt *Baker* de la Cour suprême du Canada :

Á mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une *absence de stéréotypes* dans l'évaluation des circonstances particulières de l'affaire. . . . L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de Mme Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande.

[notre emphase]

La savante Juge L'Heureux-Dubé établit la règle de trois appropriée lorsque confrontée à l'application de l'art. 114(2) de la *Loi sur l'immigration* et cette règle est établie simplement sur l'aspect raisonnable de la décision.

Elle détermine qu'il est raisonnable de considérer l'intérêt des enfants de la requérante et que les décideurs ne traitaient pas de cet aspect. Elle énonce, au par. 65 :

. . . j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. . . .

Plus loin, au para. 76 :

En conséquence, parce qu'il y a eu manquement aux principes d'quité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

Un autre aspect émanant de l'affaire *Baker* est maintenant plaidé par les avocats du ministère de la justice est à l'effet que les motifs, et bien sûr les notes des CAIPS, peuvent être présentées à titre de preuve. Les avocats du ministère utilisent

tous les arguments pour éviter le dépôt d'affidavits lors des demandes de contrôle judiciaire pour ainsi éviter de soumettre les officiers à un contre-interrogatoire.

Cette question fut réglée de façon claire et convaincante par la Cour d'appel dans l'affaire *Wang c. Canada (Ministre de l'Emploi & de l'Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 C.F. 165, 40 F.T.R. 239 (note) (C.A. féd.).

Par contre, pouvons-nous prétendre que la règle établie dans *Wang* est maintenant renversée puisque les notes de Lorenz et des CAIPS furent lues par la Cour dans l'affaire *Baker*? Je soumets que non.

Selon les règles, le requérant peut demander le dépôt du dossier lors d'une demande de contrôle judiciaire et ceci se fait fréquemment. Cet aspect est similaire à la production de documents par les parties lors de procédures devant la Cour supérieure d'une province. Dans ce cas, selon les règles, le défendeur ou le demandeur doit déposer un affidavit à l'effet que les documents produits représentent la totalité des pièces qu'il a en sa possession et qu'il peut produire.

Par ailleurs, le dépôt de documents ne constitue pas de la preuve pour la partie qui les produit puisqu'elle doit en établir la preuve s'ils ne sont pas autrement admis. Cela n'empêche pas l'autre partie au litige de produire ces documents en preuve puisque leur dépôt par l'adversaire constitue une admission.

En conséquence, un requérant peut déposer un tel dossier sans prouver quoi que ce soit. Mais cela ne veut pas dire que l'intimé peut invoquer ce dossier, s'il le désire, pour en établir le contenu. Ceci doit être fait par voie d'affidavit de la part de la personne qui a la connaissance personnelle des faits.

Cecil L. Rotenberg, Q.C.

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s. 3(c) — considered

s. 9(1) — considered

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Preamble — referred to

Article 3 ¶ 1 — considered

Article 3 ¶ 2 — considered

Article 9 ¶ 1 — considered

Article 9 ¶ 2 — considered

Article 9 ¶ 3 — considered

Article 9 ¶ 4 — considered

Article 12 ¶ 1 — considered

Article 12 ¶ 2 — considered

United Nations General Assembly, 1959, Declaration on the Rights of the Child

Preamble — considered

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Convention on the Rights of the Child, 1989, G.A. Res. 44/25; [1992] C.T.S. 3; 28 I.L.M. 1456
Generally — considered

Regulations considered by *L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):

Immigration Act, R.S.C./L.R.C. 1985, c. I-2
Immigration Regulations, 1978, SOR/78-172

s. 2.1 [en. SOR/93-44]

APPEAL by applicant from judgment reported at *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.), dismissing applicant's appeal from judgment dismissing application for judicial review of immigration officer's refusal of application under s. 114(2) of *Immigration Act* for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada.

POURVOI de la requérante à l'encontre du jugement publié à (1996), 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (C.A. Féd.), rejetant l'appel de la requérante du jugement publié à (1995), 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (C.Féd. (1re inst.)), rejetant sa demande de contrôle judiciaire du refus, par l'agent d'immigration, d'exercer son pouvoir discrétionnaire en vertu du par. 114(2) de la *Loi sur l'immigration* pour des motifs d'ordre humanitaire.

***L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):**

1 Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and

were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter, dated April 18, 1994, and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).
>
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
>
> Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.
>
> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.
>
> There is also a potential for violence - see charge of" assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

82.1 (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.

83. (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

114. ...

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amemded by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

. . . . .

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if

appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. Federal Court -- Trial Division (1995), 101 F.T.R. 110 (Fed. T.D.)

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a serious question of general importance under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?"

B. Federal Court of Appeal (1996), [1997] 2 F.C. 127 (Fed. C.A.)

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision" concerning" children within the meaning of article 3. Finally, Strayer J.A.

considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

III. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

> (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
>
> (2) Were the principles of procedural fairness violated in this case?
>
> (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
>
> (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
>
> (iii) Was there a reasonable apprehension of bias in the making of this decision?
>
> (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

IV. Analysis

A. Stated Questions Under s. 83(1) of the Immigration Act

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (Fed. C.A.), that the requirement, in s. 83(1), that a serious question of general importance be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment & Immigration)*, [1993] 3 F.C. 370 (Fed. T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a question of general importance has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. The Statutory Scheme and the Nature of the Decision

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the *Act*, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the *Act* and the regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Jiminez-Perez v. Canada (Minister of Employment& Immigration)*, [1984] 2 S.C.R. 565 (S.C.C.), at p. 569. In addition, while in law, the H & C decision is one that provides for an *exemption* from regulations or from the *Act*, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. Procedural Fairness

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H& C decisions: *Sobrie v. Canada (Minister of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 81 (Fed. T.D.) at p. 88; *Said v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 23 (Fed. T.D.); *Shah v. Canada (Minister of Employment & Immigration)* (1994), 170 N.R. 238 (Fed. C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight* at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Soc. Pol'y* 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to

choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case, to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H& C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H& C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H& C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Canada (Minister of Employment & Immigration)* (1995), 90 F.T.R. 157 (Fed. T.D.) at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (Fed. T.D.), and *Chan v. Canada (Minister of Citizenship & Immigration)* (1994), 87 F.T.R. 62 (Fed. T.D.), it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship & Immigration)* (1995), 116 F.T.R. 241 (Fed. T.D.), an H & C decision was set aside because the decision making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.); *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 (S.C.C.) at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (Australia H.C.) at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal....

The importance of reasons was recently reemphasized by this Court in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at pp. 109-10.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.) at para. 38 Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it" might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M.H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-168; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board*, [1991] 4 All E.R. 310 (Eng. C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department* (1993), [1994] 1 A.C. 531 (U.K. H.L.), imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.) at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C. C.A.) at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Nova Scotia (Rent Review Commission)* (1982), 55 N.S.R. (2d) 71 (N.S. T.D.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Canada (Refugee Status Advisory Committee)* (1979), [1980] 2 F.C. 316 (Fed. T.D.), imposed a reasons requirement on a Ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1996), 179 N.B.R. (2d) 43 (N.B. C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the

Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H& C decision to those affected, as with those at issue in *Orlowski*, *R. v. Civil Service Appeal Board*, and *R. v. Secretary of State for the Home Department*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved:

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623 (S.C.C.); *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. Review of the Exercise of the Minister's Discretion

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to Ms. Baker show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The regulations state that "[t]he Minister *is ... authorized to*" grant an exemption or otherwise facilitate the admission to Canada of any person "*where the Minister is satisfied* that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan*, *supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.)), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.)).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as" structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given

the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the" proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a serious question of general importance by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to *exempt* applicants, in certain circumstances, from the requirements of the Act or its regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them.

Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, was unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the serious question of general importance stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H&C factors", read as follows:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. So we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, *supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision...

> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of regulation 2.1 requires that a decision-maker exercise the power based upon "*compassionate* or *humanitarian* considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to *consider* an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.); *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H& C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) The Objectives of the Act

68 The objectives of the Act include, in s. 3(*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of *reuniting* citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

(b) International Law

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. R.*, [1956] S.C.R. 618 (S.C.C.) at p. 621; *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.) at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (New Zealand C.A.) at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India) at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.).

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safegards and care". The principles of the Convention and other international instrumnts place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) The Ministerial Guidelines

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and" compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "*wholly* a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the regulations shows

that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. Conclusions and Disposition

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

***Iacobucci J.* (*Cory J.* concurring):**

78 I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.). I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my collegue concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 5

2000 CarswellNat 889
Federal Court of Canada — Appeal Division

Apotex Inc. v. Canada (Attorney General)

2000 CarswellNat 3266, 2000 CarswellNat 889, [2000] 4 F.C. 264, [2000] F.C.J. No. 634, 180 F.T.R. 278, 188 D.L.R. (4th) 145, 24 Admin. L.R. (3d) 279, 255 N.R. 319, 6 C.P.R. (4th) 165, 97 A.C.W.S. (3d) 140

In the Matter of sections 18, 18.1 and 18.2 of the *Federal Court Act* , R.S.C. 1985, c. F-7, as Amended

In the Matter of the *Food and Drugs Act* , R.S.C. 1985, c. F-27, as Amended

In the Matter of section 4 of the *Patent Act Amendment Act* , 1992, S.C. 1993, c. 2, and section 55.2 of the *Patent Act* , R.S.C. 1985, c. P-4, as Amended

In the Matter of the *Patented Medicines (Notice of Compliance) Regulations* , SOR/93-133

Apotex Inc., Appellant (Applicant) and The Attorney General of Canada, The Minister of National Health and Welfare, Merck & Co., Inc. and Merck Frosst Canada Inc., Respondents (Respondents) and Eli Lilly Canada Inc., Pharmaceutical Manufacturers Association of Canada and Canadian Drug Manufacturers Association, Interveners (Interveners)

Décary, Sexton, Evans JJ.A.

Heard: February 28-29, 2000
Judgment: May 12, 2000
Docket: A-922-96

Proceedings: affirming (1996), [1997] 1 F.C. 518, 71 C.P.R. (3d) 166, 123 F.T.R. 161, 48 Admin. L.R. (2d) 109, [1996] F.C.J. No. 1535 (Federal Court of Canada — Appeal Division)

Counsel: *H.B. Radomski* and *D. Scrimger* , for Appellant.
R. Woyiwada , for Defendant, The Attorney General of Canada.
W.H. Richardson and *C. Zayid* , for Defendant, Merck & Co. Inc.
A.G. Creber , for Defendant, Eli Lilly Canada Inc. and Pharmaceutical Manufacturers Association of Canada.
R.G. Slaght and *T. Gilbert* , for Intervenor, Canadian Drug Manufacturers Association.

Subject: Intellectual Property; Property
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.iii Where abuse of process
Intellectual property
II Patents
II.3 Patent legislation
II.3.a General principles
Intellectual property
II Patents

II.6 Transfer of interest
II.6.d Compulsory licence
II.6.d.iii Practice and procedure
II.6.d.iii.F Notice of compliance
Judges and courts
XVII Jurisdiction
XVII.5 Exchequer and Federal Courts
XVII.5.f Miscellaneous
Statutes
IV Statutory instruments
IV.4 Grounds for invalidating
IV.4.a Conditions precedent
IV.4.a.iv Miscellaneous
Statutes
IV Statutory instruments
IV.4 Grounds for invalidating
IV.4.g Miscellaneous

Headnote

Intellectual property --- Patents — Patent legislation — General
Patented Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133.
Intellectual property --- Patents — Transfer of interest — Compulsory licence — Practice and procedure — Notice of compliance
Patented Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133.
Statutes --- Statutory instruments — Grounds for invalidating — Conditions precedent — Miscellaneous issues
Patented Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133.
Judges and courts --- Exchequer and Federal Courts — Jurisdiction — General
Patented Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133.
Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — Where abuse of process
Patented Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133.
Statutes --- Retroactivity and retrospectivity — Vested rights — General
Patented Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133.

The drug manufacturer M Inc. held an exclusive licence for the drug "Norfloxacin." In 1989, the generic drug manufacturer A Inc. made its new drug submission for the same drug pursuant to the compulsory licensing scheme then in effect under the *Patent Act.* Before the issuance of the notice of compliance, the Act was amended in 1993 to abolish the compulsory licensing system, except for licences granted before December 20, 1991. To ensure that a generic drug manufacturer is in a position to have its infringing drug on the market when the patent on the brand-name drug expires, ss. 55.2(1) and 55.2(2) of the Act exempt from patent infringement the development of a generic version of a patented drug for regulatory approval, and the stockpiling of a patented drug for sale immediately after the expiry of the patent. Section 55.2(4) of the Act gives Cabinet the power to make regulations that it "considers necessary" to prevent patent infringement by anyone who engages in the activities listed in ss. 55.2(1) and 55.2(2) of the Act. The *Patented Medicines (Notice of Compliance) Regulations, 1993* link the protection of the rights of patent holders to the system of regulatory approval by the Minister of National Health and Welfare for new drugs.

In 1993, M Inc. filed a patent list pursuant to the Regulations and included the drug Norfloxacin. A Inc. then filed a notice of allegation in which it alleged that its generic form of the drug would not infringe the patent because A Inc. intended to purchase the drug in bulk from a company holding a compulsory licence. M Inc. successfully applied pursuant to the Regulations for an order prohibiting the Minister from issuing a notice of compliance to A Inc. until the expiry of the patent. A Inc. unsuccessfully appealed to the Federal Court of Appeal.

A Inc. applied for judicial review directing the Minister to issue a notice of compliance and seeking a declaration that the Regulations were invalid for being ultra vires the authority of the Cabinet under s. 55.2(4) of the Act. A Inc. contended that the power to make Regulations was only in regard to preventing infringement by those who had the benefit of the exemptions under s s. 55.2(1) and 55.2(2) of the Act. Alternatively, A Inc. submitted that the Regulations do not apply to applications filed prior to the coming into force of the Regulations. A Inc. submitted that the Regulations were unnecessary, discriminatory for relating only to pharmaceutical patents, and made for the ulterior motive of preventing A Inc. from obtaining a notice of compliance. The validity of the Regulations was also attacked on the ground that they were promulgated without prior consultation, in breach of an alleged undertaking made in a letter to the intervenor by the Minister of Consumer and Corporate Affairs. The intervenor was an association representing the Canadian and foreign-owned pharmaceutical and chemical corporations that manufacture generic drugs. M Inc. applied to stay or dismiss the application. M Inc.'s application to stay was dismissed and A Inc.'s application was dismissed. A Inc. appealed. Meanwhile, the Supreme Court of Canada allowed A Inc.'s appeal in the M Inc. prohibition proceedings and the Minister issued the notice of compliance to A Inc.

The issues on appeal were: (1) should the appeal be dismissed for mootness or abuse of process; (2) does s. 55.2(4) of the Act only authorize the making of Regulations that apply to a person who has taken advantage of ss. 55.2(1) or 55.2(2) of the Act in respect to the new drug product that is the subject of the prohibition proceeding; (3) in the absence of an express statutory power authorizing the Cabinet to enact regulations with retroactive effect, are the Regulations invalid insofar as they purport to apply to notice of compliance submissions that had been made but not yet decided when the Regulations came into effect, and (4) are the Regulations invalid because they were made in breach of an undertaking by the Minister of Consumer and Corporate Affairs to the intervenor that it would be consulted before regulations were enacted under s. 55.2(4) of the Act?

Held: The appeal was dismissed.

Per Décary J.A. (Sexton J.A. concurring): The reasons of Evans J.A. were concurred in except for the reasons on the issue of whether the Regulations are invalid for having been made in breach of an undertaking by the Minister of Consumer and Corporate Affairs to consult with the intervenor before regulations were enacted under s. 55.2(4) of the Act. The Act does not require that proposed regulations be published prior to their coming into force. The Act does contain provisions requiring prior consultation before certain regulations are adopted, however, there is no duty to consult before making regulations under s. 55.2 of the Act.

The doctrine of legitimate expectations does not apply to the regulation-making power of the Cabinet in this case. The alleged undertaking was at best a personal undertaking of a political nature that was not enforceable in a court and, in any event, was not an undertaking that could bind the Cabinet as decision-maker. A true undertaking by a Minister of the Crown would be salient, include some specifics as to the form and timetable of the consultation and would be given to all interested persons in some official form. A Minister can make an undertaking having some legal consequences only with regard to a decision that is his/hers alone to make. Absent statutory authority or an express delegation of authority to a Minister by the Cabinet, a Minister cannot bind the Cabinet in the exercise of its regulation-making power.

Per Evans J.A. (concurring): The appeal should not be dismissed as moot or an abuse of process. Although the recent Supreme Court of Canada judgment ordered the Minister to issue to A Inc. a notice of compliance for the drug, the attack on the validity of the Regulations remained a live issue. As a leading manufacturer of generic drugs, A Inc. had a vital interest in the question of validity beyond the confines of this proceeding.

This proceeding was not an abuse of process even though A Inc. could have challenged the validity of the Regulations in M Inc.'s earlier prohibition proceedings relating to the same drug which A Inc. eventually succeeded in the Supreme Court of Canada. In view of the uncertainty about the Regulations when the litigation was started, the obvious and continuing interest of A Inc. in having the validity of the Regulations determined, and that fact that the parties had prepared full argument on the merits, the motions judge did not err in exercising discretion in favour of hearing and determining the application for judicial review insofar as it sought a declaration that the Regulations are ultra vires.

Section 55.2(4) of the Act should be broadly construed so that it is not limited to persons who have taken advantage of ss. 55.2(1) or 55.2(2) of the Act in respect of the new drug product that is the subject of the prohibition proceeding. Rather than limiting the scope of the regulation-making power to "any person who has made, constructed, used or sold a patented invention in accordance with subsection (1) or (2), " s. 55.2(4) of the Act uses the present tense and states "any

person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2)." This is more conducive to describing a generic drug manufacturer rather than one who has done any of the enumerated items on a particular occasion. The French-language version of s. 55.2(4) of the Act also supports broadly construing the section. Furthermore, the nature and subjective definition of the purpose for which the power may be exercised supports a broad interpretation: "such regulations as the Governor in Council considers necessary for preventing the infringement of a patent."

The application of the Regulations to new drug submissions that were made but not decided when the 1993 Regulations came into effect did not trigger the presumption against retroactivity. No vested right was abrogated. In the absence of a clear legislative indication to the contrary, no one has a legal right to have an application for a statutory benefit determined in accordance with the eligibility criteria in place when the application was made. It was within the authority conferred by s. 55.2(4) of the Act to expressly provide in the Regulations that they apply to submissions made before they came into effect, but not yet decided by the Minister.

The Regulations were not made in breach of an undertaking by the Minister and were not invalid. There was no legal obligation to consult with the association before the enactment of the 1993 Regulations. The duty of fairness does not apply to the exercise of powers of a legislative nature, including regulations that apply to a particular industry. However, it does not necessarily follow that subordinate legislation can lawfully be made in breach of a categorical and specific assurance of prior consultation given to an individual by a responsible Minister of the Crown in the course of discharging departmental business. In the absence of binding authority to the contrary, the doctrine of legitimate expectations applies in principle to delegated legislative powers, provided that honouring the expectation would not breach some other legal duty or unduly delay the enactment of regulations for which there was a demonstrably urgent need. A court may set aside or declare invalid subordinate legislation made in breach of a legal duty to consult. For this purpose, it should not matter whether the duty arose from statute or by virtue of a promise that created a legitimate expectation of consultation.

Whether a promise by a public official or body that consultation will precede administrative action gives rise to a legitimate expectation that attracts a legal obligation to consult depends on the surrounding facts. The test is: "Would a reasonable person think that the promise was serious, and should a reasonable person be entitled so to think?" The wording of the Minister's letter was capable of creating a legitimate expectation that the Minister would consult with the pharmaceutical industry before any regulations under s. 55.2(4) of the Act came into effect. It was not necessary for the Minister to proceed further in the letter by proposing a timetable for the consultation process. However, the Minister's assurance did not create in the pharmaceutical industry a legitimate expectation of consultation that if breached would invalidate the regulations enacted by the Cabinet without the promised consultation. There could be no legitimate expectation when the Cabinet, and not the Minister, has the statutory authority to make the regulations in question. There is no evidence that the Cabinet expressly delegated to the Minister the authority to impose procedural restrictions on the exercise of the Cabinet's regulation-making power. There was no abuse of statutory power by the Cabinet in enacting regulations in ignorance of an undertaking of consultation given by the Minister. It would be impermissible for a court to inquire into the knowledge of members of the Cabinet about prior procedural assurances given by a Minister in order to determine whether otherwise valid regulations were knowingly enacted in breach of a ministerial undertaking.

Although there had been no consultation prior to the publication of the 1993 Regulations, there was consultation between the government and the pharmaceutical industry on Bill C-91 including the regulation-making provision which was added at third reading. Thus, it was made clear that the government intended to provide, by way of regulations, for the linkage of patent protection and the issuance of notices of compliance. After the Regulations came into effect, the industry met and communicated often with the relevant Ministers and their officials about the Regulations. The Regulations were significantly modified in 1998. It can be inferred from the the context, including the addition of s. 55.2(4) of the Act, that the consultation promised related to the implementing details of the the scheme and not to the principle of linking patent protection and regulatory control. The extensive and effective consultations that occurred after 1993 and prior to the amendments in 1998 would make it inappropriate to declare invalid the original Regulations as amended.

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Reference re Canada Assistance Plan (Canada), [1991] 2 S.C.R. 525, 58 B.C.L.R. (2d) 1, 1 Admin. L.R. (2d) 1, 1 B.C.A.C. 241, 1 W.A.C. 241, 83 D.L.R. (4th) 297, 127 N.R. 161, [1991] 6 W.W.R. 1 (S.C.C.) — considered

Cases considered by *Evans J.A.* (concurring):

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Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) (1990), 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134, [1990] 3 S.C.R. 1170 (S.C.C.) — considered

R. v. Brent London Borough Council (1986), 84 L.G.R. 168 (Eng. Q.B.) — referred to

R. v. Liverpool Corp., [1972] 2 Q.B. 299, [1972] 2 All E.R. 589, [1972] 2 W.L.R. 1262 (Eng. C.A.) — considered

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s. 159(2) — referred to

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s. 12 — referred to

s. 13 — referred to

Copyright Act, R.S.C. 1985, c. C-42

s. 66.6(2) [en. R.S.C. 1985, c. 10 (4th Supp.), s. 12] — referred to

Hazardous Materials Information Review Act, R.S.C. 1985, c. 24 (3rd Supp.), Pt. III
s. 48(1) — referred to
Hazardous Products Act, R.S.C. 1985, c. H-3
s. 19 — referred to
Interpretation Act, R.S.C. 1985, c. I-21
s. 35(1) "Governor General in Council" or "Governor in Council" — considered
Mackenzie Valley Resource Management Act, S.C. 1998, c. 25
s. 90 — referred to

s. 143 — referred to

s. 150 — referred to
Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.)
Generally — referred to

s. 84 — referred to

s. 86 — referred to
Patent Act, R.S.C. 1985, c. P-4
Generally — considered

s. 55.2 [en. 1993, c. 2, s. 4] — considered

s. 55.2(1) [en. 1993, c. 2, s. 4] — considered

s. 55.2(4) [en. 1993, c. 2, s. 4] — considered

s. 101(2) [en. 1993, c. 2, s. 7] — considered
Règlements, Loi sur les, L.R.Q. c. R-18.1
art. 8 — referred to

art. 10 — referred to

art. 12 — referred to

art. 13 — referred to
Statutory Instruments Act, R.S.C. 1985, c. S-22
Generally — referred to
Statutes considered by *Evans J.A.* (concurring):
Canada Assistance Plan, R.S.C. 1970, c. C-1
s. 8 — considered
Interpretation Act, R.S.C. 1985, I-21
s. 12 — referred to

s. 23(1)(c) — referred to

s. 44(c) — considered
Patent Act, R.S.C. 1985, c. P-4
Generally — considered

s. 42 — considered

s. 55.2 [en. 1993, c. 2, s. 4] — considered

s. 55.2(1) [en. 1993, c. 2, s. 4] — considered

s. 55.2(2) [en. 1993, c. 2, s. 4] — considered

s. 55.2(4) [en. 1993, c. 2, s. 4] — considered

Patent Act Amendment Act, 1992, S.C. 1993, c. 2

Generally — considered

s. 11(1) — referred to

s. 12(1) — referred to

Treaties considered:

North American Free Trade Agreement, 1992, [1994] C.T.S. 2; 32 I.L.M. 296,612

Article 1709(10) — referred to

Regulations considered:

Patent Act, R.S.C. 1985, c. P-4

Patent Medicines (Notice of Compliance) Regulations, 1993, SOR/93-133

s. 2 "claim for the medicine itself"

s. 5(1) [am. SOR/98-166]

s. 6(1) [rep. & sub. SOR/98-166]

s. 6(5) [en. SOR/98-166]

s. 7(1)(e) [rep. & sub. SOR/98-166]

Patented Medicines (Notice of Compliance) Regulations, 1998, SOR/98-166

Generally

Words and phrases considered

ANY PERSON WHO MAKES, CONSTRUCTS, USES OR SELLS A PATENTED INVENTION IN ACCORDANCE WITH SUBSECTION (1) OR (2)

Per Evans J.A. (Décary and Sexton JJ.A. concurring): In addition, [the appellant] challenges the validity of the Regulations [*Patented Medicines (Notice of Compliance) Regulations, 1993* , SOR/93-133] on a broader basis. It will be convenient at this point to set out again the part of the provision [*Patent Act* , R.S.C. 1985, c. P-4, s. 55.2(4)] on which [the appellant] relies for this argument.

55.2(4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2) including, without limiting the generality of the foregoing, regulations

55.2(4) Afin d'empêcher la contrefaçon de brevet d'invention par l'utilisateur, le fabricant, le constructeur ou le vendeur d'une invention brevetée au sens des paragraphes (1) ou (2), le gouverneur en conseil peut prendre des règlements, notamment:

[. . .]

[. . .] if Parliament had intended to limit the scope of the regulation-making power to those who had taken advantage of subsection (1) or (2), it would have been more natural if the subsection had referred to "any person who *has made,*

constructed, used or sold a patented invention in accordance with subsection (1) or (2) .....". The use of the present tense is more apt to describe a generic drug manufacturer at large, rather than one who *has done* any of the listed things on a particular occasion.

While I recognise that the words chosen are a singularly odd way of expressing this idea, I find some comfort in the French version of subsection 55.2(4) which does not use the word "person", and uses the expression "au sens des paragraphes (1) and (2)", instead of "en conformité avec les paragraphes (1) and (2)" meaning "in accordance with".

Since the words of the statutory text do not point ineluctably to one conclusion, does the statutory context resolve the ambiguity? In my opinion, the nature and subjective definition of the purpose for which the power may be exercised supports a broad interpretation: "...such regulations as the Governor in Council considers necessary for preventing the infringement of a patent...".

REST ASSURED THAT YOU WILL BE CONSULTED BEFORE ANY SUCH REGULATIONS ARE ESTABLISHED

Per Décary J.A. (Sexton J.A. concurring): The alleged undertaking was made on February 5, 1993 by the then recently appointed Minister of Consumer and Corporate Affairs, Mr. Pierre A. Vincent. The six page letter addressed to Mr. Kay, the president of the Canadian Drug Manufacturers Association ("the Association") [the intervenor] begins as follows [1] :

Dear Mr. Kay:

On behalf of my predecessor, the Honourable Pierre Blais, I acknowledge receipt of your letters of November 16, 1992 and December 3, 1992, concerning Bill C-91. The office of the President of the Privy Council, the Minister of National Defence and the Leader of the House of Commons, have also written to us on your behalf.

I would like to reply to the questions and observations that you raise in these letters:

[...]

The Minister then goes on to address seven issues that had been raised by Mr. Kay. His comments on the last issue (issue No. 7), and his concluding words, are as follows [2] :

[...]

7. Patentees do not need the additional remedy of (*sic*) that will be conferred on them if the government proceeds to condition the regulatory approval of generic medicines on the patent status of their innovative counterparts

Finally, you have objected to an amendment to Bill C-91 giving the Governor in Council authority to prescribe regulations preventing applicants, who use an innovator's patent to obtain regulatory approval to sell their products, from obtaining such approval when an innovative competitor holds a valid patent pertaining to the item. You suggest that a patentee's right to pursue patent infringement actions in the courts is sufficient as innovators are entitled to pursue interlocutory relief and to be compensated in damages if an injunction is not granted and it turns out that there was infringement. You further suggest that regulations under this amendment will serve to keep generic competitors off the market when any allegation of patent infringement is made.

I agree that, as a general rule, judicial remedies are sufficient to address patent infringement. However, the Government, in allowing generic competitors to make use of an innovator's patent to obtain regulatory approval, will remove a patent right that would have otherwise been available to a patentee to prevent a generic competitor from undertaking such activities. The amendment to which you refer must be read in this context. It is designed to enable the Government to mitigate any harm flowing from its decision to allow these activities that would otherwise constitute patent infringement.

Subsection 55.2(1) will ensure that a generic competitor is in a position to market its product immediately after the expiry of any relevant patents. It is not the Government's intention to keep a generic competitor off the market unless there is a valid patent that will be infringed by sale of the generic product. Any regulations drafted pursuant to the newly added subsection 55.2(4) will reflect this intention. Rest assured that you will be consulted before any such regulations are established .

I appreciate your bringing your views to our attention.

Yours sincerely,

Pierre A. Vincent

cc. The Honourable Kim Campbell, P.C., Q.C., M.P.

Minister of National Defence

and Minister of Veterans Affairs

The Right Honourable Joe Clark, P.C., M.P.

President of the Queen's Privy Council

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The Honourable Harvie Andre, P.C., M.P.

Government House Leader and Minister of State

to Assist the Prime Minister and Minister

Responsible for the Canada Post

[emphasis added]

In my respectful view, the alleged undertaking, underlined *supra* , is nothing more in its full context than a brief assurance made in passing by a minister wearing his political hat. One would expect a true undertaking by a minister of the Crown to be salient, to include some specifics as to the form and timetable of the consultation and to be given to all interested persons in some official form. I find nothing of the sort in these casual words found at the end of the last paragraph of a lengthy letter. The words used by the Minister may, in retrospect, have been imprudent but the [intervenor] was naive if it believed that such a comment would be enforceable against the Minister in a court of law.

REST ASSURED THAT YOU WILL BE CONSULTED BEFORE ANY SUCH REGULATIONS ARE ESTABLISHED

Per Evans J.A. (concurring): In a letter dated February 5, 1993 written to Mr. Kay, the Chair of the CDMA [Canadian Drug Manufacturers Association, the intervenor], the new Minister of Consumer and Corporate Affairs, Mr. Vincent, reiterated the reasons for the amendment to Bill C-91 to which the CDMA had objected. He explained that the rationale for the proposed regulations [*Patented Medicines (Notice of Compliance) Regulations, 1993* , SOR/93-133] was the need to minimise harm to patent holders that might otherwise result from the provisions permitting generic drug companies to use the patented product to obtain an NOC and to stockpile the product pending the expiry of the patent. The letter ended with the following sentence: "Rest assured that you will be consulted before any such regulations are established."

[. . .]

On the facts of this case, I have no doubt that the words used were capable of creating a legitimate expectation that the Minister *would* consult the CDMA before any regulations made under s. 55.2(4) [of the *Patent Act* , R.S.C. 1985, c. P-4] came into effect. This is because of the specific and categorical nature of the assurance of consultation, given in a letter written by the Minister responsible for the development of regulations in response to the concerns expressed by the Association in the course of discussions about the course on which the Government appeared set.

I do not think that it is necessary for the minister to have gone further in the letter by, for example, proposing a timetable for the consultation process. [. . .]

In my opinion, Canadians would expect, and are entitled to expect, that a clear and unequivocal undertaking of consultation, given in writing to an individual or an association by a minister of the Crown, will be honoured, in the absence of some compelling reason for not so doing.

[. . .]

In this case, however, the Cabinet has already approved the regulations, and the question is whether their validity can be impugned because they were enacted in the absence of the consultation that the minister promised. In my view, it cannot. If the Cabinet enacts regulations in ignorance of an undertaking of consultation given by a minister, it would not seem to me to have abused its statutory power. And, given the legal protection afforded by the law to the confidentiality of cabinet proceedings and the narrow grounds on which the courts review the exercise of powers by the Cabinet, it would be impermissible for a court to enquire into the state of knowledge possessed by members of the Cabinet about prior procedural assurances given by a minister in order to determine whether otherwise valid regulations were knowingly enacted in breach of a ministerial undertaking.

Hence, in my view, the Minister's assurance did not create in the CDMA a legitimate expectation of consultation that, if breached, would invalidate Regulations enacted by the Cabinet without the promised consultation.

APPEAL by generic drug manufacturer from judgment of MacKay J. reported at (1996), [1997] 1 F.C. 518, 71 C.P.R. (3d) 166, 12 F.T.R. 161, 48 Admin. L.R. (2d) 109 (Fed. T.D.) , dismissing application for declaration that *Patented Medicine (Notice of Compliance) Regulations, 1993* are *ultra vires* .

***Décary J.A.* (*Sexton J.A.* concurring):**

1 The facts and the issues have been described by my brother Evans and there is no need repeating them here. Like him, I have reached the conclusion that the appeal should be dismissed. I adopt his reasons with respect to the first three issues he has identified. I disagree, however, with his reasoning with regards to the fourth issue. The fourth issue is stated as follows:

> Issue 4: Are the Regulations invalid because they were made in breach of an undertaking by the Minister of Consumer and Corporate Affairs to the Canadian Drug Manufacturers Association that it would be consulted before regulations were enacted under subsection 55.2(4)?
>
> [Answer: No.]

2 I will preface my analysis with a few words about the statutory context.

3 The *Patent Act* [3] ("the Act"), unlike many other statutes [4] , does not contain provisions stating that regulations proposed to be made pursuant to the Act must be published prior to their coming into force. Regulations made by the Governor in Council under subsection 55.2 of the Act are therefore subject to the general provisions of the *Statutory Instruments Act* [5] . They are not required by law to be published prior to their coming into force.

4 The *Patent Act* , like many other statutes [6] , contains provisions requiring prior consultation before certain regulations are adopted. Subsection 101(2) provides that certain regulations pertaining to the pricing of a medicine can only be made by the Governor in Council

> (2) [...] on the recommendation of the Minister, made after the Minister has consulted with the provincial ministers of the Crown responsible for health and with such representatives of consumer groups and representatives of the pharmaceutical industry as the Minister considers appropriate.
>
> (2) [...] sur recommandation du ministre faite après consultation par celui-ci des ministres provinciaux responsables de la santé et des représentants des groupes de consommateurs et de l'industrie pharmaceutique qu'il juge utile de consulter.

Parliament has therefore clearly imposed on a minister of the Crown, acting on behalf of the Governor in Council, a statutory duty to consult with certain persons in certain circumstances. No such duty is imposed under section 55.2 of the Act.

5 Some statutes, such as the *Official Languages Act* , require both prior consultation with respect to proposed regulations (s. 84) and prior publication of the proposed regulations once the consultation has been done (s. 86).

6 In other jurisdictions, such as in the Province of Quebec, a statute sets out the general rule that every proposed regulation shall be pre-published "with a notice stating, in particular, the period within which no proposed regulation may be made or submitted for approval but within which interested persons may transmit their comments to a person designated in the notice" [7] . In the Quebec statute, provision is made for the making of regulations without pre-publication in special circumstances such as when the situation is urgent (s. 12), in which case the reason justifying the absence of prior publication must be published with the regulation (s. 13).

7 All this to say that Parliament has already turned its mind to the need for pre-consultation and pre-publication and that courts should examine each given case both in light of the statute at issue and in light of the general statutory framework.

8 Turning now to my analysis, I would summarize as follows the conclusions I have reached:

> Assuming, for the sake of discussion, that the doctrine of legitimate expectations may apply to the regulation-making power of the Governor in Council, it would not apply in the circumstances of this case because the alleged undertaking is at best a personal undertaking of a political nature that is not enforceable in a court of law; in any event, it is not an undertaking that binds the decision-maker, i.e. the Governor in Council.
>
> My brother Evans having found that the alleged undertaking did not in the circumstances bind the Governor in Council, his comments on the application of the doctrine of legitimate expectations to the regulation-making power of the Governor in Council are *obiter dicta* with respect to which I need only say that I have serious reservations.

1 a) The alleged undertaking is at best a personal undertaking of a political nature that is not enforceable in a court of law.

9 The alleged undertaking was made on February 5, 1993 by the then recently appointed Minister of Consumer and Corporate Affairs, Mr. Pierre A. Vincent. The six page letter addressed to Mr. Kay, the president of the Canadian Drug Manufacturers Association ("the Association") begins as follows [8] :

> Dear Mr. Kay:

On behalf of my predecessor, the Honourable Pierre Blais, I acknowledge receipt of your letters of November 16, 1992 and December 3, 1992, concerning Bill C-91. The office of the President of the Privy Council, the Minister of National Defence and the Leader of the House of Commons, have also written to us on your behalf.

I would like to reply to the questions and observations that you raise in these letters:

[...]

10 The Minister then goes on to address seven issues that had been raised by Mr. Kay. His comments on the last issue (issue No. 7), and his concluding words, are as follows [9] :

[...]

> 7. Patentees do not need the additional remedy of (*sic*) that will be conferred on them if the government proceeds to condition the regulatory approval of generic medicines on the patent status of their innovative counterparts

Finally, you have objected to an amendment to Bill C-91 giving the Governor in Council authority to prescribe regulations preventing applicants, who use an innovator's patent to obtain regulatory approval to sell their products, from obtaining such approval when an innovative competitor holds a valid patent pertaining to the item. You suggest that a patentee's right to pursue patent infringement actions in the courts is sufficient as innovators are entitled to pursue interlocutory relief and to be compensated in damages if an injunction is not granted and it turns out that there was infringement. You further suggest that regulations under this amendment will serve to keep generic competitors off the market when any allegation of patent infringement is made.

I agree that, as a general rule, judicial remedies are sufficient to address patent infringement. However, the Government, in allowing generic competitors to make use of an innovator's patent to obtain regulatory approval, will remove a patent right that would have otherwise been available to a patentee to prevent a generic competitor from undertaking such activities. The amendment to which you refer must be read in this context. It is designed to enable the Government to mitigate any harm flowing from its decision to allow these activities that would otherwise constitute patent infringement.

Subsection 55.2(1) will ensure that a generic competitor is in a position to market its product immediately after the expiry of any relevant patents. It is not the Government's intention to keep a generic competitor off the market unless there is a valid patent that will be infringed by sale of the generic product. Any regulations drafted pursuant to the newly added subsection 55.2(4) will reflect this intention. Rest assured that you will be consulted before any such regulations are established .

I appreciate your bringing your views to our attention.

Yours sincerely,

Pierre A. Vincent

cc. The Honourable Kim Campbell, P.C., Q.C., M.P.

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[emphasis added]

11 In my respectful view, the alleged undertaking, underlined *supra* , is nothing more in its full context than a brief assurance made in passing by a minister wearing his political hat. One would expect a true undertaking by a minister of the Crown to be salient, to include some specifics as to the form and timetable of the consultation and to be given to all interested persons in some official form. I find nothing of the sort in these casual words found at the end of the last paragraph of a lengthy letter. The words used by the Minister may, in retrospect, have been imprudent but the Association was naive if it believed that such a comment would be enforceable against the Minister in a court of law.

12 Furthermore, I am not so sure that the Association was that naive. Subsequent events tend, to the contrary, to confirm that the "undertaking argument" was a mere afterthought.

13 Neither the originating Notice of Motion dated October 14, 1993 by Apotex Inc. ("Apotex"), a member of the Association whose president in an affidavit filed in support of the motion describes himself as acting on behalf of the Association, nor the application for leave to intervene filed in July 21, 1994 by the Association refer to the February 5, 1993 letter containing the alleged undertaking by the Minister.

14 It further appears from the proceedings and affidavits filed in the Trial Division that the argument originally raised by Apotex and by the Association was with respect to the lack of consultation, not with respect to the breaking of a ministerial undertaking. It was only at the hearing before Mr. Justice MacKay, in 1996, that reference was made to the alleged undertaking of the Minister [10] .

15 Had the alleged undertaking contained in the February 5, 1993 letter the importance the Association now claims it has, one would have expected the Association to raise it much earlier in the process.

16 The short answer, therefore, to the Association's submissions is that the alleged undertaking is not, and was never perceived by the Association to be, an undertaking enforceable in a court of law.

1 b) The alleged undertaking is not an undertaking that binds the decision-maker, i.e. the Governor in Council.

17 In any event, even if the alleged undertaking was such as to bind the Minister and be enforceable in a court of law, it would not, in the circumstances, have bound the Governor in Council who is, after all, the decision-maker.

18 A minister can make an undertaking having some legal consequences only with respect to a decision which is his, and his alone to make [11] . Absent statutory authority such as that found in subsection 101(2) of the Act or, arguably, absent authority expressly delegated to a minister by the Governor in Council, a minister cannot bind the Governor in Council in the exercise of its regulation-making power. It may be useful to recall that the Governor in Council, as defined by section 35 of the *Interpretation Act* [12] , is "the Governor General of Canada acting by and with the advice of [...] the Queen's Privy Council for Canada", an obvious reference to sections 11, 12 and 13 of the *Constitution Act, 1867* [13] .

19 Given the absence of evidence that the Governor in Council expressly delegated to the Minister "the authority to impose procedural restrictions on the exercise of the Cabinet's regulation-making power", to use the words of my brother Evans at paragraph 107 of his reasons, it follows, in my respectful view, that even if the alleged undertaking by the Minister were found to attract judicial attention, it could not be invoked in the case at bar against the Governor in Council.

20 The ultimate finding made by my colleague, that the Minister did not bind the Cabinet in the circumstances, makes his intermediate finding with respect to the application of the doctrine of legitimate expectations *obiter dictum* .

2) Obiter dicta.

21 While I would not normally feel the need to comment on what has ended up being *obiter* , the issue has been so throughly canvassed by my colleague that I must at least state that I have serious reservations as to the applicability of the doctrine of legitimate expectations to Cabinet in the exercise of its regulation-making power and that I would have been inclined to reach the same conclusion as that reached by Mr. Justice MacKay in the Trial Division.

22 As I have shown earlier, the need for prior consultation and for prior publication is something that has not escaped Parliament's attention. Some may be of the view that what is now an exception in federal statutes should be raised to the status of a legal requirement applicable to all regulations, but that decision should in my opinion rest with Parliament. I would be reluctant to have the judiciary move in and impose procedural restrictions of its own creation on the process leading to the making of regulations by the Governor in Council.

23 When courts enter the realm of general public policy and are asked as in this case to hold Cabinet to an undertaking such that its discretion to make regulations would be fettered, they should be reminded of the comments made by Sopinka J. in *Reference re Canada Assistance Plan (Canada)* [14] , on the application of the doctrine of legitimate expectations to the exercise of legislative powers.

24 I appreciate that Sopinka J. was not dealing in that case with regulations made by the Governor in Council, but it seems to me that it would also be an extraordinary remedy to strike down regulations made by the Governor in Council solely because of the failure of a minister of the Crown to fulfill a promise of consultation given on behalf of Cabinet. I need not, however, reach a firm conclusion as the issue, in my view, does not arise in this case.

25 I note that in all the decisions relied upon by my colleague the regulations at issue were made either by a minister in his capacity as a minister, by a municipal authority or by a school board. No precedent was cited that related to regulations made by the Governor in Council.

26 In the end, I would dismiss the appeal with costs in favour of the Attorney General of Canada and Merck Frosst Canada Inc. and against Apotex Inc. and the Canadian Drug Manufacturers Association.

Evans J.A. **(concurring):**

A. Introduction

1 In this appeal Apotex Inc. maintains that the learned Motions Judge erred in law when he dismissed Apotex' contention that the *Patented Medicines (Notice of Compliance) Regulations, 1993* , SOR/93-133 were invalid because they were not authorised by subsection 55.2(4) of the *Patent Act* , R.S.C. 1985, c. P-4, as amended by the *Patent Act Amendment Act, 1992* , S.C. 1993, c. 2, section 4.

2 These Regulations are an important part of the major reform of patent law as it affects pharmaceutical products that came into effect in 1993. For the first time the law linked the protection of the rights of patent holders to the system of regulatory approval for new drugs by the Minister. The Regulations thus handed to the "brand-name" companies an important new weapon in their battles with generic drug manufacturers.

3 Previously, regulatory approval was issued in the form of a Notice of Compliance as soon as the Minister of National Health and Welfare was satisfied that a new drug was safe and effective. However, the 1993 Regulations enabled a "brand-name" company that held a patent which might be infringed by a new generic drug to institute proceedings to prohibit the Minister from issuing an NOC for the new drug during the life of the patent. Meanwhile, from the date that a company applies for an order of prohibition the Regulations impose an automatic stay of 30 months (reduced to 24 months in 1998) restraining the Minister from issuing an NOC in respect of the generic drug pending the determination of the judicial review proceeding.

4 In view of the courts' reluctance to grant interlocutory injunctions in patent infringement actions, it is not surprising that this statutory scheme has been described as "a draconian regime": *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*, [1998] 2 S.C.R. 193 (S.C.C.) , at 214.

5 In the application for judicial review with which this appeal is concerned Apotex seeks an order directing the Minister of National Health and Welfare to issue an NOC for its version of norfloxacin, an antibiotic, and declaring that the Regulations are invalid. Apotex maintains that, properly construed, subsection 55.2(4) of the *Patent Act* authorises the making of regulations that link patent protection and regulatory approval in a significantly narrower range of situations than those currently included in the Regulations.

6 The validity of the Regulations is also attacked on the ground that they were promulgated without prior consultation, in breach of a promise made by the Minister responsible for the statutory amendments that regulations would not be enacted until there had been consultation with the Canadian Drug Manufacturers Association, a trade association representing primarily the interests of generic pharmaceutical manufacturers.

B. The Legislative Framework

7 Although the statutory scheme from which this litigation arises is complex, it is only necessary to set out here those provisions that are of most direct relevance to the issues in dispute in this appeal.

Patent Act, R.S.C. 1985, c. P-4 am. Patent Act Amendment Act, 1992, S.C. 1993, c. 2.

> 42. Every patent granted under this Act ... shall, subject to this Act, grant to the patentee and the patentee's legal representatives for the term of the patent, from the granting of the patent, the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used,
>
> . . . . .
>
> 55.2(1) It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.
>
> (2) It is not an infringement of a patent for any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) to make, construct or use the invention, during the applicable period provided for by the regulations, for the manufacture and storage of articles intended for sale after the date on which the term of the patent expires.
>
> (3) The Governor in Council may make regulations for the purposes of subsection (2), but any period provided for by the regulations must terminate immediately preceding the date on which the term of the patent expires.
>
> (4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2) including, without limiting the generality of the foregoing, regulations
>
> . . . . .

(e) generally governing the issue of a notice, certificate, permit or other document referred to in paragraph (a) in circumstances where the issue of that notice, certificate, permit or other document might result directly or indirectly in the infringement of a patent.

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and

(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict.

. . . . .

42. Tout brevet accordé en vertu de la présente loi ... et accorde, sous réserve des autres dispositions de la présente loi, au breveté et à ses représentants légaux, pour la durée du brevet à compter de la date où il a été accordé, le droit, la faculté et le privilège exclusif de fabriquer, construire, exploiter et vendre à d'autres, pour qu'ils l'exploitent, l'objet de l'invention, sauf jugement en l'espèce par un tribunal compétent.

5.2(1) Il n'y a pas contrefaçon de brevet lorsque l'utilisation, la fabrication, la construction ou la vente d'une invention brevetée se justifie dans la seule mesure nécessaire à la préparation et à la production du dossier d'information qu'oblige à fournir une loi fédérale, provinciale ou étrangère réglementant la fabrication, la construction, l'utilisation ou la vente d'un produit.

(2) Il n'y a pas contrefaçon de brevet si l'utilisation, la fabrication, la construction ou la vente d'une invention brevetée, au sens du paragraphe (1), a lieu dans la période prévue par règlement et qu'elle a pour but la production et l'emmagasinage d'articles déterminés destinés à être vendus après la date d'expiration du brevet.

(3) Le gouverneur en conseil peut, par règlement, prendre les mesures nécessaires à l'application du paragraphe (2) étant entendu que toute période ainsi prévue doit se terminer à la date qui précède immédiatement celle où expire le brevet.

(4) Afin d'empêcher la contrefaçon de brevet d'invention par l'utilisateur, le fabricant, le constructeur ou le vendeur d'une invention brevetée au sens des paragraphes (1) ou (2), le gouverneur en conseil peut prendre des règlements, notamment:

. . . . .

e) sur toute autre mesure concernant la délivrance d'un titre visé à l'alinéa a) lorsque celle-ci peut avoir pour effet la contrefaçon de brevet.

(5) Une disposition réglementaire prise sous le régime du présent article prévaut sur toute disposition législative ou réglementaire fédérale divergente.

. . . . .

Patented Medicines (Notice of Compliance) Regulations, 1993 SOR/93-133 am. SOR/98-166.

5(1) Where a person files or has filed a submission for a notice of compliance in respect of a drug and wishes to compare that drug with, or make reference to, another drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the register in respect of the other drug,

(a) state that the person accepts that the notice of compliance will not issue until the patent expires; or

(b) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(*c*) is false,

(ii) the patent has expired,

(iii) the patent is not valid, or

(iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

6(1) A first person may, within 45 days after being served with a notice of an allegation pursuant to paragraph 5(3)(*b*) or (*c*), apply to a court for an order prohibiting the Minister from issuing a notice of compliance until after the expiration of a patent that is the subject of the allegation.

(5) In a proceeding in respect of an application under subsection (1), the court may, on the motion of a second person, dismiss the application

(a) if the court is satisfied that the patents at issue are not eligible for inclusion on the register or are irrelevant to the dosage form, strength and route of administration of the drug for which the second person has filed a submission for a notice of compliance; or

(b) on the ground that the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process.

7(1) The Minister shall not issue a notice of compliance to a second person before the latest of

. . . . .

(e) subject to subsections (2), (3) and (4), the expiration of 24 months after the receipt of proof of the making of any application under subsection 6(1), and

5(1) Lorsqu'une personne dépose ou a déposé une demande d'avis de conformité pour une drogue et souhaite en faire la comparaison, ou faire renvoi, à une autre drogue qui a été commercialisée au Canada aux termes d'un avis de conformité délivré à la première personne et à l'égard de laquelle une liste de brevets a été soumise, elle doit inclure dans la demande, à l'égard de chaque brevet inscrit au registre qui se rapporte à cette autre drogue:

a) soit une déclaration portant qu'elle accepte que l'avis de conformité ne sera pas délivré avant l'expiration du brevet;

b) soit une allégation portant que, selon le cas:

(i) la déclaration faite par la première personne aux termes de l'alinéa 4(2)*c*) est fausse,

(ii) le brevet est expiré,

(iii) le brevet n'est pas valide,

(iv) aucune revendication pour le médicament en soi ni aucune revendication pour l'utilisation du médicament ne seraient contrefaites advenant l'utilisation, la fabrication, la construction ou la vente par elle de la drogue faisant l'objet de la demande d'avis de conformité.

6(1) La première personne peut, dans les 45 jours après avoir reçu signification d'un avis d'allégation aux termes des alinéas 5(3)b) ou c), demander au tribunal de rendre une ordonnance interdisant au ministre de délivrer un avis de conformité avant l'expiration du brevet visé par l'allégation.

(5) Lors de l'instance relative à la demande visée au paragraphe (1), le tribunal peut, sur requête de la seconde personne, rejeter la demande si, selon le cas:

a) il estime que les brevets en cause ne sont pas admissibles à l'inscription au registre ou ne sont pas pertinents quant à la forme posologique, la concentration et la voie d'administration de la drogue pour laquelle la seconde personne a déposé une demande d'avis de conformité;

b) il conclut qu'elle est inutile, scandaleuse, frivole ou vexatoire ou constitue autrement un abus de procédure.

7(1) Le ministre ne peut délivrer un avis de conformité à la seconde personne avant la plus tardive des dates suivantes:

. . . . .

e) sous réserve des paragraphes (2), (3) et (4), la date qui suit de 24 mois la date de réception de la preuve de présentation de la demande visée au paragraphe 6(1);

8 While not immediately germane to the particular issues raised here, it is important to note that section 55.2 and the implementing Regulations were, in a sense, ancillary to the principal reform made to the *Patent Act* by the *Patent Act Amendment Act, 1992* . This was the abolition of the compulsory licence under which, subject to the payment of a royalty, generic drug manufacturers had been able to market in Canada a competing drug that infringed another's patent.

9 The effect of the 1992 Act was thus to restore the rights of those holding patents in pharmaceutical products to their position before the introduction of compulsory licensing in 1923 and to bring them back into the mainstream of patent law as it applies to other inventions. Compulsory licences were abolished in Canada in order to comply with Article 1709(10) of the *North American Free Trade Agreement* .

10 However, in order to ensure that a generic company is in a position to have its infringing drug on the market the moment that the patent on the brand-name expires, subsections 55.2(1) and (2) authorise activities that would otherwise constitute an infringement of the patent. Subsection (1) permits use of the patented invention by a "second person" to demonstrate in its new drug submission for an NOC that its drug is equivalent to the patented medicine. Subsection (2) allows a "second person" to stockpile its otherwise infringing product for sale immediately after the expiry of the patent.

11 Although not relevant to the disposition of this appeal, I note that in a recent ruling the World Trade Organisation has upheld the "regulatory work-up" exemption in subsection (1), but not the "stockpiling" exemption in subsection (2): *Canada-Patent Protection of Pharmaceutical Products* (Complaint by the European Communities) (2000), W.T.O. Doc. WT/DS114/R (Panel Report).

12 Subsection 55.2(4) is something of a *quid pro quo* for the concessions contained in subsections (1) and (2), in the sense that it authorises the Governor in Council to make regulations to protect patent holders against competition from infringing pharmaceutical products before the patent expires by linking patent rights to the issue of an NOC.

13 Before the Motions Judge, whose decision is reported as *Apotex Inc. v. Canada (Attorney General)* (1996), [1997] 1 F.C. 518 , Apotex relied on several grounds for alleging that the Regulations were invalid. At the hearing of the appeal, however, the issues were reduced to four, and it is to these that I now turn.

C. Issues and Analysis

Issue 1: Should the appeal be dismissed for mootness or abuse of process?

14 The respondents argued as a preliminary point that the appeal should be dismissed as moot because, as a result of a decision by the Supreme Court of Canada in favour of Apotex (*Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*, [1998] 2 S.C.R. 193 (S.C.C.)), the Minister issued it with an NOC for norfloxacin. Accordingly, the request for an order directing the Minister to issue an NOC would seem redundant. Moreover, since the attack on the

validity of the Regulations provided the basis for the order sought to direct the Minister to issue the NOC, the request for declaratory relief, too, had been overtaken by events. Further, it was argued, it was not appropriate to consider aspects of the validity of the Regulations beyond those raised by the facts of this case.

15 The decision of the Trial Division under appeal in the instant case was rendered before the litigation referred to above had been decided by the Supreme Court of Canada. Counsel for Apotex conceded, in effect, that the request for an order directing the Minister to issue an NOC was now moot. However, the validity of the Regulations remains a live issue, and therefore a declaration of their legal status would still serve a useful purpose. As a major generic drug manufacturer and marketer, Apotex has an interest in the validity of the Regulations that is not confined to this particular case.

16 In addition, while Apotex had indeed secured an NOC authorising it to market norfloxacin, this regulatory approval only applies to the particular allegation on which Apotex had successfully answered the prohibition proceeding brought by Merck Frosst. This was that Apotex was not infringing the norfloxacin patent, of which Merck Frosst was an exclusive sub-licensee, because Apotex had purchased norfloxacin in bulk from a supplier who had manufactured it under a compulsory licence from Merck Frosst.

17 However, when Apotex has exhausted this source it will need another NOC to permit it to market norfloxacin, and battle is likely to be rejoined on whether there is another ground on which Apotex may successfully allege that it is not infringing Merck Frosst's norfloxacin patent. Indeed, this Court has already upheld a decision of a Trial Division judge who concluded that an allegation of a non-infringing process for producing norfloxacin was unfounded because the process relied on was not substantially different from Merck Frosst's: *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)* (1998), 80 C.P.R. (3d) 110 (Fed. T.D.) , aff'd (1999), 86 C.P.R. (3d) 489 (Fed. C.A.) . At least one other decision respecting an allegation of a different non-infringing process for manufacturing norfloxacin is apparently on its way to this Court: *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)* (1998), 84 C.P.R. (3d) 492 (Fed. T.D.) .

18 Despite the costs, both public and private, inevitably associated with proceedings instituted *seriatim* , it is settled law in this Court that a "second person" may make a series of distinct allegations of non-infringement and thereby force the patent holder to institute a new prohibition proceeding to counter each one: *Apotex Inc. v. Canada (Minister of National Health & Welfare)* (1997), 153 D.L.R. (4th) 68 (Fed. C.A.) , leave to appeal refused, [1998] 1 S.C.R. viii (S.C.C.) . In order to prevent abuse of the process of the Court, this should only be permitted when the subsequent allegation is based on new facts, such as the later discovery of another process for making the medicine that does not infringe the patent.

19 The Motions Judge considered a different abuse of process argument. This was to the effect that this proceeding was an abuse of the process of the Court because Apotex had had an opportunity to challenge the validity of the NOC Regulations in the earlier prohibition proceeding brought by Merck Frosst with respect to norfloxacin, in which Apotex eventually succeeded in the Supreme Court of Canada: see *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)* , *supra* .

20 The learned Motions Judge was of the view that Apotex could have raised the validity of the Regulations in that proceeding and that, since *res judicata* and issue estoppel apply in principle to prohibition proceedings brought under the NOC Regulations, the Court could refuse to permit Apotex to raise it in the present proceeding. However, in view of the uncertainty about the Regulations when the litigation was started, the obvious and continuing interest of Apotex in having the validity of the Regulations determined, and the fact that the parties had prepared full argument on the merits, the Motions Judge exercised his discretion not to dismiss the proceeding on this ground without getting to the merits.

21 I am not persuaded that the Motions Judge erred in the exercise of his discretion to hear and determine the application for judicial review in so far as it seeks a declaration that the Regulations are *ultra vires* , despite Apotex' failure to challenge the validity of the Regulations in the previous prohibition proceedings dealing with the same medicine.

22 For reasons similar to those given by the Motions Judge on the abuse of process point, I would not dismiss the request for a declaration of invalidity as moot. However, this does not necessarily mean that the Court will be prepared to determine the validity of the Regulations in the abstract, rather than on the basis of the facts of this case.

Issue 2: Does subsection 55.2(4) only authorise the making of Regulations that apply to a person who has taken advantage of subsections 55.2(1) or (2) in respect of the new drug product that is the subject of the prohibition proceeding?

23 Apotex made its new drug submission ("NDS") for norfloxacin in 1989, well before the statutory abolition of compulsory licences by the 1992 Act and the statutory linkage of patent protection with the issue of NOCs. It contended that its NDS could not validly be brought within the scope of the Regulations. It is true that subsection 5(1) of the Regulations states that they apply to "...a person who files or, *before the coming into force of the Regulations has filed* a submission for a notice of compliance....". However, in the submission of Apotex, Parliament did not authorise this.

24 Apotex argues that the underlined words in subsection 5(1) are invalid because they purport to give the Regulations retroactive effect. In the absence of an express or necessarily implied grant of statutory power to this effect, it is normally presumed that Parliament does not intend a regulation-making power to be exercised retroactively. This argument is considered separately as Issue 3.

25 In addition, Apotex challenges the validity of the Regulations on a broader basis. It will be convenient at this point to set out again the part of the provision on which Apotex relies for this argument.

> 55.2(4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2) including, without limiting the generality of the foregoing, regulations
>
> 55.2(4) Afin d'empêcher la contrefaçon de brevet d'invention par l'utilisateur, le fabricant, le constructeur ou le vendeur d'une invention brevetée au sens des paragraphes (1) ou (2), le gouverneur en conseil peut prendre des règlements, notamment:

26 Apotex argues that this provision expressly imposes two limitations on the Governor in Council's regulation-making power. First, regulations can only be made to the extent that the Governor in Council considers them necessary for preventing the infringement of a patent. However, in view of the subjective terms in which this power is granted, counsel for Apotex wisely abandoned his previous argument that, since the Regulations covered situations in which there may have been no breach of a patent, they were not "necessary for preventing the infringement of a patent". I would only note at this point that the broad, subjective nature of the power delegated by subsection 55.2(4) may have a more general relevance in determining the validity of the Regulations.

27 Second, such regulations can only be applied to a "second person" who has used a patented invention "in accordance with subsection (1) or (2)". This means, according to counsel, that since Apotex has not availed itself of either subsection, because it made its NDS before subsection 55.2 was enacted, the Regulations cannot apply to the submission for an NOC for norfloxacin that is under consideration here. Further, since Apotex had a licence to use the patented product, it did not need the benefit of subsection 55.2(1) in any event.

28 Hence, the argument goes, subsection 5(1) of the Regulations is invalid in so far as it purports to extend the Regulations to a submission filed, but not decided, before the Regulations came into effect, or to apply them to second persons who for other reasons have not availed themselves of the benefit of subsections 55.2(1) or (2).

29 In addition to the plain meaning of subsection 55.2(4), counsel for Apotex relies on the Regulatory Impact Analysis Statement issued with the Regulations as evidence of the legislative intent underlying the scheme. It says that regulations are needed to ensure that generic drug companies do not abuse the authorisation by subsections (1) and (2) of what would

otherwise have been a patent infringement: using the patented invention as a comparator for the purpose of obtaining an NOC and stockpiling, and then starting to sell an infringing product prior to the expiry of the patent.

30 Hence, if the "second person" has not availed itself of subsection (1) or (2), it will not have gained an advantage which it could abuse, and thus it is outside the mischief at which subsection 55.2(4) is aimed. If the "brand-name" company believes that a generic product infringes its patent, it is open to it to institute an action for infringement.

31 Moreover, counsel submitted, the purpose of the *Patent Act Amendment Act* , 1992 was to abolish compulsory licences for infringing pharmaceutical products, including those already granted after December 20, 1991 (subsection 12(1)) and, with some exceptions, to place patent holders for these products in much the same position as other patentees. If a generic manufacturer can produce and market a patented medicine without infringing the patent (for example, by discovering a non-infringing process when the patent is for the product manufactured by a particular process, or by obtaining a licence from the patentee), it is free to do so, provided that it obtained an NOC as a result of satisfying the Minister that its product is safe and effective.

32 However, in recognition of the special features and importance of the pharmaceutical industry, the *Patent Act Amendment Act, 1992* in some ways limits the rights of pharmaceutical patent holders. For example, compulsory licences granted prior to December 20, 1991 remain valid (subsection 11(1)), and the Patented Medicines Review Board was given additional powers over the prices charged for patented medicines (section 7).

33 Subsections 55.2(1) and (2) are the modifications to the statutory restoration of patent holders' rights relevant to this appeal. They are designed to ensure that patentees do not enjoy a *de facto* monopoly beyond the life of the patent by virtue of the length of time that it would take for a generic to obtain an NOC if it could not start its "regulatory work-up", or its manufacture and stockpiling of the product, until the patent had expired. Hence, it was argued, in order to ensure minimal deviation from the Act's central purpose, subsection 55.2(4) should be interpreted to authorise regulations that enhance the rights of patentees only in situations where a "second person" has taken advantage of the relaxation of patentees' rights contained in subsections (1) and (2).

34 This narrow interpretation of the scope of subsection 55.2(4) is said to be justified because there is nothing in the overall scheme of the Act to indicate that it was the intention of Parliament to afford patentees of pharmaceutical products a degree of protection, such as that conferred by the Regulations, that goes well beyond that enjoyed by patentees of other products who must rely on the normal legal remedies available in the courts for preventing, or seeking compensation for, patent infringement.

35 The learned Motions Judge rejected this argument, preferring an interpretation of subsection 55.2(4) in which the words, "any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2)" are interpreted as "describing the general class of persons to whom regulations may be made applicable", not the activity in which a second person has engaged with respect to the particular product that is the subject of the proceeding. Hence, he concluded (*supra* , at p. 550):

> ..regulations under s-s. 55.2(4) may be adopted, with reference to all applicants for an NOC who did not have a vested right to a license at the time the amending Act was adopted, whether or not they had already applied.

36 Any other interpretation, he held, would lead to the anomaly of giving a compulsory licence to Apotex and others whose applications for an NOC were in the pipeline when the new statutory regime came into effect, even though the provisions creating such licences were repealed when the *Patent Act Amendment Act, 1992* came into force and compulsory licences granted before that date, but after December 20, 1991, were invalidated.

37 Counsel seized on this part of the Motions Judge's reasons as indicative of a confusion between an NOC and a compulsory licence. Counsel pointed out that, before 1993 a "second person" who produced a pharmaceutical product by a non-infringing process did not require a compulsory licence, and thus would not have to have paid a royalty to the patent holder on the sales. It would be consistent with the new regime, it was argued, that NOC applications in the

pipeline be examined by the Minister for safety and effectiveness, and an NOC issued if they satisfied these criteria. If, when the product was marketed, a "first person" believed that its patent was thereby infringed it could institute an action for patent infringement in the normal manner.

38 Despite the argument seductively advanced on behalf of Apotex by Mr. Radomski, I am unable to accept it. The text of subsection 55.2(4) is linguistically capable of bearing either of the meanings that were posited in argument. However, if Parliament had intended to limit the scope of the regulation-making power to those who had taken advantage of subsection (1) or (2), it would have been more natural if the subsection had referred to "any person who *has made, constructed, used or sold* a patented invention in accordance with subsection (1) or (2) .....". The use of the present tense is more apt to describe a generic drug manufacturer at large, rather than one who *has done* any of the listed things on a particular occasion.

39 While I recognise that the words chosen are a singularly odd way of expressing this idea, I find some comfort in the French version of subsection 55.2(4) which does not use the word "person", and uses the expression "au sens des paragraphes (1) and (2)", instead of "en conformité avec les paragraphes (1) and (2)" meaning "in accordance with".

40 Since the words of the statutory text do not point ineluctably to one conclusion, does the statutory context resolve the ambiguity? In my opinion, the nature and subjective definition of the purpose for which the power may be exercised supports a broad interpretation: "...such regulations as the Governor in Council considers necessary for preventing the infringement of a patent...".

41 Thus, the Governor in Council could well consider that any second person, who was seeking an NOC for a new medicine that was on a first person's patent list, might be tempted, if the NOC were granted, to market its product prior to the expiry of the patent, and leave the first person to resort to whatever rights it was able to establish in a patent action. Given the reluctance of the courts to grant interlocutory injunctions in patent cases, and the length of time that it typically takes for a keenly contested patent matter to get to trial, the second person, armed with an NOC, would be able, in effect, to help itself to a *de facto* compulsory licence. The "royalty" payable would be the figure at which the dispute was settled, or the sum that a court ultimately awarded by way of damages or an accounting of profits following a finding of infringement.

42 It would certainly have been consistent with the abolition of the compulsory licence for Parliament to have conferred a regulation-making power that was wide enough to prevent this kind of abuse. Viewed in this light, it would seem immaterial to the legislative intent whether or not the second person had taken advantage of the relaxation in patent law effected by subsection (1) or (2) with respect to a particular drug.

43 Counsel for Apotex argued that this interpretation offends the scheme of the 1992 Act because, if accepted, it would create new rights for patentees, rather than simply restoring rights removed by the previous compulsory licensing provisions. However, it is more accurate to say that the Act creates only a new remedy for protecting the existing rights of patentees from infringement, namely enforcement proceedings for marketing a medicine without an NOC.

44 Of course, there will be situations in which the second person is able to establish, in either a prohibition proceeding or a private patent action, that its product is made by a non-infringing process or that the first person's patent is invalid. Meanwhile, the second person will have been denied an NOC and kept out of the market. Again, it may be asked, how is this result consistent with the stated legislative aim of protecting patentees from infringement?

45 The answer, surely, is that whether a second person is infringing may not be self-evident, but will require proof, which may be highly technical or inconclusive, or the determination of difficult legal questions about the construction or validity of the patent. An NOC is withheld from all second persons, even those who ultimately succeed in defeating the first person's claim, in order to protect patentees against those who, if granted an NOC, might be tempted to infringe. Moreover, since the time taken to process an NOC application means that the 24 months' statutory stay will often have expired by the time that the process is complete, the regime may be less draconian in operation than it may seem on paper.

46 For these reasons, and in accordance with the general directive of section 12 of the *Interpretation Act* , R.S.C. 1985, c. I-21, I have concluded that subsection 55.2(4) should be construed broadly, so that its application is not limited to those who have availed themselves of the benefits conferred by subsection (1) or (2) in connection with the particular medicine in dispute.

47 I recognise that the Regulatory Impact Analysis Statement supports the more limited interpretation advanced on behalf of Apotex, as does a letter of February 5, 1993 from the Minister of Consumer and Corporate Affairs to the Canadian Drug Manufacturers Association (CDMA), in which the Minister said of subsection 55.2(4):

> It is designed to enable the Government to mitigate any harm flowing from its decision to allow those activities that would otherwise constitute a patent infringement.

48 However, I see no reason to regard these as necessarily more reliable guides to Parliament's intention than the fact that, in enacting the Regulations, the Governor in Council obviously took a broader view of the legislative power delegated by subsection 55.2(4) than that indicated by these documents.

49 Although this suffices to dispose of Apotex' main contention on the validity of the Regulations, I should also deal with another line of argument that was debated at some length at the hearing. This concerns the relationships between subsections 55.2(1) and (2) of the Act on the one hand, and subsection 5(1) of the Regulations on the other. The question is whether the persons caught by subsection 5(1) must *by definition* also have availed themselves of subsection (1) or (2). If so, the Regulations will still be valid, even if subsection 55.2(4) is construed as narrowly as Apotex argues that it should be.

50 Subsection 5(1) provides that the Regulations apply to persons who have filed a submission for an NOC and wish "to *compare that drug with, or make reference to a drug* that has been marketed in Canada pursuant to a notice of compliance issued to a first person in respect of which a patent list has been submitted ...". On the other hand, subsection 55.2(1) refers to a person who has used the "*patented invention* " for the purpose of obtaining regulatory approval for that person's new medicine.

51 Counsel for Apotex argued that, contrary to the assumption on which subsection 5(1) of the Regulations seems to have been drafted, a person could use a drug for comparison or reference purposes without thereby necessarily making use of a "patented invention" within the meaning of subsection 55.2(1). He submitted that this would be true, for example, in the case of a "product by process" patent, since to compare two drugs in order to obtain an NOC would not involve use of the "patented invention", which was not simply the drug, but the drug as made by a particular process. The process by which the medicine is manufactured is irrelevant to the comparative exercise undertaken to establish the equivalence of the medicines for the purpose of demonstrating safety and effectiveness.

52 I cannot accept this argument. In *Deprenyl Research Ltd. v. Apotex Inc.* (1994), 55 C.P.R. (3d) 171 (Fed. T.D.) aff'd(1995), 60 C.P.R. (3d) 501 (Fed. C.A.) , it was held that a claim for a particular process for producing a product, or a "pure process" claim, was not covered by the NOC Regulations because it was not a "claim for the medicine itself" within the meaning of section 2. However, the Regulations do include patents that contain a claim for a medicine when made by a particular process, or "a process dependant claim".

53 Accordingly, since the product is always included in the patent's claim, whenever a generic manufacturer submits an abbreviated new drug submission and compares its product with a product on a first person's patent list, it is using "a patented invention" (assuming, of course, that the patent is subsequently held to be valid), whether it is the subject of a "process dependant patent" or a "product only" patent.

54 Although initially made prior to the introduction of the Regulations, Apotex' submission for an NOC for its noxfloxacin, including the comparative analysis, remained before the Minister after March 1993, until July when the licence arrangement came into effect. This, together with Apotex' possession for regulatory purposes of a sample of the

patented product, constituted use of a patented invention within the meaning of subsection 55.2(1): see *Smith Kline v. Douglas Pharmaceuticals Ltd.*, [1991] F.S.R. 522 (New Zealand C.A.) ; *Roche Products Inc. v. Bolar Pharmaceutical Co.*, 733 F.2d 858 (U.S. C.A. Fed. Cir., 1984) ; *Hoffmann-La Roche Ltd. v. Canada (Minister of National Health & Welfare)* (1996), 67 C.P.R. (3d) 484 (Fed. T.D.) , at 489, aff'd(1996), 70 C.P.R. (3d) 1 (Fed. C.A.) and 206.

55 For these reasons Apotex has not established that the NOC Regulations are in a substantive sense *ultra vires* subsection 55.2(4).

Issue 3: In the absence of an express statutory power authorising the Governor in Council to enact regulations with retroactive effect, are the Regulations invalid in so far as they purport to apply to NOC submissions that had been made, but not decided, when the Regulations came into effect?

56 In my view, the application of the Regulations to new drug submissions that were in the pipeline when the 1993 Regulations came into effect did not engage the presumption against retroactivity. No vested right was thereby abrogated: in the absence of a clear legislative indication to the contrary, no one has a legal right to have an application for a statutory benefit determined in accordance with the eligibility criteria in place when the application was made. Applicants for statutory rights normally have no more than a hope that the granting authority will render a favourable decision (see, for example, *Director of Public Works v. Sang*, [1961] A.C. 901 (Hong Kong P.C.)), although a refusal of an application may be set aside if not in accordance with the law in force when the decision was made.

57 By virtue of the *Interpretation Act* , R.S.C. 1985, c. I-21, paragraph 44(*c*), the presumption against retroactive operation of the repeal of an enactment protects rights that are both "accrued" and "accruing". If Apotex' application to the Minister did not constitute an accrued right to an NOC on the basis of statutory criteria in place when the application was made, was its right "accruing" within the meaning of paragraph 44(*c*), and thus presumptively not subject to the regulation-making power conferred on the Governor in Council by subsection 55.2(4) of the *Patent Act* ?

58 Writing a separate concurring opinion in *Scott v. College of Physicians & Surgeons (Saskatchewan)* (1992), 95 D.L.R. (4th) 706 (Sask. C.A.) , Cameron J.A. held (at p. 719) that the identical provision in paragraph 23(1)(c) of *The Interpretation Act* , R.S.S. 1978, c. I-11 protected only rights that would inevitably arise in due course, and not those that may

> ripen into an acquired or accrued right or obligation at a future time. As will be readily apparent, the implications of that in relation to the effectiveness of repeal are simply too wide to be acceptable.

59 A similar point was made in *Hutchins v. Canada (National Parole Board)*, [1993] 3 F.C. 505 (Fed. C.A.) , leave to appeal refused [1994] 1 S.C.R. vii (S.C.C.) , where the Court held that the right of a prisoner to a hearing under a repealed provision in the statute was not "accruing" at the time of the repeal, even though the applicant had taken all the steps that he could take to institute the proceeding prior to the repeal.

60 On the other hand, *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 (Fed. C.A.) , aff'd [1994] 3 S.C.R. 1100 (S.C.C.) , provides an example of an "accruing" right within the scope of the presumption. In that case, the Minister had completed the regulatory approval process when the 1993 Regulations came into effect, so that all that remained was the formal step of issuing the NOC. In other words, at the time of the repeal, the grant of an NOC did not depend on a determination by the Minister, but followed inevitably from the approval of the application.

61 It was therefore within the authority for the Governor in Council conferred by subsection 55.2(4) to provide expressly in the Regulations that they apply to submissions made before they came into effect, but not yet decided by the Minister. Accordingly, it was not unlawful for the Minister to refuse to issue an NOC to Apotex for the medicine norfloxacin, even though the submission was made before the grant of regulatory approval was linked to patent protection.

Issue 4: Are the Regulations invalid because they were made in breach of an undertaking by the Minister of Consumer and Corporate Affairs to the Canadian Drug Manufacturers Association that it would be consulted before regulations were enacted under subsection 55.2(4)?

(i) Factual background

62 In July 1992 the CDMA was advised by a senior official in National Health and Welfare that regulatory approval of new drugs through the issue of a Notice of Compliance would be linked to the protection of the rights of existing patent holders although, as then drafted, Bill C-91 contained nothing to this effect.

63 In the following month, the Association responded to record its opposition to any such scheme. These sentiments were repeated in November during the public hearings while Bill C-91 was in Committee stage. Meanwhile, the Pharmaceutical Manufacturers Association of Canada, a not-for-profit corporation representing primarily "brand-name" pharmaceutical companies, urged before the Committee that such a linkage be established through regulations.

64 In December 1992, the CDMA met with officials from the Department of Consumer and Corporate Affairs which had the carriage of the amendments to the *Patent Act* . The officials advised the Association that an amendment to Bill C-91 was to be introduced which would authorise the Governor in Council to enact regulations linking the previously separate issues of possible patent infringement and the grant of regulatory approval by the Minister of National Health and Welfare for new drugs.

65 Despite the strong objection of the CDMA, which it communicated in letters to the Minister of Consumer and Corporate Affairs, and to the Minister of Industry, Science and Technology Canada, Bill C-91 was amended at third reading to add what became subsection 55.2(4) of the *Patent Act* . This authorised the making of regulations of the kind to which the CDMA had objected.

66 After the passage of the Bill in the House of Commons, including this enabling provision, industry representatives made further submissions in January 1993 before the Senate Committee that was considering it. Meetings were also held at this time between the CDMA and a Deputy Minister of National Health and Welfare at which it was said that the Government intended to consult with the industry before enacting implementing regulations.

67 In a letter dated February 5, 1993 written to Mr. Kay, the Chair of the CDMA, the new Minister of Consumer and Corporate Affairs, Mr. Vincent, reiterated the reasons for the amendment to Bill C-91 to which the CDMA had objected. He explained that the rationale for the proposed regulations was the need to minimise harm to patent holders that might otherwise result from the provisions permitting generic drug companies to use the patented product to obtain an NOC and to stockpile the product pending the expiry of the patent. The letter ended with the following sentence: "Rest assured that you will be consulted before any such regulations are established."

68 On February 15, 1993, Bill C-91 came into force as the *Patent Act Amendment Act, 1992* , with the exception of section 55.2, which includes the controversial provision enabling the making of regulations. This section came into force on March 12, 1993, along with the *Patented Medicines (Notice of Compliance) Regulations* that created the statutory scheme implementing the linkage of the protection of patent rights and the issue of an NOC. Despite the assurance contained in the Minister's letter of February 5, 1993, the CDMA was not consulted on the content of the Regulations prior to their enactment.

69 The Regulatory Impact Analysis Statement issued with the Regulations stated that, while the principal stakeholders had been consulted on the principle of Bill C-91, "given the importance of quickly giving effect to the new statute" there had been no consultation on the text of the Regulations prior to their coming into force. Under the Federal Regulatory Plan early notice of regulations is normally given so that those interested may comment on them before they are promulgated. However, since these Regulations were new, the Government undertook to consult on their operation and to refine them if and as necessary.

70 Over the next few years there were extensive consultations with industry members and their representative associations. As a result of the experience obtained from the operation of the Regulations and, no doubt, from the consultations, extensive amendments were made to the Regulations, which came into force in 1998 as the *Patented Medicine (Notice of Compliance) Regulations* SOR/98-166.

71 Among other things, the amendments which, for the most part, favoured generic drug manufacturers, reduced from 30 months to 24 months the automatic stay on the grant of an NOC that comes into effect when a proceeding for a prohibition is instituted: subsection 6(2) of the 1998 Regulations, amending paragraph 7(1)(*e*) of the 1993 Regulations. The statutorily imposed stay is the aspect of the Regulations that generic drug manufacturers believe to be perhaps most damaging to their interests.

72 While of a relatively technical nature, these amendments cumulatively may have mitigated the adverse impact that the statutory linkage of patent protection and regulatory approval had on generic manufacturers. Nonetheless, the essential principle and general design of the scheme remained in place.

(ii) Subordinate legislation and legitimate expectations

73 There is an easy answer to the question of whether the 1993 Regulations are invalid because they were enacted without the consultation that the CDMA had been promised by the Minister. It is that, in the absence of any statutory requirement of consultation prior to the promulgation of regulations, the duty of fairness is the only legal source for a legal obligation to consult.

74 However, the duty of fairness does not apply to the exercise of powers of a legislative nature (*Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.)), including regulations that apply to a particular industry (*Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (Fed. C.A.) , leave to appeal refused [1994] 2 S.C.R. vi (S.C.C.) ; *Carpenter Fishing Corp. v. Canada* (1997), [1998] 2 F.C. 548 (Fed. C.A.) , leave to appeal refused [1998] 2 S.C.R. vi (S.C.C.)). Accordingly, there was no legal obligation to consult with the CDMA prior to the enactment of the 1993 Regulations.

75 Nor, according to this argument, could the Minister's undertaking to consult attract a legal duty to do so. This is because the basis of such a duty could only be that it created a legitimate expectation of consultation and, since this doctrine is no more than an aspect of the duty of fairness, it can have no application to the exercise of a power to which the duty itself does not apply.

76 Indeed, in *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) , at 557-560, it was specifically said that the doctrine of legitimate expectations has no application to the exercise of legislative powers. In addition, in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.) , at 1204, the Court rejected a challenge to the validity of municipal bylaws that was based on an allegation that they were passed in breach of a legitimate expectation of prior consultation.

77 This was the ground on which the learned Motions Judge dismissed the legitimate expectation argument in the instant case. He buttressed it by noting that, in any event, the statutory power in question, namely the power to enact regulations, was conferred on the Governor in Council which itself gave no procedural undertaking to the CDMA and could not be bound by the one given by the Minister.

78 It is settled law in Canada that the duty of fairness does not apply to the exercise of powers of a legislative nature, which would include the Regulations impugned in this case. Although they applied to a relatively small and readily identifiable group, the Regulations are at the "legislative" end of the spectrum of powers ranging from the legislative, through the administrative, to the judicial. This is because they were made under a broad statutory discretion by the Governor in Council conferred by subsection 55.2(4) ("The Governor in Council may make such regulations *as the*

Governor in Council considers necessary "), and are of general application to all those engaged in the pharmaceutical industry.

79 However, it does not necessarily follow that subordinate legislation can lawfully be made in breach of a categorical and specific assurance of prior consultation given to an individual by a responsible minister of the Crown in the course of discharging departmental business. Nor, on closer examination, does the case law so provide.

80 While in the *Canada Assistance Plan* case, *supra* , the Supreme Court of Canada clearly reiterated (at p. 558) the orthodox position that the duty of fairness does not apply to legislative powers so as to require prior notice before their exercise, that case does not, in my opinion, also support the view that the legitimate expectations doctrine is equally inapplicable.

81 The issue in that case relevant here concerned the legal effect of a breach of section 8 of the *Canada Assistance Plan* , R.S.C. 1970, c. C-1. This provided that the terms of the agreement entered into under the Plan would not be amended by the federal Government except with the consent of the Province, and could only be terminated by either party on the giving of twelve months' notice of an intention to terminate.

82 The Court held that this provision did not impose a substantive fetter on the right of Parliament from time to time to pass such legislation within its constitutional powers as it thinks fit. The Court then considered whether this provision created a legitimate expectation of prior consultation before a unilateral amendment to the Plan was made, and whether the federal Government acted unlawfully when it introduced legislation in Parliament to amend the funding formula without consulting the Province.

83 The Court dismissed the argument (at pp. 559-560) on the ground that, to invoke the doctrine of legitimate expectations to create a procedural entitlement in this case would unduly limit the exercise by Parliament of its power to enact legislation in the normal manner and form on matters within its constitutional competence, and thus "place a fetter on this essential feature of democracy."

84 Similar constitutional considerations do not apply to the exercise of *delegated* legislative powers which is not subject to the same level of scrutiny as primary legislation that must pass through the full legislative process. Moreover, the procedural rights created by the legitimate expectations doctrine are always subject to proof that, in particular circumstances, the public interest requires that administrative action be taken promptly without complying with the promised procedures.

85 The *Old St. Boniface* , *supra* , case might seem to be more on point because it concerned the enactment by a municipality of zoning bylaws which, like regulations, are a species of delegated legislation. However, in dismissing the argument that a promise by a committee Chair of further consultation created a legitimate expectation, the Court emphasised (at p. 1204) the presence of a procedural code specifically created by the statute for the enactment of zoning bylaws. For the courts to add to this process through the doctrine of fairness, by way of the legitimate expectations doctrine, would be both unnecessary for achieving fairness and inconsistent with the statutory procedural scheme which was "an elaborate structure designed to enable all those affected not only to be consulted but to be heard."

86 In contrast, there are no statutory provisions requiring consultation with those interested before regulations are enacted under the *Patent Act* . There is no reason, therefore, why, to borrow the words of Sopinka J. in *Old St. Boniface* , *supra* (at p. 1204), the Court in this case should not, supply

> the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

87 Nor do I think that *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) is opposed to the application of the legitimate expectations doctrine to delegated legislative powers so as to require prior consultation before they may be validly exercised. In that case L'Heureux-Dubé J. stated (at p. 839, para 26), that in

Canada a legitimate expectation can increase the procedural content of the duty of fairness beyond that which it would otherwise have had. I infer from the context in which this statement was made that L'Heureux-Dubé J. simply intended to make it clear that in our law the doctrine does not give rise to substantive rights, contrary, for example, to the position recently taken in England by the Court of Appeal in the important case of *R. v. North & East Devon Health Authority*, [1999] Lloyd's Rep. 306 (Eng. C.A.) .

88 Hence, I do not interpret L'Heureux-Dubé J. also to be saying that a representation that a person will have an opportunity to participate can never give rise to a legitimate expectation of participatory rights in respect of administrative action to which the duty of fairness would not otherwise apply. Indeed, later in the same paragraph (at p. 840), L'Heureux-Dubé J. committed herself to the general proposition that the doctrine of legitimate expectations is based on the premise that it is generally unfair for decision-makers to go back on a procedural undertaking. She did not limit this statement of principle to instances where the effect of applying the legitimate expectations doctrine is simply to enhance the content of the duty of fairness in a situation where it would otherwise have imposed some, but lesser, participatory rights.

89 Indeed, there are decisions holding that the doctrine of legitimate expectations may apply to a public authority that represents that it will follow a certain procedure before exercising a power to which the duty of fairness would probably not otherwise extend, including those of a policy or legislative nature. See, for example, *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* , *supra* ; *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Alta. Q.B.) and cases cited therein, aff'd on other grounds (1994), 157 A.R. 169 (Alta. C.A.) , leave to appeal refused [1995] 2 S.C.R. vii (S.C.C.) ; *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Ont. Div. Ct.) .

90 However, not all decisions point in this direction: see, for example, *Sunshine Coast Parents for French v. Sunshine Coast School District No. 46* (1990), 44 Admin. L.R. 252 (B.C. S.C.) , which has been the subject of trenchant criticism: see David J. Mullan, "Confining the Reach of Legitimate Expectations" (1991), 44 Admin. L.R. 245 .

91 It is also of interest that other common law jurisdictions have been prepared to apply the legitimate expectations doctrine in its procedural sense to the exercise of rule-making powers, especially when, as here, the delegated legislation applies most immediately to a defined group, even though, like Canada, these jurisdictions do not normally apply the duty of fairness to legislative powers or policy-based decisions: see, for example, *R. v. Liverpool Corp.*, [1972] 2 Q.B. 299 (Eng. C.A.) ; *Council of Civil Service Unions v. Minister for Civil Service* (1984), [1985] 1 A.C. 374 (U.K. H.L.) ; *R. v. Lord Chancellor's Dept.* (June 22, 1993), Doc. CO/991/93 (Eng. Q.B.) ; Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (North Ryde, N.S.W; Law Book, 1993), pp. 754-56.

92 There is also impressive support in the secondary literature for the proposition that the creation of a legitimate expectation of consultation should limit the general principle that the duty of fairness does not apply to the exercise of powers of a legislative nature: see, for example, David J. Mullan, "*Canada Assistance Plan* — Denying Legitimate Expectation A Fair Start?" (1993), 7 Admin. L.R. (2d) 269 , and the particularly valuable analysis by Joan G. Small, "Legitimate Expectations, Fairness and Delegated Legislation" (1994-95), 8 Can. J. Admin. L. & Practice 129.

93 A somewhat different view is advanced by David Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997), 35 Osgoode Hall L.J. 139, 188-193, where the author argues that the essential problem with the common law in this area is its unnuanced refusal to extend the duty of fairness, so as to confer on those affected a general right to participate in the legislative process prior to the enactment of delegated legislation or the making of other policy-based decisions.

94 To impose a duty on rule-makers to consult, or to engage in some other form of public participation only when a legitimate expectation of a procedural nature has been created as a result of the conduct of officials, Wright argues, is an oblique and incomplete solution to the more basic problem: the failure of the law to strengthen the democratic legitimacy

of delegated legislation by imposing through the common law duty of fairness a process in which those interested are entitled to participate.

95 However, in my view the interests protected by the doctrine of legitimate expectations are not the same as those protected by a general duty to afford an opportunity to those affected to participate in the rule-making exercise. The bases of this latter duty are the democratic values of accountability, the claim of the governed to attempt to influence the content of the law to which they will be subject, and the belief that a better considered measure is likely to emerge from a consultative process. In contrast, holding government to a procedural undertaking that was solemnly given on its behalf to an individual is more a matter of individual justice.

96 When a legitimate expectation arises from an agency's past practice, or non-statutory procedural guidelines, it serves to preclude procedural arbitrariness, not the actual expectation of the individual who may have been unaware of its existence. However, where the legitimate expectation arises from a promise or undertaking, categorically and specifically given to an individual or a defined group, the rationale for holding the government to it derives from the individual's reliance interest or, in the absence of a detrimental reliance, from the individual's right to expect that, in the absence of a compelling reason for not so doing, the government will act with basic decency by keeping promises that it makes to individuals.

97 The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power through the breach of an undertaking. These are among the traditional core concerns of public law. They are also essential elements of good public administration. In these circumstances, consultation ceases to be a matter only of political process, and hence beyond the purview of the law, but enters the domain of judicial review.

98 Accordingly, in my view the legitimate expectations doctrine is not simply a branch of the duty of fairness, in the sense that it serves the same purposes as the participatory rights conferred by the duty of fairness. Hence, there is no reason to limit its reach to the exercise of statutory powers to which the duty applies.

99 On the other hand, as with the duty of fairness, a breach will lead to the imposition of procedural duties, generally of a participatory nature, on the person or body empowered to take some administrative action, rather than requiring a particular substantive outcome to the exercise of power. Indeed, when in *Baker v. Canada (Minister of Citizenship & Immigration)* , *supra* , at p. 839, para 26, the Supreme Court of Canada recently located the legitimate expectations doctrine within the duty of fairness it was in response to an argument that a person may have a legitimate expectation of receiving a substantive, and not merely a procedural benefit. And, in the *Canada Assistance Plan* case, *supra* , the Court's concern was to preserve the sovereignty of Parliament from the imposition of novel manner and form requirements on the enactment of legislation. However, in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* , *supra* , where no contrast was made with substantive rights, it was said only that, as developed in the English cases, the legitimate expectations doctrine was an *extension* of the duty of fairness.

100 Therefore, in the absence of binding authority to the contrary, I conclude that the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need (see *R. v. Lord Chancellor's Dept.* (Q.B.D. Crown Office List; June 22, 1993; CO/991/93)).

101 A court may set aside, or declare invalid, subordinate legislation made in breach of a legal duty to consult: *R. v. Secretary of State for Health* (1990), [1992] 1 All E.R. 212 (Eng. Q.B.) , at 225. For this purpose it should not matter whether the duty arose from statute or by virtue of a promise that created a legitimate expectation of consultation. It remains to consider whether a legitimate expectation arose on the facts of this case and, if it did, whether the Regulations were enacted in breach of it.

(iii) Did a legitimate expectation arise on these facts?

102 Whether a promise by a public official or body that consultation will precede administrative action gives rise to a legitimate expectation that attracts a legal obligation to consult depends on the surrounding facts. The question has both factual and normative aspects: *would* a reasonable person think that the promise was serious, and *should* a reasonable person be entitled so to think?

103 On the facts of this case, I have no doubt that the words used were capable of creating a legitimate expectation that the Minister *would* consult the CDMA before any regulations made under subsection 55.2(4) came into effect. This is because of the specific and categorical nature of the assurance of consultation, given in a letter written by the Minister responsible for the development of regulations in response to the concerns expressed by the Association in the course of discussions about the course on which the Government appeared set.

104 I do not think that it is necessary for the minister to have gone further in the letter by, for example, proposing a timetable for the consultation process. I note that in the *Liverpool Corp.* case, *supra* , a legitimate expectation was held to have been created when the town clerk wrote to the solicitors of the taxi owners' association that, before a decision was taken to increase the number of licences available, "you have my assurance that interested parties would be fully consulted." A similar assurance was given orally by the chair of the relevant committee of the municipal council.

105 In my opinion, Canadians would expect, and are entitled to expect, that a clear and unequivocal undertaking of consultation, given in writing to an individual or an association by a minister of the Crown, will be honoured, in the absence of some compelling reason for not so doing.

106 There is, however, another aspect of the legitimacy of the expectation to be addressed: can an undertaking given by a minister that there will be consultation prior to the enactment of regulations give rise to a legitimate expectation when the Governor in Council, not the minster, has the statutory authority to make the regulations in question?

107 Not surprisingly, there is no evidence that the Governor in Council expressly delegated to the Minister of Consumer and Corporate Affairs the authority to impose procedural restrictions on the exercise of the Cabinet's regulation-making power. Nonetheless, when the promise of prior consultation is made by the minister with primary responsibility for developing regulations and bringing them before Cabinet, a citizen may reasonably assume that in so doing the minister is acting within his or her authority, whether express or implied. Accordingly, it may be open to those to whom the promise was made to seek judicial review to prevent the minister from taking proposed regulations to Cabinet until the promised consultation has occurred.

108 In this case, however, the Cabinet has already approved the regulations, and the question is whether their validity can be impugned because they were enacted in the absence of the consultation that the minister promised. In my view, it cannot. If the Cabinet enacts regulations in ignorance of an undertaking of consultation given by a minister, it would not seem to me to have abused its statutory power. And, given the legal protection afforded by the law to the confidentiality of cabinet proceedings and the narrow grounds on which the courts review the exercise of powers by the Cabinet, it would be impermissible for a court to enquire into the state of knowledge possessed by members of the Cabinet about prior procedural assurances given by a minister in order to determine whether otherwise valid regulations were knowingly enacted in breach of a ministerial undertaking.

109 Hence, in my view, the Minister's assurance did not create in the CDMA a legitimate expectation of consultation that, if breached, would invalidate Regulations enacted by the Cabinet without the promised consultation. This is sufficient to dispose of the challenge to the validity of the NOC Regulations based on the legitimate expectations doctrine. However, I should also consider another argument advanced before us, namely, that any duty to consult attracted by the minister's undertaking was in fact discharged.

(iv) Was there sufficient consultation?

110 An undertaking to consult prior to the enactment of delegated legislation cannot be discharged without affording the individual to whom it was given a reasonable opportunity to attempt to influence its content, especially on matters of a secondary policy or technical nature. In order to honour such an undertaking the process of consultation should generally include the disclosure of the text of the proposed regulations, together with an explanatory statement, and sufficient time for this material to be studied and a response prepared: see, for instance, *R. v. Brent London Borough Council* (1986), 84 L.G.R. 168 (Eng. Q.B.) .

111 None of these elements of consultation was present in this case prior to the publication of the 1993 Regulations. However, there had been consultations between the Government and the CDMA and others on Bill C-91, including the regulation-making provision which was added only at third reading. At this point it was made clear to the CDMA that the Government intended to provide by regulations for the linkage of patent protection and the issue of NOCs.

112 The CDMA is a sophisticated combatant in the high-stakes battles that the "generic" and "brand-name" branches of the pharmaceutical industry have wages for years, with both political and legal weaponry, over regulatory approval for new drugs and patent rights. Although the 1992 Act and the implementing regulations undoubtedly represented a serious set-back for the generic drug manufacturers, the CDMA cannot plausibly claim that the essential scheme of the 1993 Regulations came as a complete surprise.

113 Indeed, after the addition to Bill C-91 of what became subsection 55.2(4) of the amended *Patent Act* , the PMAC, to the knowledge of the CDMA, continued to press the Government to put in place regulations that would ensure that an NOC could not be issued to a generic manufacturer in circumstances that might enable it to market a drug that infringed a patent held by a "brand-name" company. However, despite the political know-how of the CDMA, it is plausible to believe that it ceased to make further representations of its own after it received the Minister's assurance of consultation. It might, for example, have been using the time to organise for the forthcoming consultations that it had been led to believe would take place.

114 Even for a body with the knowledge, resources and experience that it is reasonable to attribute to the CDMA, there is a very big difference, especially given the technical complexity of the scheme, between being able to anticipate the general content of regulations likely to be enacted to implement known Government policy, and having time to study and comment on the text of the proposed regulations and their stated rationale. Indeed, subsequent events suggest that, if consultation had occurred as promised by the Minister, it might have enabled the CDMA to persuade the Government to modify some features of the proposed regulations before their enactment by Cabinet.

115 Accordingly, standing alone the consultation that took place *before* the Minister gave his assurance, and in the absence of a published text of proposed regulations, would not be sufficient to mitigate the abuse of power inherent in the failure to honour the undertaking of prior consultation.

116 However, after the Regulations came into effect in March 1993 the CDMA, along with other members of the pharmaceutical industry, met and communicated often and at great length with the relevant Ministers and their senior officials about the Regulations. And, as I have already noted, the 1993 Regulations were significantly modified in 1998.

117 In these circumstances, it was submitted, any failure to consult on the text of the 1993 Regulations before they were enacted was effectively "cured". The Minister's promise had been so substantially performed that it would be inappropriate for the Court to invalidate complex regulations that seek to strike a balance between two sets of conflicting interests: on the one hand, the commercial interests of the "brand-name" companies in protecting their proprietary rights and of the "generic" companies in competing in the market and, on the other, the public's interests in better drugs and cheaper drugs.

118 It goes without saying that, as a general rule, consultation will generally be more effective if it occurs well before administrative action is finalised than if it occurs after the die is cast for all practical purposes, save, perhaps, for relatively minor adjustments. Indeed, in other administrative contexts it is rare that a duty to conduct a hearing before a decision

is made will be satisfied by an after-the-fact hearing by the same body. However, in our case it can be inferred from the context, including the addition of subsection 55.2(4), that the consultation promised related to the implementing details of the scheme and not to the principle of linking patent protection and regulatory approval.

119 In my opinion, the extensive and effective consultations that occurred after 1993, and prior to the amendments of the Regulations in 1998, would make it inappropriate to declare invalid the original Regulations as amended. I am not satisfied that the procedures eventually afforded to the CDMA were so inadequate that the failure to provide an opportunity to consult at the promised time would warrant the invalidation of the Regulations as an abuse of power, especially given the CDMA's involvement in the process before the enactment of Bill C-91, and its understanding of the issues.

120 It is certainly possible to argue that, if the consultations had occurred when promised, many of the subsequently identified wrinkles in the 1993 Regulations would have been ironed out much earlier. On the other hand, it is also possible that the Government was only prepared to modify the 1993 Regulations in light of several years of experience with the new scheme. Hence, whether the amendments made in 1998 following consultation with the CDMA and others would have been made earlier if the consultations had taken place as promised is a matter of mere speculation.

121 Of course, courts do not normally determine whether a breach of the duty of fairness occurred or, if it did, whether it should result in the quashing of the decision or order concerned, by asking whether the result would have been different if the decision-maker had meticulously observed the procedural proprieties: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) .

122 However, given the narrow grounds on which the courts have normally subjected regulations to judicial review (*Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.)) and the realities of the political context of the consultative process, the consultations that occurred after the Regulations came into force in 1993 effectively drew the sting of the abuse of power that occurred when the Minister breached his solemn undertaking to consult prior to the enactment of the 1993 Regulations.

(v) Standing

123 Although the point was not raised by the parties, I had some concerns about whether it was open for an intervener, the CDMA, to rely on a ground of review that was probably not available to the applicant: normally only those to whom a promise was made may rely on it as the basis for relief in an application for judicial review. And, since the CDMA is an intervener in, and not a party to, the application for judicial review, it is difficult to see how relief could be granted to the applicant, Apotex, on the basis of a defeat of the CDMA's legitimate expectation of consultation.

124 In view of my earlier conclusion that the Minister's undertaking could not invalidate the Regulations enacted by the Governor in Council, it is not necessary for me to provide a definitive answer this question. However, the fact that the CDMA was given leave to intervene in the application does not preclude the Court, after hearing the application on its merits, from deciding that the intervener's point, though meritorious in principle, does not warrant judicial intervention because it is not one on which the applicant could rely.

125 On the other hand, since the applicant, Apotex, is the largest generic drug manufacturer in Canada and hence, as a member of the association, can be expected to play a major role in the affairs of the CDMA, it would be unduly formalistic to draw such a sharp distinction between Apotex, the applicant, and the industry association, the intervener, that a breach of an undertaking given to the latter could not be the basis for granting a declaration of invalidity to the former, one of its members.

D. Conclusion

126 For these reasons I would dismiss the appeal on the terms set out in paragraph 26 of the reasons of my colleague, Décary J.A.

Appeal dismissed.

Footnotes

1 A.B., vol. 7 at 1847.

2 *Ibid.* at 1851-52.

3 R.S.C. 1985, c. P-4, as amended.

4 See, for example, the *Canadian Shipping Act* , R.S.C. 1985, c. S-9, s. 95(1); the *Canadian Human Rights Act* , R.S.C. 1985, c. H-6, s. 15(4) and the *Copyright Act* , R.S.C. 1985, c. C-42, s. 66.6(2).

5 R.S.C. 1985, c. S-22.

6 See, for example, the *Canada Labour Code* , R.S.C. 1985, c. L-2, s. 159(2); the *Official Languages Act* , R.S.C. 1985 (4th Supp.), c. 31, s. 84; the *Civil Air Navigation Services Commercialization Act* , S.C. 1996, c. 20, s. 12(2); the *Hazardous Materials Information Review Act* , R.S.C. 1985 (3rd Supp.), c. 24, s. 48(1); the *Hazardous Products Act* , R.S.C. 1985, c. H-3, s. 19 and the *Mackenzie Valley Resource Management Act* , S.C. 1998 c. 25, ss. 90, 143 and 150.

7 *Regulations Act* , R.S.Q. c. R-18.1, ss. 8 and 10.

8 A.B., vol. 7 at 1847.

9 *Ibid.* at 1851-52.

10 See(1996), [1997] 1 F.C. 518 (Fed. T.D.) , at 536.

11 See, for example, *Pulp, Paper & Woodworkers of Canada, Local 8 v. Canada (Minister of Agriculture)* (1994), 174 N.R. 37 (Fed. C.A.) , at 49, Desjardins J.A.

12 R.S.C. 1985, c. I-21.

13 (U.K.), 30 & 31 Vict., c. 3.

14 [1991] 2 S.C.R. 525 (S.C.C.) , at 557-60.

TAB 6

Hydro One Networks Inc.
7th Floor, South Tower
483 Bay Street
Toronto, Ontario M5G 2P5
www.HydroOne.com

Tel: (416) 345-5393
Fax: (416) 345-5866
Joanne.Richardson@HydroOne.com

Joanne Richardson
Director – Major Projects and Partnerships
Regulatory Affairs

BY COURIER

February 15, 2018

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

Dear Ms. Walli:

EB-2016-0276 – Hydro One Networks Inc. MAAD S86 to Purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation – Cost Structure Submission

In accordance with Procedural Order No. 7, issued February 5, 2018, please find attached Hydro One Networks Inc.'s Submission on the expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers.

An electronic copy of this cover letter and Submission has been filed through the Ontario Energy Board's Regulatory Electronic Submission System (RESS).

Sincerely,

ORIGINAL SIGNED BY JOANNE RICHARDSON

Joanne Richardson

cc. Parties to EB-2016-0276 (electronic)

EB-2016-0276

PROCEDURAL ORDER NO. 7

SUBMISSIONS OF HYDRO ONE INC.

FEBRUARY 15, 2018

In accordance with Procedural Order No. 7 issued by the Ontario Energy Board (the "**Board**") on February 5, 2018, Hydro One Inc. ("**Hydro One**") provides its submissions on the expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power Distribution Corporation ("**Orillia Power**") customers.

PROJECTED COST SAVINGS

In **Exhibit A, Tab 2, Schedule 1, Table 1** of Hydro One's initial Application and pre-filed Evidence (which is replicated below for convenience), the projected cost savings are outlined for Years 1 to 10 following the closing of the proposed transaction with Orillia Power.

Table 1: Projected Cost Savings - $M

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
OM&A										
Status Quo Forecast	4.8	4.9	5.0	5.1	5.2	5.3	5.4	5.5	5.6	5.8
Hydro One Forecast	4.1	2.1	2.0	1.7	1.7	1.7	1.8	1.8	1.9	1.9
Projected Savings	**0.7**	**2.8**	**2.9**	**3.4**	**3.5**	**3.6**	**3.6**	**3.7**	**3.8**	**3.9**
Capital										
Status Quo Forecast	2.7	2.8	2.9	3.0	3.1	3.2	3.3	3.4	3.5	3.6
Hydro One Forecast	3.6	2.3	2.4	2.3	2.4	2.5	2.6	2.7	2.9	3.0
Projected Savings	**(0.9)**	**0.5**	**0.5**	**0.7**	**0.7**	**0.7**	**0.7**	**0.7**	**0.6**	**0.6**

As a result of the proposed transaction, the ongoing operating, maintenance and administration ("**OM&A**") cost savings achieved in the initial 10-year period (a 60% reduction from status quo costs) are expected to persist *beyond* the extended deferred rebasing period. Capital expenditure requirements are also expected to be lower on an ongoing basis.

These savings will be achieved through an integrated operating approach and the permanent elimination of costs; as a result, the Hydro One Forecast will consistently be lower *vis-à-vis* the Status Quo Forecast beyond the deferred rebasing period. Hydro One can definitively state that the overall cost structures to serve the Orillia area (as demonstrated in **Table 1** above) will be lower following the deferred rebasing period in comparison to the status quo.

These cost savings will be achieved through *sustained* operational efficiencies in areas pertaining to distribution operations, administration, and back office functions.

Distribution Operations

The elimination of an artificial electrical boundary between Hydro One and Orillia Power will allow for the realization of benefits from contiguity, resulting in a more efficient distribution system as well as local operating and capital savings.

The geographic advantage of contiguity allows for economies of scale to be realized in the field and at the operational level through the integration of local systems owned by Orillia Power and Hydro One.

- Example: Hydro One will be able to rationalize local space needs, which will reduce ongoing costs.
- Example: More efficient scheduling of operating and maintenance work and dispatch crews over a larger service area will lead to lower OM&A costs; more efficient utilization of work equipment (e.g., trucks and other tools), which will lead to lower capital replacement requirements over time.
- Example: The elimination of the service area boundary allows for more rational and efficient planning and development of the distribution system.

Administration

Sustained administrative efficiencies will result due to economies of scale and the elimination of redundant activities:

1. Financial, regulatory and law
    - Example: Elimination of audited financial statements for Orillia Power, elimination of Orillia Power's submissions of rate applications and preparation of a separate Distribution System Plan, resulting in both lower internal and external costs.
2. Executive and governance
    - Example: Elimination of duplicative functions performed by Orillia Power's senior management and the Board of Directors.

Back Office

Reduction in back office and information technology costs through the elimination of duplicate systems for transaction processing, such as billing, customer care, human resources and financial.

- Example: Updates to customer information and billing systems relating to rate changes or other new initiatives will no longer be required by Orillia Power.

All of the above are examples of areas providing persistent operating and capital savings over time, which will ultimately provide long-term benefits to ratepayers relative to the status quo.

In addition, Orillia Power's current debt will be retired and Hydro One will be able to refinance the debt at a lower rate. Hydro One's cost of borrowing is lower than that of a local LDC, which will result in financing cost savings reflected over time in a lower debt return on rate base relative to the status quo.

As a result of these cost savings, Hydro One's costs to serve the Orillia area, while providing safe, reliable and responsive customer service, will be considerably less than the costs that would have been incurred by Orillia Power in the absence of the proposed transaction.

Furthermore, Hydro One submits that there are additional benefits and potential for cost savings from economies of scale through a higher level analysis of the electricity industry as a whole. The electricity sector is a dynamic and rapidly-changing industry, a fact which is currently affecting and will continue to affect all utilities. Such disruptive changes in the electricity industry are likely to be more challenging and proportionately costlier for smaller LDCs and their customers than for a larger distributor. Hydro One is positioned with its economies of scale, network of resources, and industry experience to navigate current and future industry change in innovative areas such as electric vehicle infrastructure, distributed generation, smart grid technology, and energy storage.

Hydro One's evidence is that the incremental OM&A costs to serve Orillia Power customers will be 60% lower than they otherwise would have been under the status quo. Capital costs and debt costs are also expected to be lower than the status quo. Hydro One believes that the long-term benefits of the proposed transaction will be even greater because of the high probability that Orillia Power may be faced with even larger economic hurdles in the future, where potentially high-cost investments may be required to address changing industry needs and these costs will need to be recovered over a smaller customer base.

In addition, overall costs to serve Hydro One's customers as a result of the proposed transaction will be less than in its absence. Future rate applications will determine how all costs will be allocated to the appropriate customers, including a share of costs for Orillia Power customers with respect to common assets and common corporate costs.

COST ALLOCATION RELATING TO ORILLIA POWER'S CUSTOMERS

Hydro One expects to file a rate application at the end of the deferred rebasing period consistent with Board policies and rate-making principles in effect at the time (e.g. fair, practical, clear, rate stability and effective cost recovery of revenue requirement), which are expected to reflect changes to the electricity industry, government policy and Board policy that may have evolved over the next ten years.

At this time, in order to satisfy the Board Handbook's direction that future rates for Orillia Power customers be reflective of Hydro One's cost to serve those customers, Hydro One expects that it would migrate Orillia Power residential and general service customers to either the new Urban Acquired rate classes that Hydro One has proposed in its current distribution application[1], or to new classes specifically created to accommodate Orillia Power's customers. In any case, Hydro One will prepare its application with proposed rates for Orillia Power's customers in accordance with Chapter 2 of the Board's Filing Requirements for Electricity Distribution Rate Applications in effect at the time, including a harmonization plan as required in Section 2.8.13.2, as noted below:

> *Section 2.8.13.2 - Rate Harmonization Mitigation Issues*
>
> *Distributors which have merged or amalgamated service areas, and which have not yet fully harmonized the rates between or among the affected distribution service areas, must file a rate harmonization plan. The plan must include a detailed explanation and justification for the implementation plan, and an impact analysis. In the event that the combined impact of the cost of service based rate increases and harmonization effects result in total bill increases for any customer class exceeding 10%, the distributor must include a discussion of proposed measures to mitigate any such increases in its mitigation plan discussed in section 2.8.13 above, or provide a justification as to why a mitigation plan is not required.*

Hydro One will ensure that future rates for acquired customers are reflective of the cost-to-serve Orillia Power customers by following a process that adjusts its Board-approved Cost Allocation Model ("**CAM**") as necessary to ensure that the costs allocated to Orillia Power customers reflect their cost-to-serve, while recognizing that the Board will ultimately approve Hydro One's cost allocation and rate harmonization plan for Orillia Power customers. Any changes affecting Orillia Power customers will involve an open, fair, transparent and robust process where the Board will continue to exercise its jurisdiction and supervisory role as the ultimate decision-maker.

[1] EB-2017-0049, currently under review by the Board

CONCLUSION

Based on the foregoing, Hydro One submits that it is abundantly clear that the costs to serve the Orillia area will be lower versus the status quo, absent the proposed transaction. Furthermore, at the time of rebasing, Hydro One will adhere to the cost allocation and rate design principles in place at such time in the future, ensuring that the costs allocated to Orillia Power customers fairly and accurately reflect the new lower cost structure to serve all customers.

In the interim, Orillia Power customers will benefit from the deferred rebasing period, which will provide rate certainty for a period of 10 years, a five-year 1% reduction in base distribution rates, Year 6 to 10 rates adjusted only by inflation less productivity, and a guaranteed $3.4 million earnings sharing mechanism refund.

In conclusion, Hydro One submits that the proposed transaction meets the Board's "no harm" test and respectfully requests that the Board approve the Orillia MAAD Application.

TAB 7

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase the shares of Orillia Power Distribution Corporation.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc.

AND IN THE MATTER OF Procedural Order No. 6 issued in the within proceeding on July 27, 2017.

AND IN THE MATTER OF sections 8 and 40 of the OEB Rules of Practice and Procedure.

SUBMISSION OF THE APPLICANT HYDRO ONE INC.

ON ITS MOTION TO REVIEW AND VARY PROCEDURAL ORDER NO. 6

1. The Applicant (Moving Party) Hydro One Inc. ("Hydro One") repeats and relies on the grounds provided in Hydro One's Notice of Motion.

2. Hydro One respectfully submits that the Board's assessment of the "no harm" test cannot be and will not be informed by the Distribution Rate Application of Hydro One Networks Inc. and, furthermore, that Hydro One and its co-Applicant have already satisfied the no harm test.

3. MAAD applications under section 86 of the *Ontario Energy Board Act, 1998* ("the Act) are about ongoing cost structures, not about the approval of future rates.

4. Procedural Order No. 6 ("PO 6") is inconsistent with previous Board decisions. It is impossible for the Board to predict what rates will be in Year 11, once OPDC's customers are integrated into Hydro One Network Inc.'s revenue requirement, hence the inapplicability of the 2018-2022 Distribution Rate Application of Hydro One Networks Inc. ("the Distribution Rate Application").

5. Rather than looking at the Distribution Rate Application, it is necessary, proper and appropriate to assess the no harm test by relying only on the evidence in EB-2016-0276 concerning the expected reductions to cost structures.

6. Furthermore, to set expectations at this time as to what rates OPDC customers will have in 11 years is a task that is neither appropriate nor meaningful. It is standard Board practice that rates of an acquired utility should be determined at the first applicable (future) rate proceeding, not during a MAAD application. As the Board stated at page 16 of the Hydro One/NPDI decision:

> "In accordance with the 2007 Report, the Board's decision will not consider future rates at this time. However, as indicated in the Motion Decision, in applying the no harm test it is appropriate for the Board to assess the cost structures that will be introduced as a result of the acquisition, in comparison to the cost structures that underpin NPDI's current rates."

7. The statement above does not differ from the Board's assessment of other MAAD applications, including, most recently, the Alectra MAAD application, where in assessing the

impact on the customers of the lowest cost entity in that transaction, Hydro One Brampton, the Board stated at page 12 of the decision:

> "The OEB considers the long term effect of a proposed transaction on cost structures. This is aligned with the long-term investment cycles of the distribution sector where most distribution assets have life expectancies in the 40 year range. Hydro One Brampton is identified as being the lowest cost entity involved in this transaction. The OEB notes that Hydro One Brampton will have additional scale available to it in the long term and its existing cost structures are embedded in its rates for the next 10 years. The OEB will consider the matter of its rates and the impact of rate harmonization in the context of a rate application. In the OEB's view, there will be no net negative impact on Hydro One Brampton's customers in the long term in comparison to the status quo."

8. Similarly, Hydro One submits that it continues to be appropriate for the Board to consider the impacts of the anticipated savings of the consolidation in a future rate proceeding for the current OPDC, namely, a rate proceeding after the 10-year deferred rebasing period.

9. The dichotomy in the assessment of current rates with future cost structures is ultimately exhibited in the Board's approval of the Energy+ MAAD. In that application, the estimate for the distribution rate impacts following harmonization of rates in 2019 indicated a 54.8% increase for Brant County Power Inc.'s GS>50kW customer class, with the Applicant confirming that it will include rate mitigation measures in accordance with Board policy to address the rate impact (page 8 of the decision). Notwithstanding that estimated rate increase, the transaction still met the OEB no-harm test and was approved, because the Board found that despite the future rate

increases, "… the evidence indicates that the proposed transaction can reasonably be expected to result in cost savings and operational efficiencies[1]".

10. Hydro One agrees with the Board's policies and previous decisions that cost structures, not rates, should be used to assess the no harm test. Hydro One reiterates not only that there is sufficient evidence on the record in this proceeding for the Board to determine that there will be a significant reduction to the cost structures as a result of this transaction, but also that the Distribution Rates Application proceeding regarding Hydro One Networks Inc. is irrelevant to the Orillia MAAD Application (EB-2016-0276).

11. In EB-2016-0276, Hydro One has filed all the required information requested by the Board in the MAAD consolidation filing guidelines[2]. Within the evidence and record of this proceeding, Hydro One has highlighted, among other benefits that this acquisition will result in:

- Expected ongoing OM&A savings of $3.9 million per year
- Expected ongoing capital savings of $0.6 million per year
- A defined 10-year rebasing deferral period
- The implementation of a guaranteed earnings sharing mechanism during Years 6-10
- Maintenance or improvement of the adequacy, quality, and reliability of service
- The elimination of redundant activities and artificial electrical borders
- Expected operation and maintenance scale efficiencies by leveraging Hydro One's economies of scale
- Lower future costs as OPDC's current debt is refinanced at a lower rate relative to the status quo
- Improved access to call centre – In addition to having access to an IVR, Hydro One's call centre is open 4 additional hours per day Monday through Friday, as well as being open on Saturdays.

[1] EB-2014-0217, Decision and Order, October 30, 2014, page 6
[2] OEB Filing Requirements for Consolidation Applications, January 19, 2016

12. Hydro One submits that the evidence and record of this proceeding clearly outline that there will be no harm to the directly-affected customers; in fact, those customers will receive multiple benefits from this transaction.

13. There will be no further information in the Distribution Rate Application that will assist the Board in determining whether these customers are harmed. As the Board wrote in the Hydro One/HCHI decision (EB-2014-0244), "Future Panels of the OEB will be guided in their decisions in setting rates by these expectations and the realities of the rate-setting environment at the time of rebasing", where the expectation is that future rates will be reflective of the cost to serve inclusive of the achieved consolidation savings. OPDC rates will reflect the cost to serve these customers, as required by the Board, after the 10-year deferral period has elapsed.

14. Furthermore, OPDC customers' rates will not be affected by the Distribution Rate Application of Hydro One Networks Inc.

15. As stated above, future rates are not part of the Board's review of a consolidation application; in fact, rate comparisons skew the no-harm analysis of cost structures and are not necessarily reflective of future rates that customers who are party to a MAAD transaction will incur.

16. Hydro One has stated that it will not rebase OPDC rates for the ten years post-acquisition. In alignment with EB-2014-0138 "Report of the Board: Rate-Making Associated with Distributor Consolidation", the Orillia MAAD Application sets forth how rates will be

determined for the ten years following the approval and close of the transaction. Therefore, even if future rates were deemed necessary to assess the no harm test (which is not the case), any decision emanating from the five-year Distribution Rates Application will not impact OPDC customers and will not assist the Board in making a decision in EB-2016-0276.

17. The Board's policies and previous decisions clearly articulate that ongoing cost structures, not rates, are subject to consideration in review and approval of a consolidation transaction such as EB-2016-0276. The Handbook to Electricity Distributor and Transmitter Consolidations says, at page 11,

> "Rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction unless there is a rate proposal that is an integral aspect of the consolidation e.g. a temporary rate reduction. Rate-setting for the consolidated entity will be addressed in a separate rate application, in accordance with the rate setting policies established by the OEB. The OEB's review of a utility's revenue requirement, and the establishment of distribution rates paid by customers, occurs through an open, fair, transparent and robust process ensuring the protection of customers."

18. This open, fair, transparent and robust utility revenue requirement review process is currently underway for the three previously-acquired LDCs ("the Three Previously-Acquired LDCs")[3] in the Distribution Rate Application of Hydro One Networks Inc. The Distribution Rate Application is an application for proposed rates, and Hydro One Networks Inc. fully expects that:

[3] Encompassing the former territories of Norfolk Power Distribution Inc., Woodstock Hydro Services Inc., Haldimand County Hydro Inc.

(a) the cost allocation proposal and corresponding rates for the Three Previously-Acquired LDCs will be fully reviewed and tested during the said Distribution Rate Application hearing; and

(b) whatever the Board ultimately approves in the Distribution Rate Application will reflect the Board's view as to what costs should appropriately be allocated to the customers of the Three Previously Acquired LDCs.

19. The Distribution Rate Application does not include a rate proposal for OPDC customers. If the Orillia MAAD Application is approved as submitted, new rates for OPDC customers will not be required until at least two future rate applications from the Distribution Rate Application.

20. Therefore, in EB-2016-0276, the Board should be concerned only with how the rates of the acquired utility, OPDC, will be determined during the deferred rebasing period. The transaction is such that Hydro One will provide a 1% reduction on base distribution delivery rates, frozen for five years, followed by a price cap adjustment applied in years six through ten that also includes an earnings-sharing mechanism over that same time period.

21. To assist the Board, Hydro One has developed a 10-year customer rate outlook comparing OPDC's customers' rates status quo (assuming OPDC would have rebased two more times over the 10-year deferral period) to the rate benefit they will receive if the Application is approved, using rate-making assumptions provided in the Application (See Appendix A). This rate outlook is consistent with the Board's determination of the no harm test in the Alectra decision, which stated, at page 19:

> "As set out earlier in the no harm analysis, the OEB finds that this transaction is within the range of transactions anticipated by the OEB's policy. The outcomes are aligned with the policy's objective of improving the efficiency of electricity distribution. As discussed earlier, the proposal should be compared to the status quo scenario, from an earnings potential perspective, whereby each utility could rebase at least once more within the 10 years, and any earnings above 300 basis points over the regulated rate of return would all flow to the shareholder until rates were reset. The OEB finds that customers will be not be harmed and will likely benefit in the long term from the enduring benefits of scale enhancements of service delivery arising from this transaction."

22. The results in Appendix A illustrate that over the 10-year deferral period, based on average consumptions, all current OPDC customers will experience a cumulative bill benefit or savings between approximately $600 and $18,000 – indicative of no harm to ratepayers.

23. The Board's service levels indicate 130 calendar days to provide a decision on a MAAD application for a written hearing.

24. The Share Purchase Agreement for OPDC was entered into by the parties on August 15, 2016, almost a year prior to the Board's issuance of PO 6. The MAAD application was submitted less than six weeks later, on September 27, 2016.

25. On January 20, 2017, the discovery phase of the Application was completed, as all interrogatory responses had been provided by the Applicant. Final arguments were submitted on May 5, 2017. In PO 6 on July 27, 2017, the Board determined that this proceeding will be held in abeyance until the release of the decision of the Distribution Rate Application.

26. PO 6 was issued without the Board's benefit of hearing submissions from the two Applicants, Hydro One and OPDC.

27. No procedural order has been issued in the Distribution Rate Application, which means that if PO 6 stands, EB-2016-0276 may be held in abeyance for at least another 6 to 12 months, in addition to the 300 days since the EB-2016-0276 application was filed.

28. Additionally, if the Board decides to defer MAAD approvals until future acquired utility rates are assessed in a s. 78 application, the ability of Hydro One and other applicants to be active consolidators in the Province will be seriously hindered, significantly impacting the sector's ability to effectively complete the aims of the Government of Ontario, documented in the Distribution Sector Review Panel, to create economic efficiencies and cost effectiveness in the distribution sector, consistent with the Board's objectives.

29. In developing the prefiled evidence, arguments and interrogatory submissions in this Application, Hydro One has made a concerted effort to incorporate the direction and guidance of the Board in previous MAAD decisions, the Board's policies and its Handbook for Distributor Consolidation. None of the Board's previous guidance with respect to MAADs has indicated that the Board requires future rate proposals (11 years beyond current day) in order to assess harm.

30. In addition to the significant impact to Hydro One of this proposed delay, there is also a significant impact on the shareholders of OPDC, their customers and staff, e.g.:

- OPDC shareholders will have forgone a 2017 price cap adjustment in anticipation that this Application would have been approved in a timely manner;

- OPDC customers have been anticipating a change in ownership that has been discussed in this application, through media outlets and other forums. Customers remain uncertain about who will be serving them and what rates they will experience in the foreseeable future; and

- OPDC, in anticipation of an acquisition, has not been replacing staff that have been lost due to attrition and retirement, which has the potential to impact the overall operations of the utility.

31. For all the above reasons, Hydro One submits that:

(a) OPDC is not one of the Three Previously-Acquired LDCs whose rates will be determined in the Distribution Rate Application of Hydro One Networks Inc.;

(b) the evidence and record in the Distribution Rate Application are not relevant to EB-2016-0276;

(c) analysis and determination of the Board's no harm test for the OPDC transaction will not be informed by the evidence and record in the Distribution Rate Application;

(d) the issuance of PO 6 without the Applicants' opportunity to make submissions in respect thereof was procedurally unfair;

(e) a further, indefinite delay of this Application is procedurally unfair, harmful to the Province's LDC consolidation goals and harmful to OPDC and its customers; and

(f) PO 6 should therefore be varied so as to allow this Application to proceed immediately in the ordinary course, without a consideration of irrelevant evidence from any other proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Michael Engelberg
Counsel for the Applicant (Moving Party) Hydro One Inc.

Total Bill Analysis
Deferred Rebasing Period Benefit to OPDC Customers as a Result of Transaction

		2016[1]	2017[2]	2018	2019	2020	2021	2022	2023	2024	2025	2026
Class - Residential	**Scenario Assumption**		Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
	Status Quo[3]	$ 146.00	$110.06	$111.82	$112.29	$112.78	$113.26	$113.75	$115.74	$116.26	$116.78	$117.40
	With Acquisition	$ 146.00	$109.34	$109.34	$109.34	$109.34	$109.34	$110.06	$110.52	$110.98	$111.45	$111.93
	Monthly Benefit		$0.72	$2.48	$2.96	$3.44	$3.92	$3.70	$5.22	$5.28	$5.33	$5.47
	Annual Benefit		$8.63	$29.80	$35.47	$41.27	$47.06	$44.35	$62.68	$63.32	$63.95	$65.65
	Add Annual ESM Benefit/Refund (Note 1)		$0.00	$0.00	$0.00	$0.00	$0.00	$31.03	$29.17	$27.34	$25.16	$22.90
Each OPDC Customer in Class Benefits from the Acquisition by;			**$8.63**	**$29.80**	**$35.47**	**$41.27**	**$47.06**	**$75.38**	**$91.85**	**$90.66**	**$89.11**	**$88.54**
										10 year Cumulative Benefit		**$598**
GS < 50 kW	**Scenario Assumption**											
	Status Quo[3]	$ 393.17	$297.12	$301.61	$302.91	$304.23	$305.57	$306.91	$311.93	$313.33	$314.73	$316.15
	With Acquisition	$ 393.17	$295.05	$295.05	$295.05	$295.05	$295.05	$297.12	$298.39	$299.67	$300.96	$302.26
	Monthly Benefit		$2.07	$6.56	$7.86	$9.19	$10.52	$9.80	$13.55	$13.66	$13.78	$13.89
	Annual Benefit		$24.82	$78.75	$94.37	$110.25	$126.25	$117.56	$162.54	$163.93	$165.31	$166.70
	Add Annual ESM Benefit/Refund (Note 1)		$0.00	$0.00	$0.00	$0.00	$0.00	$96.43	$90.65	$84.99	$78.20	$71.16
Each OPDC Customer in Class Benefits from the Acquisition by;			**$24.82**	**$78.75**	**$94.37**	**$110.25**	**$126.25**	**$213.99**	**$253.19**	**$248.91**	**$243.51**	**$237.86**
										10 year Cumulative Benefit		**$1,632**
GS > 50 kW	**Scenario Assumption**											
	Status Quo[3]	$ 11,780.39	$11,610	$11,658	$11,672	$11,686	$11,700	$11,714	$11,768	$11,784	$11,799	$11,815
	With Acquisition	$ 11,780.39	$11,590	$11,590	$11,590	$11,590	$11,590	$11,610	$11,623	$11,636	$11,649	$11,663
	Monthly Benefit		$21	$69	$82	$96	$110	$104	$145	$148	$150	$152
	Annual Benefit		$246	$824	$987	$1,153	$1,322	$1,247	$1,745	$1,773	$1,801	$1,830
	Add Annual ESM Benefit/Refund (Note 1)		$0	$0	$0	$0	$0	$1,105	$1,039	$974	$896	$816
Each OPDC Customer in Class Benefits from the Acquisition by;			**$246**	**$824**	**$987**	**$1,153**	**$1,322**	**$2,352**	**$2,784**	**$2,747**	**$2,698**	**$2,646**
										10 year Cumulative Benefit		**$17,759**

Notes:

1 Per Attachment 7, EB-2016-0276 - Note GS<50kW. Note the DRC Rate was corrected in the Interrogatory response to Board Staff - Exhibit I, Tab 1, Schedule 5 (a)

2 2017 rates forward incorporate Fair Hydro Plan which included changes to Regulatory Changes, Commodity Prices and other credits

3 "Status Quo" Rate Setting Assumption: OPDC submits Cost of Service applications in 2018 and 2023 (last COS EB-2009-0273 for 2010 rates); all other years previously approved rates adjusted by Price Cap Adjustment

4 "With Acquisition" Rate Setting Assumption: 2017-21 base distribution rates reduced by 1% from current 2016 rates; 2022 -2026 rates reflect 2016 rates increased annual by Price Cap Adjustment

Price Cap Adjustment Applied : (Held constant over extended deferred rebasing period)
Inflation Factor = 1.9%
Productivity and Stretch Factor = 0.3%

Cost of Service Year Adjustment Assumptions Applied :
Distribution Rates are increased by 6%. This 6% increase assumption represents the OEB approved average increase from the 31 LDC's who rebased in the 2016 and 2017 rate years.

5 For illustrative purposes ONLY, Hydro One has calculated the potential allocation of the guaranteed ESM refund , as follows:

Allocation of the Annual ESM Refund to OPDC Customers

Proposed Total Annual ESM Refund — *PER ESM Evidence (A-3-1 - Table 6)*

Year of Refund	**2022**	**2023**	**2024**	**2025**	**2026**
Total Annual Refund ($'s)	767,000	721,000	676,000	622,000	566,000
				TOTAL ESM (years 6 to 10)	**3,352,000**

Customer Class	2015 Revenue Requirement[6]	% Weighting	Customers per class[6]					
Residential	$ 4,133,061	48%	11,916	*Dollar / Customer Refund*	31	29	27	25	23
General Service < 50kW	$ 1,467,186	17%	1,361	*Dollar / Customer Refund*	96	91	85	78	71
General Service > 50kW	$ 2,076,212	24%	168	*Dollar / Customer Refund*	1,105	1,039	974	896	816
Other (Incl Non-Metered Scattered Load)	$ 898,110	10%	-						
Total	**$ 8,574,569**	**100%**	**13,445**						

6 Per the OEB's 2015 Yearbook (2016 is not available yet) . Total Distribution Revenue is per Tab = '2015 I/S' ; & Distribution Revenue by Class is per Tab = '2015 Stats by Class'

7 Per Attachment 4 of Hydro One's OPDC MAAD prefiled application evidence

NOTE: Hydro One when seeking disposition of the ESM will propose a methodology to refund to customers

TAB 8

A Report with Respect to Decision-Making Processes at the OEB

September 2006

Trade Commission: "…if the staff fails adequately to present the public interest and to raise all the relevant questions, no one else will".[21] According to Macaulay and Sprague:[22]

> "What is essential to realize is that a tribunal has a duty to provide a balanced record, to test every assumption, to challenge every impact and wring out every issue. *No tribunal* can wait for the apple to fall. It must shake the tree. This balance is obtainable through the active participation by staff in the hearing process."

In other words, for Board staff to proactively put before the Board the public interest position on matters where it is relevant is both a distinct role from that of the parties and is consistent with the Board's statutory mandate and responsibilities. Specifically, in making its decisions, the Board should not be limited to the options put forward by parties or the evaluation of those options by the parties. Panels will benefit from staff's identification and evaluation of options for the Board to consider.

In conclusion on this point, the Board's policy mandate and expertise should inform decisions that result from the adjudicative process. It is therefore inappropriate to quarantine the decision makers from the institutional expertise in making those decisions. The next part of this report reviews the way in which this may be done in a manner consistent with the Board's commitment and legal responsibilities as they relate to a fair and open hearing process.

(ii) Open and Fair Hearings

As an adjudicative tribunal, the OEB must make its decisions in accordance with the statutory and common law rules respecting fairness and due process. The issue is the content of these rights as they relate to positions taken by staff. Specifically, given that staff may assist panels in the deliberative process, the question is whether it is appropriate for the same staff to identify and evaluate options in an oral hearing. In legal terms, the

[21] (Toronto: Carswell, 1988), at 14-8.2.
[22] Ibid., at 14-12.

question is whether this dual role is consistent with the requirements of fairness that attend the Board's hearing process. Addressing this first requires an elaboration of the role of staff being advocated in this report.

The staff role being proposed here is the identification and evaluation of options for consideration by the panel. This involves demonstrating leadership in the hearing room, but not for the purpose of supporting or opposing a party's position. Staff's only driver is the public interest, and they remain neutral as between parties. Their analysis may lead them to see one argument or option as having greater public interest value than another. This is not the same as taking an adversarial position against a party. There are clearly limitations on how adversarial staff may be in pursuing its positions. The courts have noted that tribunal staff, where leading evidence and making submissions, represents the public interest, and therefore have a different responsibility than a private party. The seminal statement in the area is from the British Columbia Supreme Court in *Omenieca Enterprises Ltd. v. British Columbia (Minister of Forests)*:[23]

> "…counsel for the tribunal may be called upon to lead evidence, cross-examine witnesses and make submissions with a view to putting the tribunal as fully in the picture as possible. In so doing, it is important for counsel to proceed in a spirit of disinterested inquiry and to avoid the appearance of partisanship of behalf of any interest. It is undesirable to be too dogmatic in attempting to define the proper functions of counsel to administrative tribunals in all circumstances. The overriding objective is always to ensure that the proceedings are fair and impartial."

Provided that staff are pursuing a public and non-partisan interest, and provided that staff positions are put on the record or otherwise disclosed to the parties, staff involvement both in the hearing and in assisting the Board following a hearing is consistent with the duty of fairness owed to the parties in the circumstances of a Board hearing.

The Supreme Court of Canada described the underlying purpose of the duty of fairness as follows in *Baker v. Canada*:[24]

[23] (1992), 7 Admin. L.R. (2d) 95 (B.C.S.C.) at 99-100.
[24] (1999), 174 D.L.R. (4th) 193 at 211.

> "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained with the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."

The Court listed a number of factors to be considered in identifying the content of the duty of fairness in any particular case. The analytic framework employed by the Court to evaluate the duty of fairness is based on a contextual assessment of the tribunal and its operations. As the Court observed in *2747-3174 Quebec Inc. v. Quebec*:[25]

> "As is the case with the courts, an informed observer analysing the structure of an administrative tribunal will reach one of two conclusions: he or she either will or will not have a reasonable apprehension of bias. That having been said, the informed person's assessment will always depend on the circumstances. The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment. In a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. As Lamer C.J. noted in *Lippe, supra, at p. 142,* constitutional and quasi-constitutional provisions do not always guarantee an ideal system. Rather, their purpose is to ensure that, considering all of their characteristics, the structures of judicial and quasi-judicial bodies do not raise a reasonable apprehension of bias. This is analogous to the application of the principles of natural justice, which reconcile the requirements of the decision-making process of specialized tribunals with the parties' rights. I made the following comment in *IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, at pp. 323-24:*
>
> > "I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a

[25] (1996),42 Admin. L.R. (2d) 1 at para. 45:

> fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces."

In addition to the attention paid to the institutional context of the tribunal and its operations, another clear point arising from the case-law is that the content of the duty can change depending upon the impact of the decision on the party to a proceeding. As the Court held in *Baker*:

> "The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be maintained. This was expressed for example by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at p. 1113, 110 D.L.R. (3d) 311:
>
> > 'A high standard of justice is required when the right to continue in one's profession or employment is at stake…A disciplinary suspension can have grave and permanent consequences upon a professional career.'
> > …
> > The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness."

As a result, it is too simplistic to identify a single duty of fairness that the Board must meet in all of its proceedings. Some Board decisions have a greater impact on persons than others. It is therefore best to identify the content of the duty of fairness by reference to the impact of different types of Board decisions on the rights of various parties.

There is considerable case-law and academic discussion on the role of staff in administrative proceedings and how the boundaries of that role are different depending on the nature of the proceeding. For example, where staff acts as a prosecutor in a proceeding, the duty of fairness requires that staff not assist in the deliberative process. The Supreme Court of Canada put it as follows in *2747-3174 Quebec Inc. v. Quebec*:[26]

[26] (1996),42 Admin. L.R. (2d) 1 at 125:

> "This is not to say that jurists [i.e., lawyers] in the employ of an administrative tribunal can never play any role in the preparation of reasons. An examination of the consequences of such a practice would exceed the limits of this appeal, however, as I need only note, to dispose of it, that prosecuting counsel must in no circumstances be in a position to participate in the adjudicative process. The functions of prosecutor and adjudicator cannot be exercised together in this manner."

In this decision, the Supreme Court of Canada endorsed the following quotation from the Ontario Court of Appeal in *Sawyer v. Ontario (Racing Commission)*[27]

> "But there is no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission as discussed by Schroeder, J.A. in *Re Glassman and Council of Colleges of Physicians & Surgeons*, [1966] 2 O.R. 81 at p. 99 ["*Glassman*"]. He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired."

Both of these decisions related to cases where the tribunal's counsel was both a prosecutor and an advisor: these two functions were held to be incompatible.

Where staff is not in a prosecutorial role, the legal requirements are different. As indicated earlier, this is largely because the law imposes different types of procedural restrictions on tribunals where different rights of a person before it are at stake. Where, such as in the case of a prosecution, a person's career and livelihood are at stake, the courts will impose greater restrictions on tribunals. Where the Board acts in its function as an economic regulator, these restrictions are reduced. Specifically, in this context, the courts' concern with tribunal practices has tended to focus more on ensuring that staff submissions are disclosed to the parties. In other words, the courts do not require that

[27] (1979), 24 O.R. 673 ("*Sawyer*") at 676

staff not make submissions in proceedings; rather, the emphasis is that parties are made aware of and have an opportunity to respond to staff submissions.

For example, in the *Glassman* decision referred to by the Ontario Court of Appeal in *Sawyer*, the College of Physicians & Surgeons retained independent counsel to advise on matters of law. Although the advice would be provided in prosecutions, the counsel was not a prosecutor. Counsel provided legal advice on the record and parties were given the opportunity to respond. Counsel was also present during the course of deliberations. The Court of Appeal held that the requirement for disclosure of counsel's advice was sufficient to meet any concerns about a denial of natural justice. In coming to this conclusion, the Court explicitly relied upon its earlier decision in *R. v. Public Accountants Council Ex p. Stoller.*[28] In that case, the Court again held that, in a non-prosecutorial position, counsel in the hearing may continue to advise the decision maker: "I point out again that on the authorities, a case such as this is not comparable to a trial where there is a prosecutor and an accused."[29]

Thus, in the non-prosecutorial context, the courts' emphasis has been on ensuring that parties have the right to know and answer the case they have to meet. This involves a requirement that a decision maker not base his or her decision on facts which are not on the record and parties have the opportunity to respond to legal and policy arguments that are considered by the decision maker. The Supreme Court of Canada characterized this right as follows in *Consolidated Bathurst Packaging Ltd.* (1990), 42 Admin L.R. 1 at 38:

> "Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a 'fair opportunity of answering the case against [them]…It is true that on factual matters the parties must be given a 'fair opportunity…for correcting or contradicting any relevant statement prejudicial to their view'…However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right

[28] [1960] O.R. 631.
[29] *Sawyer*, at . 698. For a more recent example of the restrictions in disciplinary proceedings, see: Ahluwalia v. College of Physicians and Surgeons of Manitoba, [1999] M.J. No. 55

does not encompass the right to repeat arguments every time the panel convenes to discuss the case."

Similarly, in *Carlin v. Registered Psychiatric Nurses' Association* Binder J. stated the following:[30]

"In my opinion, in general, it is proper for counsel to:

1. Attend at the hearing of a tribunal, to provide advice to the tribunals, when *requested* by the tribunal to do so, provided, except in very special circumstances, that such advice is given *openly and in the presence of all interested parties*.
2. Assist the hearing tribunal in preparing and even drafting the reasons for decision of the tribunal." (emphasis in the original)

The above passages suggest that, in the non-prosecutorial context, a fair trial requires ensuring that parties have the opportunity to know the case they have to meet. That right consists of being able to respond to law and policy arguments put forward by staff.

This approach is also demonstrated in cases where the courts have been critical of tribunals for not giving parties the opportunity to respond to staff positions. For example, in *B.P. Canada Energy Co. v. Alta (Energy & Utilities Bd.*), the Alberta Court of Appeal found that a party's right to know the case it had to meet was arguably violated because the Alberta Energy Utilities Board staff and the panel conducted examinations of "core logs and other data not in evidence at the hearing… The fact that the parties were not present for these examinations contributes to this issue's seriousness."[31] The same Court, although dismissing a leave to appeal motion as premature, acknowledged that there may have been arguable issues for appeal with respect to staff's presentation to the Board of "evidence or interpretation of evidence [that] is not disclosed to hearing participants."[32]

[30] (1996), 39 Admin L.R. (2d) 177 (Alta. Q.B.), at 199 (emphasis in the original).
[31] (2003), 6 Admin. L.R. (4th) 163 at 173.
[32] *Devon Canada Corp. v. Alberta (Energy & Utilities Bd),* (2003), 3 Admin. L.R. (4th) 154 at 158

This is also aligned with academic opinion. In *Regulations of Professions in Canada*, J.T. Casey proposes the following approach:[33]

> "…the solution lies in the adoption of a procedure which permits counsel to a discipline tribunal to be present during deliberations but which also ensures that the dictates of procedural fairness are met. A commitment that the 'prosecutor' and counsel to the member facing charges will be given the opportunity to address any new legal issues or arguments which arise during deliberations and which were not previously canvassed by the parties in open hearings, would alleviate most of the concerns."

This approach is supported in Jones and deVillars, *Principles of Administrative Law* (3d), where the authors state that providing parties with the opportunity to respond to any new issues raised in deliberations "is entirely consistent with the principles set out in *Consolidated Bathurst* and *Tremblay* and provides the better view of what are the appropriate constraints on counsel to an administrative tribunal."[34]

Finally, in the American context, William F. Pedersen has argued that openness in administrative tribunal decision making reflects an improved method of policing fairness than imposing restrictions on staff's ability to communicate with panels:[35]

> "All these measures abandon splitting up the agency internally as a means of reducing bias. Instead, they treat the agency as a unit in which all staff members are available to advise in a final decision. They then open up the deliberations of that unit to the scrutiny of outside forces to a much greater extent than has been customary. The checks and balances on the agency remain, but they depend much less than they did on analogizing the agency to a court."

A review of the case law and the literature suggests little support for the position that, as a legal matter, staff cannot both make submissions in a proceeding and continue to assist panels in preparing decisions in non-prosecutorial hearings. The key requirement is that parties be made aware of staff positions and have the opportunity to respond.

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[33] (Toronto: Carswell, 1994) at 8-38 to 8-39)
[34] (Toronto: Carswell, 1999) at 325.
[35] "The Decline of Separation of Functions in Regulatory Agencies" (1978), 64 Virginia Law Review, 991 at 1031.

It is therefore recommended that:

- Board staff should participate in hearings with the objectives of identifying and evaluating options for the Board's consideration in a proceeding by reference to the public interest. Staff should be required to present its view of the public interest on the record so that parties may respond to it. Only in very rare cases, staff's participation in a proceeding in this role may be incompatible with its ability to assist the panel in its deliberative process. An example of this is where staff is in a prosecutorial role in a compliance proceeding in Part VII.1 of the Act.

Part III – Role of Parties

The role of the parties in OEB proceedings is linked to the role of staff. The minimal role of staff over the last several years has been accompanied by an increased reliance on parties to the proceeding. This has led to both benefits and costs. The benefit is that the OEB benefits from having a fully engaged stakeholder community. It is not unusual for a Board proceeding to have several representatives of groups representing residential customers, institutional customers, commercial customers, industrial customers, retailers, generators and environmental groups. These intervenors bring their perspective to bear on the complex problems addressed by the Board. The Board encourages intervenor participation through cost awards for hearings, Code/Rule development, and policy initiatives. It is one of the most extensive cost awards regimes in the country.

The cost of this approach is that the parties have been relied upon to represent, not just the particular interests they are retained to advance, but the totality of the public interest. As indicated, staff have not been used to add to the options presented to the Board. In addition to the issues respecting the Board's mandate discussed earlier, there are additional concerns to leaving the development of issues entirely to the parties.

One concern is that the interests claimed to be represented before the Board are extremely broad and cannot reasonably be presumed to align within the organizations that intervene