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.

COMPENDIUM AND BOOK OF AUTHORITIES OF THE SCHOOL ENERGY COALITION (Threshold Question)

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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

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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

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

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

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

31. Pre-Hearing Conference

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

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

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

(c) recommending the procedures to be adopted;

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

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

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

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

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

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

PART V - HEARINGS

32. Hearing Format and Notice

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

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

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

33. Hearing Procedure

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

34. Summons

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

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

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

35. Hearings in the Absence of the Public

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

36. Constitutional Questions

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

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

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

37. Hearings in French

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

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

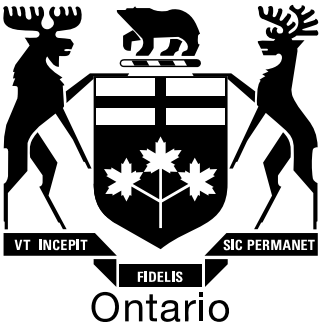
(a) by a party;

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

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

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

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

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

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

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

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2004-0167
EB-2005-0188

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

AND IN THE MATTER OF an application by Natural Resource Gas Limited for an Order or Orders approving or fixing just and reasonable rates for the 2005 fiscal year commencing October 1, 2004;

AND IN THE MATTER OF a Motion by Natural Resource Gas Limited for a rehearing and variance of the decision of the Board as set out in its Decision with Reasons RP-2004-0167/EB-2004-0253 dated December 20, 2004**.**

BEFORE: Gordon Kaiser
Vice-Chair and Presiding Member

Pamela Nowina
Vice-Chair and Member

Paul B. Sommerville
Member

DECISION WITH REASONS

October 6, 2005

On February 23, 2005 Natural Resource Gas Limited filed a Motion with the Ontario Energy Board to rehear and vary certain findings of the Board's Decision dated December 20, 2004.

In that Decision the Board ruled that the deemed long term debt rate for the 2005 fiscal year was 8% and set NRG's cost of unfunded short term debt at 5.5%, which reflected 150 basis point premium over forecast prime of 4.00%. This translated to a weighted cost of debt of approximately 7.07%[1]. In this Decision the Board also disallowed the Applicant's request for the recovery of legal expenses incurred in its appeal of the Board's April 19, 2004 Decision. The Applicant seeks a variance of these two aspects of that Decision.

NRG requested that this Motion be heard in writing and by a new panel of the Board. The Board issued its Notice of Oral Hearing and Procedural Order No. 1, dated February 17, 2005 indicating that a new panel had been appointed, and set February 23, 2005 as the filing deadline for further evidence and submissions. The Motion was heard on April 11, 2005.

Relief Sought

The Motion sought a variance of the Board finding:

a) that the deemed long-term debt rate was 8.00%;

b) that disallowed the recovery through rates of the legal fees associated with NRG's appeal to the Divisional Court of the Board's April 19, 2004 Decision.

As an alternative to the relief sought in paragraph (a), NRG seeks an Order that it be permitted to recover its actual long-term debt costs; or in the alternative be

[1] Fiscal 2005 weighted average cost of debt, calculated using a Long-Term debt rate of 8% and 5.50% on the Short-Term & Unfunded Debt.

permitted to maintain a deemed debt rate of 9.20% for its deemed debt load based upon a 50% debt, 50% equity capital structure;

As an alternative to the relief sought in paragraph (b), NRG sought an Order that the legal costs be recoverable and a variance account for that purpose or an Order establishing a deferral account to track the legal costs. NRG also requested an Order permitting recovery of such amounts, including interest thereon, over a 12-month period commencing either July 1, 2005 or October 1, 2005.

Cost of Debt

The first issue before the Board in this Motion is whether to vary its finding in the December 20, 2004 Decision regarding the long-term debt rate relied on for rate-making purposes. In this Decision, the Board established NRG's rates using a deemed capital structure. As the Applicant's actual long-term debt ratio is approximately 30%, the Board imputes short term debt in an amount that 'tops' debt up to the deemed 50% level.

The June 27, 2003 Decision

Historically, the Board has used NRG's reported cost of long-term debt and deemed a cost of short-term debt at 150 basis points greater than prime. The Board's Decision of June 27, 2003 dealt with both the 2003 and 2004 test years. For 2003, NRG proposed an 11.38% cost of long-term debt and a 6.17% cost of short-term debt; for 2004 it proposed 11.60% and 7.52% respectively. The Board accepted NRG's cost of debt for the 2003 fiscal year and deemed an overall cost of debt of 9.00% for the 2004 fiscal year. This reflected a Board finding that NRG could reduce its interest expense through the refinancing of its debt and the Board's concern that an affiliate of NRG held a significant portion of its total debt.

In its Decision of June 27, 2003 the Board stated:

> The Board is of the view that NRG should be able to refinance its entire debt in a manner which will reduce its carrying costs even when the pre-payment penalties and transactions costs are added to the debt. …the Board sees no reason to believe that NRG cannot obtain an interest rate of better than 8.75% in the current environment. The Company's financial position has improved greatly in the past few years. The Company is a rate regulated monopoly with a relatively low risk. Interest rates have declined even since NRG's preliminary discussions with two financial institutions. While, as the Applicant points out, this leads to an increase in the pre-payment penalties, it also should mean a reduction in the new rate which NRG can obtain.
>
> The Board accepts the position of the Company that it would not be appropriate to adjust the debt rate for the 2003 test year as it will take some time for NRG to complete a refinancing. The Board is prepared to accept that the 2004 interest rate should be somewhat higher than 8% as this rate will be applied to the current forecast debt, whereas a refinancing will require NRG to incur more debt to fund the pre-payment penalties and the transactions costs….the Board also notes that the calculations during the hearing of carrying costs used a figure for transactions costs of $250,000 which was at the top of the range of such costs of $100,000 to $250,000 cited by NRG. The Board has also used this figure of $250,000 in making its determinations.
>
> In light of the utility's evidence that a potential lender would be looking to re-finance its entire debt, including short-term dent, the Board believes it is appropriate to deem an overall debt rate for the 2004 test year.

The December 20, 2004 Decision

In NRG's subsequent main rates case to fix rates for the 2005 fiscal year, it sought an overall cost of debt of 9.20% on an overall debt of $4,705,623. The Company stated that the debt instruments for the 2005 fiscal year were the same as the debt instruments for the 2004 fiscal year, with one exception: the instruments previously held by NRG's affiliate were sold to Banco Securities Inc. at the face value of the debt, under the original terms and with no change in the interest rate. The Company testified that it would pursue refinancing over the next several months and that it anticipated being able to negotiate an interest rate of around

8%. These discussions were expected to be completed by February or March, 2005.

In its decision of December 20, 2004 the Board stated:

> "The Board does not accept the Utility's request for the use of a deemed debt rate of 9% or 9.2% in calculating its revenue requirement. The Board does not intend to tie the Utility's debt rate to the fluctuations of long term interest rates at this point in time. The Board, in its prior decision, set a deemed debt rate in light of the evidence before it that the Utility would be able to reduce its interest expense if it re-financed its existing debt and the fact that much of the Utility's debt was held by an affiliate.
>
> The Board is concerned about the lack of knowledge exhibited by the President of the Utility as to the identity of a major creditor of the Utility, Banco Securities Inc. The Utility has not brought forward requested evidence to demonstrate that Banco is an unaffiliated, arm's length party. Thus, there remains no evidence from an actual transaction demonstrating the interest rate that NRG could obtain in the open market.
>
> The Board has heard evidence in this proceeding that the Utility could refinance its debt at an interest rate of approximately 8% and that there would likely be associated penalties and transaction costs ("breakage costs"). The Board will adopt a deemed long term debt rate for the 2005 fiscal year of 8%. The Board will consider the prudence of breakage costs if and when they are incurred. At that time, the Board will also address the recovery of any breakage costs through rates.
>
> The Board sets NRG's cost of unfunded short term debt at 5.5%, which reflects 150 basis point premium over forecast prime of 4.00%."

The April 11, 2005 Motion

In the current Motion, NRG requested the Board amend the December 20, 2004 Decision and allow the Company to recover its forecasted debt costs of its actual debt instruments. The Company submitted that the difference between the Applicant's actual cost of debt and the Board approved cost of debt was approximately $98,000.

NRG further stated that it has had discussions with two lenders, both of which were chartered banks. It also stated that it is in the process of preparing a five-year capital expenditure forecast in support of the contemplated refinancing of the Company's existing long-term debt. This total package of existing debt and capital expenditure is valued at approximately $5 million.

NRG stated that in order to get a competitive rate, it must approach the lenders with the complete package (that is short-term debt, long-term debt and costs associated with the capital expenditure program) arguing that if a complete package was not negotiated the premium on a second and third portion of the financing would be very expensive. On further questioning NRG testified that it anticipated that within the next two months, that is May or June 2005, it would have formal discussions with lenders and within four to six months it would be approaching lenders with a final borrowing package.

Board Findings

In the Motion NRG testified that it had not made any progress on refinancing its debt because it was in the process of finalizing its capital expansion plans.

The Board determined that before rendering a decision on the Motion it would be appropriate to obtain an update from NRG as to the status of their capital plans and their financing efforts. Accordingly the Board on August 31, 2005 sent a letter to NRG requesting such an update. NRG responded on September 9, 2005 and indicated that it had still not taken any action with regard to its debt refinancing. The letter did not provide a response on the capital plans.

The Board has on a number of occasions expressed its concern that the loan to NRG is not market based and therefore not all of the interest costs associated with it are properly borne by ratepayers. The fact that the loan is now owned by a

different party does not change this concern. NRG chose to transfer this loan at face value with its high interest rate.

This is not a hearing of the application *de novo*. In considering a motion to vary, the Board considers whether new evidence has been presented by the Applicant, or whether the original panel made an error in law or principle so as to justify the reversal of the original Decision.

After reviewing the evidence and the submissions of NRG, the Board has found no compelling evidence that would cause it to vary its December 20, 2004 Decision. It is also apparent from the Company's September 9, 2005 letter in response to the Board's August 31, 2005 letter, that NRG has made no progress whatsoever with regards to new financing.

The Board therefore finds and confirms that the deemed long-term debt rate for the 2005 fiscal year of 8.00% and an unfunded short term debt rate of 150 basis point premium over forecast prime of 4.00%, as set in the Board's December 20, 2004 Decision is just and reasonable for rate setting purposes.

Legal Expenses

The second issue before the Board in this Motion is whether to vary that aspect of the Board's Decision of December 20, 2004 that disallowed the recovery of $175,000 in legal fees.

In its original 2005 rates filing, NRG budgeted $15,000 for legal fees. In its updated filing, in that case this amount was increased to $190,000 to reflect the anticipated costs of an appeal to the Divisional Court of a previous Board decision.

The background to the Divisional Court Appeal is as follows:

In October 2003, NRG discovered that its gas costs for the period October 2002 to December 2003 were under-recovered, by approximately $531,000 due to an accounting error. NRG reported the discrepancy to the Board and in November 2003 filed an Application[2] to recover these costs. In January 2004 the Board issued its decision and authorized NRG to establish a Gas Purchase Rebalancing Account to capture future unrecorded costs, but denied NRG's proposal to recover the $531,000.

Subsequently, NRG sought and was granted a review of that decision. In an April 19, 2004 Decision[3] the Board approved NRG's recovery of these unrecorded gas costs of $531,000 over three years but disallowed the interest on the outstanding balance and the legal and regulatory costs of that review. The Board stated;

> We are surprised and disappointed with the time that it took NRG to realize that its PGCVA mechanism was incorrect, which exposed the utility and its customers to unnecessary risk and created a difficult situation for the customers and the Board. However, we accept that the misrecording was the result of error, not a purposeful action by NRG. [paragraph 33]

The rationale for the Board's initial disallowance of both interest charges and legal and regulatory costs is relevant to the disallowance of legal costs at issue in this proceeding. It is clear that the Board in the earlier decision was motivated by the fact that NRG was responsible for additional costs that should not be borne by the ratepayer. At Paragraphs 38 to 40 of the Decision, the Board stated;

> Had NRG recorded gas cost variances properly in the PGCVA, the present conundrum would have been avoided….we find that NRG's error has resulted in a substantial and avoidable accumulation of potential customers' charges, through no fault of the customers.
>
> We must therefore look for a balance.

[2] RP-2002-0147/EB-2003-0286
[3] RP-2002-0147/EB-2004-0004

The Board further stated;

> …we find that a reasonable balance is recovery of the $531,794 amount over a three year period, in equal portions, without interest… Further, NRG shall not include the regulatory costs it incurred in this proceeding in estimating the regulatory costs for future test years. [paragraph 44, 47]

In summary, the Board refused the NRG request that the costs be collected in one year with interest. Instead, the Board held that it should be collected over three years without interest and that the Company would be disallowed its legal and regulatory costs of the review.

NRG then appealed to the Divisional Court seeking recovery of interest and legal costs associated with the review. The Divisional Court dismissed the appeal in its April 21, 2005 Decision[4].

The Court in upholding the Boards decision accepted the Board's judgement that NRG was partially responsible for the error and its inadvertence had caused costs to consumers. Specifically, the Court stated;

> The matter was compounded by the added issue of how to deal with the accumulation of costs caused by the appellant's inadvertence. The Board determined that customers must pay the prudently incurred unrecorded costs of the appellant, but the impact of the recovery of the accumulated total should be ameliorated by allowing recovery over three years. The accumulated cost of the time over which recovery from customers would be required and the appellant's regulatory costs (over and above the $60,312 allowed it) must be borne by the appellant…The issue before the Board in this case is much more confined: how to deal with the consequences of a failure to identify and report prudently incurred costs, and in determining that question the Board was entitled within its broad mandate to consider both the utility's and customers' interests, as it did. [paragraph 14, 15]

In the 2005 rates case, NRG sought to recover the legal costs of $190,000 related to the Divisional Court appeal.

[4] [2005] O.J. No. 1520

The Board in its Decision of December 20, 2004 disallowed these legal expenses on three grounds. First, the legal costs were solely for the benefit of the shareholder; Second, the legal costs were out-of-period; Third, the Board found that the costs were excessive. Specifically, the Board stated;

> The Board will not allow the legal expense incurred by NRG in its appeal of Board decision in RP-2002-0147/EB-2004-0004 to be recovered from its ratepayers. The Utility's return on equity compensates the Utility for the risks it incurs - including regulatory risk. This appeal was launched at management's discretion and solely for the benefit of its shareholder. It is inappropriate for ratepayers to support legal actions that, if successful, will benefit the Utility's shareholder exclusively.
>
> By way of comment, $50,000 of legal expenses has already been invoiced in the prior fiscal year. NRG ought to be aware that its proposal to include this amount in the test year for this Application represents a request for relief for costs incurred out-of-period and therefore would not be recoverable through rates. Further, the Board questions the prudence of a decision to spend $175,000 for a potential recovery of up to about half that amount. Finally, the Board questions the size of the claimed legal expenses for an appeal the Applicant expects to last no more than two days. [paragraph 3.0.7, 3.0.8]

NRG in its Factum at paragraphs 101 to 110 responded to these findings.

With respect to the ruling that the legal costs were solely for the benefit of shareholders, NRG argues, that if NRG is successful in its appeal, this could have the effect of reducing its borrowing costs because lenders take some comfort from the fact that regulated utilities such as NRG can recover there costs in the regulatory process.

With respect to the Boards findings that the cost award was out-of-period, NRG responded that the cost of the appeal could not be ascertained with greater precision prior to the filing of the updated evidence. The Company argued that at the time it submitted its evidence the $175,000 amount was the best information it

had. NRG further argued that NRG did not control the timing and was required to accommodate the Courts scheduling.

NRG also argued that claiming 2004 costs during fiscal year 2004 would have necessitated a separate application which would have been unnecessarily expensive and would have given rise to the issue of retro-activity. The Company submitted that waiting for the 2005 rate case was the appropriate business decision as it reduced the regulatory burden to NRG, the rate payers and the Board.

In this Motion NRG also argued that as a regulated utility, it should not be constrained from appealing regulatory decisions it considers inappropriate.

With respect to the ruling that the costs were excessive, NRG introduced new evidence and advised the Board that the costs were now reduced from the original estimate and would be no greater than $70,000. Board Counsel advised the panel that this new level of costs was reasonable.

Board Findings

Although the Board finds that there is some merit in NRG's arguments with respect to both the out-of-period issue and the amount of the costs, in reviewing all factors, the Board finds that the Board's previous Decision with respect to legal costs should stand and not be varied.

NRG has argued that it should not be penalized when appealing decisions of this Board by disallowance of costs associated with these appeals. This panel agrees with that submission. However, there is no suggestion that the earlier panel was attempting to penalize NRG in this regard.

As to whether these costs were out-of-period, there is merit to NRG's position that these costs were not crystallized at the time they had to be presented in the 2005 rate case.

The Board also notes that the costs have now been finalized and are considerably less than the earlier estimate of $175,000. The Company now claims that the costs will not exceed $70,000. This is new evidence that was not before the previous panel, but the quantum of costs was only one of the several reasons given by the panel for disallowance.

The Board's ruling that the appeal was solely for the benefit of the shareholders and therefore the costs should be disallowed is a more difficult issue. It can be argued that all costs that a regulated utility seeks to recover from ratepayers are to the benefit of the shareholders. On the other hand, it can be argued that all Decisions will have an impact beyond the shareholder interest.

NRG argues in this case that lenders will be comforted by the fact that the utility is successful in recovering its costs. However, the more fundamental question is why these costs were disallowed in the first instance.

A careful review of the Decisions indicates that the disallowance of the interest costs and the legal and regulatory costs has been the subject of three separate Decisions. The first was the Board's April 19, 2004 Decision[5], the second was the Divisional Court ruling on the appeal from that Decision[6] and the third was the December 20, 2004 Decision[7].

[5] RP-2002-0147/EB-2004-0004
[6] [2005] O.J. No. 1520
[7] RP-2004-0167/EB-2004-0253

It's clear why the Board disallowed both the interest and legal costs. In the April 19, 2004 Decision, the Board stated;

> Had NRG recorded gas cost variances properly in the PGCVA, the present conundrum would have been avoided….we find that NRG's error has resulted in a substantial and avoidable accumulation of potential customers' charges, through no fault of the customers.
>
> We must therefore look for a balance. [paragraph 38-40]

At paragraph 44 and 47 of that Decision, the Board concludes that the "balance" was to allow recovery of the $531,794, but not over one year as requested by the utility. Rather, the Board said the utility could recover those costs over three years but without interest. The Board added that it was also not going to allow the regulatory costs incurred with respect to the review.

NRG then appealed to the Divisional Court. The Court upheld the Board's Decision indicating, "The matter was compounded by the added issue of how to deal with the accumulation of costs caused by the appellant's inadvertence." The Court further stated " The issue before the Board is much more confined: how to deal with the consequences of a failure to identify and report prudently incurred costs, and in determining that question the Board was entitled within its broad mandate to consider both the utility's and customers' interests, as it did."

On review of the complete record, the Board finds that the principle motivation for the panel in disallowing these costs in both Decisions was that the costs were in part as a result of NRG's own error. This "inadvertence" as the Divisional Court describes it, imposed costs on customers which were the consequences of a failure to identify and report prudently incurred costs. The Divisional Court found at paragraph 15 of its Decision, "The Board's disposition, in seeking and determining a reasonable balance, was not punitive in nature."

This panel agrees with the Divisional Court's assessment. The issue of the costs of the appeal is the same issue that was before the Divisional Court. There, the costs were the costs of the review as opposed to the costs of the appeal. The principle is the same. This Board has consistently ruled that utilities should not be entitled to recover costs where those costs are a result of its own error and that error has imposed unnecessary costs on the ratepayers.

It is true that lenders and others look to the ability of a regulated utility to recover costs from its regulator. But they also look for consistency of Decisions on part of the regulator. The issue before this panel has been before the Board twice and the before the Divisional Court once. We see no reason to alter the findings.

Costs

The costs of, and incidental to, this proceeding shall immediately be paid by the Applicant upon receipt of the Board's invoice.

DATED at Toronto, October 6, 2005

ONTARIO ENERGY BOARD

Original signed by

_____

Gordon Kaiser
Vice-Chair and Presiding Member

Original signed by

_____

Pamela Nowina
Vice-Chair and Member

Original signed by

_____

Paul B. Sommerville
Member

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

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND HARVISON YOUNG JJ.

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

SWINTON J. (ORALLY)

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

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

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

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

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

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

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

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

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

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

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

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

LEDERMAN J.

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

SWINTON J.

LEDERMAN J.

HARVISON YOUNG J.

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

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

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND HARVISON YOUNG JJ.

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF GREY HIGHLANDS

Appellant

– and –

PLATEAU WIND INC. and THE ONTARIO ENERGY BOARD

Respondents

ORAL REASONS FOR JUDGMENT

SWINTON J.

Date of Reasons for Judgment: February 9, 2012

Date of Release: February 23, 2012

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

DECISION AND ORDER

EB-2014-0369

ONTARIO POWER GENERATION INC.

Motion to review and vary the Decision with Reasons on the 2014-2015 payment amounts (EB-2013-0321)

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

January 28, 2016

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1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) in response to a notice of motion filed by Ontario Power Generation Inc. (OPG) to review and vary the OEB Decision with Reasons on 2014-2015 payment amounts.[1]

OPG is the largest electricity generator in Ontario. The OEB sets the rates that OPG charges for the generation from its nuclear facilities (Pickering and Darlington) and most of its hydroelectric facilities (e.g. Sir Adam Beck I and II on the Niagara River). The rates charged by OPG are referred to as payment amounts. These payment amounts are included in the electricity costs which are shown as a line item on the electricity bill from a customer's distributor, and make up about half the total of an average household bill.

The OEB issued the 2014-2015 OPG payment amounts decision on November 20, 2014. OPG filed a notice of motion to review and vary the 2014-2015 payment amounts decision on December 10, 2014. In OPG's view, there are errors related to the OEB's disallowance of $88.0 million for the Niagara Tunnel Project and the OEB's direction to reduce the 2014 income tax provision to account for the carry-forward of a regulatory tax loss in 2013.

The OEB's $88.0 million disallowance was made up of two parts: $28.0 million related to a settlement of a claim by the tunnel contractor, (the Pre-December 2008 Disallowance), and $60.0 million related to incentives paid to the tunnel contractor (the Amended Design Build Agreement Disallowance).

Subject to the OEB review, the remedy OPG proposed in its motion is an increase to payment amounts, and an account to recover the difference from November 1, 2014 to the effective date of the higher payment amounts.

Rule 42.01 of the OEB's *Rules of Practice and Procedure* states that all motions brought under Rule 40.01 shall set out the grounds for the motion that raise a question as to the correctness of the order or decision.

The OEB's *Rules of Practice and Procedure* also states that the OEB may determine a threshold question of whether the matter should be reviewed before conducting any review of the merits of the motion. The OEB must ensure that the motion is not merely a

[1] EB-2013-0321 Decision with Reasons, Payment Amounts for Prescribed Facilities for 2014 and 2015, November 20, 2014

request for a reconsideration of the original application. A full explanation of the application of the threshold test is contained in chapter 4 of this Decision.

The OEB made provision for written and oral submissions on both the threshold and the merits of the motion in the current proceeding.

Most parties and OEB staff argued that the grounds for the motion put forward by OPG are insufficient and therefore the motion should be denied at the threshold stage.

In OPG's view, the threshold test is satisfied as there are material factual errors in the 2014-2015 payment amounts decision regarding the Niagara Tunnel Project and regarding taxes. OPG challenged the correctness of the 2014-2015 payment amounts decision on the basis that the findings are contrary to the evidence that was before the OEB.

For reasons that are contained in the following chapters the OEB has determined that OPG has not passed the threshold test on two of the three parts of its motion. The OEB has determined that errors were not made with respect to the disallowance associated with the Amended Design Build Agreement or with respect to the income tax provision to account for regulatory losses. The motion is denied on those two parts.

The OEB finds that the reasons provided in the original decision regarding certain elements of the disallowance of $28.0 million pertaining to the Pre-December Disallowance are contrary to the evidence. The OEB review panel has determined that the original disallowance of $28.0 million will be varied to a disallowance of $6.4 million.

The motion by OPG is partially granted with a variance of the original decision disallowance for the Niagara Tunnel Project of $88.0 million to a disallowance of $66.4 million.

2 THE PROCESS

OPG filed the notice of motion to review and vary the Decision with Reasons on 2014-2015 payment amounts on December 10, 2014.

The Notice of Hearing and Procedural Order No. 1 was issued on January 13, 2015. The OEB adopted all parties to the 2014-2015 payment amounts proceeding. The following intervenors participated in the motion proceeding:

- Association of Major Power Consumers in Ontario
- Canadian Manufacturers & Exporters
- Energy Probe Research Foundation
- Power Workers' Union
- School Energy Coalition (SEC)
- Society of Energy Professionals
- Vulnerable Energy Consumers Coalition

OEB staff filed its submission on February 20, 2015, and intervenors filed their submissions by March 2, 2015. The submissions addressed the threshold question of whether the matter should be reviewed as well as on the merits of the motion.

The oral hearing of the motion was held on March 24, 2015.

3 STRUCTURE OF THE DECISION

The OEB has organized this Decision into chapters, reflecting the issues that the OEB has considered in making its findings.

Chapter 4 provides an explanation of the OEB's considerations with respect to motions to review, including the application of the threshold test.

Subsequent chapters deal with the three parts of the 2014-2015 payment amounts decision that OPG requested be reviewed and varied. Chapter 5 deals with the Niagara Tunnel Project, both the threshold test and the merits of the motion pertaining to the Pre-December Disallowance and the analysis and findings pertaining to the threshold test for the Amended Design Build Agreement. Chapter 6 contains the OEB's analysis and findings on the threshold test pertaining to the tax loss carry-forward. The Decision concludes with chapter 7 dealing with implementation of the OEB's findings and the procedures for the awarding of costs to eligible parties.

4 MOTIONS TO REVIEW

4.1 The OEB's *Rules of Practice and Procedure*

Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* provides the grounds upon which a motion may be raised with the OEB:

> Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Rule 43.01 of the *Rules of Practice and Procedure* states:

> In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

4.2 The Threshold Test

In the Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0322/0338/0340, May 22, 2007, the OEB found:

> 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.

The OEB has adopted these findings in its consideration of the threshold question on many occasions over the past several years and does so again in consideration of arguments on the threshold question in this motion to review and vary. The analysis and findings on the threshold question are provided in the following chapters dealing with the three elements of this motion.

5 NIAGARA TUNNEL PROJECT

The Niagara Tunnel Project is a 10.2 km long tunnel with a diameter of 12.7 meters which runs under the City of Niagara Falls. Its purpose is to increase the flow of water to hydroelectric generation facilities owned by OPG at Niagara Falls.

OPG sought to add $1,452.6 million of Niagara Tunnel Project expense to rate base in the 2014-2015 payment amounts proceeding and to earn a return on that investment. The OEB's $88.0 million disallowance was made up of two parts: $28.0 million related to a settlement of a claim by the tunnel contractor, Strabag Inc. (the Pre-December 2008 Disallowance), and $60.0 million related to incentives paid to Strabag to complete the Niagara Tunnel Project after December 2008 (the Amended Design Build Agreement Disallowance).

5.1 The Pre-December 2008 Disallowance

OPG and Strabag disagreed on the resolution of additional costs that were incurred in the early stages of the Niagara Tunnel Project. Strabag claimed that the additional costs were the result of subsurface conditions not previously identified and that the costs should be borne by OPG, the owner. OPG's position was that no differing subsurface condition existed, and that additional costs were related to modifications to tunnel boring and rock support and that the costs should be borne by the contractor.

The dispute, in which Strabag claimed costs of $90 million, was referred to a Dispute Review Board. Strabag offered five reasons that it believed supported its claim for differing subsurface conditions. OPG had performed an audit of Strabag's costs and concluded that certain costs should not be included. It had determined that $77.4 million was the amount of additional costs associated with the claim.

The Dispute Review Board's report was structured according to the five reasons presented by Strabag. The Dispute Review Board agreed that there were differing subsurface conditions, but not for each of the five matters presented. The report does not include any analysis of how much of the total cost could be attributed to any of the five individual issues presented by Strabag. As OPG and Strabag jointly developed the Geotechnical Baseline Report which formed the basis on which claims for differing subsurface conditions were to be assessed, the Dispute Review Board found that Strabag and OPG should share the shortcomings of the resulting documents and that

both must accept the responsibility for some portion of the additional cost. OPG and Strabag ultimately negotiated a settlement and OPG paid Strabag $40 million.

In the 2014-2015 payment amounts decision, the OEB found that the payment was not prudent and disallowed $28.0 million in relation to the settlement of the Strabag claim.

Threshold Test

OEB staff and most of the parties argued that the motion should be dismissed at the threshold stage as there was no new evidence in OPG's notice of motion. Parties submitted that OPG made the same arguments in its submissions to the OEB in the 2014-2015 payment amounts proceeding.

OPG agreed that the arguments made in its motion submission were the same as the arguments made in the 2014-2015 payment amounts proceeding. OPG argued that given that the grounds for the motion are based on OPG's contention that the OEB decision contained errors it would be peculiar if the submissions were different. OPG stated that the implication of having a different submission when the grounds for the motion are based on an alleged error is that the applicant had misidentified what the issue was in the original arguments.[2]

The OEB accepts that OPG's arguments on this motion repeat arguments made in the 2014-2015 payment amounts proceeding. OPG used these same arguments in expressing its contention that the analysis and reasoning in the payment amounts decision demonstrates that the original panel misinterpreted OPG's original argument and the evidence before it. The OEB does not consider that to be inappropriate.

OPG grounded its motion to review and vary this part of the decision on the assertion that an error had been made in interpreting evidence and this led to a decision that is inconsistent with the evidence.

The interpretation of the evidence pertaining to this part of the motion is a key factor in the payment amounts decision that if found to be incorrect would change the outcome of the decision. The OEB finds that the grounds for this part of the motion have substance and has therefore considered its merits.

[2] Motion Hearing Transcript pages 153,154

Findings

The OEB finds that OPG has successfully demonstrated that the findings on the $28 million disallowance that were supported by the conclusions of the Dispute Review Board's report are contrary to the evidence that was before the OEB.

OPG's notice of motion states that the OEB did not understand the nature of the Dispute Review Board process and that the OEB's findings are factually incorrect and inconsistent with the evidence. OPG stated that the only question before the Dispute Review Board was whether there were differing subsurface conditions. If there was a positive finding on any of the reasons put forth by Strabag, then a differing subsurface condition existed.

OEB staff argued that the issue before the OEB was not simply whether there were or were not differing subsurface conditions, but rather the issue was the amount to be included in rate base. OEB staff submitted that as the Dispute Review Board made discrete findings on each of the five matters raised by Strabag, there was therefore a range of possible disallowances and as the decision to disallow $28 million was within that range, it was supported by the evidence.

At page 31-32 of the 2014-4015 payment amounts decision, it states:

> The Board is not satisfied that paying Strabag $40M for its claims up to December 2008 was prudent. This Board finds that the non-binding recommendations of the Dispute Review Board were reasonable, and that some level of shared responsibility between OPG and Strabag was appropriate. However, paying a $40M settlement (44% of Strabag's $90M claim) is excessive in the Board's view. There were five issues of dispute that were referred to the Dispute Review Board. The Dispute Review Board found that OPG was not responsible for three of the five issues and that OPG had only joint responsibility for the remaining two issues. No evidence was filed on the relative value or cost of the five issues. OPG's witnesses testified that the individual issues were not quantified.
>
> As a result of the contract renegotiation with Strabag, OPG had the right to audit Strabag's claimed losses of $90M. To the extent that the $90M was not substantiated in the audit, the $40M payment could be reduced proportionately. OPG's witnesses testified that OPG's internal auditors conducted the audit and found that a total of $12.6M was not associated with legitimate expenses, resulting in a loss of only $77.4M. The auditors

> did not recognize inter-company transfers within Strabag's organization, thereby reducing the amount from $90M to $77.4M. OPG's evidence was that they could reduce the $40M settlement proportionately based on the audit, but did not do so.
>
> The Board is unable to find that a $40M settlement of Strabag's claim was prudently incurred. In the absence of information regarding the costs attributable to each of the five issues, the Board must use its judgment of what is a reasonable amount. In determining the amount, the Board has decided to utilize the findings of the Dispute Review Board. As a result, the Board finds that OPG's ratepayers should not pay any amount for the three issues which OPG was not responsible, but should pay 50% of two issues for which OPG was jointly responsible. In addition, the Board is persuaded by the results of OPG's audit and considers the $77.4M to be the appropriate starting point for the Board's calculation, not the $90M claim by Strabag. There was no evidence or testimony provided supporting Strabag's claimed amount. As a result, the Board finds that ratepayers should only pay 20% of the $77.4M audited amount, or $15.5M. In addition, the Board denies the associated carrying costs of the disallowed $24.5M,[3] which results in a reduction of another $3.5M.[4] The Board finds this disallowance of $28.0M reasonable given the evidence provided.

As noted above, the 2014-2015 payment amounts Decision states:

> In the absence of information regarding the costs attributable to each of the five issues, the Board must use its judgment of what is a reasonable amount. In determining the amount, the Board has decided to utilize the findings of the Dispute Review Board.

This statement explains the original panel's approach to determining a reasonable amount of payment in the absence of certain information. However, the original panel based its finding that the $40 million payment was excessive on the premise that there was a correlation between the attribution for responsibility contained in the Dispute Review Board's conclusions and a reasonable sharing of responsibility for the costs. The OEB finds that there is no such correlation.

[3] $40M – (20% x $77.4M)
[4] $24.5M x 5.25% x 33/12 months

The finding that paying the $40 million settlement was excessive is based solely on the Dispute Review Board's analysis of the five issues contained in its report. The analysis provides the Dispute Review Board's conclusions with respect to responsibility for the five issues. The payment amount decision does not identify any other determinative factors that influenced the original panel's determination that the settlement payment was excessive.

The findings that the results of OPG's audit and the carrying costs should also be considered relate only to the final calculation of the disallowance.

The OEB accepts OPG's assertion that the only question before the Dispute Review Board was whether there were differing subsurface conditions. The fact that there was no quantification of costs related to each of the five issues analyzed suggests that they were either not individually quantifiable or not relevant. This is demonstrated by the fact that the parties that were engaged in the dispute and the Dispute Review Board did not or could not quantify the costs associated with each of the five issues. OPG provided evidence describing the usual approach taken by the Dispute Review Board in dealing with these matters.[5] OPG's witness stated that it is usual to only deal with the merits of a dispute in a hearing and then only return to the Dispute Review Board seeking a resolution if parties are not able to negotiate an agreement on costs. It is clear from the Dispute Review Board's report that cost was not considered in its analysis. The OEB finds that the Dispute Review Board's conclusions on attribution of responsibility have no bearing on costs and therefore cannot be used in support of the finding that the $40 million settlement was not prudently incurred.

Two other factors were included in the $28 million disallowance. These are the impact of the OPG audit results which the OEB found should have been considered, and the calculation of the carrying costs. Neither of these depends on the interpretation of the Dispute Review Board's conclusions, so the findings on these issues are unchanged.

The disallowance will be varied only by removing the amount pertaining to the Dispute Review Board's conclusions from the original disallowance calculation. The OEB has applied the same contributing share of 44% to OPG that was derived through negotiation to the post audit quantum of $77.4 million. As decided in the original decision, carrying costs on the new disallowance will not be recoverable.

[5] EB-2014-0369 Supplemental Motion Record filed January 26, 2015, page 20 – Oral Hearing Transcript Volume 1 June 12, 2014, page 64

The varied disallowance is $5.6 million[6] with an associated carrying cost of $0.8 million[7], resulting in a total varied disallowance of $6.4 million.

The difference between the original disallowance and the varied disallowance is $21.6 million. The revenue requirement impact of this difference is estimated to be $2.16 million[8] on the total annual revenue requirement for the OPG regulated facilities of $4,200 million.[9]

5.2 The Amended Design Build Agreement Disallowance

In 2009, following receipt of the Dispute Review Board's report, OPG and Strabag negotiated an Amended Design Build Agreement which increased contracted costs from $622.6 million to $985.0 million. While the structure of the initial agreement was fixed price, the structure of the amended agreement was based on target cost with incentives.

In the 2014-2015 payment amounts decision, the OEB found that the incentives were excessive and disallowed $60.0 million. At page 33 of the decision, it states:

> OPG's witnesses further confirmed that Strabag would suffer serious repercussions were it to walk away from the Project, including being sued by OPG for breach of contract, and suffering a serious blemish on its business reputation.
>
> Strabag, therefore, had very strong incentives to reach an agreement with OPG to find a way to complete the Project. Walking away from the Project would have been an extremely expensive and unpalatable option for Strabag, and for its parent company.
>
> Under these circumstances, the Board finds that the incentives offered to Strabag through the Amended Design Build Agreement were excessive. OPG understood that a contractor default was a potential risk, and indeed it took steps that should have mitigated that risk through a letter of credit

[6] $40 million – ($77.4 million x ($40 million/$90 million))
[7] $5.6 million x 5.25% x (33 months/12 months)
[8] EB-2013-0321 Oral Hearing Transcript, June 16, 2014, Vol 3 page 37: "So if you assume that you're bringing into rate base approximately $1.5 billion of capital, the kind of annual carry on that, reflective of depreciation and return on capital, rule of thumb is about 10 percent or, say, $150 million."
[9] EB-2013-0321 Payment Amounts Order, December 18, 2014, OEB approved revenue requirement for 2015

> and a comprehensive parental indemnity. However, when it came time to renegotiate the Design Build Agreement, OPG did not properly use its leverage to secure a more favourable deal. The Board will disallow recovery of $60M. The Board is mindful of the Dispute Review Board's recommendation that Strabag have appropriate incentives to complete the work. However, in the Board's view the Amended Design Build Agreement provided adequate "incentive" even without the specific incentive clauses. OPG agreed to pay Strabag hundreds of millions of extra dollars more than was provided for in the original Design Build Agreement. In the Board's judgment, the provision for incentives above this was not necessary and not prudent.

OPG argued that the OEB's reliance on the Strabag parental guarantee and indemnity was in error. As Strabag was not in default and there was no litigation in process, the indemnity provided OPG with no leverage in negotiating the Amended Design Build Agreement. OPG was advised by professionals with tunneling and litigation expertise and the negotiation was hard-fought.[10] It was necessary to include incentives in the Amended Design Build Agreement, and in the end, Strabag's profit over the 5 year project was very small.

As with the $28 million disallowance, OEB staff and most of the intervenors argued that OPG made the same argument before the panel hearing the 2014-2015 payment amounts proceeding. There were thousands of pages of evidence and two days of cross examination on the Niagara Tunnel Project. Most intervenors argued that OPG was in a position of strength following the Dispute Review Board's report and that no one can determine Strabag's real profit except Strabag.

Threshold Test

OPG contends that the OEB's reliance on the parental guarantee and indemnity was in error. The decision clearly cites the risk of Strabag suffering a serious blemish on its business reputation as an incentive for it to remain on the job.

The 2014-2015 payment amounts decision makes reference to OPG's witnesses' testimony in confirming the existence of reputational risk. OPG does not allege an error in the OEB's reliance on the existence of reputational risk. OPG argues that the OEB placed too much significance on the parental guarantee and indemnity features of the agreement.

[10] Motion Hearing Transcript, pages 156-7

The threshold test findings from the motions to review the Natural Gas Electricity Interface Review Decision covered in chapter 4 of this decision include the following:

> 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 OEB finds that the determination that the $60 million in incentives was not prudently incurred was based on the panel's findings on evidence that is not in dispute; that being the existence of reputational risk. The existence of the parental guarantee and the indemnity features was not the determinative factor in the finding of the existence of reputational risk. The OEB does not accept that there is an identifiable error in the decision that could lead to the conclusion that the findings are contrary to the evidence that was before the original panel.

The OEB does not consider the grounds for this part of OPG's motion to warrant any further consideration.

6 TAX LOSS CARRY-FORWARD

OPG incurred a regulatory tax loss of $211.6 million in 2013 that OPG attributes to a shortfall in nuclear production. In the 2014-2015 payment amounts proceeding, OPG submitted that the associated tax loss carry-forward should not be applied to regulatory taxable income in 2014 to reduce the tax provision included in the payment amounts. OPG argued that its shareholder incurred the costs associated with the loss in 2013 and should receive the benefit of the resulting tax loss carry-forward in 2014.

In the 2014-2015 payment amounts decision, the OEB found that the tax loss carry-forward should be applied against the 2014 tax provision. At page 101 of the decision, it states:

> The Board directs OPG to reduce its 2014 income tax provision to recognize and carry forward its regulatory tax loss in 2013. This finding is consistent with Board policy as indicated in the Board's 2006 Electricity Distributor's Rate Handbook (the "Handbook") and in subsequent Filing Requirements.[11] The Board understands the policies contained in the Handbook and the Filing Requirements apply to electricity distributors, not directly to OPG as an electricity generator, yet finds that the underlying Board policy should be applicable to OPG in this application.
>
> The rate regulation of the electricity distribution sector shows a history of tax loss carry-forwards being routinely used in the rate setting process for distributors. This approach is completely consistent with Board policy for tax losses to be applied to reduce income tax to be included in rates, and there is no reason for OPG to be treated any differently in this instance.
>
> OPG referred to two decisions in which the Board did not apply the policy, namely OPG's EB-2007-0905 decision and Great Lakes Power's EB-2007-0744 decision. The Board finds that the circumstances in these two cases were unique and are not comparable to OPG's current circumstances.

At the motion hearing, OPG reviewed the EB-2007-0905 and EB-2007-0744 decisions in detail and explained how these decisions and the benefits follows costs principle is applicable to 2013 regulatory tax loss. OPG argued that the 2014-2015 payment

[11] A requirement to identify any loss carry-forwards and when they will be fully utilized has been included in the Board's Filing Requirements for electricity distributors' cost of service applications since 2012. With the issuance of the 2012 Filing Requirements (for 2013 rates), the Board included any remaining relevant sections of both the 2000 and 2006 Electricity Rate Handbooks.

amounts decision did not correctly consider the two cases and made several errors, including limiting the reference to the Great Lakes Power case to the matter of regulated and non-regulated businesses. There were tax matters related to the regulated business and the OEB considered the benefits follows costs principle as well as the guidance of the Distribution Rate Handbook. OPG submitted that Great Lakes Power case is the leading case with respect to tax loss and that the OEB took a principled approach.

Threshold Test

As with the Niagara Tunnel Project disallowance, OEB staff and most of the intervenors argued that OPG made the same argument before the panel hearing the 2014-2015 payment amounts proceeding. OEB staff argued that there is no error as the basis of the OEB decision in the 2014-2015 payment amounts proceeding was the application of guidance in the Distribution Rate Handbook, not the benefits follows costs principle. OEB staff noted that tax loss carry-forwards have been applied in eleven distribution rate applications from 2005 to 2011. SEC submitted that a cost of service application rebases all costs, including taxes.

OPG argued that the panel's determinations with respect to the comparability of the two cases cited are erroneous. OPG provided what it considered to be the applicable common elements that the OEB should have considered.

The decision states that the two cases were considered to be unique and found not to be comparable to OPG's current circumstances. The decision does not contain a description of the distinguishing characteristics of the two other cases that would make them unique.

The OEB does not consider the lack of analysis of the comparability of the two cases to the current OPG circumstance to be an error. The decision to apply the tax loss carry-forward to regulatory taxable income in 2014 to reduce the tax provision included in the payment amounts was not primarily based on a determination that the current circumstances differ from the circumstances in the two cases cited by OPG.
The decision is clear as to why the OEB determined that the tax loss should be treated as directed. As noted above, the decision stated:

> The rate regulation of the electricity distribution sector shows a history of tax loss carry-forwards being routinely used in the rate setting process for distributors. This approach is completely consistent with

> Board policy for tax losses to be applied to reduce income tax to be included in rates, and there is no reason for OPG to be treated any differently in this instance.

The threshold test findings from the motions to review the Natural Gas Electricity Interface Review Decision covered in chapter 4 of this decision include the following.

> 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.

The OEB finds that even if the finding that the current circumstances differ from those in the cases cited by OPG, and was made in error, it would not affect the outcome of the decision as it would not change the primary basis on which the decision was made. As submitted by OEB staff, the basis of the OEB decision in the 2014-2015 payment amounts proceeding was the application of guidance in the Distribution Rate Handbook, not the benefits follows costs principle.

The OEB does not consider the grounds for this part of OPG's motion to warrant any further consideration.

7 IMPLEMENTATION AND COST AWARDS

7.1 Implementation

Subject to the OEB review of OPG's notice of motion, the remedy OPG proposed in its motion was an increase to payment amounts, and an account to recover the difference from November 1, 2014 to the effective date of the higher payment amounts.

The OEB has determined that errors were not made with respect to the disallowance associated with the Niagara Tunnel Project Amended Design Build Agreement or with respect to the income tax provision to account for regulatory losses. The OEB has determined that the Niagara Tunnel Project Pre-December 2008 Disallowance will be varied. The original rate base addition disallowance of $28.0 million will be varied to a disallowance of $6.4 million.

As noted earlier in this Decision, the estimated revenue requirement impact of the varied disallowance is $2.1 million per year. The approved 2015 total annual revenue requirement for the OPG regulated facilities is $4,200 million. Given the small percentage of payment amount impact the OEB finds that increasing payment amounts at this time to reflect the varied disallowance is not necessary.

The OEB orders the establishment of a variance account called the "Niagara Tunnel Project Pre-December 2008 Disallowance Variance Account". The variance account shall record the difference between the annual revenue requirement impact of the original rate base addition disallowance of $28.0 million and the varied disallowance of $6.4 million. The account shall record the difference from November 1, 2014. OPG shall record interest on the balance using the prescribed interest rates set by the OEB from time to time. OPG shall apply simple interest to the opening monthly balance of the account until the balance is fully recovered. The clearance of the Niagara Tunnel Project Pre-December 2008 Disallowance Variance Account will be reviewed in OPG's next payment amounts application.

Given the nature of the costs to be tracked in the new account and their quanta, the OEB will dispense with the requirement to establish a more detailed accounting order at this time. OPG shall include all relevant details as to the manner in which it made all entries into the new variance account at the time of disposition.

7.2 Cost Awards

As noted in the Notice of Hearing and Procedural Order No. 1, any party that was determined to be eligible for an award of costs in the 2014-2015 payment amounts proceeding (EB-2013-0321) shall be eligible for costs in this proceeding.

In determining the amount of the cost award, the OEB will apply the principles set out in section 5 of the OEB's *Practice Direction on Cost Awards* and the maximum hourly rates set out in the OEB's Cost Awards Tariff.

8 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OPG shall establish the following new variance account as described in this Decision: Niagara Tunnel Project Pre-December 2008 Disallowance Variance Account.

2. Intervenors shall file with the OEB and serve on OPG, their cost claim within 7 days from the date of issuance of this Decision.

3. OPG shall file with the OEB and serve on intervenors any objections to the claimed costs within 14 days from the date of issuance of this Decision.

4. Intrervenors shall file with the OEB and serve on OPG any responses to any objections for cost claims within 21 days of the date of issuance of this Decision.

5. OPG shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, **EB-2014-0369**, be made through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

ADDRESS

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

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto January 28, 2016

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0193

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

AND IN THE MATTER OF a Motion by Milton Hydro Distribution Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review by the Board of its Decision and Order in proceeding EB-2012-0148 dated April 4, 2013.

BEFORE: Paula Conboy
Presiding Member

Ellen Fry
Member

Marika Hare
Member

DECISION AND ORDER
ON MOTION TO REVIEW
July 4, 2013

INTRODUCTION

On April 25, 2013, Milton Hydro Distribution Inc. ("Milton Hydro") filed with the Ontario Energy Board (the "Board") a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order dated April 4, 2013 in respect of Milton Hydro's 2013 IRM rate application, EB-2012-0148, (the "2013 IRM Decision"). The Board assigned the Motion file number EB-2013-0193.

The Board has determined the threshold question of whether the matter in the Motion should be reviewed on its merits, as provided for in section 45.01 of the Board's *Rules*

of Practice and Procedure (the "threshold question"). For the reasons set out below the Board has determined that the matter should not be reviewed.

The Board issued its Notice of Motion to Review and Procedural Order No. 1 on May 14, 2013. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition ("VECC"), which was the only intervenor in Milton Hydro's 2013 rate application.

Milton Hydro submitted additional material in support of its Motion on May 22, 2013. Board staff and VECC filed their submissions on June 3, 2013. Milton Hydro filed a reply submission on June 10, 2013.

BACKGROUND

On September 14, 2012 Milton Hydro filed an IRM application for the 2013 rate year. The application sought approval for changes to the rates that Milton Hydro charges for electricity distribution, to be effective May 1, 2013.

In its 2013 IRM application, Milton Hydro requested the recovery of lost revenues of $107,762 using the Lost Revenue Adjustment Mechanism ("LRAM"). Milton Hydro's LRAM claim included lost revenues for 2010 CDM programs persistent in 2011 and 2012.

On April 4, 2013, the Board issued its 2013 IRM Decision. As part of that decision, the Board denied the LRAM claim. The following is a key portion of the Board's reasons for doing so:

> Page 42 of Milton Hydro's evidence for 2011 rates states: "Milton Hydro's revenue forecast is based on the **forecasted** kWh, KW and customer counts for the 2010 Bridge Year and 2011 Test Year" (emphasis added).
>
> There is no mention in this portion of the evidence that the load forecast was based on actual customer consumption and demand. This in fact, would be inconsistent with a "forecast", which anticipates future loads, not actual loads from previous years. Milton Hydro, as an early implementer of CDM programs, should have been aware of the approximate potential forecast loss for 2011 as a result of conservation initiatives, even without the OPA report. Without an explicit

> statement that the 2011 forecast did not include the impact of CDM, which there is not, the Board finds that the 2011 forecast must have taken load loss as a result of CDM into consideration. Therefore, the Board finds that no LRAM is available for 2011 or 2012 to account for the persistent impact of CDM programs implemented in 2010[1].

Milton Hydro's Motion seeks to vary the 2013 IRM Decision to accept the LRAM claim that the Board denied.

POSITIONS OF PARTIES

Milton Hydro submitted that the Board erred in fact in failing to take into consideration the evidence presented by Milton Hydro in its 2011 cost of service application. Milton Hydro stated that the evidence clearly showed that it did not include 2010 CDM results in its 2011 cost of service load forecast.

Board staff submitted that regardless of whether Milton Hydro explicitly identified an absence of CDM impacts in its load forecast in the application, the Board in its rebasing decision approved the total forecast as complete, given that there was no language to the contrary. The Board in over 25 LRAM decisions has determined that in the absence of an explicit statement to the contrary in a decision or settlement agreement, the load forecast is deemed to be just and reasonable for rate-making purposes and final in all respects. The 2008 CDM Guidelines state that lost revenues are only accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time. Board staff therefore submitted that there is no error in fact and that the threshold question for review has not been met.

VECC submitted that Milton Hydro's application and the Board's decision in the 2011 cost of service proceeding do not explicitly state that there was no CDM allowance for 2010 in the load forecast. On that basis VECC submitted that the 2013 IRM Decision did appropriately take into consideration the facts presented in Milton Hydro's 2011 cost of service application and there was therefore no error in fact. Accordingly, VECC also submitted Milton Hydro's Motion does not meet the threshold question and Milton Hydro's motion to vary should be denied.

[1] EB-2012-0148, Decision and Order at page 10

In its reply, Milton Hydro submitted that the Motion does meet the threshold test. Milton Hydro submitted that its evidence makes it obvious that 2010 actual data is not used and therefore the persistence of 2010 OPA CDM programs is also not included. Milton Hydro further submitted that it had identified an error in the Board's decision. In its view, the decision is contrary to the evidence provided in Milton Hydro's Cost of Service Application.

THE THRESHOLD TEST

Under section 45.01 of the Board's *Rules of Practice and Procedure* (the "Rules"), the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The Board has considered previous decisions in which the principles underlying the threshold question were discussed, namely the Board's Decision on a *Motion to Review Natural Gas Electricity Interface Review Decision* (the "NGEIR Review Decision") and the Divisional Court's decision *Grey Highlands v. Plateau.*.[2]

In the NGEIR Review Decision, the Board indicated that "the review [sought in a motion to review] is not an opportunity for a party to reargue the case".

In the *Grey Highlands v. Plateau* the Divisional Court agreed with this principle. The court dismissed an appeal of the Board decision in EB-2011-0053 where the Board determined that the motion to review did not meet the threshold test. The Divisional Court stated:

> The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.[3]

BOARD FINDINGS

In the 2013 IRM Decision, the Board considered fully the evidence filed by Milton Hydro concerning its LRAM claim. This is illustrated by the portion of the 2013 IRM Decision

[2] EB-2006-0322/0388/0340, May 22, 2007 at page 18 and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012)
[3] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) at para 7

quoted above in the “Background” section. Milton Hydro had a full opportunity in that proceeding to argue its position concerning its LRAM claim.

Milton Hydro is now asking the Board to reconsider the conclusion that it reached in interpreting the evidence in the 2013 IRM Decision after considering the arguments of the parties in that proceeding. Accordingly, the Board considers that this Motion is an attempt by Milton Hydro to reargue its case. Therefore, the Board, in considering the threshold question provided for in section 45.01 of the *Rules* has determined that the matter in the Motion should not be reviewed on its merits, and dismisses the Motion.

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit its cost claim no later than **7 days** from the date of issuance of this Decision.

2. Milton Hydro shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of this Decision.

3. VECC shall file with the Board and forward to Milton Hydro any responses to any objections for cost claims within **28 days** from the date of issuance of this Decision.

4. Milton Hydro shall pay the Board’s costs incidental to this proceeding upon receipt of the Board’s invoice.

All filings to the Board must quote file number **EB-2013-0193,** be made through the Board’s web portal at, https://www.pes.ontarioenergyboard.ca/service and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@ontarioenergyboard.ca. All other filings not filed via the board’s web portal should be filed in accordance with the Board’s Practice Directions on Cost Awards.

DATED at Toronto, July 4, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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

DECISION AND ORDER

EB-2016-0255

MILTON HYDRO DISTRIBUTION INC.

Motion to review and vary the Decision and Order dated July 28, 2016 on Milton Hydro Distribution Inc.'s electricity distribution rates and charges beginning May 1, 2016 (EB-2015-0089)

BEFORE: **Christine Long**
Vice Chair and Presiding Member

Cathy Spoel
Member

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

February 22, 2018

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1 INTRODUCTION AND SUMMARY

This is a motion brought by Milton Hydro Distribution Inc. (Milton Hydro) to review and vary certain aspects of the decision of the Ontario Energy Board (OEB) dated July 28, 2016 (the Decision) concerning Milton Hydro's electricity distribution rates for 2016.[1]

Milton Hydro asserts that the OEB panel that heard the case (the Hearing Panel) erred in fact in making its findings related to:

1. The fair market value of the property located at Fifth Line and Main Street in Milton (the Property), which was sold by Milton Hydro to an affiliate in December 2015;

2. The allocation to ratepayers of the capital gain on the portion of the Property not included in rate base; and

3. The mechanism by which the gain allocable to ratepayers is to be paid to them.

The Decision found the market value of the Property on the date of its sale to the affiliate to be $2.73 million using a per acre value of $425,000 for the 6.43 acre parcel. For the purpose of rate-making, the Decision allocates to ratepayers the entire capital gain of almost $506,000. This amount includes the gain realized on portions of the Property included and excluded from Milton Hydro's rate base.

The Decision directs the use of a permanent rate base reduction mechanism, rather than a time limited revenue offset mechanism, to credit ratepayers with the amount of the gain for the purpose of setting rates.

The members of this Review Panel disagree on the disposition of the motion.

The majority grants variance relief in relation to all three of the errors of fact alleged by Milton Hydro, while the dissenting decision would limit the grant of variance relief to the mechanism for crediting, for rate-making purposes, the portion of the capital gain on the land allocable to ratepayers.

The majority's reasons are found in chapter 4. The minority's reasons are found in chapter 5. This introductory chapter, as well as chapters 2 (Process) and 3 (Facts) were jointly authored by the majority and minority.

[1] EB-2015-0089.

2 THE PROCESS

Milton Hydro's August 28, 2015 cost of service application for OEB approval of 2016 rates was partially settled under the terms of a Settlement Proposal dated February 9, 2016 and an addendum dated April 7, 2016.[2]

An oral hearing of the issues remaining in dispute was held on April 4 and 5, 2016. Milton Hydro made oral submissions in chief on April 5, 2016 and written reply submissions on April 28, 2016 to the written arguments made by intervenors and OEB staff.

The Decision approving the settled issues and determining the disputed issues was released on July 28, 2016.

The Motion to Review and Vary (the Motion) was filed with the OEB on August 17, 2016. The Motion relied upon an affidavit sworn on that date making certain changes to the August 5, 2015 appraisal report that was before the Hearing Panel.

In its September 1, 2016 Procedural Order No. 1, the Reviewing Panel determined that the threshold under Rule 43 of the OEB's *Rules of Practice and Procedure* (Rules) had been met and that it would proceed to review, on the merits, each of the issues raised by Milton Hydro in the Motion.

Procedural Order No. 1 established a schedule for the presentation of further written submissions from Milton Hydro and from the other parties who participated in the proceedings giving rise to the Decision.

On September 15, 2016, Milton Hydro filed submissions in support of the Motion. Written submissions followed on September 20, 2016 from the School Energy Coalition (SEC) and, on September 22, 2016, from Energy Probe Research Foundation (Energy Probe) and OEB staff. Milton Hydro delivered its reply submissions on October 5, 2016.

After considering these submissions, the Reviewing Panel determined that it wished to obtain additional information from Milton Hydro and its appraiser of facts on the record of this case related to the Property valuation and capital gain allocation findings in the Decision.
The OEB asked its staff to arrange with Milton Hydro a suitable date for a brief oral hearing to deal with the issues raised. In a December 22, 2016 letter to the Chair of the

[2] EB-2015-0089 Settlement Proposal, February 9, 2016, Addendum April 7, 2017.

OEB, the president of Milton Hydro objected to this proposal and requested that the OEB consider written responses to any questions that needed to be answered to enable the OEB to render an informed decision on the Motion.

Procedural Order No. 2 was issued on January 17, 2017, attaching 16 questions for Milton Hydro and the appraiser. Written responses to these questions (PO2 Responses) were filed by Milton Hydro on January 29, 2017.

3 FACTS

Chronologically, the facts in the record before the Hearing Panel,[3] in the Affidavit, and in the PO2 Responses that are relevant to the Property valuation, capital gain allocation and payment mechanism issues include the following:

a) In 2009 Milton Hydro purchased the 6.43 acre Property for $2,218,530. The vacant land was acquired for future use as the utility's office and service center. A Royal LePage real estate agent assisted Milton Hydro in this transaction.[4]

b) Immediately adjacent to the Property was a privately owned 1.3 acre parcel that Milton Hydro wished to acquire to increase the size of its development land to about 7.7 acres.

c) In 2010 Milton Hydro had the adjacent 1.3 acre parcel appraised by Royal LePage. The appraised value range was between $600,000 and $700,000 or between about $461,000 and $538,000 per acre.[5]

d) In December 2010, Milton Hydro offered to buy the 1.3 acre parcel for $699,000 or about $538,000 per acre. The property owner would not sell for less than $750,000 or about $577,000 per acre.[6]

e) In Milton Hydro's EB-2010-0137 Application for 2011 cost of service rates, 50% of the $2,218,530 cost of the Property was included in rate base because that portion of the Property was being used for the outside storage of utility materials and equipment. The remaining 50% of the Property, being held for future utility use as the location for the new office and service centre, was not included in rate base.[7]

f) In November 2012, at a time when locations for the future office and service centre other than the Fifth and Main location were being examined,[8] Milton Hydro ascribed a $2.7 million value to the Property and a per acre value of $450,000.[9] The record showed that by the end of March 2012 Milton Hydro had

[3] All of the references in the footnotes that follow are to the EB-2015-0089 record unless otherwise noted.
[4] Interrogatory Responses, December 18, 2015 at pages 787-790; PO2 Responses, February 3, 2017 at page 3.
[5] PO2 Responses, February 3, 2017 at page 6.
[6] Transcript Vol. 1 at page 152 and Exhibit K1.3 Option 11.
[7] Transcript Vol. 2 at page 108 and Exhibit 1, August 28, 2015, page 32.
[8] See Interrogatory Responses, December 18, 2015 at pages 739-743.
[9] Interrogatory Responses, December 18, 2015 at page 756 of 901. The document containing the $2.7 million and $450,000 per acre amounts (a presentation by the President/CEO to the Relocation.

investigated the suitability and pricing of 12 properties and had identified three sites to be pursued. This evidence notes prices in Milton had been skewing upwards since August 2011.[10]

g) In or about May of 2014, Milton Hydro decided to replace the Property as the location for its new office and service centre with lands and premises at 200 Chisholm Drive in Milton. The serviced land at Chisholm Drive was valued at $4.040 million or about $575,000 per acre. The purchase was completed in September in 2014. The building was renovated and the utility moved in to the premises in late 2015.[11]

h) Having acquired the 200 Chisholm Drive premises to replace the land at Fifth and Main, Milton Hydro decided to sell that land to its affiliate Milton Energy and Generation Solutions Inc. (MEGS).To that end it retained Colliers International Inc. (Colliers) to appraise the Property.[12]

i) Colliers prepared an appraisal report dated August 5, 2015. In the cover letter to the report, and in the signed certification included as Appendix E to the report, the market value "as at August 5, 2015", was estimated at $2.4 million. This estimate was based on Colliers analysis and was subject to the "Contingent and Limiting Conditions" listed in Appendix A. This Appendix states that: "This report has been prepared… for the purpose of providing an estimate of value of the development site located at 5th Line and Main Street… for Internal Purposes". This condition also notes that the OEB "... may rely on the appraisal for regulatory purposes."[13]

j) The Executive Summary, in the analysis section of the report, showed the "rate per acre" as $425,000 (which multiplied by 6.43 acres would produce $2.73 million). At page 33 in the analysis section, under a heading entitled "Final Estimate of Value", the opinion that the Property "should achieve a rate per acre in the narrowed range of $339,217 to $442,213 per acre" is expressed. The report then refers to the value range for the five key comparable sales from $339,217 to $478,723 followed by the opinion that "a rate in the range of

Committee of the board of directors on November 14, 2012) was referenced in the Decision text at pages 46 and 55 in statements that reflect the allocation of the gain amount related thereto to defray total project costs.

[10] Interrogatory Responses, December 18, 2016 Relocation Committee Minutes, April 2, 2012, pages 739-743.

[11] Interrogatory Responses, December 18, 2015, page 845 of 901.

[12] Exhibit 1, August 28, 2015, page 32.

[13] Exhibit 1, August 28, 2015, Attachment 1-3, page 149 of 920.

$400,000 and $450,000 would be reasonable". Immediately below that finding is a table showing a range per acre of $350,000 to $400,000.[14]

k) Before completing its August 2015 report, Colliers did not investigate and Milton Hydro did not inform Colliers of the market activity related to the 1.3 acre parcel adjacent to the property including the 2010 appraisal done by Royal LePage of that parcel; Milton Hydro's offer to purchase that parcel for $699,000 (about $538,000 per acre); or of Milton Hydro's 2012 internal estimate ascribing to the Property a value estimate of $2.7 million based on a per acre value of $450,000.[15]

l) The initial draft of the appraisal report estimated a $2.7 million value for the Property using a per acre value of $425,000 being the mid-point of a $400,000 to $450,000 per acre subset of the comparable sales value range.[16]

m) A peer review process at Colliers involving another appraiser resulted in a reduction in the initial value estimate value from $2.7 million to $2.4 million in the report sent to Milton Hydro. This report used the same information set out in the initial draft. The report establishes the reasonable range of value outcomes by stating "The Subject should achieve a rate per acre in the narrowed range of $339,217 to $442,213."[17]

n) In their reviews of the report, which was eventually finalized and filed with the OEB, neither Milton Hydro nor Colliers staff noticed that the value range of $400,000 to $450,000 that the report described as reasonable and the mid-point rate per acre value of $425,000 had not been changed as a result of the peer review process.[18]

o) Evidence in the EB-2015-0089 Application dated August 28, 2015 stated that "The land Milton Hydro owns at Main and Fifth has been appraised at $2,400,000 and will be put up for sale". The evidence refers to the August 5, 2015 appraisal done by Colliers.[19]

[14] Exhibit 1, August 28, 2015, Attachment 1-3, page 149 and table at page 179 of 920.
[15] PO2 Responses, pages 6-7 and Attachment B.
[16] Exhibit 1, August 28, 2015, Attachment 1-3, page 149 of 920.
[17] PO2 Responses, Attachment B, page 28 (page 117 of 140).
[18] PO2 Responses, page 28 of 20.
[19] Exhibit 1, August 28, 2015, page 32.

p) In interrogatory responses filed in December 2015, Milton Hydro reported that the land had been sold in December of 2015 for its appraised value.[20]

q) Minutes of Milton Hydro meetings held in 2015 stated that the property would be sold to MEGS "until a decision regarding final disposition or use has been made".[21]

r) The Settlement Proposal that the OEB was asked to approve included a term stating, "Other Revenue: The parties accept the evidence of Milton Hydro that its Other Revenue in the amount of $2,018,810 is appropriate and correctly determined in accordance with OEB policies and Practices". Within this amount was Milton Hydro's calculation of the capital gain amount of $87,975 per annum related to the 50% portion of the Property that was in rate base.[22]

s) At the oral hearing on April 4, 2016, Milton Hydro relied on the property owner's rejection of an arm's-length offer that it made in 2011 of $750,000 to support its use of a cost of $800,000 to acquire the 1.3 acre parcel adjacent to Milton Hydro's Property at Fifth and Main (about $615,000 per acre). Milton Hydro treated its own arm's length market activity in prior years related to the adjacent parcel as a reliable indicator of current value.[23] This cost estimate was being used to support the presentation of the total costs of the 200 Chisholm Drive project as being less than the total costs of acquiring the 1.3 acre parcel for use in combination with the Property to develop an appropriately sized office and service centre.[24]

t) No questions were asked during the oral hearing about the $2.4 million valuation of the Property or the allocation of the capital gain realized on the portion of the Property not in rate base. There were no submissions in chief from Milton Hydro or from intervenors on these points.

u) Milton Hydro's April 28, 2016 written reply argument contained a request that the OEB reduce the Settlement Proposal allocation to ratepayers of the $87,595 per annum capital gain amount related to the portion of the Property in rate base in the event that the amount was not brought into account when

[20] Interrogatory Responses, December 18, 2015, 4.0 Staff 63, page 217 of 901.
[21] Interrogatory Responses, December 18, 2015, SEC 14, Report to the Board of Directors, August 26, 2015, page 851 of 901.
[22] Settlement proposal, February 9, 2016, page 18.
[23] When testifying about the $800,000 cost to acquire estimate at Tr. Vol.1 at page 152, the CEO of Milton Hydro stated "The owner had in 2011 turned down 750, so we felt that's quite a realistic estimate of what it might cost us to purchase that corner property."
[24] Exhibit K1.3, page 5 and Tr. Vol. 1, page 152.

considering possible rate base disallowances.[25] The evidence in the record relating to the calculation of that $87,595 capital gain amount included the evidence pertaining to the affiliate transaction sale price for the Property of $2.4 million.[26] The Hearing Panel considered this evidence to inform its response to the new point raised by Milton Hydro in its reply submissions.

[25] Reply Argument, April 28, 2016, page 34.
[26] Interrogatory Responses, December 18, 2015, 4.0-Staff 63, page 217 of 901.

4 REASONS FOR DECISION OF VICE-CHAIR LONG AND MEMBER SPOEL

4.1 INTRODUCTION AND SUMMARY

We have read the reasons of our colleague. We agree with his analysis and conclusion in respect of Issue 3: the Hearing Panel erred in applying the capital gain on the Property as a permanent reduction to rate base, because that approach would result in ratepayers being overcompensated for their contribution to the cost of the Property.

We are, however, unable to agree with our colleague on Issues 1 and 2. On Issue 1, we find that the Hearing Panel erred in deeming the market value of the Property to be $2.73 million, rather than the actual sale price of $2.4 million. Although the Hearing Panel was correct to point out discrepancies in the appraisal report that supported the $2.4 million valuation, we find that those discrepancies have now been adequately explained by Milton Hydro and the appraiser.

On Issue 2, we find that the Hearing Panel erred in returning the entire amount of the capital gain on the Property to ratepayers. In our view, only half of the capital gain should have been returned to ratepayers, because ratepayers had only paid for half of the cost of the Property in the first place.

4.2 NATURE OF THE OEB'S REVIEW

Milton Hydro's motion is brought under Rule 40.01 of the OEB's *Rules of Practice and Procedure*, which provides that, "Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision." Rule 42.01 states that every motion brought under Rule 40.02 must:

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

Under Rule 43.01, the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. In this case, the OEB determined that the threshold had been met, and therefore established a process for reviewing the motion on the merits:

> Milton Hydro's notice of motion raises questions concerning the correctness of the Decision insofar as it relates to the disposition of the property at Fifth Line and Main Street; it would appear that Milton Hydro does not seek merely to reargue its case.[27]

The OEB has said that in a motion to review, the original hearing panel is entitled to deference. In its decision on a motion to review brought by Brant County Power Inc. in connection with the distribution rates for Brantford Power Inc., the OEB found, "A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong."[28] The OEB referred to the decision of the Ontario Court of Appeal in *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*, 2010 ONCA 284, where the Court confirmed that it was appropriate to review the impugned OEB decision (to require the utility's dividends to be approved by a majority of the independent directors) on the standard of reasonableness. The OEB added that, "We believe that the standards that a court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision."[29]

4.3 FAIR MARKET VALUE AND THE GAIN AMOUNT

The facts concerning this issue are set out above. In brief, Milton Hydro bought the Property at Fifth and Main in 2009 for $2,218,530 and sold it to an affiliate in 2015 for $2.4 million. The 2015 price was based on an appraisal report prepared for Milton Hydro by Colliers.

The Hearing Panel noted discrepancies in the appraisal report:

> This appraisal states, in the "Final Estimate of Value" section, that "Given the Subject's location, development potential, land use controls in place and other influencing factors of employment land sites, a rate [per acre] in the range of $400,000 and $450,000 would be reasonable for the Subject Parcel". The

[27] Notice of Hearing and Procedural Order No. 1.
[28] EB-2009-0063, Decision and Order, August 10, 2010, para. 35.
[29] EB-2009-0063, Decision and Order, August 10, 2010, para. 38.

> "Executive Summary" section of the appraisal ascribes a "Rate per Acre" of $425,000 to the land having an area of 6.43 acres.
>
> The appraisal inexplicably presents a chart for values per acre ranging between $350,000 and $400,000 rather than the $400,000 to $450,000 already found to be reasonable. The value of $2.4 million that Milton Hydro has used to derive the capital gain realized on the sale of the land falls well below the $2.73 million value that results from multiplying the appraiser's $425,000 "Rate per Acre" by the area of the parcel consisting of 6.43 acres. At a sale value of $2.73 M, the capital gain is $505,950 and not the amount of $175,950 used by Milton Hydro for rate-making purposes. Milton Hydro proposes to deduct 50% of its calculation of the gain of $175,950 or an amount of $87,975 from the 2016 base revenue requirement.[30]

The Hearing Panel deemed the sale price to be $2.73 million, based on the $425,000 rate per acre found in the appraisal, rather than the $2.4 million appraised value:

> With respect to the first question, the OEB finds that for rate-making purposes, the appraisal evidence supports a sale value of $2.73 million for the 6.43 parcel rather than the $2.4 million amount presented by Milton Hydro. This sale value is derived by multiplying the $425,000 per acre mid-point of the value range, as determined by the appraiser, by the land area of 6.43 acres. The OEB finds that the capital gain realized on the sale is $505,950 and not the $175,950 calculated by Milton Hydro.[31]

In its motion materials, Milton Hydro asserted that the discrepancy in the appraisal report was due to "typographical errors". It filed a "corrected appraisal" showing a rate per acre of $375,000, and confirming the original total Property value of $2.4 million.

In Procedural Order No. 2, the OEB requested further information about the discrepancy in the appraisal report as filed in the original proceeding. In response, Milton Hydro explained that certain portions of the appraisal report had not been adjusted to reflect the appraiser's final decision. In its response to questions asked in Procedural Order No. 2, Milton Hydro confirmed that no communications/discussions took place between Milton Hydro and Colliers as to the values to be included in the appraisal report.[32]

[30] Decision and Order, page 46 (footnotes omitted).
[31] Decision and Order, page 54.
[32] PO2 Responses, page 15.

We accept Milton Hydro's explanation, which is supported by Colliers. There was a mistake in the rate per acre shown on page 33 of the appraisal report. The mistake has now been corrected. It is important to note that the actual signed certification included in the report attested to a value of $2.4 million.

Although the rate per acre, before the correction was made, was shown on page 33 of the report as $400,000 to $450,000, the very same page also had a table with a rate per acre of $350,000 to $400,000, which is what Colliers says was the correct amount. Although the mix-up was regrettable, and has caused considerable confusion, we are satisfied that it has now been resolved.

In his reasons below, our colleague suggests that Milton Hydro should have advised Colliers about its efforts to purchase a 1.3 acre property next to the Fifth and Main Property in 2010. Milton Hydro had obtained an appraisal for that neighbouring property showing a rate per acre of $461,000 to $538,000 per acre, and Milton Hydro's offer of about $538,000 per acre was rejected by the owner for being too low. In our view, it was not improper for Milton Hydro to keep that information to itself. Providing such details might have been seen as interfering with the independence of the appraiser.

In any case, local property markets can change considerably in five years, and it is not apparent that having 2010 data would have been relevant for Colliers's 2015 appraisal.

The Decision also refers to an internal presentation by the President/CEO of Milton Hydro to the Relocation Committee of the Board of Directors in which a value of $2.7 million was ascribed to the Property based on a value of $450,000 per acre.[33] While the Hearing Panel considered the internal presentation in coming to its decision, we find that the evidence of the appraiser (Colliers) as corrected, to be of more weight than a reference in an internal presentation.

In conclusion, we find that, in light of the new information provided in this motion by Milton Hydro, the Decision of the Hearing Panel was not within the range of reasonable outcomes. The Hearing Panel deemed the property to have a value of $2.7 million. This conclusion was reached as a result of ambiguity in the appraisal report. Now that the new information has resolved that ambiguity, deeming the Property to be a different value than the appraised value is not reasonable. The appraised value should be varied to reflect a purchase price of $2.4 million, and a corresponding capital gain of $175,950, as presented in Milton Hydro's Motion to Review and Vary application.

[33] EB-2015-0089 Decision, pages 38 and 55, referring to a November 14, 2002 presentation.

4.4 PORTION OF THE CAPITAL GAIN ALLOCATED TO RATEPAYERS

The Decision allocated 100% of the capital gain to ratepayers while expressly acknowledging that only 50% of the asset which created the capital gain was in rate base. Our colleague's view is that the allocation of the gain is a discretionary exercise which is within the purview of the Hearing Panel and as such falls within the reasonableness standard of review.

The Decision finds that the entire Property was initially purchased for future use as a utility asset. By 2011, 50% of the Property was in rate base as it was being used for storage. The Decision finds that the other 50% was for future utility use. On that basis, the Hearing Panel determined that the gain on the second 50% should be credited to ratepayers. With one property replacing another, the Hearing Panel determined that it was appropriate for 100% of the capital gain to be attributed to ratepayers.

The Decision clearly sets out the Hearing Panel's rationale for including 100% of the capital gain. These reasons are highlighted in the dissenting reasons below. The Decision also clearly demonstrates that the Hearing Panel was aware that only 50% of the Property was included in rate base.

Our colleague's reasons rely on the premise that a panel is permitted to exercise discretion and that it is not the Reviewing Panel's role to substitute its discretion for the Hearing Panel's exercise of that discretion.

We are of the view that the costs vs. benefits concept is a key regulatory principle that should not be easily strayed from. It is unclear to the Majority in this review decision how the fact that the original Property (of which only 50% was allocated to rate base) was replaced by a future utility property would precipitate a move to include 100% of the capital gain to the benefit of ratepayers.

Our colleague is of the view that the discretion exercised by the Hearing Panel was within the range of reasonable outcomes and therefore cannot be changed by the Review Panel.

At outlined at the beginning of this decision, the Review Panel agrees that the standard of review is reasonableness.

We find that the allocation of 100% of the gain is not a reasonable outcome in this case. There was nothing in the record to support a departure from one of the OEB's key

regulatory principles. In our view, consistency of approach is important for the OEB, the utilities and the ratepayers. In this case, neither the applicant nor any of the other parties had an opportunity to make submissions on the appropriateness of this treatment of the capital gain. In our view, it is unreasonable to depart from the OEB's usual approach without affording the affected party an opportunity to address the issue. As such, the motion to review on this point succeeds.

4.5 MECHANISM FOR CREDITING THE GAIN AMOUNT TO RATEPAYERS

We are in full agreement with our colleague's reasons for varying the Hearing Panel's decision to allocate the capital gain to ratepayers by way of a permanent reduction to rate base. However, our approach to implementing the variance differs from our colleague's proposed approach.

4.6 IMPLEMENTATION

The Review Panel, in agreeing with Milton Hydro that the sale price of the Property was $2.4 million rather than $2.7 million, reduces the capital gain from $506,000 to $175,950, and credits half of that gain to ratepayers ($87,975). The Review Panel also finds that this amount should have been returned to ratepayers as an annual revenue offset of $17,595 for five years, starting May 1, 2016, the effective date of the Decision.

In the Decision, the Hearing Panel reduced Milton Hydro's rate base by $506,000 to address the capital gain issue, rather than the requested revenue offset. This reflected 100% of the deemed capital gain on the Property.

That aspect of the Decision is varied. The Review Panel finds that the sale price of the Property was $2.4 million, which means the capital gain was $175,950 rather than $506,000. Only half of that amount ($87,975) should have been credited to ratepayers, which Milton Hydro proposed to be disposed of by way of an annual revenue offset of $17,595 over five years, effective May 1, 2016.

This means that Milton Hydro's rates (as determined in the Decision) have been lower than they should have been over the 2016 and 2017 rate periods. Accordingly, a revised rate order for 2016 and 2017 is required. Milton Hydro shall prepare a draft rate order for approval by the Review Panel, reflecting this Decision and Order, in the manner set out below:

1) For the 2016 Cost of Service year, Milton Hydro is directed to calculate its revised revenue requirement by increasing its rate base by $506,000 and then offsetting this revenue requirement amount by $17,595. The difference between the 2016 approved revenue requirement and the revised revenue requirement will determine the lost revenue total for 2016.

2) For 2017, a year where Milton Hydro's rates were adjusted using the IRM formula, Milton Hydro is directed to create a revised 2016 rate schedule, and use this schedule to produce a revised 2017 rate schedule by applying the 2017 IRM formula and any other aspects of its 2017 IRM Decision. (The revised 2017 rate schedule will be used to determine the 2018 IRM rate schedule.)

3) Milton Hydro is then directed to calculate 2017 lost revenue by applying the revised 2017 rate schedule to 2017 actual and forecast loads to April 30, 2018, compare these revenues to the actual/forecast revenues using the actual approved 2017 rate schedule. This lost revenue shall also be offset by the $17,595 annual capital gain credit.

4) Milton Hydro shall then add the 2016 and 2017 lost revenue totals and subtract the remaining capital gain amount, $52,785, to arrive at the net lost revenue to be collected from ratepayers through a rate rider in the 2018 rate year (if a material amount).

4.7 COST AWARDS

Provision for cost awards will be made when the OEB issues a decision with the final rate order.

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Decision and Order dated July 28, 2016 (EB-2015-0089) is varied so that:

    a) The capital gain on the Property is determined to be $175,950
    b) 50% of the capital gain shall be allocated to ratepayers
    c) The allocation to ratepayers shall be effected through an annual offset of $17,595 over five years, effective May 1, 2016.

2. Milton Hydro shall file a draft rate order reflecting this Decision and Order, providing detailed calculations of all steps to arrive at the lost revenue amount, no later than **March 9, 2018**.

3. OEB staff and intervenors may make submissions on the draft rate order no later than **March 16, 2018**.

4. Milton Hydro may reply to any submissions of OEB staff and intervenors no later than **March 20, 2018**.

DATED at Toronto February 22, 2018

ONTARIO ENERGY BOARD

Original Signed By

_____

Christine Long
Vice Chair and Presiding Member

Original Signed By

_____

Cathy Spoel
Member

6 DISSENTING REASONS OF MEMBER THOMPSON

6.1 INTRODUCTION AND SUMMARY

All members of this Review Panel agree that the reasonableness standard of review is to be applied when assessing Milton Hydro's challenges to the findings of fact and exercises of discretion made by the Hearing Panel. These findings relate to the fair market value, gain allocation and gain repayment issues. We also agree that the principle that findings of fact and exercises of discretion made by a hearing panel are to be accorded a high degree of deference is embedded within an application of the reasonableness standard.

The reasonableness standard of review implies that two or more alternatives are available to a decision-maker to appropriately determine a matter in dispute. Each of the alternatives falls within a range of reasonable outcomes supported by the record before the decision-maker. In contrast, the correctness standard of review implies that there is a single defensible answer.[34]

A proper application of the reasonableness standard of review calls for the reviewing panel to scrutinize the entire record under review to consider the range of reasonable outcomes that it supports. If the outcome of the initial decision falls within that range, then, on review, that outcome cannot be varied and replaced with another outcome within the range.

Under the auspices of the reasonableness standard of review, an OEB review panel cannot substitute its preferred decision outcome for an initial decision that falls within the range of reasonable outcomes supported by the record being reviewed. When determining this range of reasonable outcomes in a particular case, the reviewing panel is obliged to consider the record under review in its entirety. Pieces of information in the record are not to be considered in isolation.

In conducting a reasonableness analysis, it is not within a review panel's authority to substitute its decision for a decision that it may disagree with. Rather, it is obliged to

[34] See *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 at para. 23 for the limited class of cases to which the correctness standard applies. That standard of review is limited to (i) constitutional questions regarding the division of powers; (ii) true questions of jurisdiction; (iii) questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; and (iv) questions regarding the jurisdictional lines between two or more competing specialized tribunals.

make an assessment of whether the conclusion reached by the hearing panel falls within the range of reasonable outcomes supported by the entire record under review. I disagree with the majority decision on the market value and gain allocation issues because it does not adhere to the requirements of the reasonableness standard of review. The entire record under review in this case reveals that the determinations made by the Hearing Panel on the market value and gain allocation issues were decision outcomes that fell within the range of reasonableness. These determinations are not subject to variance under an application of the reasonableness standard of review.

The majority decision is one that the reasonableness review standard does not allow. It constitutes an impermissible substitution of the majority's preferred outcomes for the decisions made by the Hearing Panel that fall within the range of reasonable outcomes supported by the entire record under review.

My disagreement with the majority decision stems from its failure to properly apply the essential requirements of the reasonableness standard of review to the entire record under review in this case.

An essential feature of a reasonableness review is an objective assessment by the reviewing panel to determine the range of reasonable outcomes that the record under review supports related to each of the challenged findings. The "range of reasonable outcomes" feature of the reasonableness review standard determines whether a challenged finding is or is not subject to variance by a review panel.

If a finding made by a hearing panel falls within the range of reasonable outcomes supported by the record under review, then that finding is "reasonable" and not subject to variance. Findings that fall within the range of reasonable outcomes supported by the record under review cannot be found by a reviewing panel to be "unreasonable". An objective consideration of the breadth of the range of reasonable outcomes that the record under review supports in relation to each of the challenged findings is a prerequisite to a determination of whether each finding is either reasonable and not variable or unreasonable and variable.

The majority decision fails to apply this essential prerequisite of a reasonableness assessment. It finds that the market value finding of $2.73 million was "unreasonable" even though the record under review clearly supports a range of per acre market value alternatives at a level that includes a $425.000 per acre and $2.73 million value for the Property having an area of 6.43 acres.

The $2.4 million amount, which the majority decision prefers, also falls within the range of value outcomes supported by the record under review. However, under the reasonableness standard of review, a review panel cannot substitute its preferred outcome within the range of reasonableness for the outcome within that range that the Hearing Panel has found to be appropriate.

This principle was recently expressed by the Ontario Court of Appeal in its January 25, 2018 decision in *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61. At paragraph 101 of that decision the Court stated:

> The function of a reviewing court, such as the Divisional Court, is to determine whether the tribunal's decision contains an analysis that moves from the evidence before it to the conclusion that it reached, not whether the decision is the one the reviewing court would have reached: *Ottawa Police Services*, at para. 66. With due respect to the Divisional Court, it failed to do so in the case of the Panel's decision about Cheng. Instead, it impermissibly re-weighed the evidence and substituted inferences it would make for those reasonably available to the Panel. That was an error. The findings of fact made and inferences drawn by the Panel in respect of Cheng were reasonably supported by the record.

The majority decision disregards this principle when it substitutes its $2.4 million market value for the $2.73 million value found by the Hearing Panel. To achieve its preferred result, the majority engages in the impermissible re-weighing of evidence. The majority decision also inappropriately focusses on isolated pieces of evidence in the record being reviewed rather than on the contents of the entire record as a whole.

Similarly, on the gain allocation issue the majority decision finds that the option favoured by the Hearing Panel was "unreasonable" even though that option was among those that fell within the range of gain allocation alternatives that the record under review supported. Under a proper application of the reasonableness standard, the finding made by the Hearing Panel is not subject to variance. Under the principles applicable to a reasonableness assessment, the Hearing Panel's finding is "reasonable" and cannot be found by the Review Panel to be "unreasonable".

Once again, the majority decision impermissibly ascribes greater weight to the benefits follow costs allocation alternative that it favours, as a substitute for the different allocation option falling within the range of allocation options supported by the record that the Hearing Panel found to be appropriate.

The findings that the majority decision makes in relation to the market value and gain allocation issues are a result of a misapplication of the principles embedded in the reasonableness standard of review.

The concern expressed in the majority decision about the process followed by the Hearing Panel in relation to the gain allocation issue is irrelevant to a determination of whether the Hearing Panel's allocation approach fell within the range of reasonable allocation outcomes that the record supported. Process concerns call for a process remedy. They do not tilt the scales one way or the other when considering whether a particular finding does or does not fall within the range of reasonable allocation outcomes supported by the record being reviewed.

The section that follows elaborates upon the principles related to the reasonableness standard of review and its application. Included in this "principles" section is a sub-section that describes the careful approach that the OEB takes to ensure that utility transactions with affiliates do not prejudice ratepayers. This item is relevant to the factual context that gave rise to the market value issue and its gain allocation and credit mechanism derivatives.

That section is followed by a consideration of matters raised by parties in their submissions related to the contents of the record to be considered by the Review Panel. This section considers the admissibility of the Affidavit on which Milton Hydro relies. This section also includes a consideration of the applicability of provisions of the OEB's Accounting Procedures Handbook (APH) to a determination of the gain allocation issue. The analysis in this section leads me to conclude that the record under review consists of the record before the Hearing Panel, Milton Hydro's affidavit, the relevant provisions of the APH and the PO2 Responses.

This dissenting opinion then applies the principles to the facts in the record under review related to each of the challenges made by Milton Hydro. This opinion provides a detailed description of those facts and concludes that:

a) The finding of a $2.73 market value for the land, as of the end of 2015, falls within the range of reasonable value outcomes supported by the record. That finding is not subject to variance on review.

b) The discretionary allocation to ratepayers of the entire gain on property acquired for a specific utility project, but not yet in rate base, was a tenable exercise of discretion in a case where the gain is realized on an item of utility property held for future use that is being sold because of the utility's acquisition of a

replacement property for the same purpose. The benefits follow costs principle applicable to non-utility business activities has no priority status in relation to gains realized on the sale of utility assets being held for future utility-specific project use.

c) The Hearing Panel's direction that rate base be permanently reduced by the amount of the capital gain was unreasonable and incorrect. The gain repayment mechanism should credit ratepayers with the allocable amount of the gain, but no more.

The relief that I would grant Milton Hydro is summarized in the Implementation section of this dissent.

6.2 THE REASONABLENESS STANDARD OF REVIEW AND ITS APPLICATION

6.2.1 The OEB's Standard of Review

The principles that are to be applied in an OEB review proceeding have been articulated in many cases. These principles include a requirement that an applicant for review and variance of a decision by a hearing panel "… 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."[35]

This principle, expressed in the May 22, 2007 Natural Gas Electricity Interface Decision (NGEIR Review Decision), has been repeatedly adopted in subsequent OEB decisions.[36] In the Ontario Power Generation Inc. (OPG) Review Decision, EB-2009-0038, dated May 11, 2009, the OEB stated, at page 15:

> If a reviewing panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend or cancel the order or decision, or if they find it to be appropriate, remit the matter back to the original panel. As noted above, the

[35] NGEIR Review Decision, EB-2006-0322/EB-2006-0338/EB-2006-0340, page 18.
[36] NGEIR Review Decision, EB-2006-0322/EB-2006-0338/EB-2006-0340, page 18; Connection Procedures Review Decision, EB-2007-0797, pages 7-9; OPG Review Decision, EB-2009-0038; OPG Review Decision, EB-2011-0090, pages 5-7; London Hydro Review Decision, EB-2012-0220, pages 6-8; Hydro One Remote Communities Review Decision, EB-2013-0331, pages 2-3; and OPG Review Decision, EB-2014-0369, pages 5-6.

> Board has determined that identifiable errors that are material and relevant to the outcome of the reviewed decision have been made.

Specific errors in the decision under review are to be identified and shown to be incorrect in a material way before the OEB's power to vary that decision is engaged. Findings of fact and exercises of discretion that lie within the range of reasonable outcomes supported by the record under review cannot be shown to be incorrect in a material way.

There must be a clear, identifiable and material error or new facts that take the case outside the range of reasonable outcomes that the record under review supports. Changes to evidence in the record before a hearing panel that do not alter the range of reasonable outcomes supported by the entire record being reviewed cannot justify a variance to an original decision.

In the Connection Procedures Decision released a few months after the May 27, 2007 NGEIR Review Decision, the OEB addressed the scope of its power to review in response to submissions made by OEB staff that the OEB has a wide latitude in relation to reviews. The OEB stated:

> This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion for review must raise a question as to the correctness of the decision in issue. The Board has previously indicated, in the NGEIR Motions Decision and in the Notice and PO, that the grounds for review set out in Rule 44.01 are not exhaustive. It may be that the emergence of previously unknown or unforeseen implications of a decision could be considered a ground for review. However, in the circumstances of this case this panel does not need to decide that issue….[37]

This dissent adheres to the NGEIR Review Decision and supports the conclusion that exceptional and unforeseen circumstances would need to occur before any departure from that approach might be justified.

Other cases have elaborated on the standard of review applicable to OEB review proceedings. For example, in a 2010 decision related to a motion for review and variance brought by Brant County Power Inc., the OEB adopted the principle that:

> A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and is clearly wrong. A

[37] Connection Procedures Review Decision, supra, page 9.

> decision would be clearly wrong if it was arbitrary or was made for an improper purpose or was based on irrelevant facts or failed to take the statutory requirements into account.[38]

The deference that an OEB review panel is to extend to findings of fact that fall within the range of factual outcomes supported by the record being reviewed was recognized in a 2011 Motion for Review brought by OPG as follows:

> …the Board agrees with the submissions made by the parties who argued that a reviewing panel should only interfere with an original finding of fact in the clearest of cases. The law generally afforded original findings of fact considerable deference.[39]

The "submissions" with which the OEB agreed in that case included the submissions made by OEB staff that were quoted earlier in the decision as follows:

> As stated in the Board staff submission, "Only if the review panel determines that the finding reached by the Decision panel was not within the range of reasonable alternatives should its decision be overturned." In Board staff's view, it is not the task of the reviewing panel to substitute its own judgement for that of the original panel unless it is convinced that the original panel made a clear and material error, and that the original panel clearly misapprehended the evidence.[40]

The August 10, 2010 Brant County Power review decision cited earlier adopted the principle that, in conducting its reviews of prior OEB decisions the OEB should use the same "reasonableness" standard that a court uses in reviewing such decisions. After articulating the reasonableness standard of review expressed by the Ontario Court of Appeal in the Toronto Hydro Dividend case[41] and a passage from the Supreme Court of Canada's decision in *Law Society of New Brunswick v. Ryan,*[42] the OEB stated: "We believe that the standards that a court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision."[43]

[38] Brant County Power Review Decision, EB-2009-0063, page 11, paragraph 35.
[39] OPG Review Decision, EB-2011-0090, page 11.
[40] See footnote 39, page 8.
[41] *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284.
[42] *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247.
[43] Brant County Power Review decision, EB-2009-0063, page 12, paragraph 38.

Descriptions of how reasonableness is determined in a particular case are provided in each of the Toronto Hydro Dividend and *Law Society of New Brunswick v. Ryan* cases and referred to in the Brant County Power case as follows:

> The standard of review with respect to Decisions of the Ontario Energy Board was most recently canvassed by the Ontario Court of Appeal in the *Toronto Hydro Dividend* case. There, the Court of Appeal upheld the Board's Decision that required any future dividends to be approved by the majority of the independent directors. The Court noted that "in judicial review reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. <u>But it is also concerned with whether the Decision falls within a range of acceptable outcomes which are defensible in respect of facts and law.</u>
>
> In finding that the Decision was justified the Court referred to the often cited passage from *Law Society of New Brunswick vs. Ryan* where Iacobucci J. articulated the relationship between the reasons of the tribunal and the reasonableness of the Decision:
>
> > A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.*[44]

Two features of a reasonableness assessment contained in these descriptions should be noted. The first is the adoption of the "range of reasonable outcomes" approach expressed in the Toronto Hydro Dividend case. The second, expressed in the *Law Society of New Brunswick v. Ryan* case, is the adoption of the concept that a review panel should refrain from substituting its own decision for a decision of a hearing panel that is supported by a tenable explanation, even though that explanation is not one that the reviewing panel finds compelling.

[44] See footnote 43, page 11, paragraphs 36 and 37 (underlining added by OEB; italics appeared in Brant County Power decision).

The Courts have regularly applied a reasonableness approach when determining motions for judicial review of an exercise of adjudicative decision-making by an administrative tribunal. Reasonableness assessments apply to all questions of fact or exercises of discretion raised in a request for adjudicative review.

In the *Newfoundland and Labrador Nurses* case,[45] the Supreme Court of Canada unanimously confirmed that the standard of review of adjudicative decision-making by an administrative tribunal is reasonableness. In commenting on conducting a reasonableness assessment of the reasoning and outcomes components of decision-making the Court emphasized that "…. the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[46]

That decision emphasizes that a review panel should show deference and respect for the decision making process of administrative bodies with regard to the facts and that care should be taken to refrain from substituting their own decision of the appropriate outcome when the decision being reviewed falls within the range of outcomes supported by the record being reviewed. The decision states:

> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.[47]

The decision adds: "Reviewing judges should pay 'respectful attention' to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."[48] The Court quoted with approval the following with respect to the sufficiency of reasons:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the

[45] *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708.
[46] See footnote 45, paragraph 14
[47] See footnote 45, paragraph 15
[48] See footnote 45, paragraph 17

> parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.[49]

The *Newfoundland and Labrador Nurses* case also emphasizes that reasons need not refer to every piece of evidence in the record that is capable of supporting a factual finding. The decision under review is not deficient because it does not specifically refer to each and every item in the record related to the market value and gain allocation issues. The absence of such references does not impugn either the reasons or the result under a reasonableness analysis.[50] Put another way, a reasonableness assessment of findings of fact and exercises of discretion is based on the entire record. It is not limited in scope to only the items of evidence specifically referenced in the reasons for decision.[51]

The case concludes with a statement that the decision under review should not be varied because the hearing panel "… was alive to the question at issue and came to a result well within the range of reasonable outcomes."[52]

Under the reasonableness standard of review that these precedents establish, the factual and discretionary aspects of a decision under review are correct if they fall within the range of reasonable outcomes that the record under review supports. There is no identifiable and materially incorrect error when a particular finding of fact or exercise of discretion under review falls within the range of reasonable outcomes supported by the record under review. A finding of fact or exercise of discretion under review contains an identifiable and materially incorrect error when it is shown to lie outside this "range of reasonable outcomes".

A determination of the range of outcomes that the record under review supports is essential under the reasonableness standard of review articulated in OEB precedent decisions. This essential component of the standard cannot be disregarded. The range of outcomes that the record supports must be determined in this review proceeding to comply with the OEB's review standard.

[49] See footnote 45, paragraph 18
[50] See footnote 45, paragraph 16.
[51] This point was recently highlighted in the Ontario Court of Appeal decision in *Finkelstein v. Ontario Securities Commission* cited in the Introduction and Summary part of this dissent. At para. 84(iii) of that decision the Court endorsed findings made by the Divisional Court in that case that included the proposition that "The evidence must be examined and weighed in its entirety. The evidence should not be viewed in isolation."
[52] See footnote 45, paragraph 26.

6.2.2 Regulatory Treatment of Affiliate Transactions

Within the legal framework that applies to a determination of the Property value issue in this case are the regulatory principles that apply, for ratemaking purposes, to determine the appropriateness of amounts paid by an affiliate to acquire assets owned by the utility.

The need for regulators to protect ratepayers from transactions that benefit a utility affiliate at the expense of utility ratepayers is well established. The Ontario Court of Appeal noted this in paragraph 60 of its decision in the Toronto Dividend case by referring to paragraph 5.1.7 of the OEB decision under appeal and stating: "The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate."[53]

A regulator needs to take care to ensure that the unregulated affiliate is not deriving an inappropriate benefit at the expense of utility ratepayers.

At a high level, the record under review in this proceeding that relates to the appropriateness of the value paid by the affiliate in its acquisition of the Property has three separate components:

a) The August 5, 2015 appraisal report;

b) The sworn testimony of Milton Hydro's CEO at the oral hearing before the Hearing Panel that the realistic 2015 cost of acquiring the 1.3 privately owned parcel at the corner of Fifth Line and Main was about $800,000 or about $615,000 per acre; being an amount substantially in excess of the $375,000 per acre price that that Milton Hydro's affiliate paid to acquire the utility's 6.43 acre parcel at the same location; and

c) The $450,000 per acre and $2.7 million Property value amounts which Milton Hydro's CEO presented to Milton Hydro directors in late 2012, some three years before the 2015 sale to the affiliate, which also materially exceeded the $375,000 per acre and $2.4 million Property value amounts that the affiliate paid to the utility.

The Hearing Panel adopted a $400,000 to $450,000 value range and its mid-point of $425,000 to find, for ratemaking purposes, that the value per acre and the Property values should be $425,000 per acre and $2.73 million for the 6.43 acres of land. The

[53] *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284, paragraph 60.

Hearing Panel rejected the $350,000 to $400,000 value range, and the use of its mid-point of $375,000 per acre to derive the $2.4 million Property value presented in the August 5, 2015 appraisal report. There was nothing ambiguous about the values that the Hearing Panel used to determine a market value for the Property, for ratemaking purposes, of $2.73 million as stated in the majority decision.

I disagree with the majority decision when it states that the Hearing Panel's market value finding was "based on an ambiguity". The Decision unambiguously reveals the value per acre range of $400,000 to $450,000 and mid-point per acre value of $425,000 that the Hearing Panel considered to be appropriate.

The Hearing Panel was alive to sources of land value information other than the appraisal report referenced in the Decision. One of these other sources of information was the 2012 report to directors in which Milton Hydro officials ascribed a $450,000 per acre value to the Property and a total value of $2.7 million. Another consisted of the oral testimony and supporting exhibit provided by a Milton Hydro executive at the OEB hearing to the effect that the 1.3 acre parcel abutting the Property had a market value of $800,000 or about $615,000 per acre.

The foregoing facts are part of the entire record that is to be considered when reviewing Milton Hydro's assertion that the Hearing Panel's findings of fact related to the affiliate transaction are unreasonable and incorrect.

The majority decision uses the phrase "actual sale price" when referring to the $2.4 million affiliate transaction amount. An "actual sale price" has relevance to ratemaking when a transaction between a utility and another is an arm's length open market transaction. The phrase should not be used to refer to an affiliate transaction amount because an affiliate transaction amount derives from an estimate or appraisal of value and not from an open market transaction.

The "price" in an affiliate transaction involving an OEB regulated utility is the amount that the OEB accepts as reasonable. The Hearing Panel made a finding of fact that, for ratemaking purposes, the market value of the property at the time of its transfer to the affiliate was $425,000 per acre and $2.73 million for the 6.43 acre parcel. An adjudicative finding of fact based on supporting evidence does not amount to "deeming" a price as the majority decision suggests. The action of "deeming" an outcome implies that there are no facts to support that result. That is not the situation in this case.

This $425,000 per acre and resulting $2.73 million value are the findings of fact that are to be reviewed and the question is whether these amounts fall within the range of reasonable value outcomes that the entire record under review supports.

The foregoing comprise the well-established principles that should be applied by the Review Panel in this case to determine whether the Hearing Panel's decisions related to the market value of the Property, the portion of the gain to be allocated to ratepayers and the mechanism for crediting the gain amount to ratepayers are incorrect as Milton Hydro asserts.

The sections that follow include a determination of items related to the components of the record being reviewed followed by an analysis of the range of reasonable outcomes that the record under review supports in relation to each of the matters in issue.

6.3 RECORD UNDER REVIEW

Subject to the determination of an issue related to admissibility, the record being reviewed in this case consists of the record before the Hearing Panel, Milton Hydro's August 17, 2016 Affidavit (Affidavit), the accounting policies in the APH, and the PO2 Responses.

6.3.1 Admissibility of the Affidavit

Milton Hydro seeks to change portions of the appraisal evidence referenced in the Decision on the grounds that these portions of the evidence constitute an "error of fact" under Rule 40.01(a) of the OEB Rules. The Affidavit is relied upon to effectively seek a re-opening of the EB-2015-0089 proceeding to reduce the $400,000 to $450,000 value range and the $425,000 amounts contained in the Colliers August 5, 2015 appraisal that was before the Hearing Panel.

These changes are proposed on grounds that Milton Hydro had no opportunity to explain the inconsistencies in the report before the Decision issued and that the numbers in the report that it proposes to change are typographical errors.

In its September 20, 2016 submissions SEC's position is that the OEB should not accept this evidence without affording the parties an opportunity to test it. SEC's submissions detail five topic areas on which it has questions about the appraisal.[54] In

[54] SEC's concerns included: the very low increase in value of the property compared to its purchase price in 2009 and inflation increase over the period 2009-2015; the reason for the lowest comparable of about

their September 22, 2016 submissions, neither Energy Probe nor OEB staff had any objections to the changes being made as proposed by Milton Hydro.

After reviewing these submissions, the OEB sought to have its staff schedule with Milton Hydro a date for a brief oral hearing to deal with questions of this nature. Milton Hydro objected to this process and requested that questions be submitted in writing. Written questions were submitted by the OEB with Procedural Order No. 2 and responses were provided shortly thereafter.

The PO2 Responses reflect the extent to which SEC's concerns have been addressed. The PO2 Responses reveal that the amounts in the Report before the Hearing Panel accurately reflected the opinion of the appraiser who prepared the initial draft of the report. That appraiser used the comparable sale and other information in the report to establish a value range of about $339,000 to about $482,000, a subset value range of $400,000 to $450,000 and a Property value of $2.7 million. This range was a correct expression of the initial appraiser's estimate.

A peer review process at Colliers involving another appraiser led to a lower Property value estimate of $2.4 million. It is unclear from the PO2 Responses whether the second appraiser actually reduced the $400,000 to $450,000 value range contained in the initial draft. Attachment B of the PO2 Responses, being a letter from Colliers, states as follows:

> Within our file there are three Drafts. The third Draft is the only report that was sent to the client. Within Draft 1, we concluded at a market estimate of $2,700,000 (rate per acre ranging from $400,000 to $450,000). This value was never communicated to the client. Following a peer review process (review by a second AACI designated appraiser), we deemed the rate should be at the lower end of the range given that the Subject falls within phase 3 of the Derry Green Corporate Business Park a policy plan that covers approximately 2000 acres of Employment lands.

This statement makes no mention of any value range other than the $400,000 to $450,000 range.

In the course of revising the initial opinion draft to reflect the outcome of the peer review process, Colliers did not revise and Milton Hydro staff did not question the value range subsets and price per acre amounts in the successive drafts of the report.

$339,000 not being eliminated as an outlier; the average of the comparable sales of $433,651; and the contents of successive drafts of the appraisal reports – see SEC Sept. 20, 2016 Submissions.

The e-mail exchanges between the appraiser and Milton Hydro, over the 17 days between July 20 and August 6, 2015, show that Milton Hydro received the draft of the report on July 20, 2015, sent it back with comments on August 4, received a further draft on August 5 that was reviewed and sent back to the appraiser on August 6. The final report containing both the value range supported by the comparable sale and the $400,000 to $450,000 range was sent to Milton Hydro on August 6, 2015.[55]

The PO2 Responses establish that Colliers did not investigate whether there had been any market activity related to the property adjacent to Milton Hydro's property and that Milton Hydro did not disclose to Colliers any of the facts related to its evaluation and offer to purchase the 1.3 acre parcel at Fifth Line and Main Street owned by its immediate neighbour; or the fact that it had ascribed a value of $2.7 million to the Property some three years before its sale to its affiliate.

The PO2 Responses reveal that the changes that the Affidavit makes to the appraisal report that was before the Hearing panel are probably more appropriately characterized as editorial changes that were missed following the peer review process rather than as typographical errors.

Regardless of whether these items are characterized as editorial revisions or typographical errors, they were made by Milton Hydro and Colliers and not by the Hearing Panel. That said, Milton Hydro correctly states that it had no opportunity before the Decision issued to explain the inconsistencies in the appraisal report that was before the Hearing Panel. The Decision reveals that the Hearing Panel, while alive to these inconsistencies, did not reconvene the hearing to receive further submissions on the relief that Milton Hydro requested, for the first time, in its written Reply argument.

That late request for relief triggered the Hearing Panel's consideration of the Property value and gain allocation and recovery issues.

Situations often arise in proceedings before the OEB where submissions made in argument prompt the OEB's examination of evidence in the record upon which no questions have been posed during the course of the oral hearing. A hearing panel has process options that it can consider in such circumstances. These include prolonging the hearing process related to the issue by either calling for submissions on the issue or deferring a determination of the issue to a future proceeding. Another option is to refrain from reconvening or deferring the matter and, instead, dealing with the issue on the basis of the existing record. This was the course taken by the Hearing Panel in this case.

[55] PO2 Responses, Attachment F.

However, because Milton Hydro had no opportunity to address the inconsistencies in the appraisal report before the Decision issued, the affidavit containing the explanation for these deficiencies and PO2 responses pertaining to that explanation should form part of the record being reviewed in this proceeding.

While the Affidavit is admissible and forms part of the record under review, the question for the Review Panel is not whether they do or do not accept the Affidavit's explanation of the circumstances giving rise to the deficiencies in the appraisal. Regardless of this explanation, under the reasonableness standard of review the question is and remains whether the $2.73 million value finding made by the Hearing Panel falls within the range of value outcomes supported by the entire record being reviewed. The question for the Review Panel is, "What range of value outcomes did all of the evidence before the decision-makers reasonably support?"

Milton Hydro's explanation for the portions of the appraisal report that the Hearing Panel found to be "inexplicable" does nothing to reduce the upper limit of the range of per acre values that is supported by a consideration of all of the evidence in the record under review related to that value issue. The changed and unchanged parts of the report remain as one of the items of evidence in the entire record to be considered when determining the range of reasonable value outcomes that the record under review supports.

The explanation provided in the Affidavit does not elevate the $375,000 per acre amount that appeared in the initial report and in the changed and unchanged parts of the revised report to some superior status in the record under review. Reducing the sub-set value range and its mid-point in the August 5, 2015 appraisal report does nothing to alter the evidence in the report of the range of values regarded as achievable. Nor do the changes to the report have any impact of the two other independent sources of value evidence being Milton Hydro's own arm's length marketing activities related to many other properties in the area, its own $2.7 million value estimate in 2012 and the value evidence related to the 1.3 acre parcel immediately adjacent to the Property.

The original and revised appraisal reports each support, as achievable, a rate per acre of up to about $442,000. The Hearing Panel's finding of a value of $425,000 per acre lies below the upper limit of the range that the appraisal regards as achievable. The second appraiser's preference for a subset range of $350,000 to $400,000 and a mid-point value of $375,000 per acre does not take the $425,000 acre amount out of the range of values that the appraisal finds to be achievable.

Moving the appraisal's value range subset and mid-point amount down by $50,000 per acre are not "new" facts or information that lies outside of the range of value outcomes that the record supports. Rather they are revisions to existing facts to support a particular value finding within the value range supported by the record under review being a particular value that the Hearing Panel rejected. Under the OEB's reasonableness standard of review, a post-decision explanation or elaboration in support of one value over another cannot justify a variance when each of the values falls within the range of reasonableness established by the whole of the evidence before the decision-makers.

As more fully discussed below, there is per acre value evidence in the record, independent of the August 5, 2015 appraisal report; that supports values per acre well in excess of $425,000.

The reasonableness standard of review requires an applicant seeking variance of a finding of fact made by a hearing panel to establish that there is no evidence in the record under review that is capable of supporting that finding. Milton Hydro has not and cannot discharge that onus.

6.3.2 OEB Accounting Policies

The APH contains provisions dealing with the recording of the original cost of land used for utility purposes and land held for future utility use. It also includes provisions that specify the accounts that are to be used for dealing with gains or losses arising from the disposition of utility assets and assets held for future utility use.[56]

Milton Hydro relies of the provisions of these accounting rules to support its position that the Hearing Panel erred in directing a permanent rate base reduction in the amount of the capital gain allocable to ratepayers. However, Milton Hydro disregards the provisions of these rules related to land being held for future utility use but not yet in rate base.

Under the APH, gains and losses on land held for future utility use are treated the same as gains or losses on land already being used for utility purposes. These provisions of

[56] APH section 1905 deals with utility land in service. APH 2040 deals with assets held for future utility use but not yet in service. Account 2040 covers land held for future utility use but not yet in service. Gains on Disposition of Utility Property in service are covered by section 4355 of the APH on which Milton Hydro relies to support the revenue requirement offset for ratepayers stemming from the disposition of the portion of the land in service and in rate base. Gains from Future Use Utility Property under section 2040B are to be recorded in APH account 4345. The APH Rules treat utility property in service and property held for future utility use but not yet in service in the same manner.

the APH, as well as those upon which Milton Hydro relies, have relevance to both the gain allocation and credit mechanism issues.

I accept that the accounting rules in the APH are a component of the OEB's policy framework that should be considered when determining the range of outcomes that the record being reviewed supports in relation to each of these issues. As OEB staff point out in their submissions, these rules do not bind the OEB. They do however identify allocation and credit mechanism options that fall within the range of reasonable outcomes for each of these issues.

6.3.3 Conclusions on the Record under Review

For these reasons I would find that the record to be reviewed to determine the range of outcomes that it supports in relation to each of the matters in issue consists of the record before the Hearing Panel, the Affidavit, the OEB's accounting policies in the APH and the PO2 Responses.

6.4 FAIR MARKET VALUE AND THE GAIN AMOUNT

To properly apply the OEB's reasonableness standard of review to the Hearing Panel's market value finding of $2.73 million, the reviewing panel should first examine the Hearing Panel's decision on the value issue. Second, the entire record under review is to be screened to ascertain the range of value outcomes that it supports. Third, the criteria under the reasonableness standard of review that an applicant must satisfy to set aside a finding of fact are to be considered. The reviewing panel concludes by determining whether the criteria for varying the Hearing Panel's finding of fact have been satisfied.

6.4.1 Hearing Panel's Decision on the Value Issue

As a preliminary matter, the Decision found that Milton Hydro's request, presented for the first time in its reply argument, for a reduction in the annual capital gain revenue requirement offset amount of $87,950 in the Settlement Proposal, was a request that fell within the ambit of the unresolved 200 Chisholm Drive issue.[57]

[57] Decision, page 10.

The Decision notes that the sale of the property for $2.4 million was not an open market transaction but an affiliate transaction between Milton and MEGS.[58] The Hearing Panel was alive to the fact that the property had not been put up for sale on the open market. Upon becoming alive to the fact that sale of the Property was to an affiliate, the Hearing Panel had an obligation to take care to ensure that ratepayers were not being prejudiced by that affiliate transaction.

The Decision notes that the body of the analysis section of the August 5, 2015 appraisal report does not support the concluding opinion as to value.[59] The Decision considers but rejects as "inexplicable" the $375,000 per acre value that is the basis for the estimated $2.4 million market value of the land contained in the appraisal report.[60] The Decision finds that, for ratemaking purposes, the appraisal evidence supports a value range of $400,000 to $450,000 and a sale value of $2.73 million based on a per acre value of $425,000 for the 6.43 acre parcel. The Decision unambiguously states the per acre value range and its mid-point value upon which the $2.73 million market value finding is based.

The Decision refers to the November 2012 presentation made by the President/CEO of Milton Hydro to the Relocation Committee of the Board of Directors. That presentation ascribed a $2.7 million sale value to the Property based on a per acre value of $450,000.[61] The Hearing panel was "alive" to that information related to the market value issue.

A review of that entire presentation, in the context of the testimony and exhibits presented at the oral hearing about many properties that Milton Hydro had investigated over the years as alternative sites to Fifth and Main for the location of its utility office/service centre project, demonstrates Milton Hydro's familiarity with land and property values in the area.[62] The oral testimony and exhibits filed at the hearing referred to ten property options that Milton Hydro had investigated since 2010 as alternatives to Fifth Line and Main for the location of its utility office/service centre project.[63]

[58] Decision, page 46.
[59] Decision, page 46.
[60] Decision, page 46.
[61] See Chapter 3 Facts, footnote 9.
[62] See Interrogatory Responses, December 18, 2015, Relocation Committee Minutes April 12, 2014, pages 739-743, listing the 12 properties investigated by Milton Hydro personnel, per acre prices, and the three properties identified for further pursuit, and the November 14 Meeting Minutes and 15 page presentation, pages 744-761.
[63] Exhibit K1.3, pages 17-18, and Tr. Vol 1, pages 150-152.

At the oral hearing Milton Hydro's testimony also referenced the arm's length market activity in which it had engaged in prior years in an attempt to acquire the privately owned 1.3 acre parcel at Fifth Line and Main to give it sufficient development land at that location to satisfy its utility office/service centre needs. That prior market activity was relied upon by Milton Hydro to support a realistic value estimate for the 1.3 acre parcel of $800,000 or about $615,000 per acre. The Hearing Panel was "alive" to this information relating to the market value issue. During their oral testimony about the cost of property at this location the Milton Hydro witnesses never referred to the appraisal certified value estimate of immediately adjacent land at $375,000 per acre.

The Hearing Panel's value finding of $425,000 per acre ($2.73 million for the 6.43 acres) was supported by the appraisal and other evidence specifically referenced in the Decision. There was no need for the Hearing Panel to list in the Decision all of the information in the record that supported a conclusion that a per acre value of $425,000 fell within the range of reasonable per acre value outcomes.[64]

6.4.2 Does the Reasonable Range of Value Outcomes Include $425,000/Acre?

Any estimate of the fair market value of a particular item of property, regardless of whether it is expressed in a written appraisal or in some form of presentation, stems from an analysis of arm's length open market activity. The best evidence of market value is actual arm's length market activity related the particular property being assessed and other properties similarly situated.

An appraisal is nothing more than an estimate of the value of a particular property derived from market activity selected by the appraiser to form the factual basis for the estimate. Appraisers use examples of actual market activity to develop ranges of value that they regard as achievable and then select a point within that achievable range as their value estimate. The certificate in an appraisal merely formalizes the estimate that is based on the market activity described and analyzed in the body of the appraisal report. Such a certificate is not the equivalent of a price in an arm's length open market transaction.

Any appraiser retained by a property owner to support the pricing for a property to be sold in the open market would investigate market activity related to properties that adjoin the property to be sold. Any property seller seeking an appraisal for the purpose of pricing the property for sale in the open market would inform the appraiser of the market activity in which it had engaged in relation to adjoining property. This is particularly so when the seller was planning to rely on that activity to support a

[64] See footnotes 50 and 51.

presentation to the OEB of a current cost to acquire adjoining property of about $615,000 per acre.

One can reasonably ask how Milton Hydro can credibly assert that a per acre value of $375,000 for development land at Fifth Line and Main Street is reasonable when its CEO told the OEB that it would realistically cost $615,000 per acre to purchase a 1.3 acre parcel at that very location.

When an OEB hearing panel is called upon to consider the fair market value of a utility property that has been sold to an affiliate, it is not obliged to accept, as reasonable, the particular value estimate presented by the utility's appraiser. A hearing panel can consider the actual market activity on which the utility's appraiser has relied to formulate its estimate along with other market activity information and value estimates based thereon that the utility's appraiser did not consider. It is open to a hearing panel to find a value different from the appraiser's estimate as the value that should be accepted as reasonable for ratemaking purposes.

The three components of market activity evidence reflected in the record under review relevant to a consideration of the breadth of the range of per acre property values that the record supports are referenced above in Section 5.2.3 and include:

a) The arm's length market activity described in the August 5, 2015 Colliers appraisal that was before the Hearing Panel, which remained unchanged in the revised version of that report presented with the Affidavit. Each version of the August 5, 2015 appraisal supports as achievable per acre values of up to $442,000;

b) The arm's length market activity in which Milton Hydro participated related to the 1.3 acre parcel at Fifth Line and Main. This activity supports a per acre value much higher than $425,000; and

c) The market activity in which Milton Hydro engaged over the years 2010 to 2014 in relation to the many other properties that it investigated as alternatives to completing the development of its office/service centre project on property located at Fifth Line and Main Street. This activity supported the $450,000 per acre value ascribed to the property in the CEO's November 2012 presentation to directors.

Milton Hydro's witnesses referred to and relied upon the second and third sources of these market activities in their oral testimony before the Hearing Panel. This testimony

alerted the Hearing Panel to these sources of information. Milton Hydro made no reference to the Colliers appraisal report during the course of the proceeding. Where errors of fact are alleged, an OEB review panel is obliged to consider all information in the record before the decision makers in determining the range of factual outcomes supported by that record.

A careful analysis of all three sources of the market activity information that was before the Hearing Panel is presented in the "Facts" section of this consolidated decision. This evidence is summarized below.

6.4.3 Colliers' Appraisal Report

The August 5, 2015 appraisal report in the record before the Hearing Panel states that it was being prepared for the purpose of providing an estimate of value to Milton Hydro for "internal purposes" and notes that the OEB may rely on the report for regulatory purposes. As previously noted, this report relies on five comparable property sales; one at $339,217 and the other four falling within a range of $442,000 to $478,000. The report states that: "The Subject Parcel should achieve a rate per acre in the narrowed range of $339,217 to $442,213." This statement supports a finding that a reasonable range of rate per acre outcomes for the Property includes a per acre value of $425,000.

This analysis section of report establishes a value range of $400,000 to $450,000 for the Property with a mid-point rate per acre of $425,000.

The revised August 5, 2015 Report filed with the Affidavit relies on the same market transactions and the same achievable sales range with an upper limit of $442,213. This report makes changes to the initial report by reducing the limits of the value range in the analysis section of the report by $50,000 to conform to the $$350,000 to $400,000 value table in the initial report and the $375,000 per acre value used to estimate the value of the property at $2.4 million.

The Affidavit and PO2 Responses state that the appraiser who prepared an initial draft of the report concluded at a market value estimate of $2.7 million using a value range of about $339,000 to $478,000 per acre established by a set of comparable sales, a subset thereof with a rate per acre of $400,000 to $450,000 and a mid-point per acre value of $425,000. Following a peer review by another appraiser it was deemed that the rate should be at the lower end of the range. On its face this response indicates that the range of $400,000 to $450,000 was not an error. It was the opinion of the appraiser who drafted the initial report that led him to value the Property at $2.7 million.

The PO2 Responses at Attachment F reveal that during the three separate e-mail exchanges between the appraiser and Milton Hydro over the period July 20, 2015 to August 6, 2015 relating to the reviews of the draft report, no one questioned the $400,000 to $450,000 value range.

The August 5, 2015 appraisal report makes no reference to the arm's length market activity in which Milton Hydro engaged in relation to the 1.3 acre parcel at Fifth Line and Main nor to the many other properties that Milton Hydro investigated over the years 2010 to 2014. The PO2 Responses reveal that the appraiser did not ask and Milton Hydro did not disclose the activities in which it had engaged that supported a $615,000 per acre value estimate for development property at Fifth Line and Main that Milton Hydro subsequently presented to the OEB as a "realistic" estimate of current market value.

6.4.4 Milton Hydro's Market Activities Related to the 1.3 Acre Parcel

The record before the Hearing Panel and the PO2 Responses reveal that Royal LePage provided Milton Hydro with a 2010 appraisal of the 1.3 acre parcel of its immediate neighbour at between $461,000 and $538,000 per acre. Milton Hydro made an arm's length offer in 2010 to its immediate neighbour of about $700,000 or a per acre rate of about $538,000. The neighbour wanted $750,000 or about $577,000 per acre. As already noted at the April 4, 2016 oral hearing, Milton Hydro estimated that it would cost $800,000 or about $615,000 per acre to purchase this land and relied on its own arm's length market activity with the property owner to support that cost as a realistic estimate of the 2015 value of that parcel.

6.4.5 Other Market Activities and the 2012 Value Estimate of $2.7 Million

The record under review reveals that by March 2012 and before the CEO made the November 2012 presentation to Milton Hydro directors, Milton Hydro had already investigated the availability and pricing of 12 property alternatives to a Fifth Line and Main Street location for its office/service centre project and had then identified three property options to be pursued.[65]

This activity was in addition to its own arm's length efforts to purchase the adjacent 1.3 acre parcel. These activities and the 15 page November 2012 presentation reveal that Milton Hydro was very involved in and familiar with the prevailing prices for property in the area. Milton Hydro was not a neophyte in matters relating to property values when

[65] See footnote 62.

the CEO made the November 2012 presentation. In that presentation Milton Hydro ascribed a $450,000 per acre and $2.7 million value to the Property.

6.4.6 Impermissible Re-weighing of Evidence

When applying the reasonableness standard of review a reviewing panel is not to examine the evidence in isolation. The evidence is to be examined in its entirety. A reviewing panel cannot re-weigh the evidence to support findings that are substitutes for findings made by a hearing panel that are supported by the record. The majority decision does not comply with these principles. The majority decision impermissibly ascribes little, if any, weight to the following evidence related to the market value issue:

a) Milton Hydro's arm's length market activities related to the adjoining 1.3 acre parcel;

b) Its other market activities and its 2012 value estimate for the Property of $2.7 million;

c) The value of about $442,000 per acre considered by the Colliers appraisal to be achievable; and

d) The diluted quality of the Colliers appraisal report that does not consider all of the market activities in which Milton Hydro itself engaged.

The majority decision discredits the evidence of Milton Hydro's arm's length market activities related to the 1.3 acre parcel on the grounds that "property markets can change considerably in five years". I disagree with this feature of the majority decision.

The majority's observation is in conflict with the record under review and Milton Hydro's testimony at the oral hearing stating, unequivocally, that the market activity in which it engaged some years ago was a realistic indicator of current value. The record under review reveals that, since 2012, property values in the area were increasing and not decreasing as the observation in the majority decision suggests. The Review Panel must respect the record under review.

The majority decision discredits Milton Hydro's $2.7 million value estimate in 2012 for the Property on the grounds that this value estimate made by the CEO was contained in an "internal" document. I disagree with this feature of the majority decision. It is not the form of the presentation but the substance of the information that underpins a value estimate that matters.

At the time that the CEO made his presentation to the directors, Milton Hydro officials had, for years, been personally involved in and were very experienced in property values related to sites at which its new office/service centre might be located. These activities included the investigation and offer on the 1.3 acre parcel and the investigation some 12 other properties as alternatives for the location of its office/service centre project.

Milton Hydro's market based activities that supported the CEO's November 2012 presentation were essentially the same market based activities on which the CEO relied when making his presentation made to the OEB at the oral hearing in this case. Each of the presentations was supported by the significant market activity in which Milton Hydro officials had personally engaged. These presentations and supporting documents and the appraisal prepared for Milton Hydro's "internal purposes" are equivalents.[66] These presentations and the market activities supporting them cannot be discredited on review because they were "internal" and not presented in an appraisal format.

The majority decision disregards the failure of Milton Hydro to disclose and the failure of the Colliers appraisers to ask about the market activities in which Milton Hydro had engaged that supported Milton Hydro's $615,000 per acre value estimate at the hearing for the 1.3 acre parcel at Fifth Line and Main Street. The majority's rationale for this approach is that this non-disclosure and failure to investigate was not "improper" and that the appraisers' knowledge of this information might have compromised their "independence".

An investigation of these activities by the appraiser and/or disclosure of them to the appraiser by Milton Hydro does not compromise the independence of the appraiser as the majority decision finds. The lack of investigation and disclosure do not relate to appraiser "independence". Rather these items relate to the quality of the appraisal report which depends upon the arm's length market activities that are reflected in that report. A failure to include in an appraisal information related to the property adjacent to the property being appraised dilutes the quality of the appraisal.

Similarly I disagree with the majority's disregard of all of the market activity information that is separate and apart from the market activity reflected in the revised appraisal on the grounds that the appraiser's estimate is deserving of greater weight. As already noted the Ontario Court of Appeal has recently confirmed that a review panel is not to re-weigh various items of evidence in the record under review. Rather it considers the probative capability of the entire record to identify the range of outcomes that the record supports.

[66] See Chapter 3, FACTS, subparagraph (i).

There is no factual basis in the record for treating the appraiser's market activity based value estimates any differently than the value estimates derived from the market activities in which Milton Hydro officials participated that the appraiser did not consider. The majority's attribution of greater weight to the appraisal is both inappropriate in a review proceeding and untenable having regard to the extensive participation of Milton Hydro officials in market-related activities over a period of some four years.

6.4.7 Summary

In summary the record under review overwhelmingly supports a range of values that includes a value of $425,000 per acre and a $2.73 million value for the Property's 6.43 acres for ratemaking purposes. That the range of values includes $425,000 per acre value is supported by:

a) the $339,212 to $442,217 per acre range that initial and revised Colliers appraisal reports establishes as achievable for the Property;

b) the value range of the $400,000 to $450,000 per acre range established by the Colliers appraiser who prepared the initial draft of the report;

c) the $400,000 to $450,000 per acre range in the report before the Hearing Panel;

d) the values for four of the five comparable properties in the Colliers reports equal to or greater than $442,000;

e) the per acre values for the 1.3 acre parcel immediately adjacent to the property reflected in Milton Hydro's presentation to the Hearing Panel ($615,000), its arm's length open market offer to purchase the property ($538,000) and the appraisal of the property that it obtained from Royal LePage ($461,000 to $538,000); and

f) the $450,000 per acre and $2.7 million values that Milton Hydro ascribed to the Property in 2012.

6.4.8 Criteria to be Satisfied to Set Aside a Finding of Fact

The applicant for review must show that the challenged finding of fact is contrary to the record under review. A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and the decision is

clearly wrong. A reviewing panel should only interfere with a finding of fact in the clearest of cases. The law accords considerable deference to findings of fact.

In my view, having regard for the record being reviewed, Milton Hydro has not and cannot satisfy these criteria.
There is no identifiable and materially incorrect error in a finding of fact that falls within the range of reasonable factual outcomes that the record under review supports. Under the OEB's reasonableness standard of review a finding of fact not reviewable if it falls within the range of reasonable factual outcomes that the record under review supports.

A review panel is to refrain from substituting its own decision of the appropriate outcome when the decision being reviewed falls within the range of outcomes supported by the record being reviewed.

6.4.9 Conclusion

The record under review overwhelmingly supports, as reasonable, a range of decision alternatives to the market value issue in excess of $375,000. The August 5, 2015 appraisal report, on which the majority relies, regarded a per acre value of $442,213 per acre as achievable. In 2012 Milton Hydro considered a per acre value of $450,000 to be appropriate. At the 2015 hearing, Milton Hydro was asking the OEB to treat the Property as having a per acre value of about $615,000.

In my view, Milton Hydro cannot credibly contend that the Hearing Panel's $2.73 million Property value finding falls outside the reasonable range of value outcomes when that value is:

a) essentially the same as the $2.7 million value that Milton Hydro ascribed to the Property some three years prior to its sale; and

b) much lower than the $615,000 per acre value for development property at Fifth Line and Main Street presented by Milton Hydro's CEO to the Hearing Panel during the course of his oral testimony on April 4, 2016.

Based on the foregoing review of all of the facts in the record under review pertaining to the Property value issue, I would find that the Hearing Panel's Property value finding of $2.73 million falls within the range of reasonable per acre value outcomes established by that record. The $2.73 million value finding has not been clearly shown to be incorrect in a material way.

Moreover, in the context of Milton Hydro's extensive property investigations that informed its own 2012 value estimate for the Property of $2.7 million, I find the substitution of a $2.4 million year-end value for 2015 for the $2.73 million amount found by the Hearing Panel to be appropriate to be incompatible with the OEB's obligation to ensure that ratepayers are not prejudiced by transactions between a utility and its affiliates. The substituted value of $2.4 million materially reduces the capital gain amount to be considered in setting rates by $330,000, from about $506,000 to about $176,000.

I would deny the request for a variance of the $2.73 million market value finding.

6.5. PORTION OF THE GAIN ALLOCATED TO RATEPAYERS

As with the previous issue, to apply the established standard of review the Review Panel examines the Hearing Panel's decision to determine the rationale for allocating the entire gain on land not in rate base to ratepayers. This is followed by a screening of the record under review to determine the range of gain allocation outcomes that it supports. The criteria that must be satisfied to justify a variance are then applied to determine whether the variance relief requested should be granted or denied.

6.5.1 Hearing Panel's Decision on the Gain Allocation Issue

The question for the Hearing Panel in relation to the gain allocation issue was to determine the allocation as between the utility shareholder and its ratepayers of the amount of the capital gain on the Property attributable to the 50% portion of the land not yet in rate base. Milton Hydro had allocated to ratepayers the gain attributable to the land in rate base. The issue for determination by the Hearing Panel related to the appropriate regulatory treatment of the gain on the remainder not in rate base.

No changes to the record before the Hearing Panel are relied upon to support the requested variance of the hearing Panel's allocation of the entire gain to ratepayers for ratemaking purposes. Rather Milton Hydro's request for variance is effectively based on the proposition that the gain on the portion of the land not in rate base cannot, in any circumstances, be allocated to ratepayers. On this issue the question for the Review Panel is whether the gain allocation alternatives available to the Hearing Panel included the option of an allocation of some or all of the gain to ratepayers.

I agree with that portion of the majority decision on this issue that acknowledges that the Hearing Panel did not disregard the fact that 50% of the land had not yet been included in rate base. The Hearing Panel was clearly alive to that fact.

The Decision reveals that the factors that prompted the Hearing Panel to allocate to ratepayers all of the gain attributable to the portion of the land not in rate base included:

a) The fact that the Property had been acquired by Milton Hydro pursuant to a utility project plan to develop its own office/service centre; and

b) The fact that the land at the 200 Chisholm Drive premises was purchased as a substitute and replacement for the Property as a new location for the utility office/service centre project.

At page 39, the Decision refers to the Settlement Agreement in Milton Hydro's 2011 cost of service proceeding where the parties agreed that the Property would be the site for the future office/service centre. The Decision at page 54 finds that the property was purchased for this specific utility purpose.

At page 54, the Decision notes that the Chisholm Drive premises was a substitute and replacement for the Property.

At page 55, the Decision finds that the appropriate regulatory treatment of a gain realized when one parcel of property, acquired for a future utility use, is replaced with another to serve that same utility use is to allocate that gain to ratepayers. The Hearing Panel's gain allocation rationale referred to the CEO's November 2012 presentation to directors that showed the entire $2.7 million value of the property been applied as a credit to the then total estimated office/service centre project costs budget to defray the costs estimated to be incurred for completing the utility project at a different location.

In that 2012 presentation, the amount of the then estimated sale value of the Property of $2.7 million that was applied to defray the total project costs included, rather than excluded, the portion of the total capital gain amount of about $500,000 attributable the land not included in rate base.[67] The gain of the portion of the land not in rate base was allocated to ratepayers to defray the costs of substituting the land at 200 Chisholm Drive for the Property as a new location for the utility office/service centre project.

The evidence indicated that the land related costs for the 200 Chisholm Drive premises were $4.040 million compared to the costs of the Property of about $2.2 million and the additional $0.8 million that Milton Hydro said that it would likely have to pay for the 1.3 acre parcel that was needed to provide sufficient lands at the Fifth Line and Main Street location to satisfy its utility needs.

[67] The original cost of the land was about $2.2 million. A $2.7 million value produces a gain of about $500,000.

6.5.2 Range of Outcomes Supported by the Record under Review

The Record under review in relation to the gain allocation issue includes the OEB's accounting policies expressed in its APH. What is informative about these provisions in relation to this issue is that gains and losses on land and other assets acquired for future utility use are treated the same; they are allocated to ratepayers.[68]

While I accept the submissions of OEB staff that the accounting rules are not necessarily binding in a particular case, these APH provisions, at the very least, identify gain allocation options that fall within the range of outcomes that the record under review supports.

For ratemaking purposes, it is important to distinguish between assets acquired for a non-utility purpose and assets acquired and held for future use in connection with a specific utility project not yet in service because it has yet to be completed.

Assets acquired and held for the purpose of a specific utility project, but not yet in service because the project has not been completed, are utility assets "in the making" and not assets acquired to support non-utility business activities. Under the provisions of the APH, gains and losses on utility assets "in the making" are treated in the same manner as gains and losses on utility assets.

The majority decision fails to distinguish between assets acquired by a utility company to serve a particular utility project purpose and assets acquired to support a non-utility business activity. All of the land at the Fifth Line and Main Street location was acquired by Milton Hydro for a specific utility project purpose. The fact that Milton Hydro put a fence around the portion of the property that it used for outside storage purposes does not alter the fact that the entire property was acquired for a specific utility project purpose.[69] When one utility asset in the making is disposed of at a gain or a loss because of the acquisition of a substitute asset, the gain or loss allocation options available to the OEB include the allocation of all, some, or none of the gain or loss to ratepayers.

Put another way, the OEB's broad discretion over gains and losses realized on assets in service and in rate base extends to assets acquired and held for the purpose of their use in a specific utility project, but not yet in service because the project has not yet been completed.

[68] See footnote 56.
[69] See PO2 Responses, page 20.

While I readily accept that the benefits follow costs allocation principle traditionally applies to capital gains and losses realized on assets acquired to support non-utility business activities, I disagree with the majority that the benefits follows costs principle has any priority status when considering gains and losses on the disposition of utility-specific project assets acquired and held for future use but not yet in service because the utility project has not yet been completed.

The range of allocation options supported by the record under review includes an allocation of all of the gain to ratepayers to defray the increased costs associated with the utility's acquisition of replacement land at a cost greater that the property initially acquired as the location for the utility office/service centre project.

6.5.3 Criteria to be Satisfied to Set Aside an Exercise of Discretion

The question for the Review Panel is whether the discretion to make an allocation of the entire gain to ratepayers exists, and if so, whether the Hearing Panel's asset replacement and project costs defrayal rationale for allocating the entire amount to ratepayers was tenable.

The majority decision accepts that the Hearing Panel had the discretion to make an allocation of the entire gain to ratepayers, but that it should not have departed from the benefits follow costs allocation principle because the asset was not yet in service and in rate base. The majority decision effectively treats the portion of the Property not yet in rate base as an asset acquired to support a non-utility business activity rather than a utility specific project asset not yet in service because the project has not yet been completed.

An example of an OEB exercise of ratemaking power over utility-specific project assets, not yet in service and rate base because the project has not yet been completed, is the Decision with Reasons in EB-2006-0501 dealing with a transmission rates application by Hydro One Networks Inc. That decision found that circumstances related to an inability to complete the construction of the Niagara Reinforcement Project were sufficiently special to warrant an imposition on ratepayers of some of the carrying charges on the millions of dollars that had been spent on the project even though the project was incomplete and not in service.

The OEB's findings in that case, that the discretion exists to impose costs on ratepayers when they are not receiving any benefits from assets acquired for a utility specific project purpose, supports the conclusion that the discretion exists to do the opposite, namely to transmit benefits to ratepayers even though they have incurred no costs in

connection with utility-specific project costs that are not in rate base because the project has not yet been completed.

I disagree with the majority's conclusion that the Hearing Panel erred in failing to apply the benefits follow costs allocation approach. This conclusion fails to recognize the distinction between assets acquired to support non-utility business activities, to which the benefits follow costs principle traditionally applies, and assets acquired and held for a specific utility project but not yet in service because the project had not been completed.

The breadth of the OEB's discretion over gains or losses on utility project assets held for future use but not yet in service is the same as the breadth of the OEB's discretion over gains of losses on utility assets in service and in rate base. While the benefits follow costs principle lies within the range of outcomes that the record under review supports, this allocation principle has no presumptive priority status as the majority suggests.

Applying the gain realized on a disposition of a utility asset to defray the increases in costs associated with its replacement has been previously accepted by the OEB and affirmed by the Courts as a legitimate exercise of gain allocation discretion.[70] Extending that rationale to utility assets in the making makes good sense and is compatible with OEB accounting procedures that treat gains and losses on utility assets and utility assets in the making in the same manner. The Hearing Panel's rationale for allocating 100% of the gain to ratepayers is tenable even if the majority does not find that rationale to be compelling.

As an alternative to its conclusion that the Hearing Panel erred in departing from the benefits follow costs principle, the majority finds that the Hearing Panel's gain allocation was unreasonable because it was made without calling for submissions on the issue from Milton Hydro. This is a process concern that has no relevance to the question of whether the entire record under review supports the gain allocation alternative that the Hearing Panel found to be appropriate.

In their submissions, SEC and OEB staff supported the Hearing Panel's decision on the gain allocation issue. LPMA supported Milton Hydro's position on the issue. The process concern that the majority decision expresses does not tilt the scales related to the gain allocation alternatives that the record supports one way or another. Put another

[70] EB-2007-0680, Toronto Hydro-Electric System, at page 27 and *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*, (2009), 252 OAC 188, paragraphs 23, 29 and 32.

way, Milton Hydro's position on the gain allocation does not prevail by default because the majority decision has raised a process concern.

As already noted, the process options available to the Hearing Panel, when the request made by Milton Hydro in its reply argument led to the Hearing Panel's consideration of the market value and gain allocation issues, included reconvening the hearing to receive submissions on the issue, or deferring the matter for consideration in a future proceeding or deciding the issue on the basis of the existing record. The Hearing Panel decided to proceed on the basis of the existing record.

I question whether the majority decision can reasonably assert that the Hearing Panel should have called for further submissions from the utility on an issue raised by the utility, for the first time, in its reply submissions. Regardless of that issue and even if there was procedural error in not calling for further submissions on an issue that arose because of relief requested in reply argument, that procedural error has been remedied by calling for submissions on the gain allocation issue in this review proceeding and by inviting Milton Hydro to express its views on the applicability of the relevant APH provisions in the PO2 Responses.

Milton Hydro's reply submissions addressed the gain allocation issue. Milton Hydro has not sought an opportunity to make further submissions on the point. It resisted the efforts of the OEB to schedule a brief oral hearing related to the market value and gain allocation issues. That resistance led to the issuance of Procedural Order No. 2 and the PO2 Responses in which Milton Hydro provided information relating to the applicability of the APH to the gain allocation issue. What more can Milton Hydro say about this issue?

The majority decision does not provide a process remedy for its process concern. A process concern calls for a process remedy. If the majority is not satisfied with the opportunities that Milton Hydro has had to be heard on the gain allocation issue, then the process remedy is to either call for further submissions in this review proceeding; or send the matter back to the members of the Hearing Panel that continue to be OEB members; or direct that the matter be brought forward by Milton Hydro for determination in its next rate case. The majority decision does not adopt any of these process remedies.

The procedural issue that the majority raises has no relevance to a determination of the range of options that the record under review supports. All members of the Review Panel are obliged to objectively apply the criteria reflected in the standard of review and

determine whether the allocation made by the Hearing Panel falls within the range of reasonable outcomes supported by the entire record being reviewed.

Milton Hydro has now had its say on the gain allocation issue. In my view, its position that benefits follow costs invariably applies to all assets not yet in rate base lacks merit when the OEB is dealing with gains or losses on utility-specific project assets acquired for future use but not yet in rate base because the project has not yet been completed.

6.5.4 Conclusion

The range of reasonable allocation options available to the hearing panel included the option of following the provisions of the APH to allocate to ratepayers the entire gain on the utility-specific project assets being held for future use, but not yet in service because the project had not been completed.

The Hearing Panel's explanation for selecting that allocation alternative, being that the entire gain on the Property should be applied to defray the costs of its replacement, was tenable.

The majority decision disregards the obligation under the reasonableness standard of review to respect the range of outcomes that the record under review supports. In disregarding the range of discretionary outcomes that the record supports, the majority decision impermissibly substitutes its preferred exercise of discretion for that exercise of discretion made by the Hearing Panel that falls within the range of outcomes supported by the record being reviewed.

6.6 MECHANISM FOR PAYING THE GAIN AMOUNT TO RATEPAYERS

6.6.1 Hearing Panel's Decision

The Hearing Panel's Decision directed that a permanent rate base reduction be implemented to credit ratepayers with the gain on the land not in rate base.
The primary matter of concern is whether the Hearing Panel erred in failing to limit the duration of the gain credit mechanism to the time required to pay no more than the total amount of the gain to ratepayers.

All members of the Review Panel agree with Milton Hydro that the Decision erred in making the duration of the reduction permanent rather than time limited. Ratepayers are

entitled to receive the amount of the gain allocable to them, but no more. The Decision shall be varied to achieve that outcome.

6.6.2 Range of Allocation Outcomes Supported by the Record under Review

There were two options available to the Hearing Panel to credit the amount of the gain to ratepayers.

One option was to use a term limited rate base reduction of about $506,000 to effectively credit the gain amount to ratepayers at the rate of $39,400 per year.[71] The duration of this credit mechanism would depend on the dollar amount of the gain allocation to ratepayers.

The other option was to use a revenue offset mechanism of the type specified in the provisions of the APH on which Milton Hydro relies. Under this approach, with an amortization period terminating at the end of Milton Hydro's 2020 rate year, the annual revenue offset amount in the case of a capital gain amount allocable to ratepayers of $506,000 will be considerably larger than the annual reduction amount of $39,400 that results from a rate base reduction of about $506,000. However, the utility's obligation to ratepayers will be discharged much earlier than it would be under the rate base reduction approach.

6.6.3 Criteria to be Applied

The reasonableness standard of review calls for the gain credit mechanism to fall within the range of allocation outcomes that the record under review supports. The permanent rate base reduction directed by the Decision falls outside that range and is unreasonable and an error.

6.6.4 Conclusion

The gain credit mechanism for ratemaking purposes must be corrected. I agree with Energy Probe that a shorter payment period better aligns the credit to ratepayers of the gain amount with the 2015 date of its realization.

For these reasons the gain-related rate base reduction embedded in Milton Hydro's rate base should be eliminated effective May 1, 2018, being the beginning of Milton Hydro's 2018 rate year. At that time the portion of the gain remaining to be paid to ratepayers

[71] Affidavit, paragraph 10.

should be credited by way of a revenue requirement offset, with any amortization thereof to be completed no later than the end of Milton Hydro's 2020 rate year.

6.7 IMPLEMENTATION

For these reasons I would deny the requested variance of the $2.73 million value amount and the resulting capital gain amount of $506,000 of which Milton Hydro will have paid about $78,800 by May 1, 2018. I would also deny the request to eliminate the allocation to ratepayers of the portion of the gain amount attributable to land not in rate base.

For the two years ending April 30, 2018 Milton Hydro will have credited ratepayers with a sum of about $78,800 under the rate base reduction credit mechanism. This leaves about $427,200 to be paid by way of a three-year amortized revenue offset, or about $142,400 per year for each of the years 2018, 2019, and 2020 in the scenario where the entire gain is allocated to ratepayers.

I would direct Milton Hydro to reduce its rate base by $506,000 effective May 1, 2018 and to include in its revenue requirement for each of the years 2018, 2019 and 2020 an annual revenue requirement offset amount of $142,400.

Original Signed By

_____

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

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2018-0171

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

NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1

June 18, 2018

On May 2, 2018, Hydro One Inc.(Hydro One) and Orillia Power Distribution Corporation (Orillia Power) each filed a Notice of Motion for a review and variance of the OEB's EB-2016-0276 Decision and Order, in which the OEB denied Hydro One's application to acquire the shares of Orillia Power. The OEB will hear these motions together and has assigned file number EB-2018-0171 to this matter.

The motions filed by Hydro One and Orillia Power seek a variance of the OEB's EB-2016-0276 Decision on the basis that the OEB:

a) Changed its policy without notice and erred in departing from its own guidance and not providing notice of the change
b) Erred in relying on irrelevant evidence filed in the Hydro One Distribution Rate Application
c) Changed the standard to be met, applying a higher standard that the OEB must be *assured* rather than there must be a *reasonable expectation* that underlying cost structures would be no higher than they would be in the absence of the acquisition
d) Erred in ruling that Hydro One failed to file further evidence requested by the OEB

e) Considered new criteria, i.e. Hydro One's general cost allocation methodology which fetters and pre-empts the discretion of a future panel responsible for setting rates for the consolidated entity

The OEB will adopt as intervenors in this proceeding, the intervenors from the EB-2016-0276 proceeding. A list of the parties of record in that proceeding is attached as Appendix A. Any party that was determined to be eligible for costs in the EB-2016-0276 proceeding shall be eligible for costs in this proceeding.

Under Rule 43.01 of the OEB's *Rules of Practice and Procedure*, the OEB may, in respect of a motion filed, determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The OEB has decided that it will first consider the threshold question and has scheduled an oral hearing on this matter. Any party that intends to make submissions at the oral hearing is required to file a brief (maximum 5 page) written summary setting out its position on the threshold matter and any materials that it intends to rely on prior to the hearing. After hearing the submissions, the OEB may have questions.

The OEB considers it necessary to make provisions for the following procedural matters related to the motions.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. An oral hearing will be held on **July 10, 2018** on the threshold question with respect to the motions filed by Hydro One and Orillia Power. The hearing will commence at 9:30 am in the OEB's hearing room at 2300 Yonge Street, Toronto.

2. Any party that wishes to make submissions on the threshold question is required to file a brief (maximum 5 page) written summary setting out its position on the threshold matter and any materials that intends to rely on by **July 3, 2018**. All materials shall be filed with the OEB and copied to all parties.

All filings to the OEB must quote the file number, EB-2018-0171, be made in searchable/ unrestricted PDF format electronically through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed

at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.oeb.ca/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at judith.fernandes@oeb.ca and OEB Counsel, Michael Millar at michael.millar@oeb.ca.

ADDRESS

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DATED at Toronto, June 18, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2016-0276

Hydro One Inc.
Orillia Power Distribution Corporation
Hydro One Networks Inc.

Application for approval to purchase Orillia Power Distribution Corporation

PROCEDURAL ORDER NO. 6
July 27, 2017

Hydro One Inc. (Hydro One) filed an application on October 11, 2016, under section 86(2)(b) of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B) (Act), requesting approval to purchase all of the shares of Orillia Power Distribution Corporation (Orillia Power). As part of the share purchase, Orillia Power and Hydro One Networks Inc. (HONI) 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 the 2016 base electricity delivery rates for residential and general service classes until 2022
- Transfer of Orillia Power's rate order to HONI, under section 18 of the Act
- Transfer of Orillia Power's distribution system to HONI, under section 86(1)(a) of the Act
- Cancellation of Orillia Power's electricity distribution licence, under section 77(5) of the Act, after the transfer of the distribution system to HONI is completed
- Amendment of HONI's electricity distribution licence, under section 74 of the Act, at the same time as Orillia Power's licence is cancelled, authorizing HONI to serve Orillia Power's customers

A Notice of Hearing was issued on November 7, 2016. In Procedural Order No.1, 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. In accordance with Procedural Order No. 2, these parties filed interrogatories which were responded to by the applicants.

In Procedural Order No. 5, the OEB made provision for the filing of submissions and reply submissions on the application. Submissions were filed by the parties on April 21, 2017 and reply submissions were filed by the applicants on May 5, 2017.

Having reviewed these submissions, the OEB has determined that the hearing of this application will be adjourned until the OEB renders its decision on Hydro One's distribution rate application.[1] In making this decision, the OEB notes, in particular, the following submissions.

OEB staff observed that the rates proposed for previously acquired utilities (Norfolk, Haldimand, and Woodstock) in Hydro One's distribution rate application suggest large distribution rate increases for some customers of these acquired utilities once the deferred rebasing period elapses.

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. SEC argued that there were no cost savings for Norfolk, Haldimand and Woodstock, noting the rates proposed for customers of these former utilities in Hydro One's distribution rate application.

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.

[1] OEB File No. EB-2017-0049

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 by Hydro One.

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 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 acquired distributors.

Hydro One submitted that SEC has confused lower cost structures, which it states are used to test the validity of a merger or acquisition application, with allocated costs used for rate setting.

Hydro One also submitted that the matter of how those costs are then allocated to rate classes is outside a merger or acquisition application and that it has based its rate application on a cost allocation model consistent with the OEB's principles and it will defend that allocation in that hearing.

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.

The OEB considers certain evidence recently filed in Hydro One's distribution rate application to be relevant to this proceeding.

The OEB granted its approval for Hydro One's acquisitions of Norfolk, Haldimand and Woodstock in recognition of evidence that Hydro One could serve the acquired entities at a lower cost. In granting those approvals the OEB established a clear expectation that the future rates for the customers of those acquired service areas would be reflective of the lower costs.[2]

Intervenors in this hearing have raised concerns with Hydro One's rate proposals and revenue requirements for those acquired service areas contained in its distribution rate application. Hydro One has responded that the evidence in its application for distribution rates indicates that it has served the acquired service areas at a lower cost as it had projected in its acquisition applications. Hydro One submitted that its rate making proposals are based on a cost allocation model consistent with the OEB's principles and it will defend its allocation proposals in that hearing.

Hydro One's cost allocation proposals result in significant rate increases for certain customers within the acquired utility customer grouping.[3] It is not apparent to the OEB that Hydro One's cost allocation proposal responds positively to the expectation that the future rates for the customers of those acquired service areas would be reflective of the lower costs.

The OEB has determined that Hydro One should defend its cost allocation proposal in its distribution rate application prior to the OEB determining if the Orillia acquisition is likely to cause harm to any of its current customers. The OEB's determinations in the Hydro One rate case will be determinative of how customers impacted by acquisitions are to be treated.

In its submission, Orillia Power refers to the Report of the Ontario Distribution Sector Review Panel and how this acquisition is illustrative of the benefits of consolidation.

[2] Hydro One/Norfolk Decision – EB-2013-0196/EB-2013-0187/EB-2013-0198, p. 19 – "…., it is the Board's expectation that when HONI makes its application for rate rebasing, it will propose customer classes for NPDI customers that reflect the costs of serving those customers."; Hydro One/Haldimand Decision – EB-2014-0244, p. 4 – "The OEB has accepted the evidence that the cost to serve Haldimand on a go forward basis will be lower. The OEB expects that the lower service costs will lead to relatively lower rates."; Hydro One/Woodstock Decision – EB-2014-0213, p.9 – "The OEB accepts Hydro One's evidence concerning the cost drivers that are likely to result in savings being achieved. Hydro One's evidence is that rates will be determined based on the costs to service Woodstock customers."

[3] Hydro One application – EB-2017-0049 – Exh.H1/T1/Sch.2

The OEB recognises the economies of scale that consolidation can provide. This recognition is embedded in its stated policies on mergers, acquisitions, amalgamations and divestitures.[4] The application of the OEB's no harm test ensures that consolidations occur with due consideration to the directly impacted customers. This is particularly important in cases involving Hydro One given its spectrum of density related cost structures.

Therefore, this hearing is adjourned until a decision in Hydro One's distribution rate application has been rendered.

The OEB is making provision for the consideration of intervenor costs for the period up to and including final submissions for this phase of the proceeding.

The OEB considers it is necessary to make provision for the following matters related to this proceeding.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The application by Hydro One Inc. for approval to purchase Orillia Power Distribution Corporation will be held in abeyance until further notice.

2. Intervenors eligible for cost awards shall file with the OEB and forward to Hydro One Inc. their respective cost claims for the period up to and including the filing of final submissions for this phase of the proceeding by August 10**,** 2017.

3. Hydro One Inc. shall file with the OEB and forward to intervenors any objections to the claimed costs by August 21**,** 2017.

4. Intervenors shall file with the OEB and forward to Hydro One Inc. any responses to any objections for costs claimed by August 28**,** 2017.

5. Hydro One Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

[4] OEB Handbook to Electricity Distributor and Transmitter Consolidations issued January 19, 2016

All filings to the OEB must quote the file number, EB-2016-0276, be made in searchable/ unrestricted PDF format electronically through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at https://www.oeb.ca/industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at judith.fernandes@oeb.ca.

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DATED at Toronto, July 27, 2017

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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

DECISION AND ORDER

EB-2017-0320

HYDRO ONE INC.

ORILLIA POWER DISTRIBUTION CORPORATION

Motions to review and vary Procedural Order No. 6 issued in Ontario Energy Board Proceeding EB-2016-0276

BEFORE: Lynne Anderson
Presiding Member

Emad Elsayed
Member

Michael Janigan
Member

January 4, 2018

TABLE OF CONTENTS

1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) in response to filings by each of Hydro One Inc. (Hydro One) and Orillia Power Distribution Corporation (Orillia Power) of a notice of motion to review and vary the OEB's Procedural Order No. 6 issued in Hydro One's application for approval to acquire Orillia Power.[1]

On September 27, 2016, Hydro One filed an application (MAAD application) requesting the OEB's approval to purchase all of the shares of Orillia Power. As part of the share purchase, Hydro One proposed that the 2016 base electricity delivery rates of Orillia Power's residential and general service classes be reduced by 1% and kept frozen at this level until 2022. Hydro One and Orillia Power also requested approval to: (a) transfer Orillia Power's rate order to Hydro One; (b) transfer Orillia Power's distribution system to Hydro One; (c) cancel Orillia Power's electricity distributor licence; and (d) amend Hydro One's electricity distributor licence. The OEB assigned the application file number EB-2016-0276.

In Procedural Order No. 5 issued in the MAAD application, the OEB made provision for the filing of submissions and reply submissions. OEB staff observed in its submission that the rates proposed for previously acquired utilities (Norfolk, Haldimand, and Woodstock) in Hydro One's distribution rate application[2], filed March 31, 2017, suggest large distribution rate increases for some customers of these acquired utilities once the deferred rebasing period elapses. Some intervenors in the MAAD application raised concerns with Hydro One's rate proposals and revenue requirements for those acquired service areas contained in its distribution rate application, submitting that it is not clear the no harm test has been met.

Hydro One submitted that its rate making proposals are based on a cost allocation model consistent with the OEB's principles and that it would defend its allocation proposals in its distribution rate application. Hydro One further argued that its distribution rate application is for the period 2018 to 2022 and it includes no rate proposals for Orillia Power's customers. In the MAAD application, Hydro One proposes to freeze Orillia Power customers' rates for 10 years, beyond the effective dates proposed in Hydro One's current distribution rate application. Orillia Power argued that the evidence filed supports a finding that efficiencies will be gained and lower costs will be realized as a result of the proposed acquisition.

[1] EB-2016-0276 - Application by Hydro One Inc. and Orillia Power Distribution Corporation For Approval of Share Acquisition and Related Transactions
[2] EB-2017-0049

The OEB issued Procedural Order No. 6 (Procedural Order) in the MAAD proceeding 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 distribution rate application. The OEB found that Hydro One should defend its cost allocation proposal in the 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 for a review and variance of the Procedural Order on August 14, 2017 and August 16, 2017, respectively.

Rule 42.01 of the OEB's *Rules of Practice and Procedure* (Rules) states that all motions brought under Rule 40.01 shall set out the grounds for the motion that raise a question as to the correctness of the order or decision.

The OEB's Rules state that the OEB may determine a threshold question of whether the matter should be reviewed before conducting any review of the merits of the motion. The OEB must ensure that the motion is not merely a request for a reconsideration of the original application. A full explanation of the application of the threshold test is set out in chapter 3 of this Decision.

The OEB has determined that the threshold test has been met for the reasons set out in this Decision. The OEB grants the motions and refers this matter back to the panel on the MAAD application for re-consideration.

2 THE PROCESS

The OEB issued a Notice of Hearing and Procedural Order No.1 on October 24, 2017 confirming that it would hear the motions filed by Hydro One and Orillia Power together.

The OEB adopted all intervenors to the MAAD proceeding. The only intervenor to participate in the motion proceeding was the School Energy Coalition (SEC). Mr. Kehoe, an intervenor in the MAAD proceeding, filed a submission opposing the acquisition of Orillia Power by Hydro One, but did not make a submission on the motion being heard in this proceeding.

The OEB provided an opportunity for cross-examination of new materials filed with the motions and also made provision for written submissions on both the threshold and the merits of the motions.

OEB staff and SEC cross-examined the new material filed with the motions on November 10, 2017. OEB staff filed its submissions on November 24, 2017 and SEC filed its submissions on November 27, 2017. Hydro One and Orillia Power filed their reply arguments on December 13, 2017.

3 MOTIONS TO REVIEW

3.1 The OEB's *Rules of Practice and Procedure*

Rule 42.01(a) of the OEB's Rules provides the grounds upon which a motion may be raised with the OEB:

> Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Rule 43.01 of the Rules states:

> In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

3.2 The Threshold Test

In the Motions to Review the Natural Gas Electricity Interface Review Decision[3], the OEB found:

> 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.

[3] EB-2006-0322/0338/0340, May 22, 2007

> 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.

The OEB has adopted these findings in its consideration of the threshold question on many occasions over the past several years and does so again in consideration of arguments on the threshold question in these motions.

4 POSITIONS OF PARTIES

In their motions, Hydro One and Orillia Power submitted that the evidence and record in the rate application is not relevant to the MAAD application and will not inform the analysis and determination of the OEB's no harm test for the proposed share acquisition transaction. Hydro One and Orillia Power also submitted that the issuance of the Procedural Order without giving the applicants an opportunity to make submissions was procedurally unfair.

Orillia Power submitted that the adjournment of the MAAD application until the OEB renders a decision in the rate application causes undue delay and prejudice to Orillia Power. As part of its motion, Orillia Power filed new evidence regarding operational problems that have arisen as a result of the adjournment. As part of its motion, Hydro One filed new information providing a 10-year customer rate outlook comparing the Orillia Power status quo rates to the rate benefit to customers if the MAAD application is approved.

SEC argued that the motions put forward by Hydro One and Orillia Power should be denied on the basis that they fail to meet the threshold test.

SEC submitted that while the applicants have argued that they did not have a chance to argue the relevance and substance of the rate application, they could have provided arguments on how the rates proceeding evidence should be interpreted if it was found to be relevant. SEC argued that the operational consequences claimed by Orillia Power only arise because Orillia Power wrongly assumed that the MAAD application would be approved and did not have a backup plan in place if the OEB did not approve the application.

SEC also argued that the OEB's adjournment decision is only wrong if there is an error of law or if there is a manifest error of interpretation, neither of which, in its view, is applicable in this case. SEC submitted that the use of the evidence in the rate proceeding in the MAAD proceeding is part of an area of law relating to "similar fact evidence", i.e. evidence which might be probative in determining in the MAAD proceeding whether the Orillia Power customers will be harmed.

SEC submitted that if the OEB finds the threshold test is met with respect to the issue of relevance of the rate proceeding evidence, the OEB is still required to meet its objective with respect to price protection and suggested the following options:

- Accept the procedural solution determined by the OEB panel in the MAAD proceeding and therefore deny the motions; or

- Allow the Motions and remit the matter back to the OEB panel in the MAAD proceeding to hear evidence on how they can protect Orillia Power customers with respect to prices.

SEC further submitted that, if the OEB finds the threshold test is met with respect to operational consequences, that in balancing the consequences of additional delay with the protection of Orillia Power customers with respect to prices, the latter should prevail.

OEB staff argued that it is not entirely correct to say that the moving parties had no opportunity to address the relevance of the rate proceeding in the MAAD proceeding as this was raised by SEC in its final submissions and responded to by Hydro One in its reply argument. However, OEB staff also submitted that the information presented with the motions was not all available to the OEB when the Procedural Order was issued and that it is at least potentially relevant to that decision. OEB staff noted the applicants' arguments relating to the "right to be heard" on the adjournment issue and the resultant material impacts on the applicants, and submitted that under such circumstances parties should have the opportunity to make submissions on all issues that could impact them materially.

OEB staff submitted that the threshold test has been passed and that the OEB should consider the motions filed on their merits.

OEB staff submitted that the motions should be granted in part, stating that any information from the rate application is not directly relevant to the MAAD application. OEB staff submitted that the rate application contains no information on Orillia Power, regarding what rates or overall cost structures will be. While the rate case may be indicative of Hydro One's overall strategy with respect to acquired utilities, OEB staff noted that Hydro One may well have different plans for Orillia Power, and the relevance of the information from the rate application will be largely speculative. OEB staff submitted that the assessment of no harm in a consolidation application should include a consideration of whether the underlying cost structures are sustainable and beneficial beyond the proposed 10-year deferral period.

OEB staff suggested that the adjournment is not the optimal course as a lengthy delay may impose operational challenges for Orillia Power and that the decision on Hydro One's five-year rate application is unlikely to provide the information that is required.

OEB staff submitted that the matter should be referred back to the panel on the MAAD application and suggested that, if the panel believes more or better information is required, the panel should re-open the record and require the production of that information.

In reply arguments, Hydro One and Orillia Power submitted that the threshold test is met reiterating the grounds set out in their motions, namely the irrelevance of the rate proceeding evidence and procedural unfairness arising from the adjournment of the MAAD application. The moving parties argued that the OEB brought rate-setting into the scope of the MAAD application, which is inconsistent with OEB policies and past decisions, and made findings contrary to the evidence that was before the panel, thereby making an identifiable and material error of law or fact.

The moving parties also submitted, in final arguments, that in issuing the Procedural Order which effectively stayed the MAAD application, the OEB erred because the threshold test for a stay of proceedings under the *Statutory Powers and Procedures Act, 1990* was not met and that the OEB's decision causes prejudice to Orillia Power.

5 DECISION ON THE MOTIONS

The OEB finds that the threshold test has been met, and that the motions succeed on their merits.

The OEB's findings are based on its consideration of the following aspects. The first relates to the aspect of procedural fairness. In the OEB's view, the moving parties did not have the opportunity to thoroughly explore the relevance of the distribution rate application to the MAAD application before the Procedural Order was issued, particularly considering that the rate application was not filed until after the discovery process for the MAAD application was completed. The second aspect relates to new information filed as part of Orillia Power's motion regarding the potential impact of a lengthy delay in the MAAD application that was not available when the Procedural Order was issued. These reasons apply to both the threshold and the merits.

The OEB grants the motions and refers this matter back to the panel on the MAAD application for re-consideration. The OEB has determined that the panel in the MAAD proceeding is in the best position to continue hearing the MAAD application and to re-open the record if it becomes necessary to seek additional information or clarification in areas that are within the scope of the MAAD proceeding. These areas could include issues raised herein in the submissions of the moving and responding parties such as:

- whether the outcome of the rate application involving the acquisition of other distributors will provide relevant information about the effect of the acquisition on customers of Orillia Power
- the overall cost structures following the deferral period and their effect on the customers of the acquired utility
- the significance of a delay in the determination of the MAAD application balanced against the evidence that may be obtained as a result of such delay

This panel of the OEB is not determining the merits of the MAAD application. Any issues on the merits of the MAAD application and the conduct of that proceeding raised in the submissions of the moving or responding parties herein are referred back to the panel in the MAAD proceeding for its consideration.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The motions filed by Hydro One Inc. and Orillia Power Distribution Corporation are granted and refers this matter back to the panel on the EB-2016-0276 proceeding for re-consideration.

2. SEC shall file with the OEB and serve on Hydro One Inc. and Orillia Power Distribution Corporation, its cost claim within 7 days from the date of issuance of this Decision.

3. Hydro One Inc. and Orillia Power Distribution Corporation shall file with the OEB and serve on SEC any objections to the claimed costs within 14 days from the date of issuance of this Decision.

4. SEC shall file with the OEB and serve on the Hydro One Inc. and Orillia Power Distribution Corporation any responses to any objections for cost claims within 21 days of the date of issuance of this Decision.

5. Hydro One Inc. and Orillia Power Distribution Corporation shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, EB-2017-0320, be made in searchable/ unrestricted PDF format electronically through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.oeb.ca/industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto January 4, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2016-0276

Hydro One Inc.
Orillia Power Distribution Corporation

Application for approval to purchase Orillia Power Distribution Corporation

PROCEDURAL ORDER NO. 7
February 5, 2018

On October 11, 2016, Hydro One Inc. (Hydro One) filed an application (MAAD application) with the Ontario Energy Board (OEB) requesting approval to purchase all of the shares of Orillia Power Distribution Corporation (Orillia Power). As part of the share purchase, Hydro One proposed that the 2016 base electricity delivery rates of Orillia Power's residential and general service classes be reduced by 1% and kept frozen at this level until 2022. Orillia Power and Hydro One also requested approval to: (a) transfer Orillia Power's rate order to Hydro One; (b) transfer Orillia Power's distribution system to Hydro One; (c) cancel Orillia Power's electricity distributor licence; and (d) amend Hydro One's electricity distributor licence.

In Procedural Order No. 5, the OEB made provision for the filing of submissions and reply submissions on the MAAD application. Having reviewed these submissions, the OEB issued Procedural Order No. 6 in which it determined that the hearing of the MAAD application would be adjourned until the OEB rendered its decision on Hydro One's distribution rate application.[1]

Hydro One and Orillia Power each filed a Notice of Motion requesting for a review and variance of Procedural Order No. 6. In a decision[2] (Motions Decision) issued on January 4, 2018, the OEB granted the motions and referred the matter back to the

[1] EB-2017-0049
[2] EB-2017-0320

OEB panel on the MAAD application for re-consideration. The panel on the Motions proceeding stated that the panel in the MAAD proceeding is in the best position to continue hearing the MAAD application and to re-open the record if it becomes necessary to seek additional information or clarification in areas that are within the scope of the MAAD proceeding.

The Motions Decision indicated that these areas could include issues raised in the submissions of the moving and responding parties in the Motions proceeding such as:

- whether the outcome of the rate application involving the acquisition of other distributors will provide relevant information about the effect of the acquisition on customers of Orillia Power
- the overall cost structures following the deferral period and their effect on the customers of the acquired utility
- the significance of a delay in the determination of the MAAD application balanced against the evidence that may be obtained as a result of such delay

The OEB panel on the MAAD application originally adjourned the MAAD proceeding due to its observation of evidence filed by Hydro One in its distribution rate application pertaining to proposed rates for certain customers that were recently acquired by Hydro One.

The Handbook to Electricity Distributor and Transmitter Consolidations issued on January 19, 2016, states the following on page 7:

"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 acquired customers following a consolidation will be no higher than they otherwise would have been.''

The OEB panel had determined that it would wait to be informed by the OEB determination on Hydro One's proposed rates in its distribution rate application prior to determining if the acquisition of Orillia Power would result in harm to its customers.

In response to the Motions Decision, the OEB has determined that it will re-open the record of the MAAD application as it wishes to receive further material, in the form of evidence or submissions from Hydro One on what it expects the overall cost

structures to be following the deferred rebasing period and the impact on Orillia Power customers. The OEB will determine whether or not a further discovery process is required prior to establishing a schedule for submissions from OEB staff and intervenors and reply argument from Hydro One upon review of Hydro One's filing of evidence or submissions.

The OEB considers it is necessary to make provision for the following matters related to this proceeding.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Hydro One Inc. shall file evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers by **February 15, 2018**. The evidence or submissions shall be filed with the OEB and copied to all parties.

All filings to the OEB must quote the file number, EB-2016-0276, be made in searchable/ unrestricted PDF format electronically through the OEB's web portal at https://www.pes.oeb.ca/eservice/. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.oeb.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at judith.fernandes@oeb.ca and OEB Counsel, Michael Millar at michael.millar@oeb.ca.

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DATED at Toronto, February 5, 2018

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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Joanne Richardson
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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.

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2016-0025

Enersource Hydro Mississauga Inc., Horizon Utilities Corporation, and PowerStream Inc.

Application for approval to amalgamate to form LDC Co. and for LDC Co. to purchase and amalgamate with Hydro One Brampton Networks Inc.

DECISION ON ISSUES LIST
June 30, 2016

Enersource Hydro Mississauga Inc. (Enersource), Horizon Utilities Corporation (Horizon), and PowerStream Inc. (PowerStream), (collectively, the applicants) filed a complete application with the Ontario Energy Board (OEB) on April 18, 2016 under section 86 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, (Schedule B) (the Act) seeking approval of the following:

a) Amalgamation of Enersource, Horizon, and PowerStream to form LDC Co.
b) LDC Co. share purchase and amalgamation with Hydro One Brampton Networks Inc. (Hydro One Brampton) and continuing as LDC Co.
c) Enersource Holdings Inc. share purchase of Enersource
d) Transfer of PowerStream's existing shares of Collus PowerStream Utility Services Corp to LDC Co.
e) Transfer of Hydro One Brampton's distribution system to LDC Co

An application is also made under section 18 of the Act requesting approval for the transfer of the distribution licences and rate orders for each of the applicants and Hydro One Brampton to LDC Co.

A Notice of Application and Hearing was issued on May 16, 2016.

The OEB provided an opportunity for intervenors and OEB staff to file submissions on the applicants' confidentiality requests and on the applicants' draft issues list. The OEB received submissions from AMPCO, BOMA, CCC, ECAO, SEC, VECC and OEB staff. This Decision relates solely to the Issues List and a decision on the confidentiality requests will follow at a later date.

Decision on Issues List

SEC submitted that the OEB is legally obligated to consider whether its non-binding policies relating to a distributor consolidation should be applied, either in whole or in part, to the proposed transactions. SEC submitted two additional issues should be be added to the issues list:

1. To what extent, if any, is it appropriate and in the public interest for the Board to apply its policies as set forth in its *2015 Report – Rate-Making Associated with Distributor Consolidation*, and its *2016 Handbook for Electricity Distributor and Transmitter Consolidations*, to the proposed transactions? In particular, and without limiting the generality of the foregoing…

The suggested issue by SEC continued with eight sub issues to provide additional detail in scoping the proposed issue. SEC asserts that "discovery" must occur, followed by the submissions of the parties, before the OEB can decide whether its policies are "fully applicable" in this case.

In support of its submission SEC referred to a Decision and Order of the OEB on a Notice of Motion to Review and Vary in EB-2014-0155. The Motion was for a review and variance of the Decision in an applicant's cost of service proceeding in which the OEB determined that "in the absence of previous direction by the Board to undertake a lead/lag study; the Board does not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application."[1] SEC submitted that the OEB fettered its discretion by binding its ability to determine an appropriate WCA percentage of any number but 13% in the absence of a lead/lag study.

In making its Decision on the Notice of Motion to Review and Vary, the OEB referred to a decision of the Federal Court of Appeal in *Thamotharem v. Canada (Minister of Citizenship and Immigration)* wherein the Court stated:

[1] Decision and Order on Notice of Motion to Review and Vary, EB-2014-0155, page 2.

> Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered[.][2]

The second issue raised by SEC relates to the settlement agreement and subsequent order in the Horizon EB-2014-0002 rate proceeding. SEC submitted the following issue should be added:

2. Will the Settlement Agreement and Board order in EB-2014-0002 continue to apply to LDC Co? If so, how should LDC Co. comply with Horizon's commitments, and the Board's order, in that Settlement Agreement, for example with respect to earnings sharing mechanism (ESM), capital variance account, and other provisions?

AMPCO, BOMA, CCC, VECC filed submissions agreeing with SEC's suggested additions to the draft issues list.

ECAO requested that the OEB add the following issue to the issues list:

Does the proposed consolidation, and its impact on the cost structure of the consolidating entities, promote economic efficiency in the electricity industry by fostering competitive, market-based pricing for electricity services?

OEB staff submitted no changes to the proposed issue list.

In their reply submission, the applicants submitted that the OEB should reject the submissions of SEC and the other intervenors that call on the OEB to revisit its own policies regarding mergers, acquisitions, and divestitures (MAADs) applications. The applicants submitted that, in order to maintain consistent decision-making, the OEB should not depart from its policy for MAADs application unless, in the circumstances of a particular case, there are good reasons to do so.

[2] Federal Court of Appeal Decision in *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 20007 FCA 198 at para 66, quoted in SEC Submission, May 12, 2014, page 7.

The applicants also referred to the 2016 *Handbook for Electricity Distributor and Transmitter Consolidations* (Handbook) and noted 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. The applicants noted that they have requested that the rate orders of the predecessor distributors to be transferred to LDC Co. and the evidence filed in support of the application indicates that Horizon will remain on Custom IR until the end of the IR term and that issues relating to rate-making for LDC Co.'s service areas, including the treatment of any ESM, capital variance and efficiency adjustments, would be addressed in future rate applications.

The applicants also submitted that the suggested issue proposed by the ECAO falls outside of the scope of this proceeding.

OEB Findings

The OEB has determined that there is no need for a stand-alone issue regarding the applicability of the OEB's policies with respect to MAADs and rate making pertaining to MAADs provided in the , 2015 *Report – Rate-Making Associated with Distributor Consolidation* and the Handbook.

The OEB has provided considerable guidance and direction regarding MAADs applications including:

i. The August 2005 Decision issued by the Board in respect of three different section 86 applications that were combined (the "Combined Proceeding") for the purpose of addressing common issues largely relating to the scope of the issues the Board will consider in determining applications under section 86;

ii. The Board's July 2007 Report on Rate-Making Associated with Distributor Consolidation;

iii. The 2015 Report; and

iv. The Handbook[3].

[3] EB-2005-0234 EB-2005-0254 EB-2005-0257 (Combined Decision); EB2007-0028 Rate Making Policies Associated with Distributor Consolidation, 2007; EB-2014-0138 Report of the Board Rate-Making Associated with Distributor Consolidation March 26 , 2016 ; 2016 Handbook for Electricity Distributor and Transmitter Consolidations

This level of information and guidance regarding the process for review of an application and the information the OEB expects to receive ensures that the OEB has the information it needs order to properly consider and assess the application.

With respect to SEC's argument that the OEB is legally obligated to put its mind to whether or not policies relating to distributor consolidation should be applied, the OEB observes that the extent to which and the manner in which its policies are applied is always determined based on the specifics of the applications before it. Thee OEB does not in assessing applications require a specific issue regarding the applicability of the OEB's policies. The OEB sees no reason to depart from this approach in this case.

With respect to the second issue raised by SEC, the OEB is of the view that the question of the fulfillment of the settlement agreement that was accepted by the OEB in Horizon EB-2014-0002 need not be established as an issue. The applicants' have a proposal regarding the continuation of rates for each of the consolidating entities as part of the deferral of rebasing. The extent to which that proposal allows for the implementation of this settlement agreement can be the subject of discovery and argument as part of the deferral of rebasing issue.

EACO has requested a specific issue dealing with the impact of the proposed consolidation on the competitiveness of electricity services stating that the merger may lead to less competition and therefore result in an increase in LDC costs. As part of its review of the proposed consolidation, the OEB will consider both the costs and benefits resulting from the proposed transaction. As a result, the issue raised by EACO is more appropriately dealt with in that context. The OEB does not find that a separate issue as suggested by EACO is necessary.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Issues List attached as Schedule A is approved.

All filings to the OEB must quote the file number, EB-2016-0025, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at

http://www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at Judith.Fernandes@ontarioenergyboard.ca and Maureen Helt at Maureen.Helt@ontarioenergyboard.ca.

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DATED at Toronto, **June 30, 2016**

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

A-38-06

2007 FCA 198

The Minister of Citizenship and Immigration (*Appellant*)

v.

Daniel Thamotharem (*Respondent*)

and

The Canadian Council For Refugees and **The Immigration Refugee Board** (*Interveners*)

INDEXED AS: THAMOTHAREM v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Décary, Sharlow and Evans JJ.A.—Toronto, April 16; Ottawa, May 25, 2007.

Citizenship and Immigration — Immigration Practice — Appeal from Federal Court decision setting aside decision of Refugee Protection Division (RPD) of Immigration and Refugee Board (IRB) dismissing respondent's claim for refugee protection — Cross-appeal from Federal Court's finding Guideline 7 of Guidelines Issued by the Chairperson pursuant to the Immigration and Refugee Protection Act (IRPA) 159(1)(h) not invalid on ground depriving refugee claimants of right to fair hearing — Guideline 7 providing that, except in exceptional circumstances, Refugee Protection Officer (RPO) to start questioning claimant in refugee protection claim — Per Evans J.A. (Décary J.A. concurring): (1) Refugee claimants deserving high degree of procedural protection but tailored to fit inquisitorial, informal nature of hearing — Fair adjudication of individual rights compatible with inquisitorial process — Procedure in Guideline 7 not breaching IRB's duty of fairness — (2) Administrative agency not requiring express grant of statutory authority to issue guidelines, policies to structure exercise of discretion or interpretation of enabling legislation — *Although* language of Guideline 7 more than "recommended but optional process", not unlawful fetter on discretion, as long as deviation from normal practice in exceptional circumstances not precluded — Evidence not establishing reasonable person would think RPD members' independence unduly constrained by Guideline 7 — (3) Power granted by IRPA, s. 159(1)(h) to Chairperson to issue guidelines broad enough to include guideline concerning exercise of members' discretion in procedural, evidential or substantive matters — Chairperson's guideline-issuing, rule-making powers overlapping — Not unreasonable for Chairperson to choose to implement standard order of questioning through guideline rather than rule of procedure — Appeal allowed, cross-appeal dismissed — Per Sharlow J.A. (concurring): Chairperson's powers under IRPA to issue guidelines, make rules respecting activities, practice, procedure of Board not interchangeable — Standard procedure outlined in Guideline 7 should have been implemented by means of a rule, but neither procedurally unfair nor unlawfully fettering IRB members' discretion.

This was an appeal from a Federal Court decision granting an application for judicial review to set aside a decision of the Refugee Protection Division (RPD) dismissing the respondent's claim for refugee protection. The respondent cross-appealed the finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* (IRPA) is not invalid because it deprives refugee claimants of the right to a fair hearing. Guideline 7 was issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines . . . to assist members in carrying out their duties" as outlined in the *Immigration and Refugee Protection Act* (IRPA), paragraph 159(1)(*h*). The IRPA also empowers the Chairperson to make rules for each of the three Divisions of Board but these rules must be approved by the Governor in Council and laid before Parliament. The key paragraphs of Guideline 7 provide that the standard practice in a refugee protection claim will be for the Refugee Protection Officer (RPO) to start questioning the claimant (paragraph 19), although paragraph 23 states that the RPD member hearing the claim may, in exceptional circumstances, vary the order of questioning. Guideline 7 was challenged on the grounds that (1) it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel; and (2) even if does not breach the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under the IRPA, paragraph 161(1)(*a*). While the Federal Court held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing in the absence of a provision in either the IRPA or the *Refugee Protection Division Rules* (Rules), it rejected the respondent's argument that it deprives refugee claimants of the right to a fair hearing and distorts the "judicial" role of the member hearing the claim. It remitted the matter for re-determination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing.

The respondent is a Sri Lankan Tamil who claimed refugee protection in Canada but his claim was rejected. Before the issue of Guideline 7, which was applied during the respondent's hearing despite the respondent's objection,

neither the IRPA nor the Rules addressed the order of questioning at a hearing. The order of questioning was within the individual members' discretion and practice thereon was not uniform across Canada.

The main issues in the present case were: (1) whether Guideline 7 prescribes a hearing procedure that is in breach of claimants' right to procedural fairness; (2) whether Guideline 7 is unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings; and (3) whether Guideline 7 is invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*).

Held, the appeal should be allowed, and the cross-appeal should be dismissed.

Per Evans J.A. (Décary J.A. concurring): (1) At a general level, the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament as well as the RPD's high volume case load. Although a relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process where the order of questioning is not as obvious as it generally is in an adversarial hearing. Furthermore, the fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of the person who is informed of the facts and has thought the matter through. Guideline 7 does not curtail counsel's participation in the hearing since counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or any other aspect of the procedure to be followed at the hearing. Although fairness may require a departure from the standard order of questioning in some circumstances, the procedure prescribed by Guideline 7 does not, on its face, breach the Board's duty of fairness.

(2) Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion. Through the use of "soft law" (policy statements, guidelines, manuals and handbooks), an agency can communicate prospectively its thinking on an issue to agency members and staff as well as to the public at large and to the agency's "stakeholders" in particular. An administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation. Although not legally binding on a decision maker, guidelines may validly influence a decision maker's conduct. The use of guidelines and other "soft law" techniques to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Immigration and Refugee Board (IRB).

Despite the express statutory authority of the Chairperson to issue guidelines under IRPA, paragraph 159(1)(*h*), they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

Since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order in the absence of clear evidence to the contrary. The Federal Court correctly concluded that the language of Guideline 7 is more than "a recommended but optional process". The fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts. While RPD members must perform their adjudicative functions without improper influence from others, case law also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions. Evidence that the IRB "monitors" members' deviations from the standard order of questioning does not create the kind of coercive environment that would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. Nor did the evidence establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7.

(3) On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159. The exercise of the Chairperson's power to issue guidelines is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) that is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid. Thus, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. Provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, that the

subject of a guideline could have been enacted as a rule of procedure issued under IRPA, paragraph 161(1)(*a*) will not normally invalidate it. It was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the guideline, rather than through a formal rule of procedure.

Per Sharlow (concurring): The two powers the IRPA gives the Chairperson to issue guidelines in writing to assist members in carrying out their duties (paragraph 159(1)(*h*)) and to make rules respecting the activities, practice and procedure of the Board, subject to the Governor in Council's approval (paragraph 161(1)(*a*)) differ substantively and functionally and are not interchangeable at the will of the Chairperson. The Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the member to start questioning the refugee claimant should have been implemented by means of a rule rather than a guideline. But the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and Guideline 7 does not unlawfully fetter the discretion of members. Despite Guideline 7, each member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the member is assigned.

statutes and regulations judicially considered

An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49.
Canadian Human Rights Act, R.S.C., 1985, c. H-6, ss. 27(2) (as am. by S.C. 1998, c. 9, s. 20), (3) (as am. *idem*), 49(2) (as am. *idem*, s. 27).
Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6.
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 74(*d*), 159, 161, 162(2), 165, 170(*a*),(*g*),(*h*).
Inquiries Act, R.S.C., 1985, c. I-11, ss. 4, 5.
Refugee Protection Division Rules, SOR/2002-228, rr. 16(*e*), 25, 38, 69, 70.
Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 25.1(1) (as am. by S.O. 1994, c. 27, s. 56).

cases judicially considered

applied:

Benitez v. Canada (Minister of Citizenship and Immigration), [2007] 1 F.C.R. 107; (2006), 40 Admin. L.R. (4th) 159; 290 F.T.R. 161; 54 Imm. L.R. (3d) 27; 2006 FC 461; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; (1990), 68 D.L.R. (4th) 524; 42 Admin. L.R. 1; 90 CLLC 14,007; 105 N.R. 161; 38 O.A.C. 321.

distinguished:

Bell Canada v. Canadian Employees Association, [2003] 1 S.C.R. 884; (2003), 227 D.L.R. (4th) 193; [2004] 1 W.W.R. 1; 3 Admin. L.R. (4th) 163; 109 C.R.R. (2d) 65; 306 N.R. 34; 2003 SCC 36; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321.

considered:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104; 121 D.L.R. (4th) 79; 28 Admin. L.R. (2d) 1; 77 O.A.C. 155 (C.A.).

referred to:

Benitez v. Canada (Minister of Citizenship and Immigration), [2008] 1 F.C.R. 155; 2007 FCA 199; *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1; (1993), 94 DTC 6069; 69 F.T.R. 63 (F.C.T.D.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268; 2002 SCC 3; *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741; (1994), 29 Admin. L.R. (2d) 211; 87 F.T.R. 46 (T.D.); *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn.*, [1978] 2 S.C.R. 141; (1977), 81 D.L.R. (3d) 609; 36 C.P.R. (2d) 1; 18 N.R. 181; *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 49 Admin. L.R. 118; 41 F.T.R. 118; 13 Imm. L.R. 118 (F.C.T.D.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121; (1959), 16 D.L.R. (2d) 689; *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146; (1999), 180 D.L.R. (4th) 95; [2000] CLLC 230-002; 176 F.T.R. 161 (T.D.); *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195; (2004), 236 D.L.R. (4th) 485; 11 Admin. L.R. (4th) 306; 34 Imm. L.R. (3d) 157; 316 N.R. 299; 2004 FCA 49; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; (1992), 90 D.L.R. (4th) 609; 3 Admin. L.R. (2d) 173; 136 N.R. 5; 147 Q.A.C. 169.

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APPEAL from a Federal Court decision ([2006] 3 F.C.R. 168; (2006), 40 Admin. L.R. (4th) 221) granting an application for judicial review to set aside a decision of the Refugee Protection Division ([2004] R.P.D. No. 613 (QL)) dismissing the respondent's claim for refugee protection. CROSS-APPEAL from that decision's finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* is not invalid because it deprives refugee claimants of the right to a fair hearing. Appeal allowed and cross-appeal dismissed.

appearances:

Jamie R. D. Todd and *John Provart* for appellant.

John W. Davis for respondent.

Christopher D. Bredt and *Morgana Kellythorne* for intervener, the Immigration and Refugee Board.

Catherine F. Bruce and *Angus Grant* for intervener, the Canadian Council for Refugees.

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Davis & Grice, Toronto, for respondent.

Borden Ladner Gervais LLP, Toronto, for intervener, the Immigration and Refugee Board.

The Law Offices of Catherine F. Bruce and *Ms. Barbara Jackman*, Toronto, for intervener, the Canadian Council for Refugees.

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

[1] The Chairperson of the Immigration and Refugee Board (the Board) has broad statutory powers to issue both guidelines and rules. Rules have to be approved by the Governor in Council and laid before Parliament, but guidelines do not.

[2] This appeal concerns the validity of Guideline 7 *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act: Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, issued in 2003 by the Chairperson of the Board pursuant to the statutory

power to "issue guidelines . . . to assist members in carrying out their duties": *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), paragraph 159(1)(*h*). The key paragraphs of Guideline 7 provide as follows: "In a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant" (paragraph 19), although the member of the Refugee Protection Division (RPD) hearing the claim "may vary the order of questioning in exceptional circumstances" (paragraph 23).

[3] The validity of Guideline 7 is challenged on two principal grounds. First, it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel. Second, even if Guideline 7 does not prescribe a hearing that is in breach of the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under IRPA, paragraph 161(1)(*a*), not as a guideline under IRPA, paragraph 159(1)(*h*). Guideline 7 is not valid as a guideline because paragraphs 19 and 23 unlawfully fetter the discretion of members of the RPD to determine the appropriate order of questioning when hearing refugee protection claims.

[4] This is an appeal by the Minister of Citizenship and Immigration from a decision by Justice Blanchard of the Federal Court granting an application for judicial review by Daniel Thamotharem to set aside a decision by the RPD dismissing his claim for refugee protection: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 168 (F.C.).

[5] Justice Blanchard held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing, in the absence of a provision in either IRPA or the *Refugee Protection Division Rules*, SOR/2002-228, dealing with this aspect of refugee protection hearings. He remitted Mr. Thamotharem's refugee claim to be determined by a different member of the RPD on the basis that Guideline 7 is an invalid fetter on the exercise of decision makers' discretion.

[6] However, Justice Blanchard rejected Mr. Thamotharem's argument that Guideline 7 is invalid because it deprives refugee claimants of the right to a fair hearing and distorts the "judicial" role of the member hearing the claim. Mr. Thamotharem has cross-appealed this finding.

[7] The Judge certified the following questions for appeal pursuant to paragraph 74(*d*) of IRPA.

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard?

2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion?

3. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

[8] Immediately after hearing the Minister's appeal in *Thamotharem*, we heard appeals by unsuccessful refugee claimants challenging the validity of Guideline 7 and, in some of the cases, impugning on other grounds the dismissal of their claim. In the Federal Court, 19 applications for judicial review concerning Guideline 7 were consolidated. Justice Mosley's decision on the Guideline 7 issue is reported as *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107 (F.C.). The appeals from these decisions were also consolidated, *Benitez* being designated the lead case.

[9] In *Benitez*, Justice Mosley agreed with the conclusions of Justice Blanchard on all issues, except one: he held that Guideline 7 was not an unlawful fetter on the discretion of Board members because its text permitted them to allow the claimant's counsel to question first, as, in fact, some had.

[10] For substantially the reasons that they gave, I agree with both Justices that Guideline 7 is not, on its face, invalid on the ground of procedural unfairness, although, as the Minister and the Board conceded, fairness may require that, in certain circumstances, particular claimants should be questioned first by their own counsel. I also agree that Guideline 7 is not incompatible with the impartiality required of a member when conducting a hearing which is inquisitorial in form.

[11] However, in my opinion, Guideline 7 is not an unlawful fetter on the exercise of members' discretion on the conduct of refugee protection hearings. The Guideline expressly directs members to consider the facts of the particular case before them to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning. The evidence does not establish that members disregard this aspect of Guideline 7 and slavishly adhere to the standard order of questioning, regardless of the facts of the case before them. Accordingly, I agree with Justice Mosley on this issue and must respectfully disagree with Justice Blanchard.

[12] Nor does it follow from the fact that Guideline 7 could have been issued as a statutory rule of procedure that

it is invalid because it was not approved by the Governor in Council. In my opinion, the Chairperson's rule-making power does not invalidate Guideline 7 by impliedly excluding from the broad statutory power to issue guidelines "to assist members in carrying out their duties" changes to the procedure of any of the Board's Divisions.

[13] Accordingly, I would allow the Minister's appeal and dismiss Mr. Thamotharem's cross- appeal and his application for judicial review. Although separate reasons are given in *Benitez*, [2008] 1 F.C.R. 155 (F.C.A.) dealing with issues not raised in Mr. Thamotharem's appeal, a copy of the reasons in the present appeal will also be inserted in Court File No. A-164-06 (*Benitez*) and the files of the appeals consolidated with it.

B. FACTUAL BACKGROUND

(i) Mr. Thamotharem's refugee claim

[14] Mr. Thamotharem is Tamil and a citizen of Sri Lanka. He entered Canada in September 2002 on a student visa. In January 2004, he made a claim for refugee protection in Canada, since he feared that, if forced to return to Sri Lanka, he would be persecuted by the Liberation Tigers of Tamil Eelam.

[15] In written submissions to the RPD before his hearing, Mr. Thamotharem objected to the application of Guideline 7, on the ground that it deprives refugee claimants of their right to a fair hearing. He did not argue that, on the facts of his case, he would be denied a fair hearing if he were questioned first by the refugee protection officer (RPO) and/or the member conducting the hearing. There was no evidence that Mr. Thamotharem suffered from post-trauma stress disorder or was otherwise particularly vulnerable.

[16] At the hearing of the claim before the RPD, the RPO questioned Mr. Thamotharem first. The RPD held that the duty of fairness does not require that refugee claimants always have the right to be questioned first by their counsel and that the application of Guideline 7 does not breach Mr. Thamotharem's right to procedural fairness.

[17] In a decision dated August 18, 2004 [[2004] R.P.D.D. No. 613 (QL)], the RPD dismissed Mr. Thamotharem's refugee claim and found him not to be a person in need of protection. It based its decision on documentary evidence of improved country conditions for Tamils in Sri Lanka, and on the absence of reliable evidence that Mr. Thamotharem would be persecuted as a perceived member of a political group or would, for the first time, become the target of extortion.

[18] In his application for judicial review, Mr. Thamotharem challenged this decision on the ground that Guideline 7 was invalid and that the RPD had made a reviewable error in its determination of the merits of his claim. As already noted, Mr. Thamotharem's application for judicial review was granted, the RPD's decision set aside and the matter remitted to another member for redetermination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing. In responding in this Court to the Minister's appeal, Mr. Thamotharem did not argue that, even if Guideline 7 is valid, Justice Blanchard was correct to remit the matter to the RPD because it committed a reviewable error in determining the merits of the claim.

(ii) Guideline 7

[19] Before the Chairperson issued Guideline 7, the order of questioning was within the discretion of individual members; neither IRPA nor the *Refugee Protection Division Rules*, addressed it. Refugee protection claims are normally determined by a single member of the RPD. The evidence indicated that, before the issue of Guideline 7, practice on the order of questioning was not uniform across Canada. Members sitting in Toronto and, possibly, in Vancouver and Calgary, permitted claimants to be "examined in chief" by their counsel before being questioned by the RPO and/or the member. In Montréal and Ottawa, on the other hand, the practice seems to have been that the member or the RPO questioned the claimant first, although a request by counsel for a claimant to question first seems generally to have been granted.

[20] It is not surprising that the Board did not regard it as satisfactory that the order of questioning was left to be decided by individual members on an *ad hoc* basis, with variations among regions, and among members within a region. Claimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted.

[21] There was also a view that refugee protection hearings would be more expeditious if claimants were generally questioned first by the RPO or the member, thus dispensing with the often lengthy and unfocussed examination-in-chief of claimants by their counsel. The backlog of refugee determinations has been a major problem for the Board. For example, from 1997-1998 to 2001-2002 the number of claims referred for determination each year increased steadily from more than 23,000 to over 45,000, while, in the same period, the backlog of claims referred but not decided grew from more than 27,000 to nearly 49,000: Canada, Immigration and Refugee Board, Performance Report for the period ending March 31, 2004.

[22] Studies were undertaken to find ways of tackling this problem. For example, in a relatively early report, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, December 1993), refugee law scholar, Professor James C. Hathaway, made many recommendations designed to make the Board's determination of refugee claims more effective, expeditious, and efficient. The following passage from the Report (at pages 74-75) is particularly relevant to the present appeal.

The present practice of an introductory "examination in chief" by counsel should be dispensed with, the sworn testimony in the Application for Refugee Status being presumed to be true unless explicitly put in issue. Panel members should initially set out clearly the substantive matters into which they wish to inquire, and explain any concerns they may have about the sufficiency of documentary evidence presented. Members should assume primary responsibility to formulate the necessary questions, although they should feel free to invite counsel to adduce testimony in regard to matters of concern to them. Once the panel has concluded its questioning, it should allow the Minister's representative, if present, an opportunity to question or call evidence, ensuring that the tenor of the Ministerial intervention is not allowed to detract from the non-adversarial nature of the hearing. Following a brief recess, the panel should outline clearly on the record which matters it views as still in issue, generally using the Conference Report as its guide. Any matters not stated by the panel to be topics of continuing concern should be deemed to be no longer in issue. Counsel would then be invited to elicit testimony, call witnesses, and make submissions as adjudged appropriate, keeping in mind that all additional evidence must be directed to a matter which remains in issue. [Footnotes omitted.]

[23] Starting in 1999, the Board worked to develop what became Guideline 7, which was finally issued in October 31, 2003, as part of an action plan to reduce the backlog on the refugee side by increasing the efficiency of its decision-making process. In addition to the order of questioning provisions in dispute in this case, Guideline 7 also deals with the early identification of issues and disclosure of documents, procedures when a claimant is late or fails to appear, informal pre-hearing conferences, and the administration of oaths and affirmations.

[24] In addition to the consultations with the Deputy Chairperson and the Director General of the Immigration Division mandated by paragraph 159(1)(*h*) before the Chairperson issues a guideline, the Board held consultations on the proposed Guideline with members of the Bar and other "stakeholders." Some, however, including the Canadian Council for Refugees, an intervener in this appeal, regarded the consultations as less than meaningful, while others characterized Guideline 7 as an overly "top-down" initiative by senior management of the Board. On the basis of the material before us, I am unable to comment on either of these observations.

[25] From December 1, 2003, the implementation of Guideline 7 was gradually phased in, becoming fully operational across the country by June 1, 2004. Like other guidelines issued by the Chairperson, Guideline 7 was published.

C. LEGISLATIVE FRAMEWORK

(i) IRPA

[26] IRPA confers on the Chairperson of the Board broad powers over the management of each Division of the Board, including a power to issue guidelines.

159. (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson

(*a*) has supervision over and direction of the work and staff of the Board;

. . .

(*g*) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;

(*h*) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties; [Underlining added.]

[27] IRPA also empowers the Chairperson of the Board to make rules for each of the three Divisions of Board. The rules, however, must be approved by the Governor in Council and laid before Parliament.

161. (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting

(*a*) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(*b*) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;

(*c*) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and

(*d*) any other matter considered by the Chairperson to require rules.

(2) The Minister shall cause a copy of any rule made under subsection (1) to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the approval of the rule by the Governor in Council. [Underlining added.]

[28] IRPA emphasizes the importance of informality, promptness and fairness in the Board's proceedings.

162. . . .

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[29] In keeping with the inquisitorial nature of the RPD's process, IRPA confers broad discretion on members in their conduct of a hearing.

165. The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing. .

[30] Part I of the *Inquiries Act*, R.S.C., 1985, c. I-11, empowers commissioners of inquiry as follows:

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

(*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

[31] The following provisions of IRPA respecting the decision-making process of the RPD are also relevant.

170. The Refugee Protection Division, in any proceeding before it,

(*a*) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;

. . .

(*g*) is not bound by any legal or technical rules of evidence;

(*h*) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

(ii) Guideline 7

[32] Paragraphs 19 and 23 of Guideline 7, issued by the Chairperson under IRPA, paragraph 159(1)(*h*), are of immediate relevance in this appeal, while paragraphs 20-22 provide context.

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

20. In a claim for refugee protection where the Minister intervenes on an issue other than exclusion, for example, on a credibility issue, the RPO starts the questioning. If there is no RPO at the hearing, the member will start the questioning, followed by the Minister's counsel and then counsel for the claimant.

21. In proceedings where the Minister intervenes on the issue of exclusion, Minister's counsel will start the questioning, followed by the RPO, the member, and counsel for the claimant. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

22. In proceedings where the Minister is making an application to vacate or to cease refugee protection, Minister's counsel will start the questioning, followed by the member, and counsel for the protected person. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*. [Underlining added; endnote omitted.]

D. ISSUES AND ANALYSIS

Issue 1: Standard of review

[33] The questions of law raised in this appeal about the validity of Guideline 7 are reviewable on a standard of correctness: they concern procedural fairness, statutory interpretation, and the unlawful fettering of discretion. The exercise of discretion by the Chairperson to choose a guideline rather than a formal rule as the legal instrument for amending the procedure of any of the Board's Divisions by is reviewable for patent unreasonableness.

Issue 2: Does Guideline 7 prescribe a hearing procedure that is in breach of claimants' right to procedural fairness?

[34] Justice Blanchard dealt thoroughly with this issue at paragraphs 36-92 of his reasons. He concluded that the jurisprudence did not require that, as a matter of fairness, claimants always be given the opportunity to be questioned first by their counsel (at paragraphs 38-53). He then considered (at paragraphs 68-90) the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 21-28 (*Baker*), for determining where to locate refugee protection hearings on the procedural spectrum from the informal to the judicial. Largely on the basis of the adjudicative nature of the RPD's functions, the finality of its decision, and the importance of the individual rights at stake, he concluded (at paragraph 75) that "a higher level of procedural protection is warranted."

[35] However, recognizing also that the content of the duty of fairness varies with context, Justice Blanchard noted that Parliament had chosen an inquisitorial procedural model for the determination of refugee claims by the RPD, in the sense that there is no party opposing the claim, except in the rare cases when the Minister intervenes to oppose a claim on exclusion grounds. Consequently, in the overwhelming majority of cases, the task of probing the legitimacy of claims inevitably falls to the RPO, who questions the claimant on behalf of the member, and/or to the member of the RPD conducting the hearing, especially when no RPO is present. This is an important reason for concluding that not all the elements of the adversarial procedural model followed in the courts are necessarily required for a fair hearing of a refugee claim: see paragraphs 72-75.

[36] Justice Blanchard also acknowledged that claimants may derive tactical advantages from being taken through their story by their own lawyer before being subjected to questioning by the RPO, who will typically focus on inconsistencies, gaps, and improbabilities in the narrative found in the claimant's Personal Information Form (PIF) and any supporting documentation, as well as any legal weaknesses in the claim. The tactical advantage of questioning first may be particularly significant in refugee hearings because of the vulnerability and anxiety of many claimants, as a result of: their inability to communicate except through an interpreter; their cultural backgrounds; the importance for them of the RPD's ultimate decision; and the psychological effects of the harrowing events experienced in their country of origin.

[37] Nonetheless, Justice Blanchard concluded that these considerations do not necessarily rise to the level of unfairness. Indeed, in addition to shortening the hearing, questioning by the RPO may also serve to improve the quality of the hearing by focusing it and enabling a claimant's counsel to make sure that aspects of the claim troubling the member are fully dealt with when the claimant comes to tell his or her story. Consequently, in order to be afforded their right to procedural fairness, claimants need not normally be given the opportunity to be questioned by their counsel before being questioned by the RPO and/or RPD member.

[38] Justice Blanchard noted, for example, that RPD members receive training to sensitize them to the accommodations needed when questioning vulnerable claimants, that claimants may supplement or modify the information in their PIF and adduce evidence before the hearing, and that expert evidence indicated that vulnerable claimants' ability to answer questions fully, correctly and clearly is likely to depend more on the tone and style of questioning than on the order in which it occurs.

[39] Moreover, the duty of fairness forbids members from questioning in an overly aggressive and badgering manner, or in a way that otherwise gives rise to a reasonable apprehension of bias. Fairness also requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it. To this end, fairness may also require that, in certain circumstances, a claimant be afforded the right to be questioned first by her or his counsel. In addition, Guideline 7 recognizes that there will be exceptional cases in which, even though not necessarily required by the duty of fairness, it will be appropriate for the RPD to depart from the standard order of questioning.

[40] I agree with Justice Blanchard's conclusion on this issue and have little useful to add to his reasons. Before us, counsel did not identify any error of principle in the applications Judge's analysis nor produce any binding judicial authority for the proposition that it is a breach of the duty of fairness to deny claimants the right to be questioned first by their own counsel. Criticisms were directed more to the weight that Justice Blanchard gave to some of the evidence and the factors to be considered. I can summarize as follows the principal points made in this Court by counsel.

[41] First, the importance of the individual rights potentially at stake in refugee protection proceedings indicates a court-like hearing, in which the party with the burden of proof goes first: see, for example, *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1 (F.C.T.D.), at page 1. I agree at a general level that the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament, as well as the RPD's high volume case load, considerations which reduce the power of the claim to aspects of the adversarial model used in courts, including the order of questioning.

[42] Second, the procedure set out in Guideline 7 is derived from the erroneous notion that the RPD is a board of inquiry, not an adjudicator. Unlike those appearing at inquiries, refugee claimants have the burden of proving a claim, which the RPD adjudicates.

[43] I do not agree. The Board correctly recognizes that the RPD's procedural model is more inquisitorial in nature, unlike that of the Immigration Appeal Division (*Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paragraph 82). I cannot conclude on the basis of the evidence as a whole that the Board adopted the standard order of questioning in the mistaken view that the RPD is a board of inquiry, even though it decides claimants' legal rights in the cases which they bring to it for adjudication and claimants bear the burden of proof. This conclusion is not undermined by a training document "Questioning 101", prepared by the Board's Professional Development Branch in 2004 for members and RPOs, which contains a somewhat misleading reference to the compatibility of the standard order of questioning with "a board of inquiry model."

[44] A relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, especially before inexperienced tribunal members or those who lack the confidence that legal training can give. Nonetheless, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process, where the order of questioning is not as obvious as it generally is in an adversarial hearing.

[45] Third, placing RPD members in the position of asking the claimant questions first, when no RPO is present, distorts their judicial role by thrusting them into the fray, thereby creating a reasonable apprehension of bias by making them appear to be acting as both judge and prosecutor. Guideline 7 is particularly burdensome for members now that panels normally comprise a single member, and there is often no RPO present to assume the primary responsibility for questioning the claimant on behalf of the Board.

[46] I disagree. Adjudicators can and should normally play a relatively passive role in an adversarial process, because the parties are largely responsible for adducing the evidence and arguments on which the adjudicator must decide the dispute. In contrast, members of the RPD, sometimes assisted by an RPO, do not have this luxury. In the absence in most cases of a party to oppose the claim, members are responsible for making the inquiries necessary, including questioning the claimant, to determine the validity of the claim: see IRPA, paragraph 170(*a*); *Sivasamboo v. Canada (Minister of Citizenship and Immigration*), [1995] 1 F.C. 741 (T.D.), at pages 757-778; *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250, at paragraph 21. The fact that the member or the RPO may ask probing questions does not make the proceeding adversarial in the procedural sense.

[47] To the extent that statements in *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.), suggest that a member of the RPD hearing a refugee claim is restricted to asking the kind of questions that a judge in a civil or criminal proceeding may ask, they are, in my respectful opinion, incorrect, especially when no RPO is present.

[48] The fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of a person who was informed of the facts and had thought the matter through in a practical manner. Inquisitorial processes of adjudication are not unfair simply because they are relatively unfamiliar to common lawyers.

[49] Fourth, Guideline 7 interferes with claimants' right to the assistance of counsel because it prevents them from being taken through their story by their counsel before being subject to the typically more sceptical questioning by the RPO. I do not agree. Guideline 7 does not curtail counsel's participation in the hearing; counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or, for that matter, any other aspect of the procedure to be followed at the hearing.

[50] Finally, no statistical evidence was adduced to support the allegation that Guideline 7 jeopardizes the ability of the RPD accurately to determine claims for refugee protection. There is simply no evidence to establish what impact, if any, the introduction of Guideline 7 has had on acceptance rates.

[51] In summary, the procedure prescribed by Guideline 7 is not, on its face, in breach of the Board's duty of fairness. However, in some circumstances, fairness may require a departure from the standard order of questioning. In those circumstances, a member's refusal of a request that the claimant be questioned first by her counsel may render the determination of the claim invalid for breach of the duty of fairness.

[52] Consequently, if the Chairperson had implemented the reform to the standard order of questioning at refugee determination hearings in a formal rule of procedure issued in accordance with paragraph 161(1)(*a*), it would have been beyond challenge on the grounds advanced in this appeal respecting the duty of fairness, including bias. The somewhat technical question remaining is whether the Chairperson's choice of legislative instrument (that is, a guideline rather than a formal rule of procedure) to implement the procedural change was in law open to him.

Issue 3: Is Guideline 7 unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings?

[53] As already noted, Justice Blanchard and, in *Benitez*, Justice Mosley, reached different conclusions on whether Guideline 7 unlawfully fettered the discretion of members of the RPD in deciding the order of questioning at a refugee determination hearing. The records in the two applications were not identical. In particular, there was more evidence before Justice Mosley, comprising some 40 decisions and excerpts from transcripts of RPD hearings, that RPD members are willing to recognize exceptional cases in which it is appropriate to depart from the standard order of questioning.

[54] In the circumstances of these appeals, it is appropriate to consider all the evidence before both judges. From a practical point of view, it would be anomalous if this Court were to reach different conclusions about the validity of Guideline 7 in two cases set down to be heard one after the other. However, I do not attach much, if any, significance to the differences in the records. Justice Blanchard properly based his conclusion, for the most part, on what he saw as the mandatory language of Guideline 7.

(i) Rules, discretion and fettering

[55] Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis.

[56] Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A.) at pages 108-109 (*Ainsley*).

[57] Both academic commentators and the courts have emphasized the importance of these tools for good public administration and have explored their legal significance. See, for example, Hudson N. Janisch, "The Choice of Decision Making Method: Adjudication, Policies and Rule Making" in *Special Lectures of the Law Society of Upper Canada 1992, Administrative Law: Principles, Practice and Pluralism*, Scarborough: Carswell, 1992, page 259; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 374-379; Craig, Paul P., *Administrative Law*, 5th ed. (London: Thomson, 2003), at pages 398-405, 536-540; *Capital Cities Communications Inc. et al. v. Canadian radio-Telivision Commn.*, [1978] 2 S.C.R. 141, at page 171; *Vidal v. Canada (Minister of Employment and Immigration*) (1991), 49 Admin. L.R. 118 (F.C.T.D.), at page 131; *Ainsley*, at pages 107-109.

[58] Legal rules and discretion do not inhabit different universes, but are arrayed along a continuum. In our system of law and government, the exercise of even the broadest grant of statutory discretion which may adversely affect individuals is never absolute and beyond legal control: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at page 140 (*per* Rand J.). Conversely, few, if any, legal rules admit of no element of discretion in their interpretation and application: *Baker*, at paragrah 54.

[59] Although not legally binding on a decision maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision maker's conduct. Indeed, in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at page 6):

The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; . . ." does not fetter the exercise of that discretion. [Emphasis added.]

The line between law and guideline was further blurred by *Baker*, at paragraph 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

[60] The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

[61] It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at page 327 (*Consolidated-Bathurst*):

It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION]"difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted.]

[62] Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administra-tive decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms*, at page 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

[63] In addition, the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision. *Ainsley* is the best known example. That case concerned a challenge to the validity of a non-statutory policy statement issued by the Ontario Securities Commission setting out business practices which would satisfy the public interest in the marketing of penny stocks by certain securities dealers. The policy also stated that the Commission would not necessarily impose a sanction for non-compliance on a dealer under its "public interest" jurisdiction but would consider the particular circumstances of each case.

[64] Writing for the Court in *Ainsley*, Doherty J.A. adopted [at page 110] the criteria formulated by the trial Judge for determining if the policy statement was "a mere guideline" or was "mandatory," namely, its language, the practical effect of non-compliance, and the expectations of the agency and its staff regarding its implementation. On the basis of these criteria, Doherty J.A. concluded that the policy statement was invalid. He emphasized, in particular, its minute detail, which "reads like a statute or regulation" (at page 111), and the threat of sanctions for non-compliance. He found this threat to be implicit in the Commission's pronouncement that the business practices it

described complied with the public interest, and was evident in the attitude of enforcement staff ,who treated the policy as if it were a statute or regulation, breach of which was liable to trigger enforcement proceedings.

(ii) Guideline 7 and the fettering of discretion

(a) Is Guideline 7 delegated legislation?

[65] An initial question is whether guidelines issued under IRPA, paragraph 159(1)(*h*) constitute delegated legislation, having the full force of law "hard law". If they do, Guideline 7 can no more be characterized as an unlawful fetter on members' exercise of discretion with respect to the order of questioning than could a rule of procedure to the same effect issued under IRPA, paragraph 161(1))(*a*): *Bell Canada v. Canadian Employees Association*, [2003] 1 S.C.R. 884, at paragraph 35 (*Bell Canada*).

[66] In my view, despite the express statutory authority of the Chairperson to issue guidelines, they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

[67] However, the meaning of "guideline" in a statute may depend on context. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pages 33-37, La Forest J. upheld the validity of mandatory environmental assessment guidelines issued under section 6 of the *Department of the Environment Act*, R.S.C., 1985, c. E-10, which, he held, constituted delegated legislation and, as such, were legally binding.

[68] In my view, *Oldman River* is distinguishable from the case before us. Section 6 of the *Department of the Environment Act* provided that guidelines were to be issued by an "order" "*arrêté*" of the Minister and approved by the Cabinet. In contrast, only rules issued by the Chairperson require Cabinet approval, guidelines "*directives*" do not. It would make little sense for IRPA to have conferred powers on the Chairperson to issue two types of legislative instrument, guidelines and rules, specified that rules must have Cabinet approval, and yet given both the same legal effect.

[69] Guidelines issued by the Human Rights Commission pursuant to subsection 27(2) [as am. by S.C. 1998, c. 9, s. 20] of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, have also been treated as capable of having the full force of law, even though they are made by an independent administrative agency and are not subject to Cabinet approval: *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.), at paragraphs 136-141; *Bell Canada*, at paragraphs 35-38.

[70] In *Bell Canada*, LeBel J. held (at paragraph 37), "[a] functional and purposive approach to the nature" of the Commission's guidelines, that they were "akin to regulations." a conclusion supported by the use of the word "*ordonnance*" in the French text of subsection 27(2) of the *Canadian Human Rights Act*. In addition, subsection 27(3) [as am. by S.C. 1998, c. 9, s. 20] expressly provides that guidelines issued under subsection 27(2) are binding on the Commission and on the person or panel assigned to inquire into a complaint of discrimination referred by the Commission under subsection 49(2) [as am. *idem*, s. 27] of the Act.

[71] In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the word "*directives*" in the French text of paragraph 159(1)(*h*) suggests a less legally authoritative instrument than "*ordonnance*."

[72] I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(*h*) cannot have the same legally binding effect on members as statutory rules may.

(b) Is Guideline 7 an unlawful fetter on members' discretion?

[73] Since guidelines issued by the Chairperson of the Board do not have the full force of law, the next question is whether, in its language and effect, Guideline 7 unduly fetters RPD members' discretion to determine for themselves, case-by-case, the order of questioning at refugee protection hearings. In my opinion, language is likely to be a more important factor than effect in determining whether Guideline 7 constitutes an unlawful fetter. It is inherently difficult to predict how decision makers will apply a guideline, especially in an agency, like the Board, with a large membership sitting in panels.

[74] Consequently, since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order, in the absence of clear evidence to the contrary, such as that

members have routinely refused to consider whether the facts of particular cases require an exception to be made.

[75] I turn first to language. The *Board's Policy on the Use of Chairperson's Guidelines*, issued in 2003 [Policy No. 2003-07], states that guidelines are not legally binding on members: section 6. The introduction to Guideline 7 states: "The guidelines apply to most cases heard by the RPD. However, in compelling or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly."

[76] The text of the provisions of Guideline 7 are of most immediate relevance to this appeal. Paragraph 19 states that it "will be" standard practice for the RPO to question the claimant first; this is less obligatory than "must" or some similarly mandatory language. The discretionary element of Guideline 7 is emphasized in paragraph 19, which provides that, while "the standard practice will be for the RPO to start questioning the claimant" (emphasis added), a member may vary the order [at paragraph 23] "in exceptional circumstances."

[77] Claimants who believe that exceptional circumstances exist in their case must apply to the RPD, before the start of the hearing, for a change in the order of questioning. The examples, and they are only examples, of exceptional circumstances given in paragraph 23 suggest that only the most unusual cases will warrant a variation. However, the parameters of "exceptional circumstances" will no doubt be made more precise, and likely expanded incrementally, on a case-by-case basis.

[78] I agree with Justice Blanchard's conclusion (at paragraph 119) that the language of Guideline 7 is more than "a recommended but optional process." However, as *Maple Lodge Farms* makes clear, the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts: see *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195 (F.C.A.).

[79] To turn to the effect of Guideline 7, there was evidence that, when requested by counsel, members of the RPD had exercised their discretion and varied the standard order of questioning in cases which they regarded as exceptional. No such request was made on behalf of Mr. Thamotharem. In any event, members must permit a claimant to be questioned first by her or his counsel when the duty of fairness so requires.

[80] In at least one case, however, a member wrongly regarded himself as having no discretion to vary the standard order of questioning prescribed in Guideline 7. On July 3, 2005, this decision was set aside on consent on an application for judicial review, on the ground that the member had fettered the exercise of his discretion, and the matter remitted for re-determination by a different member of the RPD: *Baskaran v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-7189-04). Nonetheless, the fact that some members may erroneously believe that Guideline 7 removes their discretion to depart from the standard practice in exceptional circumstances does not warrant invalidating the Guideline. In such cases, the appropriate remedy for an unsuccessful claimant is to seek judicial review to have the RPD's decision set aside.

[81] There was also evidence from Professor Donald Galloway, an immigration and refugee law scholar, a consultant to the Board and a former Board member, that RPD members would feel constrained from departing from the standard order of questioning. However, he did not base his opinion on the actual conduct of members with respect to Guideline 7.

[82] In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.

[83] I recognize that members of the RPD must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board. However, the jurisprudence also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions, a particular challenge for large tribunals which, like the Board, sit in panels.

[84] Most notably, the Supreme Court of Canada in *Consolidated-Bathurst* upheld the Ontario Labour Relations Board's practice of inviting members of panels who had heard but not yet decided cases to bring them to "full Board meetings," where the legal or policy issues that they raised could be discussed in the absence of the parties. This practice was held not to impinge improperly on members' adjudicative independence, or to breach the principle of procedural fairness that those who hear must also decide. Writing for the majority of the Court, Gonthier J. said (at page 340):

The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances.

The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice.

[85] However, the arrangements made for discussions within an agency with members who have heard a case must not be so coercive as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952.

[86] Evidence that the Immigration and Refugee Board "monitors" members' deviations from the standard order of questioning does not, in my opinion, create the kind of coercive environment which would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. On a voluntary basis, members complete, infrequently and inconsistently, a hearing information sheet asking them, among other things, to explain when and why they had not followed "standard practice" on the order of questioning. There was no evidence that any member had been threatened with a sanction for non-compliance. Given the Board's legitimate interest in promoting consistency, I do not find it at all sinister that the Board does not attempt to monitor the frequency of members' compliance with the "standard practice."

[87] Nor is it an infringement of members' independence that they are expected to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning. Such an expectation serves the interests of coherence and consistency in the Board's decision making in at least two ways. First, it helps to ensure that members do not arbitrarily ignore Guideline 7. Second, it is a way of developing criteria for determining if circumstances are "exceptional" for the purpose of paragraph 23 and of providing guidance to other members, and to the Bar, on the exercise of discretion to depart from the standard order of questioning in future cases.

[88] In my opinion, therefore, the evidence in the present case does not establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline; the evidence of members' deviation from "standard practice"; and the need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly by single members.

[89] Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

(iii) Is Guideline 7 invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*)?

[90] On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Members' "duties" include the conduct of hearings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit": IRPA, subsection 162(2). In my view, structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159.

[91] In any event, the Chairperson did not need an express grant of statutory authority to issue guidelines to members. Paragraph 159(1)(*h*) puts the question beyond dispute, establishes a duty to consult before a guideline is issued, and, perhaps, enhances their legitimacy.

[92] An express statutory power to issue guidelines was first conferred on the Chairperson of the Board in 1993, as a result of an amendment to the former *Immigration Act* [R.S.C., 1985, c. I-2] by Bill C-86 [*An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49]. Appearing before the Committee of the House examining the Bill, Mr. Gordon Fairweather, the then Chairperson of the Board welcomed this addition to the Board's powers (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-86*, 3rd Sess., 34th Parl., July 30, 1992, at page 80.):

I'm also pleased that the minister has responded to the need for new tools for managing the board itself. In the board's desire to ensure consistency of decision-making, we welcome the legislative provision allowing for guidelines…. The provision will reinforce my authority, after appropriate consultations, and the courts have been very specific about saying, no guidelines until you have consulted widely with the caring agencies, the immigration bar, and other non-governmental organizations. But the courts have given the green light for such provision provided

we go through those consultations.

This provision will reinforce my authority, or the chair's authority—that is a little less pompous—after appropriate consultations to direct members toward preferred positions and therefore foster consistency in decisions. [Emphasis added.]

[93] In my view, the present appeal raises an important question about the relationship between the Chairperson's powers to issue guidelines and rules. In particular, are these grants of legal authority cumulative so that, for the most part, the scope of each is to be determined independently of the other? Or, is the Chairperson's power to issue guidelines implicitly limited by the power to make rules of procedure? If it is, then a change to the procedure of any Division of the Board may only be effected through a rule of procedure issued under paragraph 161(1)(*a*) which has been approved by Cabinet and subjected to Parliamentary scrutiny in accordance with subsection 161(2).

[94] The argument in the present case is that Guideline 7 is a rule of procedure and, since it reforms the existing procedure of the RPD, should have been issued under paragraph 161(1)(*a*), received Cabinet approval and been laid before Parliament. The power of the Chairperson to issue guidelines may not be used to avoid the political accountability mechanisms applicable to statutory rules issued under subsection 161(1).

[95] For this purpose, the fact that Guideline 7 permits RPD members to exercise their discretion in "exceptional circumstances" to deviate from "standard practice" in the order of questioning does not prevent it from being a rule of procedure: rules of procedure commonly confer discretion to be exercised in the light of particular facts.

[96] An analogous line of reasoning is found in the Ontario Court of Appeal's decision in *Ainsley*, where it was said that the Ontario Securities Commission's policy statement prescribing business practices of penny stock dealers which would satisfy the statutory public interest standard was invalid, because it was in substance and effect "a mandatory provision having the effect of law" (at page 110). In my opinion, however, *Ainsley* should be applied to the present case with some caution.

[97] First, when *Ainsley* was decided, the Commission had no express statutory power to issue guidelines and no statutorily recognized role in the regulation-making process. In contrast, the Chairperson of the Board has a broad statutory power to issue guidelines and, subject to Cabinet approval, to make rules respecting a broad range of topics, including procedure.

[98] Admittedly, the Board's rules of procedure (as well, of course, as IRPA itself and regulations made under it by the Governor in Council) have a higher legal status than guidelines, in the sense that, if a guideline and a rule conflict, the rule prevails.

[99] Second, the policy statement considered in *Ainsley* was directed at businesses regulated by the Commission and was designed to modify their practices by linking compliance with the policy to the Commission's prosecutorial power to institute enforcement proceedings, which could result in the loss of a licence by businesses not operating in "the public interest." Guideline 7, on the other hand, is directed at the practice of RPD members in the conduct of their proceedings. It does not impose *de facto* duties on members of the public or deprive them of an existing right. Guideline 7 lacks the kind of coercive threat, against either claimants or members, in the event of non-compliance, which was identified as important to the decision in *Ainsley*.

[100] The Commission's promulgation of detailed industry standards, other than through enforcement proceedings against individuals, when it lacked any legislative power, raised rule of law concerns. In my opinion, the same cannot plausibly be said of the Chairperson's decision to introduce a standard order of questioning through the statutory power to issue guidelines, rather than his power to issue rules.

[101] Third, while the Board can only issue formal statutory rules of procedure with Cabinet approval, tribunals often do not require Cabinet approval of their rules. In Ontario, for example, the procedural rules of tribunals to which the province's general code of administrative procedure applies are not subject to Cabinet approval: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, subsection 25.1(1) [as am. by S.O. 1994, c. 27, s. 56]. Hence, it cannot be said to be a principle of our system of law and government that administrative tribunals' rules of procedure require political approval.

[102] Fourth, while Guideline 7 changed the way in which the Board conducts most of its hearings, it represents, in my view, more of a filling in of detail in the procedural model established by IRPA and the *Refugee Protection Division Rules*, than "fundamental procedural change" or "sweeping procedural reform," to use the characterization in the memorandum of the intervener, the Canadian Council for Refugees.

[103] For example, paragraph 16(*e*) includes the questioning of witnesses in the RPO's duties, but is silent on the precise point in the hearing when the questioning is to occur. Similarly, while rule 25 deals with the intervention of

the Minister, it does not specify when the Minister will lead evidence and make submissions. Rule 38 permits a party to call witnesses, but does not say when they will testify.

[104] Fifth, the differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated. Rules of procedure commonly permit those to whom they are directed to depart from them in the interests of justice and efficiency. Thus, rule 69 of the *Refugee Protection Division Rules* permits a member to change a requirement of a rule or excuse a person from it, and to extend or shorten a time period. Failure to comply with a requirement of the Rules does not make a proceeding invalid: rule 70.

[105] Finally, as I have already indicated, the Chairperson's power to issue guidelines extends, on its face, to matters of procedure. Its exercise is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) which is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid.

[106] On the basis of the foregoing analysis, I conclude that, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. That the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(*a*) will not normally invalidate it, provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, which, for reasons already given, I have concluded that it does not.

[107] In my opinion, the Chairperson may choose through which legislative instrument to introduce a change to the procedures of any of the three Divisions of the Board. Parliament should not be taken to have implicitly imposed a rigidity on the administrative scheme by preventing the Chairperson from issuing a guideline to introduce procedural change or clarification.

[108] I do not say that the Chairperson's discretion to choose between a guideline or a rule is beyond judicial review. However, it was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the more flexible legislative instrument, the guideline, rather than through a formal rule of procedure.

[109] First, Guideline 7 is not a comprehensive code of procedure nor, when considered in the context of the refugee determination process as a whole, is it inconsistent with the existing procedural model for RPD hearings. Second, the procedural innovation of standard order questioning may well require modification in the light of cumulated experience. Fine-tuning and adjustments of this kind are more readily accomplished through a guideline than a formal rule. Parliament should not be taken to have intended the Chairperson to obtain Cabinet approval for such changes.

E. CONCLUSIONS

[110] For these reasons, I would allow the Minister's appeal, dismiss Mr. Thamotharem's cross-appeal, set aside the order of the Federal Court, and dismiss the application for judicial review. I would answer the first two certified questions as follows:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard? No

2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion? No.

[111] Since I would dismiss the application for judicial review, the third question does not arise and need not be answered.

DÉCARY J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[112] SHARLOW J.A.: I agree with my colleague Justice Evans that this appeal should be allowed, but I reach that conclusion by a different route.

[113] As Justice Evans explains, IRPA gives the Chairperson two separate powers. One is the power in paragraph 159(1)(*h*) to issue guidelines in writing to assist members in carrying out their duties. The other is the power in paragraph 161(1)(*a*) to make rules respecting the activities, practice and procedure of the Board, subject to the approval of the Governor in Council. Both powers are to be exercised in consultation with the Deputy Chairpersons

and the Director General of the Immigration Division. In my view, these two powers are different in substantive and functional terms and are not interchangeable at the will of the Chairperson.

[114] The subject of Guideline 7 is the order of proceeding in refugee hearings. That is a matter respecting the activities, practice and procedure of the Board, analogous to the subject-matter of the procedural rules of courts. In my view, the imposition of a standard practice for refugee determination hearings should have been the subject of a rule of procedure, not a guideline.

[115] I make no comment on the wisdom of the Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the member to start questioning the refugee claimant. That is a determination that the Chairperson was entitled to make. However, to put that determination into practice while respecting the limits of the statutory authority of the Chairperson, the Chairperson should have drafted a rule to that effect, in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, and sought the approval of the Governor in Council.

[116] Justice Evans notes that some commentators have suggested that the implementation of a rule under paragraph 161(1)(*a*) is more onerous in administrative and bureaucratic terms than the implementation of a guideline under paragraph 159(1)(*h*). That appears to me to be an unduly negative characterization of the legislated requirement for the approval of the Governor in Council, Parliament's chosen mechanism of oversight for the Chairperson's rule-making power under paragraph 161(1)(*a*). It is also belied by the facts of this case, which indicates that the development of Guideline 7 took approximately four years. I doubt that a rule with the same content would necessarily have taken longer than that.

[117] The more important question in this case is whether the Chairperson's erroneous decision to implement a guideline rather than a rule to establish a standard practice for refugee hearings provides a sufficient basis in itself for setting aside a negative refugee determination made by a member who requires a refugee claimant to submit to questions from the RPO or the member before presenting his or her own case.

[118] I agree with Justice Evans that the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and that Guideline 7, properly understood, does not unlawfully fetter the discretion of members. In my view, despite Guideline 7, each member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the member is assigned.

[119] It may be the case that a particular member may conclude incorrectly that Guideline 7 deprives the member of the discretion to permit a refugee claimant to present his or her case before submitting to questioning from the RPO or the member. If so, it is arguable that a negative refugee determination by that member is subject to being set aside if (1) the member refused the request of a refugee claimant to proceed first and required the refugee claimant to submit to questioning by the RPO or the member before presenting his or her case, and (2) it is established that, but for Guideline 7, the member would have permitted the refugee claimant to present his or her case first. In the case of Mr. Thamotharem, those conditions have not been met.

[120] For these reasons, I would dispose of this appeal as proposed by Justice Evans, and I would answer the certified questions as he proposes.

CITATION: Jackson v. Ontario (Natural Resources), 2009 ONCA 846
DATE: 20091201
DOCKET: C49636

COURT OF APPEAL FOR ONTARIO

Laskin, Simmons and Lang JJ.A.

BETWEEN

Larry Jackson, L.R. Jackson Fisheries Ltd. and William Cronheimer

Applicants (Appellants)

and

Her Majesty the Queen in Right of Ontario as Represented by the Minister of Natural Resources

Respondent (Respondent)

John H. McNair and Mavis J. Butkus, for the appellants

William Manuel, Edmund Huang and Elaine Atkinson, for the respondent

Timothy S.B. Danson, for the intervener, Ontario Federation of Anglers and Hunters

Heard: May 6, 2009

On appeal from the judgment of the Divisional Court (E.R. Browne, J.R. Henderson and D.J. Gordon JJ.) dated May 26, 2008, with reasons reported at (2008), 239 O.A.C. 29.

Laskin J.A.:

A. OVERVIEW

[1] Ontario and four Americans states – Michigan, New York, Ohio and Pennsylvania – border Lake Erie. Every year, government representatives from these five jurisdictions meet as a committee – the Lake Erie Committee – to discuss the management of the fish stocks in the Lake. The Committee recommends an annual total allowable catch for the two economically most important fish, walleye and yellow perch, and then allocates each jurisdiction's share of that catch based on a fixed formula. Ontario's Minister of Natural Resources typically accepts the Committee's recommendations.

[2] The Minister is authorized to issue commercial fishing licences, and to attach as conditions to those licences catch quotas for each species of fish. These individual quotas for walleye and yellow perch are based on Ontario's share of the total allowable catch.

[3] The appellants carry on commercial fishing operations in Lake Erie. They have earned their livelihood from fishing for many years. In 2007 and 2008, the Minister reduced their individual catch quotas for walleye and yellow perch. The Minister did so because she had accepted the Lake Erie Committee's recommendations for a reduction in Ontario's share of the total allowable catch for each fish.

[4] The appellants then brought a judicial review application to challenge the regulatory regime by which the provincial Minister imposes catch quotas in commercial

fishing licences for Lake Erie. They sought a declaration that the federal *Ontario Fishery Regulations* for 1989 and 2007 are *ultra vires* to the extent that they authorize the provincial Minister to impose these quotas in their licences. And they sought to set aside their walleye and yellow perch quotas for 2007 and 2008. The Divisional Court dismissed their application.

[5] On their appeal, the appellants argue the same three points that were rejected by the Divisional Court:

> 1) Neither the federal *Fisheries Act*, R.S.C. 1985, c. F-14, nor the regulations to this Act passed by the Governor in Council validly delegate to Ontario's Minister of Natural Resources the authority to attach catch quotas to commercial fishing licences;
>
> 2) The Minister improperly fettered her discretion by accepting the Lake Erie Committee's annual recommendations on the total allowable catch for walleye and yellow perch; and
>
> 3) The Minister's exercise of her discretion to allocate individual catch quotas was unreasonable because of her reliance on the Lake Erie Committee's recommendations.

What underlies all three arguments is the appellants' contention that instead of invariably accepting the Lake Erie Committee's recommendations, the Minister should fix overall catch quotas independently.

[6] To put these arguments in context, I will review briefly the regulatory framework for managing the Lake Erie fishery.

B. REGULATORY FRAMEWORK

[7] The management of Ontario's fisheries is an example of both cooperative federalism and international cooperation.

1. The Applicable Federal Legislation

[8] Section 91(12) of the *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c.3, gives Parliament exclusive legislative authority in relation to inland fisheries. Parliament has exercised that authority by passing the *Fisheries Act*. Under s. 7(1) of that Act, the federal Minister of Fisheries and Oceans may "issue or authorize to be issued leases and licences for fisheries or fishing". Section 43, which is germane to this appeal, authorizes the Governor in Council to make regulations on a wide variety of subjects. These include regulations:

- For the proper management and control of the sea-coast and inland fisheries;
- Respecting the conservation and protection of fish;
- Respecting the issue, suspension and cancellation of licences and leases;
- Respecting the terms and conditions under which a licence may be issued;
- Prescribing the powers and duties of persons engaged or employed in the administration and enforcement of the Act; and

- Authorizing those engaged in the administration and enforcement of the Act to vary a fishing quota or limit the size or weight of fish that is fixed by regulation.

2. The Federal *Ontario Fishery Regulations*

[9] The Governor in Council has exercised its authority under s. 43 of the *Fisheries Act* by passing, at various times, *Ontario Fishery Regulations* (OFR). Three sets of regulations were discussed in this appeal: OFR 1978, OFR 1989 and OFR 2007.[1]

[10] OFR 1978 contained detailed rules regulating commercial fishing. These rules included, for example:

- Prohibitions against the use of listed fishing gear;
- Restrictions on the placement of nets;
- General and special conditions of gill net licences in specific water;
- Conditions of carp and sturgeon gill net licences and trawl net licences;
- Size of mesh for gill nets;
- Regulation of quantities of underweight or undersized fish;
- Prohibitions against fishing gear in identified waters between certain dates;

[1] OFR 1978 is at SOR/63-157
OFR 1989 is at SOR/89-93
OFR 2007 is at SOR/2007-237

- Maximum quantities and mesh sizes of gill nets;
- Aggregate quotas for yellow pickerel, sturgeon, lake trout and whitefish for each fishing licence;
- Seasonal and global quotas for commercial fishing by body of water and fish species, including lake trout, lake herring, chubb, whitefish and yellow perch; and
- Minimum size limits for commercial catches for ciscoes, herring, lake trout, sturgeon, whitefish, yellow pickerel and perch depending on the body of water from which the fish were harvested.

[11] In 1989, the OFR was substantially rewritten and streamlined. Much of the detail that had been in OFR 1978 was removed and attached to individual commercial fishing licences. The regulatory impact analysis statement that accompanied OFR 1989 described the thinking behind this policy change:

> For commercial fishing, cumbersome, indirect controls over fishing gear are removed and replaced by direct controls (closed seasons together with an explicit allocation of fish to each licensed commercial fisherman). This will allow commercial fishermen to fish in more economically efficient ways and reduce their capital costs for equipment over the long term and will encourage the industry to maximize the value of landings through innovative marketing and quality control.

See *Canada Gazette Part II*, Vol. 123 No. 4, pp. 1430-1433 at 1432.

[12] In 2007, the OFR was again rewritten and even further streamlined. However, the policy change reflected in OFR 1989 was carried forward into OFR 2007. An important part of the appellants' argument on improper delegation rests on a comparison between

what they describe as a comprehensive federally-enacted regulatory scheme governing commercial fishing in Ontario in OFR 1978, and what they allege is the absence of a comprehensive scheme in OFR 1989 and OFR 2007.

[13] OFR 1989 and OFR 2007 do, however, contain provisions concerning the licensing of commercial fishing. For example, s. 3(1)(a) of OFR 2007 stipulates that "no person shall, except as authorized under a licence, fish". The provincial aspect of the legislative scheme comes into play through the definition of licence. Section 1(1) of OFR 2007 defines a licence to mean, among other things, "a licence or permit issued under the *Fish and Wildlife Conservation Act, 1997*", S.O. 1997, c. 41.

[14] Consistent with the policy change first reflected in OFR 1989, s. 4(1) of OFR 2007 authorizes the provincial Minister to impose a broad array of terms and conditions in a commercial fishing licence, including a quota on the quantity of a species of fish that may be caught.

3. Ontario's *Fish and Wildlife Conservation Act, 1997*

[15] The legislative underpinning for Ontario's management of its fisheries is the provincial *Fish and Wildlife Conservation Act, 1997*. Section 60 authorizes the Minister of Natural Resources to issue licences for the purpose of this Act and the *Ontario Fishery Regulations*.

4. The Lake Erie Committee

[16] The last link in the cooperative arrangements for managing Ontario's fishery on Lake Erie is the Lake Erie Committee. In 1954, Canada and the United States entered into the Convention on Great Lakes Fisheries. Article II of the Convention established the Great Lakes Fisheries Commission. The Commission in turn established the Lake Erie Committee.

[17] The Lake Erie Committee operates under a joint strategic plan, which was agreed to by the Great Lakes Fisheries Commission, Ontario, the eight Great Lakes states and the two federal governments. This joint strategic plan mandates a coordinated approach to the management and allocation of fish stocks on the Great Lakes. Specifically, the plan states that "protection of fish stock from overexploitation by any or all user groups is a paramount responsibility of all fishery agencies. Fishery agencies need to make joint allocation decisions on stocks of common concerns." The Lake Erie Committee is charged with carrying out this mandate on Lake Erie.

[18] The Committee has five members, one for each of the jurisdictions bordering the Lake. The Ontario Minister's delegate on the Committee and its Chair at the time was Michael Morencie, a senior public servant in the Ministry of Natural Resources and Manager of the Ministry's Lake Erie Management Unit. On the judicial review application, Mr. Morencie testified extensively about the deliberations of the Lake Erie

Committee and its processes for making recommendations on the annual allowable harvest for walleye and yellow perch.

[19] The Committee receives proposals from two sub-bodies – the Walleye Task Group and the Yellow Perch Task Group – on a recommended allowable harvest for each species. Ontario experts are members of both groups. The Committee relies on the Task Groups' proposals in formulating its own recommendations for the total allowable catch for walleye and yellow perch.

[20] Mr. Morencie acknowledged that conflicts arise between Ontario's interests and the interests of the American states. Commercial fishing on Lake Erie is largely confined to Ontario's part of the Lake. The American side is dominated by sport fishing; walleye, in particular, is the mainstay of a large sport fishing community. Consequently, the American representatives on the Committee tend to be unsympathetic to commercial fishing and press for more conservative total catch quotas than does Ontario. As there is no weighted voting on the Committee, Ontario frequently finds itself in a minority position.

[21] Still, Mr. Morencie said that the Lake Erie Committee operates by consensus. It aims for considerations jointly agreed to by all five Committee members.

5. Ministerial Discretion

[22] The quotas for walleye and yellow perch allocated to the appellants and other commercial fishing operations in Lake Erie depend on three discretionary decisions by the Minister of Natural Resources or her delegate. The Minister's first discretionary decision concerns the total allowable catch for each species. Usually – although, as I will discuss, not always – the Minister exercises her discretion to accept the Lake Erie Committee's recommendations. Ontario is then allocated a share of the total allowable catch for walleye and yellow perch based on a formula, which has been accepted by all jurisdictions. Ontario receives 43 per cent of the total allowable catch for walleye and 49 per cent of the total allowable catch for yellow perch. These percentages are based on a proportionate share of the functional habitat for walleye, and on the surface area of waters within Ontario's jurisdiction for yellow perch. The total allowable catch for each species of fish changes every year, but Ontario's percentage of the overall allowable catch does not.

[23] The Minister's second decision is her exercise of discretion to apportion Ontario's share of the total allowable catch among its user groups: commercial fishing, recreational or sport fishing, aboriginal fishing and government research. In practice, the Minister allocates about 98 per cent of Ontario's share to commercial fishing.

[24] The Minister's final decision is the allocation of quota amounts for each species of fish to individual commercial fishing licences. The reduction in the appellants' individual quotas in 2007 and 2008 prompted their challenge to the regulatory regime.

C. ANALYSIS

1. Has the Governor in Council validly delegated authority to Ontario's Minister of Natural Resources to attach quotas to commercial fishing licences?

[25] Under OFR 1978, OFR 1989 and OFR 2007, the Governor in Council delegated to Ontario's Minister of Natural Resources authority to attach quotas to individual commercial fishing licences. The appellants' principal ground of appeal is that this delegation under OFR 1989 and OFR 2007 is invalid.

[26] Under our constitutional system, Parliament cannot delegate its legislative powers to a provincial legislature. Parliament can, however, delegate its legislative powers to another body: see *R. v. Furtney*, [1991], 3 S.C.R. 89 at 104. Here, Parliament has not delegated its legislative power in relation to inland fisheries to the provincial legislature. Instead, it has delegated its legislative power over fisheries to another body, the Governor in Council, which, in turn, has sub-delegated this power to the Ontario Minister of Natural Resources. Thus, the delegation at issue here is not constitutionally impermissible. The narrow question raised by the appeal is whether the delegation is invalid because it was not carried out properly.

[27] In support of their argument on the invalidity of the delegation, the appellants make three submissions. First, they say that the delegation is invalid because the *Fisheries Act* does not specifically authorize the Governor in Council to delegate powers – including the power to attach species quotas to commercial fishing licences – to the provincial Minister. Second, they say that the delegation is invalid because neither OFR 1989 nor OFR 2007 establishes a "comprehensive federally-enacted regulatory scheme". Third, they say that the delegation is invalid because what has been delegated is legislative power, not administrative power.

[28] The appellants acknowledge that in 1985, in *Peralta et al. and the Queen in Right of Ontario et al. v. V. Warner et al. (*1985), 49 O.R. (2d) 705 (C.A.), aff'd [1988] 2 S.C.R. 1045, this court rejected a similar challenge to the Governor in Council's delegation of authority to the provincial Minister to attach quotas to commercial fishing licences. That delegation was under OFR 1978 and this court upheld its validity. The appellants submit that the delegation in question in *Peralta* differs from the delegation in question on this appeal. In OFR 1978, the appellants say, the federal government established detailed regulatory provisions for commercial fishing, and the provincial Minister allocated quotas within and consistent with those provisions. Thus, the sub-delegation from the Governor in Council to the provincial Minister was valid. By contrast, the appellants say, the absence of detailed regulatory provisions in OFR 1989 and OFR 2007 makes the sub-delegation to the provincial Minister invalid.

[29] I do not agree with the appellants' submissions. The policy change reflected in the streamlining of OFR 1989 and OFR 2007 – or in the appellants' words, the removal of "a comprehensive federally-enacted regulatory scheme – does not turn a valid sub-delegation into an invalid one. In my view, the Governor in Council has validly sub-delegated to the provincial Minister of Natural Resources authority to attach quotas to commercial fishing licences. I will now specifically address the appellants' three submissions.

(i) No specific authority in the *Fisheries Act*

[30] The *Fisheries Act* does not specifically authorize the Governor in Council to delegate its powers to the provincial Minister. The appellants contend that the Act's failure to do so renders the delegation invalid. This contention is at odds with *Reference Re: Regulations in Relation to Chemicals*, [1943] S.C.R. 1.

[31] In the *Chemicals Reference*, the Supreme Court of Canada had to decide whether a broad delegation of powers to the Governor in Council under s. 3 of the *War Measures Act* authorized the Governor in Council to delegate its powers to subordinate agencies, though the statute did not contain any specific wording that it could do so. Despite the absence of specific wording, the court held that the Governor in Council had authority to delegate to subordinate agencies. Chief Justice Duff put the principle this way at 12:

> I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the

> appointment of subordinate officials, or the delegation to them of such powers as those in question. Ex facie such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.

And in concurring reasons, Rinfret J. stated at 19:

> That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war.

[32] Any suggestion that this principle, which originated in war time legislation, was confined to circumstances of emergency was dispelled in *Reference Re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] 2 S.C.R. 1198. There, the Supreme Court affirmed that the rationale underlying the *Chemicals Reference* was not limited to emergency legislation.

[33] Therefore, the absence of specific authority in the *Fisheries Act* is not fatal to the Governor in Council's delegation of authority to the provincial Minister. As is invariably the case, the issue becomes one of Parliamentary intent. I agree with Ontario that several considerations show Parliament intended the Governor in Council, in making gegulations under s. 43 of the *Fisheries Act*, to be authorized to delegate its powers and duties.

[34] Under s. 43, the Governor in Council is authorized to make regulations "respecting" a wide range of subjects, including for example, "respecting the terms and conditions under which a licence and lease may be issued". "Respecting" is a broad term and, in my view, reflects Parliament's intention that the Governor in Council have authority to delegate its powers to other bodies.

[35] Moreover, s. 43(l) of the *Fisheries Act* authorizes the Governor in Council to prescribe the powers and duties of persons employed in the administration and enforcement of the statute. At least implicitly, this provision shows that the Governor in Council can make regulations delegating its powers and duties. At the same time, s. 43(l) does not limit the persons who may be prescribed powers and duties. The choice of delegate is that of the Governor in Council. And the Governor in Council has chosen the provincial Minister. Section 4(1) of OFR 2007 authorizes the provincial Minister to specify a broad array of terms and conditions in commercial fishing licences, including species quotas on the fish that can be caught.

[36] In addition to these considerations, administrative necessity underscores Parliament's intent. In *Peralta*, Mackinnon A.C.J.O. commented on the importance of administrative necessity at p. 717:

> When courts have considered whether delegation of ministerial powers was intended, considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative

> powers given to him. Further, in such cases the suitability of the delegate has been a material factor in determining whether such delegation is intended and lawful. [Citation omitted.]

[37] And, as Mackinnon A.C.J.O. pointed out at p. 717: "it is the provincial ministers, familiar with the multiplicity of situations and problems in their own province, to whom these powers are delegated."

(ii) Absence of a comprehensive federally-enacted regulatory scheme

[38] The appellants also contend that the delegation of authority to the Ontario Minister to attach quotas to commercial fishing licences and the exercise of that authority are invalid because of the absence in OFR 1989 and ORF 2007 of any detailed provisions or even guidelines governing commercial fishing in Ontario. The appellants maintain that in the absence of any standards in the federal legislation, the provincial Minister is not applying a federal scheme when she attaches quotas as conditions to the appellants' licences. In advancing this contention, the appellants rely on the majority judgment of the Supreme Court of Canada in *Brant Dairy Co. v. Ontario (Milk Commission)*, [1973] S.C.R. 131, where the majority of the Supreme Court held that a regulation purportedly made in the exercise of a delegated power was invalid. I do not accept the appellants' argument.

[39] Since the *Chemicals Reference*, the law has been clear that in delegating authority the delegating body – Parliament, or as in this case, the Governor in Council – need not

establish a comprehensive regulatory regime or even fix standards or guidelines. In the *Agricultural Product Marketing Act Reference* at 1225-1226, the majority judgment affirms that there is no constitutional requirement to do so:

> Involved in the appellants' submissions, as reflected in their factum and in oral argument, was the contention that there is a constitutional requirement in the delegation of authority that standards be fixed by Parliament or where, as here, there is delegation in depth, that is by orders which the Governor-in-Council is authorized to make, the orders of the Governor-in-Council should establish standards and not, by wholesale redelegation, leave their determination to the provincial boards nor, as s. 2(1) provides, adopt the various provincial standards for federal purposes. I do not think this Court would be warranted in imposing such a constitutional limitation on the delegation of authority. The matter of delegation in depth is covered by the judgment of this Court in Reference re Regulations (Chemicals) under the War Measures Act [[1943] S.C.R. 1.], and I would not limit its rationale to emergency legislation. There is sufficient control on a administrative law basis through the principle enunciated and applied by this Court in the Brant Dairy Case … and I find no ground for raising it to a constitutional imperative.

[40] Thus the absence of detailed provisions governing the commercial fishery in OFR 1989 and ORF 2007 does not render the Governor in Council's delegation to the provincial Minister invalid.

[41] The *Brant Dairy* case referred to in the passage from the *Agricultural Product Marketing Act Reference* quoted above shows how the exercise of delegated authority can be invalid. But the principle that emerges from *Brant Dairy* does not assist the appellants. In *Brant Dairy*, Ontario's *Milk Act, 1965* authorized the Milk Commission to

regulate the marketing of milk in the province, including fixing quotas. The Act also authorized the Milk Commission to delegate its regulation making power to the Milk Marketing Board. The Commission did so by making a regulation sub-delegating its powers to the Board. That sub-delegation was held to be valid: "the Commission could lawfully invest the Board with the discretion originally committed to the Commission in the carrying out of the powers conferred by the Act."

[42] The problem with the sub-delegation arose when the Milk Marketing Board failed to properly exercise the power delegated to it. The Commission had delegated to the Board the power to make regulations providing for, among other things, "the fixing and allotting to persons of quota for the marketing of a regulated product on such basis as the Commission deems proper". Instead of carrying out the power delegated to it, however, the Board simply passed a regulation providing that "[t]he marketing board may fix and allot to persons quotas for the marketing of milk on such basis as the marketing board deems proper". The court held that this regulation was *ultra vires* because:

> What the Board has done has been to exercise the power in the very terms in which it was given. It has not established a quota system and allotted quotas, but has simply repeated the formula the statute, specifying no standards and leaving everything in its discretion.

[43] In other words, instead of making a regulation setting out quotas, the Board made a regulation authorizing itself to allot quotas in its discretion. That, the Court said, was illegal:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades the exercise of the power and, indeed, turns the legislative power into an administrative once. It amount to a re-delegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this court in *Attorney General of Canada v. Brent*, [1956] S.C.R. 318. [at 146-7]

[44] The *Brant Dairy* principle does not apply here. Under s. 43 of the *Fisheries Act*, the Governor in Council was authorized to make Regulations on a variety of matters including regulations respecting the terms and conditions under which a licence may be issued and regulations prescribing the powers and duties of persons engaged in the administration of the Act.

[45] The Governor in Council validly exercised that authority by passing OFR 1989 and OFR 2007. However, and this is the key difference between the present case and *Brant Dairy*, the Governor in Council did not delegate to the provincial Minister the power to make regulations fixing species quotas on fish that may be caught; he simply delegated to the provincial Minister, in s. 4(1)(a) of OFR 2007, the authority to specify a quota as a condition of a commercial fishing licence. The Ontario Minister has exercised that discretionary authority given to her by attaching quotas to the appellants' and other commercial fishing licences. In short, in *Brant Dairy* the Milk Board acted illegally because it improperly carried out the delegated power given to it; by contrast, here the provincial Minister has acted legally because she has properly carried out the power delegated to her.

(iii) Delegation of legislative, not administrative power

[46] Finally, the appellants contend that the delegation to the provincial Minister is invalid because what has been delegated is legislative power, not administrative power. The contention appears to be that the Governor in Council can validly delegate only administrative powers.

[47] Respectfully, this contention is misconceived. For the purpose of determining whether a delegation is valid, the distinction between legislative and administrative power is irrelevant. The delegation of any kind of power, legislative or administrative, to Parliament or a provincial legislature, is not permitted. The delegation of any kind of power, even a legislative power, to an official or to a body other than Parliament or a legislature, is quite permissible: see e.g. *Chemicals Reference*; *R. v. Furtney* at para. 33; and Hogg, *Constitutional Law of Canada*, 5th ed. supplemented (Scarborough: Thomson Carswell, 2007) at 14-22.

[48] Admittedly, para. 63 of the judgment of this court in *Peralta* suggests that legislative power cannot be delegated. That suggestion is inconsistent with principles of delegation and with the Supreme Court of Canada's jurisprudence. Thus, it is unnecessary to characterize the delegation of the provincial Minister. However characterized, the Governor in Council's delegation of its powers to Ontario's Minister of Natural Resources is valid.

[49] I would not give effect to the appellants' principal ground of appeal.

2. Did the Minister fetter her discretion?

[50] Fettering of discretion is a common basis for challenging administrative decision-making. It is one of the appellants' grounds of review on this appeal. They contend that by accepting the Lake Erie Committee's recommendations on the total allowable catch for walleye and yellow perch, and Ontario's share of the catch, the Minister has fettered her discretion. I do not accept this contention.

[51] Decision makers fetter their discretion when they fail to genuinely exercise discretionary power in an individual case, and instead automatically apply an existing policy or guideline: see David J. Mullan, *Administrative Law* (Toronto: Irwin Law 2001) at 115-116. The appellants argue that, year after year, in allocating quotas to commercial fishing licences, the Minister has automatically accepted the recommendations of an outside body, the Lake Erie Committee, instead of independently determining Ontario's share of the total allowable catch for each species of fish. In my view, the appellants' argument fails for three reasons.

[52] First, Ontario has accepted, as a matter of policy, joint decision-making on the management of fish stocks in Lake Erie. It is surely not the court's role to second guess this policy. It is not for the court to say, as the appellants urge us to do, that the Minister should adopt a "go it alone" policy.

[53] Moreover, Ontario's policy makes good sense. Fish do not respect the 49th parallel; our ecosystem does not pay attention to international boundaries. Cooperative decision making among the five jurisdictions with a stake in the Lake Erie fishery is undoubtedly the best way to manage and conserve a fragile yet shared resource.

[54] Second, the appellants' argument does not take into account of the process by which the Lake Erie Committee arrives at its recommendations. Ontario's own experts and delegates participate in that process. The delegate from Ontario's Ministry of Natural Resources, along with the four other delegates, must agree on the recommendations. It is, therefore, hardly surprising that the Minister finds the Committee's recommendations persuasive, even compelling, and usually accepts them.

[55] Third, although the Lake Erie Committee's recommendations are persuasive, the Minister does not automatically rubber stamp them. The record before us refers to two examples where the Minister did not accept the Committee's recommendations: the 2004 arbitration and the 2005 yellow perch error correction.

[56] The 2004 arbitration arose because members of the Lake Erie Committee believed that the harvest of walleye should be reduced. However, the members were at an impasse on how to achieve this reduction. The American members insisted Ontario make a 40 per cent cut to its commercial fish harvest; Ontario proposed a 20 to 22 per cent cut. Because of the impasse, the Committee appointed two experienced arbitrators to consider the issue. Out of their consideration, the parties reached a negotiated settlement: Ontario

accepted a 30 per cent cut in its commercial walleye harvest. This example shows that Ontario did not simply accept the American position on the allowable catch for commercial walleye fishing.

[57] In 2005, the Lake Erie Committee's recommendation on yellow perch erroneously understated Ontario's allocation. Ontario did not accept the Committee's recommendation; it complained. And its complaint led to an error correcting adjustment to the allocation. This example also shows that the Minister has not automatically surrendered her discretion to the Committee's recommendations.

[58] For these reasons, I do not accept the appellants' argument on fettering of discretion.

3. Has the Minister exercised her discretion unreasonably?

[59] The appellants' related argument is that the Minister has exercised her discretion unreasonably because, in allocating quotas to commercial fishing licences, she has relied on the Lake Erie Committee's recommendations on the total allowable catch. In support of this argument, the appellants submit that the Lake Erie Committee relies on data of dubious reliability, and that a coordinated strategy for managing the Lake Erie fishery does not require Ontario to surrender its decision making to a joint international body. The Divisional Court rejected these submissions, concluding that "it is not unreasonable for the Minister to heavily rely on the recommendations of the [Lake Erie Committee]

when the Minister determines the fish quota for the applicants." I agree with the Divisional Court's conclusion.

[60] The Divisional Court specifically addressed the appellants' attack on the reliability of the data used by the Committee:

> The Minister also acknowledges that the data used by the task groups may be uncertain or indefinite, but the evidence shows that the data used is the best data available. Moreover, the [Lake Erie Committee] and the task groups are aware of the fact that the data is uncertain, and have an ongoing discussion as to how to improve the reliability of the data.

I agree with the Divisional Court's assessment.

[61] Moreover, the Minister's reliance on the Lake Erie Committee's recommendations is entirely reasonable. These recommendations are the product of the collective wisdom, expertise and science of experts from the five jurisdictions that share the Lake Erie fishery. Ontario's own experts actively participate in the Committee's deliberations. And the consensual decision-making that produces the catch quotas for walleye and yellow perch. Viewed in this context, the Minister's adoption of the Committee's recommendations can only be considered reasonable.

[62] At the same time, Ontario is not legally required to accept the Lake Erie Committee's recommendations. Although its recommendations ordinarily are compelling, the Minister occasionally has departed from them, reinforcing the reasonableness of her approach.

[63] I would not give effect to this ground of appeal.

D. CONCLUSION

[64] I would reject the three grounds of appeal raised by the appellants. In my view, the Governor in Council has validly delegated authority to Ontario's Minister of Natural Resources to attach walleye and yellow perch quotas to the appellants' commercial fishing licences.

[65] Moreover, in ordinarily adopting the Lake Erie Committee's recommendations on the total allowable catch for walleye and yellow perch, the Minister has neither fettered her discretion nor exercised her discretion unreasonably.

[66] I would dismiss the appeal, with costs payable by the appellants and fixed at $20,000, inclusive of disbursements and G.S.T. No costs shall be awarded to or against the intervener.

RELEASED: December 1, 2009
"JL"

"John Laskin J.A."
"I agree Janet Simmons J.A."
"I agree S.E. Lang J.A."

Minister of Labour for Ontario *Appellant*

v.

Canadian Union of Public Employees and Service Employees International Union *Respondents*

and

Canadian Bar Association and National Academy of Arbitrators (Canadian Region) *Interveners*

Ministre du Travail de l'Ontario *Appelant*

c.

Syndicat canadien de la fonction publique et Union internationale des employés des services *Intimés*

et

Association du Barreau canadien et National Academy of Arbitrators (Canadian Region) *Intervenantes*

INDEXED AS: C.U.P.E. *v.* ONTARIO (MINISTER OF LABOUR)

Neutral citation: 2003 SCC 29.

File No.: 28396.

2002: October 8; 2003: May 16.

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

RÉPERTORIÉ : S.C.F.P. *c.* ONTARIO (MINISTRE DU TRAVAIL)

Référence neutre : 2003 CSC 29.

N^{o} du greffe : 28396.

2002 : 8 octobre; 2003 : 16 mai.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations — Hospital labour disputes — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether Minister required to select arbitrators qualified by expertise and acceptance in labour relations community — Whether retired judges, as a class, biased against labour — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Administrative law — Judicial review — Appointment of board of arbitration — Legislation requiring disputes over collective agreements in hospitals and nursing homes to be resolved by compulsory arbitration — Minister of Labour appointing retired judges to chair arbitration boards — Whether appointment process for selecting chairs of arbitration boards violates natural justice or infringes institutional independence

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Relations de travail — Conflits de travail dans des hôpitaux — Constitution d'un conseil d'arbitrage — Loi exigeant que le règlement des différends en matière de convention collective qui surviennent dans les hôpitaux et les maisons de soins infirmiers soit assujetti à l'arbitrage obligatoire — Désignation par le ministre du Travail de juges retraités à la présidence des conseils d'arbitrage — Le ministre était-il tenu de choisir des arbitres ayant une expertise et étant acceptés dans le milieu des relations du travail? — En tant que catégorie, les juges retraités ont-ils un parti pris contre les travailleurs et les travailleuses? — Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14, art. 6(5).

Droit administratif — Contrôle judiciaire — Constitution d'un conseil d'arbitrage — Loi exigeant que le règlement des différends en matière de convention collective qui surviennent dans les hôpitaux et les maisons de soins infirmiers soit assujetti à l'arbitrage obligatoire — Désignation par le ministre du Travail de juges retraités à la présidence des conseils d'arbitrage — Le processus de désignation des présidents des conseils d'arbitrage

and impartiality of arbitration boards — Whether appointment process breached legitimate expectations of unions — Whether appointments caused reasonable apprehension of bias — Whether Minister disqualified or required to delegate task of making appointments because of interest in arbitrations — Whether Minister's appointments patently unreasonable — Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14, s. 6(5).

Since 1965, Ontario's hospitals, nursing homes and their employees have been required to resolve disputes over collective agreements by compulsory arbitration under the *Hospital Labour Disputes Arbitration Act* ("*HLDAA*"). If the parties cannot agree on a mutually acceptable arbitrator, a panel of three members is struck, two designated by the parties and the third chosen by the two designates or, if they fail to agree, appointed by the Minister of Labour. Amendments to the *Labour Relations Act* in 1979 facilitated the formation and use of a list of arbitrators with expertise acceptable to both management and the unions. A similar register of arbitrators was dropped from the *HLDAA* in 1980 but a normal practice was for senior officials of the Ministry of Labour, under delegated authority, to identify appropriate arbitrators. Following the 1995 provincial election, a reorganization of public sector institutions, including schools and hospitals, led to Bill 136. The Bill contained the proposed *Public Sector Dispute Resolution Act, 1997* which included a Dispute Resolution Commission. Organized labour opposed many aspects of the Bill, including the proposed commission. When the Minister announced a return to the sector-based system of appointing arbitrators, the unions believed the selection of *HLDAA* chairpersons would thereafter be limited to mutually agreed candidates.

In early 1998, the Minister appointed four retired judges to chair several arbitration boards. They were not appointed by mutual agreement nor were they on the "agreed" list compiled under s. 49(10) of the *Labour Relations Act, 1995*. The unions were not consulted. The President of the Ontario Federation of Labour complained to the Minister that the understanding about a return to the *status quo* had been breached without consultation. The unions objected that retired judges lack expertise,

contrevient-il à la justice naturelle ou compromet-il l'indépendance et l'impartialité institutionnelles des conseils d'arbitrage? — Le processus de désignation a-t-il frustré les attentes légitimes des syndicats? — Les désignations ont-elles suscité une crainte raisonnable de partialité? — Le ministre était-il inhabile à faire les désignations et était-il tenu de déléguer la tâche de les faire en raison de l'intérêt qu'il aurait dans les arbitrages? — Les désignations ministérielles étaient-elles manifestement déraisonnables? — Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14, art. 6(5).

Depuis 1965, en Ontario, la *Loi sur l'arbitrage des conflits de travail dans les hôpitaux* (« *LACTH* ») oblige les hôpitaux, les maisons de soins infirmiers et leurs employés à soumettre à l'arbitrage leurs différends en matière de convention collective. Dans le cas où les parties ne s'entendent pas sur le choix d'un arbitre qui leur est acceptable, il y a alors formation d'un conseil d'arbitrage composé de trois membres, dont deux sont désignés par les parties alors que le troisième est choisi par les deux membres désignés par les parties, ou encore par le ministre du Travail si les parties n'arrivent pas à s'entendre. Les modifications apportées à la *Labour Relations Act* en 1979 facilitaient l'établissement et l'utilisation d'une liste d'arbitres ayant une expertise et acceptables à la fois par le patronat et les syndicats. Un registre d'arbitres similaire a été retiré de la *LACTH* en 1980, mais les hauts fonctionnaires du ministère du Travail, qui exercent les pouvoirs qui leur sont délégués, avaient coutume de désigner des arbitres compétents. À la suite de l'élection de 1995, une réorganisation des institutions du secteur public, y compris les écoles et les hôpitaux, a abouti au projet de loi 136. Ce projet de loi renfermait le projet de *Loi de 1997 sur le règlement des différends dans le secteur public* qui prévoyait notamment la création d'une commission de règlement des différends. Le mouvement syndical s'est opposé à maints éléments du projet de loi, dont le projet de création de cette commission. Lorsque le ministre a annoncé un retour au système sectoriel de désignation des arbitres, les syndicats ont cru que le choix des présidents visés par la *LACTH* serait désormais limité aux candidats sur lesquels les parties se seraient entendues.

Au début de 1998, le ministre a désigné quatre juges retraités à la présidence de plusieurs conseils d'arbitrage. Leur désignation ne résultait pas d'un commun accord et leur nom ne figurait pas non plus sur une liste « convenue » dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*. Les syndicats n'ont pas été consultés. Le président de la Fédération du travail de l'Ontario s'est plaint auprès du ministre que l'entente concernant un retour au statu quo avait été violée sans

experience, tenure and independence from government. They also complained the Minister had breached procedural fairness by not delegating the task of making appointments to senior officials. The four judges initially appointed declined to act but other retired judges accepted the appointments. The unions sought declarations that the Minister's actions denied natural justice and lacked institutional independence and impartiality. The Divisional Court dismissed the application for judicial review. The Court of Appeal allowed the unions' appeal, concluding that the Minister had created a reasonable apprehension of bias and interfered with the independence and impartiality of the arbitrators, as well as defeating the legitimate expectation of the unions contrary to the requirements of natural justice. The Minister was ordered not to make any further appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" compiled under s. 49(10) of the *Labour Relations Act, 1995*.

Held (McLachlin C.J. and Major and Bastarache JJ. dissenting): The appeal should be dismissed for reasons that differ somewhat from those of the Court of Appeal. The Minister is required, in the exercise of his power of appointment under s. 6(5) of the *HLDAA*, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour relations community as generally acceptable to both management and labour.

Per Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ.: The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *HLDAA* was to provide an adequate substitute for strikes and lock-outs. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, "the parties must perceive the system as neutral and credible". This view was fully supported by the *HLDAA*'s legislative history.

The Minister was not required to proceed with the selection of chairpersons by way of "mutual agreement" or from the s. 49(10) roster. Nor were retired judges as a "class" reasonably seen as biased against labour. Nevertheless, the Minister was required by the *HLDAA*, properly interpreted, to select arbitrators from candidates

qu'il y ait eu des consultations. Les syndicats ont fait valoir que les juges retraités sont dénués d'expertise et d'expérience et qu'ils ne sont ni inamovibles ni indépendants du gouvernement. Ils se sont en outre plaints du fait que le ministre avait manqué à l'équité procédurale en ne déléguant pas à des hauts fonctionnaires la tâche de faire des désignations. Les quatre juges désignés initialement ont refusé d'agir en qualité d'arbitres, mais d'autres juges retraités ont accepté les désignations. Les syndicats ont sollicité un jugement déclarant que les actes du ministre constituaient un déni de justice naturelle et étaient caractérisés par l'absence d'indépendance et d'impartialité institutionnelles. La Cour divisionnaire a rejeté la demande de contrôle judiciaire. La Cour d'appel a accueilli l'appel des syndicats, concluant que le ministre avait suscité une crainte raisonnable de partialité et porté atteinte à l'indépendance et à l'impartialité des arbitres, ainsi qu'à l'expectative légitime des syndicats, contrairement aux exigences de la justice naturelle. Le ministre s'est vu interdire de faire d'autres désignations « à moins que ces désignations ne soient faites à partir de la liste traditionnelle d'arbitres expérimentés en relations du travail », dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*.

Arrêt (la juge en chef McLachlin et les juges Major et Bastarache sont dissidents) : Le pourvoi est rejeté pour des raisons qui diffèrent quelque peu de celles de la Cour d'appel. Dans l'exercice de son pouvoir de désignation conféré par le par. 6(5) *LACTH*, le ministre doit être convaincu que les candidats à la présidence sont non seulement indépendants et impartiaux, mais également qu'ils ont une expertise appropriée en matière de relations du travail et sont reconnus, dans le milieu des relations du travail, comme étant généralement acceptables à la fois par le patronat et par les syndicats.

Les juges Gonthier, Iacobucci, Binnie, Arbour, LeBel et Deschamps : Le ministre était tenu, en droit, d'exercer son pouvoir de désignation d'une manière conforme aux fins et aux objets de la loi qui lui conférait ce pouvoir. L'un des objets fondamentaux de la *LACTH* était de prévoir un moyen adéquat de remplacer la grève et le lock-out. Pour que cet objet de la Loi puisse être réalisé, « les parties doivent percevoir le système comme étant neutre et crédible », comme l'écrivait le ministre lui-même le 2 février 1998. Ce point de vue était entièrement étayé par l'historique législatif de la *LACTH*.

Le ministre n'était pas tenu de choisir les présidents des conseils d'arbitrage d'un « commun accord » ou à partir de la liste dressée en vertu du par. 49(10). En tant que « catégorie », les juges retraités ne pouvaient pas non plus être raisonnablement perçus comme ayant un parti pris contre les travailleurs et les travailleuses. Néanmoins,

who were qualified not only by their impartiality, but by their expertise and general acceptance in the labour relations community.

Section 6(5) of the *HLDAA* contemplates the appointment of "a person who is, in the opinion of the Minister, qualified to act". The Minister's discretion is constrained by the scheme and object of the Act as a whole, which is to create a "neutral and credible" substitute for the right to strike and lock-out. Labour arbitration has traditionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. Although the s. 6(5) power is expressed in broad terms, the Minister is nevertheless required, in the exercise of that power, to have regard to relevant labour relations expertise, independence, impartiality and general acceptability within the labour relations community. These criteria are neither vague nor uncertain. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill them. The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDAA*'s object and purposes. The Minister, under the *HLDAA*, is not given a broad policy function. His narrow role is simply to substitute for the parties in naming a third arbitrator in case of their disagreement and, given the context, background and purpose of the Act, his rejection of labour relations expertise and general acceptability as relevant factors was patently unreasonable.

Although, as a member of Cabinet, the Minister was committed to public sector rationalization and had a perceived interest in the appointment process and the outcome of the arbitrations, the legislature specifically conferred the power of appointment on the Minister and, absent a constitutional challenge, clear and unequivocal statutory language conferring that authority prevailed over the common law rule against bias. The Minister's power to delegate the appointment process under s. 9.2(1) of the *HLDAA* was permissive only and to take away his authority to make his own choice would amount to a judicial amendment of the legislation.

The Minister satisfied any duty to consult with the unions about the change in the appointments process.

la *LACTH*, correctement interprétée, exigeait que le ministre désigne comme arbitres des personnes compétentes en raison non seulement de leur impartialité, mais aussi de leur expertise et de leur acceptabilité générale dans le milieu des relations du travail.

Le paragraphe 6(5) *LACTH* prévoit la désignation d'une « personne qui, [de l'avis du ministre], est compétente pour agir en cette qualité [d'arbitre] ». Le pouvoir discrétionnaire du ministre est limité par l'économie et l'objet de la *LACTH* dans son ensemble, laquelle loi établit un système qui, d'après l'intention du législateur, doit servir de moyen « neutre et crédible » de remplacer le droit de grève et de lock-out. L'arbitrage en matière de relations du travail repose traditionnellement sur le consentement, l'arbitre étant choisi par les parties ou étant acceptable par chacune d'elles. Bien que le pouvoir conféré au par. 6(5) soit énoncé en termes généraux, le ministre est néanmoins tenu, en exerçant ce pouvoir, de prendre en considération l'expertise pertinente en matière de relations du travail ainsi que l'indépendance, l'impartialité et l'acceptabilité générale dans le milieu des relations du travail. Ces critères ne sont ni vagues ni incertains. Un grand nombre d'arbitres professionnels en droit du travail dépendent, pour leur subsistance, de leur capacité reconnue de satisfaire à ceux-ci. Il en résulte un cadre tout à fait acceptable à l'intérieur duquel le législateur a voulu accorder au ministre une liberté d'action considérable, mais non illimitée, pour faire des désignations conformes aux fins et aux objets de la *LACTH*. La *LACTH* n'attribue pas au ministre une fonction d'orientation générale. Son rôle limité consiste simplement à remplacer les parties pour désigner un troisième arbitre en cas de désaccord de leur part, et compte tenu du cadre, du contexte et de l'objet de la Loi, son rejet de l'expertise en matière de relations du travail et de l'acceptabilité générale comme facteurs pertinents était manifestement déraisonnable.

Même si, en sa qualité de membre du Cabinet, le ministre était un défenseur de la rationalisation du secteur public et était perçu comme ayant un intérêt dans le processus de désignation et dans l'issue des arbitrages, le législateur lui a expressément conféré le pouvoir de désignation, et en l'absence de contestation constitutionnelle, le texte clair et non équivoque qui confère ce pouvoir primait sur la règle de common law interdisant la partialité. Le pouvoir de déléguer la tâche de faire des désignations, que le par. 9.2(1) *LACTH* confère au ministre, est seulement facultatif, et il y aurait modification judiciaire de la Loi si on lui retirait son pouvoir de faire ses propres choix.

Le ministre s'est acquitté de toute obligation qui pouvait lui incomber de consulter les syndicats au sujet de

There were extensive meetings during which the Minister signalled that the process was subject to reform and that retired judges were potential candidates for appointments. The unions made clear their opposition. Section 6(5) of the *HLDAA* did not impose on the Minister a procedural requirement to consult with the parties to each arbitration nor does the evidence establish a firm practice of appointing from a list or by mutual agreement. A general, ambiguous promise to continue an existing system subject to reform does not suffice under the doctrine of legitimate expectation to bind the Minister's exercise of his or her discretion.

The Court of Appeal had concluded that the Minister's approach tainted both the independence and impartiality of the *HLDAA* arbitration boards to which the retired judges had been appointed. This conclusion was not justified. The *HLDAA* commands the use of *ad hoc* arbitration boards. Such boards are not characterized by financial security or security of tenure beyond the life of the arbitration itself. The independence of arbitrators is guaranteed by training, experience and mutual acceptability. Since s. 6(5) requires the appointment of individuals qualified by training, experience and mutual acceptability, the proper exercise of the appointment power would lead to a tribunal which would satisfy reasonable concerns about institutional independence.

Impartiality raises different considerations. The Court of Appeal did not suggest that the retired judges were in fact biased or partial but concluded that they might reasonably be seen to be "inimical to the interests of labour, at least in the eyes of the appellants". The test, however, is not directed to the subjective perspective of one of the parties but to the reasonable, detached and informed observer. Retired judges as a class have no greater interest than other citizens in the outcome of the arbitrations and there are no substantial grounds to think they would do the bidding of the Minister or favour employers so as to improve the prospect of future appointments. A fully informed, reasonable person would not stigmatize retired judges, as a class, with an anti-labour bias. Allegations of individual bias must be dealt with on a case-by-case basis.

la modification du processus de désignation. Il y a eu de nombreuses rencontres au cours desquelles le ministre a indiqué que le processus faisait l'objet d'une réforme et que les juges retraités étaient des candidats potentiels pour les désignations. Les syndicats ont exprimé clairement leur opposition. Le paragraphe 6(5) *LATCH* n'impose pas au ministre l'obligation procédurale de consulter les parties à chaque arbitrage, et la preuve n'établit pas non plus l'existence d'une pratique bien établie consistant à faire les désignations à partir d'une liste ou à les faire d'un commun accord. Selon la règle de l'expectative légitime, une promesse générale et équivoque de maintenir le système existant, sous réserve d'une réforme, n'est pas suffisante pour obliger le ministre à exercer son pouvoir discrétionnaire.

La Cour d'appel a conclu que l'approche du ministre compromettait à la fois l'indépendance et l'impartialité des conseils d'arbitrage constitués en vertu de la *LACTH*, pour lesquels des juges retraités avaient été désignés. Cette conclusion n'était pas justifiée. La *LACTH* commande le recours à des conseils d'arbitrage *ad hoc*. Ces conseils ne sont pas caractérisés par une sécurité financière ou une inamovibilité continuant d'exister après la fin de l'arbitrage même. L'indépendance des arbitres est garantie par leur formation, leur expérience et leur acceptabilité par les parties. Vu que le par. 6(5) exige la désignation de personnes compétentes en raison de leur formation, de leur expérience et de leur acceptabilité par les parties, l'exercice approprié du pouvoir de désignation permettra de constituer un tribunal administratif qui répondra aux préoccupations raisonnables concernant l'indépendance institutionnelle.

L'impartialité fait intervenir des considérations différentes. La Cour d'appel n'a pas indiqué que les juges retraités avaient, en fait, des préjugés ou un parti pris, mais elle a conclu qu'ils pourraient raisonnablement être perçus comme étant « hostiles aux intérêts des travailleurs et des travailleuses, du moins aux yeux des appelants ». Toutefois, ce critère est axé non pas sur le point de vue subjectif de l'une des parties, mais sur celui de l'observateur raisonnable, neutre et renseigné. En tant que catégorie, les juges retraités n'ont pas plus d'intérêt que les autres citoyens dans l'issue des arbitrages, et il n'y a aucun motif sérieux de penser qu'ils se plieraient à la volonté du ministre ou favoriseraient les employeurs afin d'améliorer leurs chances de désignation future. Une personne raisonnable et bien renseignée ne reprocherait pas aux juges retraités, en tant que catégorie, d'avoir un parti pris contre les travailleurs et les travailleuses. Les allégations de partialité de la part d'une personne doivent être examinées cas par cas.

The appropriate standard of review is patent unreasonableness. The pragmatic and functional approach applies to the judicial review of the exercise of a ministerial discretion and factors such as the existence of a privative clause, the Minister's expertise in labour relations, the nature of the question before the Minister and the wording of s. 6(5) all call for considerable deference. A patently unreasonable appointment is one whose defect is immediate, obvious and so flawed in terms of implementing the legislative intent that no amount of curial deference can justify letting it stand.

La norme de contrôle applicable est celle du caractère manifestement déraisonnable. L'approche pragmatique et fonctionnelle s'applique au contrôle judiciaire de l'exercice d'un pouvoir ministériel discrétionnaire, et des facteurs comme l'existence d'une clause privative, l'expertise que le ministre possède en matière de relations du travail, la nature de la question soumise au ministre et le libellé du par. 6(5) commandent tous une très grande déférence. Une désignation manifestement déraisonnable est celle qui comporte un défaut flagrant et évident et qui est à ce point viciée, pour ce qui est de mettre à exécution l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.

The appointments were not patently unreasonable simply because the Minister did not restrict himself to the s. 49(10) list of arbitrators. Some arbitrators on the list were unacceptable to the unions and some acceptable arbitrators were not on the list, confirming the reasonableness of the Minister's view that candidates could qualify without being on the list. However, in assessing whether the appointments were patently unreasonable, the courts are entitled to have regard to the importance of the factors the Minister altogether excluded from his consideration. In this case, the Minister expressly excluded relevant factors that went to the heart of the legislative scheme. The matters before the boards required the familiarity and expertise of a labour arbitrator. Expertise and neutrality foster general acceptability. Appointment of an inexpert and inexperienced chairperson who is not seen as generally acceptable in the labour relations community is a defect in approach that is both immediate and obvious. Having regard to the legislative intent manifested in the *HLDAA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable. The qualifications of specific appointees will have to be assessed on a case-by-case basis if challenged.

Les désignations n'étaient pas manifestement déraisonnables simplement parce que le ministre ne s'en est pas tenu à la liste d'arbitres dressée en vertu du par. 49(10). Certains arbitres inscrits sur la liste étaient inacceptables par les syndicats, alors que d'autres arbitres acceptables n'étaient pas inscrits sur cette liste, ce qui confirme le caractère raisonnable de l'opinion du ministre selon laquelle des candidats non inscrits sur la liste pouvaient tout de même remplir les conditions requises pour être désignés. Cependant, en déterminant si les désignations étaient manifestement déraisonnables, les tribunaux judiciaires ont le droit de tenir compte de l'importance des facteurs que le ministre n'a pas voulu prendre en considération. En l'espèce, le ministre a expressément exclu des facteurs pertinents qui allaient directement au cœur du régime législatif. Les questions soumises aux conseils requéraient les connaissances et l'expertise d'un arbitre en droit du travail. L'expertise et la neutralité favorisent l'acceptabilité générale. La désignation au poste de président d'une personne inexperte ou inexpérimentée qui n'est pas perçue comme étant généralement acceptable dans le milieu des relations du travail comporte un défaut à la fois flagrant et évident. Compte tenu de l'intention du législateur qui ressort de la *LACTH*, l'approche que le ministre a adoptée en matière de désignations fondées sur le par. 6(5) était manifestement déraisonnable. Si elles sont contestées, les qualifications de certaines personnes désignées devront être évaluées cas par cas.

The appeal is thus dismissed on the limited ground that appointments that excluded from consideration labour relations expertise and general acceptability in the labour relations community were patently unreasonable.

Le pourvoi est donc rejeté uniquement en raison du caractère manifestement déraisonnable des désignations faites sans tenir compte de l'expertise en matière de relations du travail et de l'acceptabilité générale dans le milieu des relations du travail.

Per McLachlin C.J. and Major and Bastarache JJ. (dissenting): The appropriate standard of review for the exercise of the Minister's appointment power under s. 6(5) of the *HLDAA* is patent unreasonableness. The pragmatic and functional approach focusses on the particular provision being invoked. The Minister exercised power under

La juge en chef McLachlin et les juges Major et Bastarache (dissidents) : La norme de contrôle applicable à l'exercice par le ministre du pouvoir de désignation que lui confère le par. 6(5) *LACTH* est celle du caractère manifestement déraisonnable. L'approche pragmatique et fonctionnelle met l'accent sur la disposition qui est

a single statute, his enabling legislation, and, absent a constitutional challenge, the patent unreasonableness standard need not make room for a review of statutory interpretation of enabling legislation on a correctness basis. There is no basis for dividing the Minister's decision into component questions subject to different standards of review, nor should the Minister's power be viewed as due less deference because it is circumscribed by legislation. Not every administrative action involves a distinct and identifiable exercise of statutory interpretation. Where, as here, the factors indicate that the question raised by the provision is one intended by the legislators to be left to the exclusive decision of the administrative decision maker, it simply is not one for the courts to make. The presence of a privative clause is compelling evidence that deference is due. The Minister knows more about labour relations than the courts and will be taken to have expertise. Deference is owed to expert decision makers designated by the legislature. The fact-based nature of the question before the Minister also points to deference and empowering the Minister, rather than an apolitical actor, suggests a legislative intent of political accountability.

The Minister did not make appointments that were patently unreasonable. A contextual approach to statutory interpretation of the enabling legislation is necessary for determining the criteria relevant to exercise of the discretion. In some cases, the criteria are spelled out in the legislation, regulations or guidelines or found in the specific purposes of the relevant Act. In others, the relevant factors may be unwritten and derived from the purpose and context of the statute. In this case, there are no relevant regulations, guidelines, or other instruments, and the statute does not say much. The Act stipulates that appointees must be qualified in the opinion of the Minister, expressly contemplating the importance of the Minister's opinion. Labour relations expertise, independence and impartiality, reflected in broad acceptability, are not necessarily dominant or obvious factors and should not be imposed as specific restrictions on the Minister's discretion. The Minister developed an opinion and determined that judging experience was a relevant qualification. The Act called for the Minister to reach his own opinion, not to consider a specific determining factor. Given how much work it takes to identify labour relations experience and broad acceptability as factors and to imply them into s. 6(5), weighing them less heavily than another unwritten qualification, namely judicial experience, does not vitiate the appointments as patently

invoquée. Le ministre a exercé son pouvoir en vertu d'une seule loi, à savoir sa loi habilitante, et en l'absence de contestation constitutionnelle, il n'est pas nécessaire que la norme du caractère manifestement déraisonnable ouvre la porte au contrôle de l'interprétation de la loi habilitante selon la norme de la décision correcte. Rien ne justifie de diviser la décision du ministre en différentes questions assujetties à des normes de contrôle différentes. Il n'y a pas lieu non plus de considérer que le pouvoir du ministre a droit à moins de déférence du fait qu'il est circonscrit par la Loi. Les actions administratives ne comportent pas toutes un exercice distinct et identifiable d'interprétation législative. Lorsque, comme en l'espèce, les facteurs en présence indiquent que la question soulevée par la disposition en cause est une question que le législateur a voulu assujettir au pouvoir décisionnel exclusif de l'instance administrative, il n'appartient tout simplement pas aux tribunaux judiciaires de se prononcer sur cette question. La présence d'une clause privative atteste persuasivement que l'on doit faire montre de déférence. Le ministre a une meilleure connaissance des relations du travail que les tribunaux judiciaires et l'on considérera qu'il a une expertise. Les décideurs spécialisés désignés par le législateur ont droit à la déférence. La nature contextuelle de la question soumise au ministre milite elle aussi en faveur de la déférence et le fait d'habiliter le ministre, au lieu d'un acteur apolitique, indique que le législateur a voulu qu'il y ait responsabilité politique.

Les désignations faites par le ministre n'étaient pas manifestement déraisonnables. Pour déterminer les critères pertinents relativement à l'exercice du pouvoir discrétionnaire, il faut interpréter la loi habilitante selon une méthode contextuelle. Dans certains cas, les critères sont énumérés dans la loi, les règlements ou les lignes directrices applicables, ou encore ressortent des objets particuliers de la loi pertinente. Dans d'autres cas, les facteurs pertinents peuvent être tacites et émaner de l'objet et du contexte de la loi en cause. En l'espèce, il n'y a aucun règlement, aucune ligne directrice ni aucun autre instrument pertinents et la loi applicable ne dit pas grand-chose. La Loi précise que les personnes désignées doivent être compétentes de l'avis du ministre et prévoit ainsi expressément que l'avis du ministre est important. L'expertise en relations du travail, l'indépendance et l'impartialité, que traduit la notion d'acceptabilité générale, ne sont pas nécessairement des facteurs dominants ou évidents et ne doivent pas constituer des restrictions particulières au pouvoir discrétionnaire du ministre. Le ministre s'est formé une opinion et a décidé que l'expérience en tant que juge était une condition requise pertinente. La Loi exigeait que le ministre forme sa propre opinion et non qu'il prenne en considération un facteur déterminant particulier. Compte tenu de la somme de travail nécessaire pour relever les facteurs que sont l'expérience en

unreasonable. It takes significant searching or testing to find the alleged defect or even the factors said to constrain the Minister. It is therefore difficult to characterize the appointments as immediately or obviously defective, not in accordance with reason, clearly irrational, or so flawed that no amount of curial deference could justify letting them stand based on a failure to consider these factors. Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference, and our intervention is not warranted in these circumstances.

Concerns about institutional independence and institutional impartiality do not render the Minister's appointments patently unreasonable. The Act requires that the tribunals be *ad hoc* and retired judges as a class cannot reasonably be seen as so partial that appointing them took the Minister outside the bounds of his statutory discretion. The possibility of a successful challenge to a particular board is not foreclosed but the constraints on the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the boards actually appointed.

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relations du travail et l'acceptabilité générale et pour supposer qu'ils sont prévus au par. 6(5), le fait de leur accorder moins d'importance qu'à une autre condition requise également tacite, à savoir l'expérience judiciaire, ne vicie pas les désignations en les rendant manifestement déraisonnables. Il faut procéder à un examen ou à une analyse pour déceler le défaut allégué ou même les facteurs qui, dit-on, restreignent la liberté d'action du ministre. Il est donc difficile de considérer que les désignations ministérielles comportent un défaut flagrant ou évident, qu'elles sont non conformes à la raison ou clairement irrationnelles ou qu'elles sont à ce point viciées qu'aucun degré de déférence judiciaire ne pourrait justifier de les maintenir pour le motif que ces facteurs n'ont pas été pris en considération. Si on veut maintenir le principe de la retenue et de la déférence judiciaires, il est essentiel de reconnaître la gravité d'annuler une décision pour le motif qu'elle est manifestement déraisonnable; nous ne sommes pas justifiés à intervenir dans ces circonstances.

Les préoccupations relatives à l'indépendance et à l'impartialité institutionnelles ne rendent pas manifestement déraisonnables les désignations faites par le ministre. La Loi exige que les tribunaux administratifs soient *ad hoc*, et en tant que catégorie, les juges retraités ne peuvent pas être raisonnablement perçus comme étant à ce point partiaux qu'en les désignant le ministre a excédé le pouvoir discrétionnaire que lui confère la Loi. La possibilité de s'attaquer avec succès à un conseil en particulier n'est pas écartée, mais en l'absence d'une contestation mettant directement en cause l'indépendance ou l'impartialité de conseils réellement constitués, les contraintes auxquelles est soumis le pouvoir ministériel discrétionnaire ne permettent pas de procéder à un examen général de l'impartialité et de l'indépendance des conseils, qui serait fondé sur le processus de désignation suivi.

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Citée par le juge Binnie

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(QL). Appeal dismissed, McLachlin C.J. and Major and Bastarache JJ. dissenting.

Leslie McIntosh, for the appellant.

Howard Goldblatt, *Steven Barrett* and *Vanessa Payne*, for the respondents.

J. Gregory Richards, *Jeff G. Cowan* and *Susan Philpott*, for the intervener the Canadian Bar Association.

Michel G. Picher and *Barbara A. McIsaac*, *Q.C.*, for the intervener the National Academy of Arbitrators (Canadian Region).

The reasons of McLachlin C.J. and Major and Bastarche JJ. were delivered by

1 BASTARACHE J. (dissenting) — I adopt Binnie J.'s recital of the facts and judicial history. In my view, however, the Minister of Labour ("Minister") did not make appointments that were patently unreasonable. In reaching that decision, I would adopt a somewhat different approach to that of Binnie J. with regard to judicial review for abuse of discretion. I also object to Binnie J.'s conclusion that the impartiality and independence of boards can be challenged on the sole basis of the appointment process without any direct attack on a board actually constituted.

2 With regard to judicial review for abuse of discretion, as I shall explain, the balance of factors in this case militates unambiguously for the patent unreasonableness standard of review. This deferential standard applies fully to each appointment. In reviewing discretionary appointments, I think it unhelpful and inappropriate, under the pragmatic and functional approach, to separate the Minister's interpretation of the scope of his power under s. 6(5) of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("*HLDAA*"), from the ultimate appointments. Instead, what that approach requires is to assess the entire discretionary

O.J. No. 358 (QL). Pourvoi rejeté, la juge en chef McLachlin et les juges Major et Bastarache sont dissidents.

Leslie McIntosh, pour l'appelant.

Howard Goldblatt, *Steven Barrett* et *Vanessa Payne*, pour les intimés.

J. Gregory Richards, *Jeff G. Cowan* et *Susan Philpott*, pour l'intervenante l'Association du Barreau canadien.

Michel G. Picher et *Barbara A. McIsaac*, *c.r.*, pour l'intervenante National Academy of Arbitrators (Canadian Region).

Version française des motifs de la juge en chef McLachlin et des juges Major et Bastarache rendus par

LE JUGE BASTARACHE (dissident) — Je souscris à l'exposé des faits et à l'historique des procédures judiciaires figurant dans le motifs du juge Binnie. J'estime, cependant, que les désignations faites par le ministre du Travail (« ministre ») n'étaient pas manifestement déraisonnables. L'approche que j'utilise pour arriver à cette conclusion diffère quelque peu de celle du juge Binnie en ce qui concerne le contrôle judiciaire pour abus de pouvoir discrétionnaire. Je m'oppose également à la conclusion du juge Binnie voulant que l'impartialité et l'indépendance des conseils puissent être mises en doute en raison seulement du processus de désignation suivi, sans que le conseil réellement constitué ne soit directement contesté.

Comme je l'expliquerai, en ce qui concerne le contrôle judiciaire pour abus de pouvoir discrétionnaire, l'importance relative des facteurs en présence milite sans équivoque en faveur de l'application de la norme de contrôle du caractère manifestement déraisonnable. Cette norme qui commande la déférence s'applique parfaitement à chaque désignation. Je pense qu'en appliquant l'approche pragmatique et fonctionnelle à l'examen des désignations discrétionnaires, il n'est ni utile ni approprié de dissocier des désignations que le ministre a faites, en définitive, de son interprétation de l'étendue du pouvoir qui lui est conféré par le par. 6(5) de la *Loi sur*

decision against the standard of patent unreasonableness.

Moreover, the constraints on the exercise of the Minister's discretion do not permit a general inquiry into the independence and impartiality of the boards on the basis of the appointment process in the absence of a direct challenge to the independence or impartiality of boards actually appointed. The respondents' attack on the institutional independence or impartiality of the boards must be levied against a particular board. This attack is not appropriately an argument as to whether the Minister abused his discretion.

I do, however, accept Binnie J.'s analysis and conclusion that the Minister satisfied his duty of procedural fairness.

I. What is the Standard of Review for the Appointment Power?

I do not share Binnie J.'s appreciation of the potential confusion in determining, as separate exercises, the content of the duty of procedural fairness and the standard of review. Both exercises examine the context of an administrative decision. The same factor may be salient for both exercises. Nevertheless, the two inquiries proceed separately and serve different objectives. The content of the duty of procedural fairness seeks to ensure the appropriate relationship between the citizen and the administrative decision maker. In contrast, the standard of review speaks to the relationship between the administrative decision maker and the judiciary. In the former case, there is no need to determine a degree of deference.

Binnie J. and I agree ultimately on the appropriate standard of review. This agreement masks, however, some disagreement on the pragmatic and functional approach adopted by this Court.

l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14 (« *LACTH* »). Cette approche exige plutôt l'appréciation de l'ensemble de la décision discrétionnaire selon la norme du caractère manifestement déraisonnable.

3 De plus, en l'absence d'une contestation mettant directement en cause l'indépendance ou l'impartialité de conseils réellement constitués, les contraintes auxquelles est soumis l'exercice du pouvoir ministériel discrétionnaire ne permettent pas de procéder à un examen général de l'impartialité et de l'indépendance des conseils, qui serait fondé sur le processus de désignation suivi. La contestation des intimés, qui met en cause l'indépendance ou l'impartialité institutionnelles des conseils, doit viser un conseil particulier. La présente contestation n'est pas une façon appropriée de se demander si le ministre a abusé de son pouvoir discrétionnaire.

4 J'accepte toutefois l'analyse et la conclusion du juge Binnie selon lesquelles le ministre s'est acquitté de son obligation d'équité procédurale.

I. Quelle norme de contrôle s'applique au pouvoir de désignation?

5 Je ne partage pas l'avis du juge Binnie selon lequel le fait de déterminer séparément le contenu de l'obligation d'équité procédurale et la norme de contrôle applicable risque d'engendrer une certaine confusion. Dans les deux cas, il y a examen du contexte d'une décision administrative. Le même facteur peut également ressortir dans les deux cas. Les deux examens sont néanmoins effectués séparément et visent des objectifs différents. L'obligation d'équité procédurale a pour objet d'assurer l'existence de bons rapports entre les citoyens et l'instance décisionnelle administrative. Par contre, la norme de contrôle concerne les rapports entre l'instance décisionnelle administrative et le pouvoir judiciaire. Dans le premier cas, il n'est pas nécessaire d'établir un degré de déférence.

6 En définitive, le juge Binnie et moi nous entendons sur la norme de contrôle applicable. Cette entente cache toutefois un désaccord au sujet de l'approche pragmatique et fonctionnelle adoptée par la Cour.

7 As this Court recognized in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 28, this approach focusses on "the particular, individual provision being invoked and interpreted by the tribunal". The result is that some provisions within the same statute may require greater deference than others, depending on the factors. It does not follow, however, that exercise of a discretionary power under a single provision, such as s. 6(5) in this appeal, should be viewed as "the product of a number of issues or determinations" (Binnie J.'s reasons, at para. 97) with the decision maker's statutory interpretation singled out for closer scrutiny. Binnie J.'s citations to this Court's decision in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 ("*CBC*"), support the impression that a single administrative decision contains within it parts that are independently reviewable on a more or, more likely, less deferential standard. That appeal related to the standard of review for an agency's decision that required it to interpret a statute other than its enabling legislation. The passage from the plurality, to which Binnie J. refers, concludes that where the standard of review for a decision as a whole is patent unreasonableness, the correctness of the interpretation of an external statute may nevertheless affect the overall reasonableness of that decision. That authority is not apparently relevant to a case such as the present appeal, where the Minister exercises a power under a single statute, his enabling legislation. Given the present context, reference to that authority can only suggest, wrongly, that even in these circumstances a patent unreasonableness standard must make room, within the broader decision, for review of statutory interpretation on a correctness basis. The obvious exception, where a legal question will take a different standard from the global decision, is when an agency's decision engages constitutional issues. Constitutional questions will necessarily be reviewable on a correctness standard. Special cases like *CBC* will be dealt with on a case-by-case basis. In this case, however, the main issue is that of deciding whether the Minister failed to consider proper

Comme la Cour l'a reconnu dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 28, cette approche met l'accent sur « la disposition particulière invoquée et interprétée par le tribunal ». Par conséquent, selon les facteurs, certaines dispositions d'une même loi peuvent commander plus de déférence que d'autres. Toutefois, il ne s'ensuit pas que l'exercice d'un pouvoir discrétionnaire en vertu d'une seule disposition, comme le par. 6(5) en l'espèce, devrait être perçu comme étant « le fruit d'un certain nombre de questions ou de décisions » (motifs du juge Binnie, par. 97), ni qu'il y a lieu d'examiner de plus près l'interprétation que le décideur a donnée de la loi en cause. Les passages de l'arrêt *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157 (« *SRC* »), que cite le juge Binnie, tendent à confirmer l'impression qu'une même décision administrative comporte des parties qui peuvent être contrôlées indépendamment selon une norme qui commande plus ou moins de déférence ou qui est plus susceptible de commander moins de déférence. Ce pourvoi concernait la norme de contrôle applicable à la décision d'un organisme qui l'a obligé à interpréter une loi autre que sa loi habilitante. Dans le passage mentionné par le juge Binnie, les juges majoritaires concluent que, dans le cas où la norme de contrôle applicable à l'ensemble d'une décision est celle du caractère manifestement déraisonnable, la justesse de l'interprétation d'une loi non constitutive peut néanmoins influer sur le caractère raisonnable global de cette décision. Ce précédent n'est manifestement pas pertinent dans un cas comme la présente affaire où le ministre exerce son pouvoir en vertu d'une seule loi, à savoir sa loi habilitante. Compte tenu du présent contexte, le renvoi à ce précédent ne peut qu'indiquer à tort que, même dans ces circonstances, la norme du caractère manifestement déraisonnable doit, en ce qui concerne l'ensemble de la décision, ouvrir la porte au contrôle de l'interprétation de la loi selon la norme de la décision correcte. L'exception évidente, où il sera nécessaire d'appliquer à une question de droit une norme différente de celle applicable à l'ensemble de la décision, est le cas où la décision d'un organisme fait intervenir des questions d'ordre constitutionnel,

factors when making appointments under s. 6(5). It is a single issue.

It is true that some enabling statutes distinguish between the agency's factual and legal determinations. Such statutes may contemplate an appeal from the agency's legal determinations while protecting, with a privative clause, findings of fact. See e.g. *Telecommunications Act*, S.C. 1993, c. 38, s. 64(1). Yet, where there is no basis for dividing a decision into component questions — here the privative clause in s. 7 of the *HLDAA* expressly shields the entire appointment —, the single appropriate standard of review, and the deference it dictates, apply to all aspects of the decision. There is no basis for the view that an expert decision maker given due deference with regard to a discretionary appointment power is due less deference because the power is circumscribed by legislation, the suggestion being that there is a statutory interpretation aspect to his or her decision. The authorities that Binnie J. cites for the self-evident proposition that a discretion is never untrammelled and that "there is always a perspective within which a statute is intended to operate" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.)) do not indicate that each administrative action necessarily involves a distinct and identifiable exercise of statutory interpretation.

Indeed, it is worth recalling the basis on which the *CBC* case that Binnie J. cites, *supra*, discusses the standard for an agency's interpretation of an external statute. The key factor in the analysis in that case was the Canada Labour Relations Board's expertise. The concern was that the Board did not have expertise respecting the interpretation of the external statute. What was lacking was expertise as experience,

qui pourront nécessairement faire l'objet d'un contrôle fondé sur la norme de la décision correcte. Des cas particuliers comme l'affaire *SRC* seront traités au cas par cas. En l'espèce, cependant, la principale question qui se pose est de savoir si, en faisant des désignations en vertu du par. 6(5), le ministre a omis de prendre en considération des facteurs pertinents. Il s'agit là d'une seule question.

8 Il est vrai que certaines lois habilitantes établissent une distinction entre les décisions qu'un organisme prend sur le plan du droit et celles qu'il prend sur le plan des faits. Ces lois peuvent prévoir un droit d'interjeter appel contre les décisions de l'organisme portant sur des questions de droit, tout en protégeant, au moyen d'une clause privative, ses conclusions de fait. Voir, par exemple, la *Loi sur les télécommunications*, L.C. 1993, ch. 38, par. 64(1). Pourtant, lorsque rien ne justifie de diviser une décision en différentes questions — en l'espèce, la clause privative de l'art. 7 *LACTH* protège expressément la désignation en entier —, la seule norme de contrôle applicable et la déférence qu'elle commande visent tous les aspects de la décision. Rien ne justifie de considérer que, dans l'exercice d'un pouvoir discrétionnaire, un décideur spécialisé a droit à moins de déférence du fait que ce pouvoir est circonscrit par la loi, l'idée étant que sa décision comporte un volet « interprétation législative ». La jurisprudence que le juge Binnie cite à l'appui de la proposition évidente voulant qu'un pouvoir discrétionnaire ne soit jamais illimité et qu' [TRADUCTION] « une loi [soit] toujours censée s'appliquer dans une certaine optique » (*Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.)), n'indique pas que toute action administrative comporte nécessairement un exercice distinct et identifiable d'interprétation législative.

9 En réalité, il vaut la peine de se rappeler la raison pour laquelle l'arrêt *SRC*, précité, que cite le juge Binnie, analyse la norme de contrôle applicable à l'interprétation qu'un organisme donne d'une loi autre que sa loi constitutive. Le facteur clé de l'analyse dans cette affaire était l'expertise du Conseil canadien des relations du travail. On craignait que le Conseil n'ait pas l'expertise voulue pour

the kind that a board acquires from applying a statute repeatedly over time. The nature of this expertise as experience is made clear by Iacobucci J.'s caveat: "I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate" (*CBC*, *supra*, at para. 48; see also *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C.A.), leave to appeal refused June 20, 2002, [2002] 2 S.C.R. ix). Since the Minister has expertise at applying his own statute, it is difficult to see the relevance of discussing the interpretation of the external statute in *CBC*. Where the standard of review for a decision is patent unreasonableness, there is no reason to scrutinize more closely the decision maker's interpretation of its own statute.

10 Indeed, this Court developed the patent unreasonableness standard in the context of agencies engaged in interpreting their enabling legislation. The reviewing court's question will often be whether the statute can bear the agency's interpretation. This frequently requires of the reviewing court that it defer to the agency's interpretation of the enabling legislation. As L'Heureux-Dubé J. wrote for this Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 775, the patent unreasonableness standard ensures "that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision". See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

interpréter l'autre loi en question. Il lui manquait l'expertise constituée par l'expérience qu'un tel organisme acquiert à force d'appliquer une loi. Le juge Iacobucci définit clairement la nature de cette expertise constituée par l'expérience lorsqu'il fait remarquer « qu'une certaine retenue peut être indiquée dans des cas où la loi non constitutive se rapporte au mandat du tribunal et où celui-ci est souvent appelé à l'examiner » (*SRC*, précité, par. 48; voir aussi *Toronto Catholic District School Board c. Ontario English Catholic Teachers' Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 (C.A.), autorisation de pourvoi refusée le 20 juin 2002, [2002] 2 R.C.S. ix). Vu que le ministre a l'expertise voulue pour appliquer sa loi habilitante, on voit difficilement l'utilité d'analyser l'interprétation de la loi non constitutive dans l'affaire *SRC*. Dans le cas où la norme de contrôle applicable à une décision est celle du caractère manifestement déraisonnable, rien ne justifie d'examiner de plus près l'interprétation que le décideur donne de sa loi habilitante.

En fait, la Cour a établi la norme du caractère manifestement déraisonnable dans le contexte d'organismes qui interprétaient leur loi habilitante. La question que se pose souvent le tribunal qui effectue un contrôle judiciaire est de savoir si la loi peut être interprétée de la façon dont l'a fait l'organisme en cause. Pour répondre à cette question, le tribunal qui effectue le contrôle judiciaire doit souvent s'en remette à l'interprétation que l'organisme donne de sa loi habilitante. Comme la juge L'Heureux-Dubé l'écrivait, au nom de la Cour, dans l'arrêt *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, p. 775, la norme du caractère manifestement déraisonnable permet d'« éviter qu'un contrôle de la justesse de l'interprétation administrative ne serve de paravent, comme ce fut le cas dans le passé, à un interventionnisme axé sur le bien-fondé d'une décision donnée. » Voir aussi *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227.

Where, as here, the factors indicate that the question raised by the provision is one intended by the legislators to be left to the exclusive decision of the administrative decision maker (*Pushpanathan*, *supra*, at para. 26; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.), it is not one for the courts to make. Assignment of such questions to the decision maker does not serve merely to permit experienced persons to compile the record for the inevitable judicial review proceedings in a superior court. This is particularly clear in the present case, where the decision maker's — the Minister's — function is only to name a chairperson so that arbitration may proceed expeditiously. For the statutory scheme to function, the parties must believe, as a general rule, that where their disagreement requires the Minister to name a chairperson, that chairperson is validly chosen and the arbitration must proceed.

11 Lorsque, comme en l'espèce, les facteurs en présence indiquent que la question soulevée par la disposition en cause est une question que le législateur a voulu assujettir au pouvoir décisionnel exclusif de l'instance administrative (*Pushpanathan,* précité, par. 26; *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890, par. 18, le juge Sopinka), il n'appartient pas aux tribunaux judiciaires de se prononcer sur cette question. Le fait de confier au décideur le soin de trancher ces questions ne vise pas simplement à permettre à des personnes expérimentées de constituer le dossier nécessaire aux fins de l'inévitable contrôle judiciaire par une cour supérieure. Cela est particulièrement évident dans la présente affaire où l'unique fonction du décideur — à savoir le ministre — est de désigner un président ou une présidente afin que l'arbitrage puisse se dérouler promptement. Pour que le régime législatif fonctionne, les parties doivent croire qu'en règle générale, lorsque leur désaccord force le ministre à désigner une personne à la présidence, cette désignation est valide et l'arbitrage doit avoir lieu.

The difficulty may stem from Binnie J.'s importing a practical sense of how decisions are actually made into the specialized judicial review context. Obviously, one could divide nearly every administrative decision into preliminary determinations. Even a purely legal question of statutory interpretation relies on the prior factual determination that the decision maker was reading the correct version of the Act and not some other document. In the course of selecting a chairperson for an arbitral board, the Minister made choices concerning for instance which officials to consult and determined how many options were open to him. But for judicial review to be workable, courts generally operate on the assumption that they can isolate a single decision to be reviewed. They then determine one standard of review for that decision. For present purposes, it is unworkable to view the Minister's naming of an individual as comprising multiple determinations.

12 Le fait que le juge Binnie donne une explication pratique de la manière dont les décisions sont effectivement prises dans le contexte spécial du contrôle judiciaire peut constituer le problème. Manifestement, presque toute décision administrative pourrait être divisée en décisions préliminaires. Même une question purement juridique d'interprétation législative repose sur la décision factuelle préalable que le décideur interprétait la bonne version de la loi en cause, et non quelque autre document. En désignant une personne à la présidence d'un conseil d'arbitrage, le ministre a fait des choix concernant, par exemple, les fonctionnaires à consulter et a décidé combien de possibilités s'offraient à lui. Mais pour que le contrôle judiciaire soit possible, les cours de justice tiennent généralement pour acquis qu'elles peuvent isoler une décision pour la contrôler. Ils déterminent ensuite la norme de contrôle qui sera appliquée à cette décision. Pour les besoins du présent pourvoi, considérer que la désignation ministérielle d'une personne comporte maintes décisions pose des problèmes insurmontables.

Admittedly, the pragmatic and functional approach may require different standards of review

13 Certes, l'approche pragmatique et fonctionnelle peut exiger l'application de normes de contrôle

for different questions. This recognizes that the diversity of the contemporary administrative state includes different types of decision makers. Parliament and the provincial legislatures have not structured or qualified every agency to determine finally the same types of question. But judicial review would become grossly unwieldy and complex if each decision was to be viewed as a multiplicity of preliminary determinations.

différentes à des questions différentes. On reconnaît ainsi que la diversité qui caractérise l'État administratif contemporain comprend l'existence de différents types de décideurs. Le Parlement et les législatures provinciales n'ont pas structuré les organismes de manière à ce qu'ils puissent tous, en définitive, trancher le même genre de questions et ils ne les a pas non plus tous autorisés à le faire. Cependant, le contrôle judiciaire deviendrait excessivement lourd et complexe si chaque décision devait être considérée comme comportant maintes décisions préliminaires.

14 The question, then, is the standard of review for the exercise of the Minister's appointment power under s. 6(5) of the *HLDAA*. In my view, *Pushpanathan*, *supra*, and this Court's subsequent jurisprudence indicate unambiguously that the appropriate standard is patent unreasonableness.

La question qui se pose est donc celle de la norme de contrôle applicable à l'exercice du pouvoir ministériel de désignation conféré par le par. 6(5) *LACTH*. À mon avis, l'arrêt *Pushpanathan*, précité, et la jurisprudence subséquente de la Cour indiquent sans équivoque que la norme applicable est celle du caractère manifestement déraisonnable.

15 First, as Binnie J. notes, a privative clause (s. 7) precludes judicial review of a ministerial appointment. As noted in *Pushpanathan*, *supra*, at para. 30, the presence of a privative clause "is compelling evidence that the court ought to show deference to the [administrative decision maker's] decision".

En premier lieu, comme le souligne le juge Binnie, une clause privative (art. 7) empêche le contrôle judiciaire d'une désignation ministérielle. Comme on le précise l'arrêt *Pushpanathan*, précité, par. 30, la présence d'une clause privative « atteste persuasivement que la cour doit faire montre de retenue à l'égard de la décision » de l'instance décisionnelle administrative.

16 As Iacobucci J. noted in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50, the second and third factors, expertise and the purpose of the provision and the Act as a whole, often overlap. I will discuss them together. I agree with Binnie J. that the Minister and his officials know more about labour relations than do the courts. This Court has recently confirmed in a labour context that courts owe deference to the expert decision makers designated by the legislature: *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 566, 2001 SCC 47; *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23. Although, as Binnie J. notes, the Minister is asked to make an appointment on behalf of the parties, the particular provision at issue does not simply refer to a "qualified" person. Rather, s. 6(5) states that an appointee is to be qualified "in the opinion of the

Comme le juge Iacobucci l'a fait remarquer dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 50, les deuxième et troisième facteurs, à savoir l'expertise et l'objet de la disposition et de la loi dans son ensemble, se confondent souvent. Je vais analyser ces facteurs ensemble. Je partage l'avis du juge Binnie selon lequel le ministre et ses fonctionnaires ont une meilleure connaissance des relations du travail que les tribunaux judiciaires. La Cour confirmait récemment, dans un contexte de relations du travail, que les tribunaux judiciaires doivent faire montre de déférence à l'égard des décideurs spécialisés désignés par le législateur : *Ivanhoe inc. c. TUAC, section locale 500*, [2001] 2 R.C.S. 566, 2001 CSC 47; *Ajax (Ville) c. TCA, section locale 222*, [2000] 1 R.C.S. 538, 2000 CSC 23. Bien que, comme le souligne le juge Binnie, on demande au

Minister". I shall return to this important distinction in my discussion below of the relevant considerations. This specific language in the enabling provision demands deference: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30, where the legislation at issue referred, as in the present appeal, to the opinion of the Minister. See also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 57, *per* Binnie J.

ministre de faire une désignation au nom des parties, la disposition en cause ne renvoie simplement pas à une personne « compétente ». Le paragraphe 6(5) précise plutôt que la personne désignée doit être compétente « à son avis », c'est-à-dire de l'avis du ministre. Je reviendrai sur cette importante distinction dans l'analyse que je ferai des éléments pertinents qui doivent être pris en considération. Ce libellé particulier de la disposition habilitante commande la déférence : voir l'arrêt *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration),* [2002] 1 R.C.S. 3, 2002 CSC 1, par. 30, où la loi en cause mentionnait, comme en l'espèce, l'avis du ministre. Voir aussi *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41, par. 57, le juge Binnie.

I wish to emphasize the importance of expertise in determining the standard of review. Iacobucci J. has stated that expertise "is the most important of the factors that a court must consider in settling on a standard of review": *Southam*, *supra*, at para. 50. Expertise is the "substantive rationale for deference" (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 290). The concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters falling within their expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591, *per* Iacobucci J.; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46, *per* Gonthier J. This concept obviously applies to full-time tribunals composed of members possessing special qualifications or who presumptively acquire expertise during their lengthy terms (*Southam*, *supra*; *Pezim*, *supra*; *National Corn Growers*, *supra*; *New Brunswick Liquor Corp.*, *supra*). Yet other decision makers are also to be accorded deference on the basis of an expertise superior to that of the reviewing court. In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 50-53, this Court held that the collegial composition of the New Brunswick Judicial Council,

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Je tiens à souligner l'importance de l'expertise en ce qui concerne la détermination de la norme de contrôle applicable. Le juge Iacobucci a affirmé que l'expertise « est le facteur le plus important qu'une cour doit examiner pour arrêter la norme de contrôle applicable » : *Southam*, précité, par. 50. L'expertise constitue la [TRADUCTION] « justification fondamentale de la déférence » (D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 290). Le concept de la spécialisation des fonctions commande la déférence à l'égard des décisions que des tribunaux administratifs spécialisés rendent sur des questions relevant de leur champ d'expertise : *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 591, le juge Iacobucci; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1745-1746, le juge Gonthier. Ce concept s'applique manifestement aux tribunaux administratifs à temps plein composés de membres qui possèdent des compétences particulières ou qui sont présumés avoir acquis une expertise au cours de leurs longs mandats (*Southam*, *Pezim*, *National Corn Growers* et *Société des alcools du Nouveau-Brunswick*, précités). Pourtant, d'autres décideurs ont également droit à la déférence en raison de leur expertise plus grande que celle du tribunal qui effectue le contrôle judiciaire. Dans

among other factors, amounted to some expertise deserving deference, even though no member of the Council necessarily had qualifications any different from those of the reviewing judge. In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 32, the Court noted that the fact of being a lay person could, in the context of a lawyers' Discipline Committee, amount to a certain expertise distinct from that of a court in the sense that a lay person may better understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the legal profession and confidence in the administration of justice. As for Ministers exercising discretion, this Court's jurisprudence makes clear that they will be taken to have expertise, by virtue of their position, their ability to weigh policy concerns, and their access to information: *Suresh*, *supra*, at para. 31; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 59. In this case, in particular, the labour relations context is one more appropriately left to management by the legislatures and the executive than by the courts. As LeBel J. recently noted, "[t]he management of labour relations requires a delicate exercise in reconciling conflicting values and interests. The relevant political, social and economic considerations lie largely beyond the area of expertise of courts": *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, at para. 239. In the present case, then, the formal rationale for deference provided by the legislative text "in the opinion of the Minister" overlaps with the substantive rationale for deference, the fact that the Minister actually is better positioned to make the assessment than any reviewing court.

18 Finally, the fourth factor, the nature of the question, also points to deference. Appointment of a

l'arrêt *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11, par. 50-53, la Cour a statué que la composition collégiale du Conseil de la magistrature du Nouveau-Brunswick, notamment, représentait une expertise justifiant la déférence, même si aucun membre du Conseil ne possédait nécessairement des compétences différentes de celles du juge effectuant le contrôle judiciaire. Dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 32, la Cour a fait remarquer que le fait d'être un non-juriste pouvait, dans le contexte d'un comité de discipline pour les avocats, représenter une certaine expertise différente de celle d'un tribunal judiciaire, en ce sens qu'un non-juriste peut mieux comprendre en quoi certains comportements et certains choix de sanctions pourraient affecter l'image de la profession juridique dans le public en général et sa confiance dans l'administration de la justice. En ce qui concerne l'exercice d'un pouvoir discrétionnaire par un ministre, la jurisprudence de la Cour établit clairement que l'on considérera que le ministre a une expertise en raison du poste qu'il occupe, de son aptitude à évaluer des préoccupations de politique générale et de l'accès qu'il a à des sources d'information : *Suresh*, précité, par. 31; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 59. En l'espèce particulièrement, il convient davantage que le soin de gérer les relations du travail relève des pouvoirs législatif et exécutif que du pouvoir judiciaire. Comme l'a récemment fait remarquer le juge LeBel, « [l]a gestion des relations du travail exige un exercice délicat de conciliation des valeurs et intérêts divergents. Les considérations politiques, sociales et économiques pertinentes débordent largement du domaine d'expertise des tribunaux » : *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, 2001 CSC 70, par. 239. Donc, en l'espèce, la justification officielle de la déférence qu'expriment les mots « à son avis », c'est-à-dire de l'avis du ministre, se confond avec sa justification fondamentale, à savoir que le ministre est vraiment mieux placé pour procéder à l'évaluation qu'un tribunal qui effectue un contrôle judiciaire.

Enfin, le quatrième facteur, à savoir la nature de la question, milite lui aussi en faveur de la

particular arbitrator to a particular hospital labour dispute is "highly fact-based and contextual": *Suresh*, *supra*, at para. 31. More generally, discretionary decision makers are given "substantial leeway" and are presumptively due deference: *Baker*, *supra*, at para. 56. Furthermore, empowering the Minister, as opposed to an apolitical figure such as the Chief Justice of the province, suggests a legislative intent that political accountability also play a role in policing appointments and the integrity of hospitals interest arbitration. See *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at para. 50, *per* Major J.

The Minister's appointments are thus reviewable only on the most deferential, patent unreasonableness standard, and it is this standard I shall now apply.

II. Was Appointing Retired Judges Patently Unreasonable?

A. *The Standard of Patent Unreasonableness*

Before answering this question, it is helpful to review some of the ways that this Court has articulated the test for patent unreasonableness. These are not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?

In *Suresh*, *supra*, at para. 41, this Court indicated that a patently unreasonable decision is one that is unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures. This linkage of the nominate grounds for abuse of discretion with the patent unreasonableness standard demonstrates the unified approach to review of discretionary decision making set out by L'Heureux-Dubé J. in *Baker*, *supra*. Other formulations of the test for patent unreasonableness are also helpful. Most relevantly in this appeal, other formulations assist in

déférence. La désignation d'un arbitre pour un conflit de travail dans un hôpital est « largement contextuelle et tributaire des faits » : *Suresh*, précité, par. 31. De manière plus générale, les décideurs discrétionnaires disposent d'« une grande liberté d'action » et sont présumés avoir droit à la déférence : *Baker*, précité, par. 56. En outre, le fait d'habiliter le ministre, au lieu d'une personnalité apolitique comme le juge en chef de la province, indique que le législateur a voulu que la responsabilité politique joue elle aussi un rôle dans la surveillance des désignations et le maintien de l'intégrité des arbitrages de différends dans les hôpitaux. Voir *Comeau's Sea Foods Ltd. c. Canada (Ministre des Pêches et des Océans)*, [1997] 1 R.C.S. 12, par. 50, le juge Major.

19 Les désignations ministérielles ne peuvent ainsi faire l'objet d'un contrôle que selon la norme commandant la plus grande déférence, à savoir la norme du caractère manifestement déraisonnable, et c'est cette norme que je vais maintenant appliquer.

II. La désignation de juges retraités était-elle manifestement déraisonnable?

A. *La norme du caractère manifestement déraisonnable*

20 Avant de répondre à cette question, il est utile d'examiner certaines façons dont la Cour a formulé le critère du caractère manifestement déraisonnable. Il s'agit non pas de critères indépendants ou de rechange, mais simplement de façons d'exprimer la seule question qui se pose : qu'est-ce qui fait qu'une chose est manifestement déraisonnable?

21 Dans l'arrêt *Suresh*, précité, par. 41, la Cour a indiqué qu'une décision manifestement déraisonnable est une décision déraisonnable à première vue qui n'est pas étayée par la preuve ni viciée par l'omission de tenir compte des facteurs pertinents ou d'appliquer la procédure appropriée. Cette corrélation entre les causes énumérées d'abus de pouvoir discrétionnaire et la norme du caractère manifestement déraisonnable démontre l'approche unifiée que la juge L'Heureux-Dubé a exposée, dans l'arrêt *Baker*, précité, relativement au contrôle du processus décisionnel discrétionnaire. D'autres

construing the terms "vitiated by failure to consider the proper factors". A reweighing or reconsideration of factors that were originally considered will not suffice to vitiate the decision. Furthermore, it is not necessarily sufficient that a new relevant factor be invoked to vitiate the ministerial decision.

22 In *Ryan*, *supra*, Iacobucci J. writes that "[a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand" (para. 52).

23 In *Southam*, *supra*, Iacobucci J. distinguishes the reasonableness *simpliciter* standard from that of patent unreasonableness. He states that the difference lies "in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable." A decision is not patently unreasonable, he says, "if it takes some significant searching or testing to find the defect". He says too that "once the lines of the problem have come into focus, . . . the unreasonableness will be evident" (para. 57). Another way of getting at the evident quality of the unreasonableness is to say that once identified, a defect rendering a decision patently unreasonable "can be explained simply and easily" (*Ryan*, *supra*, at para. 52).

24 In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), Cory J. states that the "very strict test" of patent unreasonableness is whether the decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64).

25 These formulations indicate the high degree of deference in the patent unreasonableness standard. Even where a reasonableness *simpliciter* standard applies, the question is not what decision the

formulations du critère du caractère manifestement déraisonnable sont également utiles. Fait très pertinent en l'espèce, d'autres formulations aident à interpréter les mots « viciée par l'omission de tenir compte des facteurs pertinents ». La réévaluation ou le réexamen des éléments pris en considération initialement ne suffit pas pour que la décision soit viciée. Il ne suffit pas nécessairement non plus d'invoquer un nouveau facteur pertinent pour que la décision ministérielle soit viciée.

Dans l'arrêt *Ryan*, précité, le juge Iacobucci écrit qu'« [u]ne décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir » (par. 52).

Dans l'arrêt *Southam*, précité, le juge Iacobucci établit une distinction entre la norme de la décision raisonnable *simpliciter* et celle du caractère manifestement déraisonnable. Selon lui, la différence réside « dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. » Une décision n'est pas manifestement déraisonnable, dit-il, « s'il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut ». Il ajoute qu'« une fois que les contours du problème sont devenus apparents, [. . .] [le] caractère déraisonnable ressortira » (par. 57). Une autre façon d'appréhender l'aspect manifeste du caractère déraisonnable consiste à dire que, dès qu'il est relevé, le défaut qui rend une décision manifestement déraisonnable « peut être expliqué simplement et facilement » (*Ryan*, précité, par. 52).

Dans l'arrêt *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1993] 1 R.C.S. 941 (« *AFPC* »), le juge Cory affirme que le « critère très strict » du caractère manifestement déraisonnable consiste à se demander si une décision est « clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison » (p. 963-964).

Il ressort de ces formulations que la norme du caractère manifestement déraisonnable commande une grande déférence. Même lorsque la norme de la décision raisonnable *simpliciter* s'applique, la

reviewing judge would have made in the shoes of the administrative decision maker: *Southam*, *supra*, at paras 79-80, *per* Iacobucci J. This is even more the case when the standard is patent unreasonableness. Indeed, this Court has stated explicitly that a reviewing court's role is not to reweigh the factors considered by the discretionary decision maker: *Suresh*, *supra*, at paras. 37-41. Nor is the goal to review the decision or action on its merits: *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at para. 53, *per* L'Heureux-Dubé J.

question n'est pas de savoir quelle décision aurait rendue le juge qui effectue le contrôle s'il avait été à la place de l'instance décisionnelle administrative : *Southam*, précité, par. 79-80, le juge Iacobucci. Cela est d'autant plus vrai lorsque la norme applicable est celle du caractère manifestement déraisonnable. En fait, la Cour a précisé que le rôle du tribunal qui effectue un contrôle judiciaire n'est pas de réévaluer les facteurs considérés par le décideur discrétionnaire : *Suresh*, précité, par. 37-41. L'objectif n'est pas non plus de contrôler la décision ou l'action quant au fond : *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793, par. 53, la juge L'Heureux-Dubé.

Having set out this background on the standard, I turn now to apply that standard to the Minister's appointments of chairpersons.

26 Après avoir exposé le contexte dans lequel elle s'applique, je vais maintenant appliquer la norme aux désignations ministérielles des présidents.

B. *Application of the Standard*

B. *Application de la norme*

Binnie J. concludes that the appointments were patently unreasonable because the Minister's approach excluded relevant criteria (labour relations experience and broad acceptability) and substituted another criterion (prior judicial experience).

27 Le juge Binnie conclut que les désignations étaient manifestement déraisonnables parce que l'approche adoptée par le ministre excluait les critères pertinents (expertise en matière de relations du travail et acceptabilité générale) et leur substituait un autre critère (expérience judiciaire antérieure).

This assessment requires that we determine the relevant criteria for exercise of the discretion, or at least whether the Minister relied upon irrelevant criteria or failed to consider a relevant and important criterion. I agree with Binnie J. that a contextual approach to statutory interpretation of the enabling legislation is necessary for determining the relevant criteria. We disagree, however, as to what the essential criteria ultimately turn out to be. We disagree as to which factor or factors must be given primary importance for an appointment to survive review as not "clearly irrational" or patently unreasonable.

28 Cette appréciation oblige à déterminer les critères pertinents pour l'exercice du pouvoir discrétionnaire, ou du moins à se demander si le ministre s'est fondé sur des critères non pertinents ou encore s'il a omis de prendre en considération un critère pertinent et important. Je partage l'avis du juge Binnie selon lequel, pour déterminer les critères pertinents, il faut interpréter la loi habilitante selon une méthode contextuelle. Nous sommes, toutefois, en désaccord sur ce qui, en définitive, s'est révélé être les critères essentiels. Nous ne nous entendons pas sur la question de savoir à quel facteur (ou quels facteurs) il faut accorder une importance primordiale pour qu'une désignation résiste au contrôle pour le motif qu'elle n'est ni « clairement irrationnelle » ni manifestement déraisonnable.

In the clearest of cases, the criteria constraining the exercise of a discretion will be spelled out in the legislation itself. In other cases, the relevant factors to consider will be specified in regulations

29 Dans les cas les plus évidents, la loi elle-même énumère les critères qui limitent l'exercice d'un pouvoir discrétionnaire. Dans d'autres cas, des règlements ou des lignes directrices précisent les

or guidelines. For example, in *Baker*, *supra*, this Court quashed the immigration officer's decision. In making the decision, the officer had failed to consider a factor expressly included in the relevant guidelines issued by the Minister of Citizenship and Immigration. Other indications of the important considerations were found in the specific purposes of the relevant Act and in international instruments (*Baker*, *supra*, at para. 67). In that appeal, the appropriate standard of review was the less deferential standard of reasonableness *simpliciter*. In other words, *Baker* says nothing one way or the other as to whether the failure to weigh heavily the interests of the children — a factor explicitly stated in the relevant documents — would have vitiated the decision as patently unreasonable. In yet another category of cases, the relevant factors may be unwritten, derived from the purpose and context of the statute. For example, in *Roncarelli*, *supra*, this Court reasonably inferred that denying or revoking a liquor permit for reasons irrelevant to the sale of liquor in a restaurant lay beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act*. Note, however, that it was an irrelevant factor that was inferred in *Roncarelli*. A statute cannot reasonably spell out and exclude in advance every irrelevant, bad faith or abusive consideration. It is much simpler for a legislator to spell out the relevant factors, and we often expect it to have done so. I would caution, then, against reviewing courts too easily concluding that implied factors are relevant and that failure, first to perceive them at all, and second to consider them, vitiates a decision. What, then, are the relevant factors in this case?

30 In this case, the statute does not say very much. It stipulates that appointees must be "qualified to act". It also states, significantly, that it is "in the opinion of the Minister" that such persons must be qualified

éléments pertinents qui doivent être considérés. Par exemple, dans l'arrêt *Baker*, précité, la Cour a annulé la décision de l'agent d'immigration. En rendant sa décision, celui-ci n'avait pas tenu compte d'un facteur explicitement prévu dans les lignes directrices pertinentes du ministre de la Citoyenneté et de l'Immigration. D'autres indications des éléments importants devant être pris en considération ressortaient des objets particuliers de la loi applicable, et des instruments internationaux (*Baker*, précité, par. 67). Dans ce pourvoi, la norme de contrôle applicable était celle de la décision raisonnable *simpliciter*, qui commande moins de déférence. Autrement dit, l'arrêt *Baker* ne dit absolument rien au sujet de la question de savoir si l'omission d'accorder de l'importance aux intérêts des enfants — facteur prévu explicitement dans les documents pertinents — aurait vicié la décision en la rendant manifestement déraisonnable. Là encore, dans une autre catégorie de cas, les facteurs pertinents peuvent être tacites et émaner de l'objet et du contexte de la loi en cause. Par exemple, dans l'arrêt *Roncarelli*, précité, la Cour a raisonnablement inféré que le refus ou la révocation d'un permis d'alcool, pour des raisons n'ayant rien à voir avec la vente d'alcool dans un restaurant, outrepassait le pouvoir discrétionnaire conféré à la Commission par la *Loi des liqueurs alcooliques*. Cependant, il y a lieu de noter que l'on a inféré un facteur non pertinent dans l'arrêt *Roncarelli*. Une loi ne peut pas raisonnablement énumérer et exclure d'avance tout facteur non pertinent, caractérisé par la mauvaise foi ou encore abusif. Il est beaucoup plus simple pour le législateur d'énumérer les facteurs pertinents et c'est ce à quoi nous nous attendons souvent. Par conséquent, je déconseille aux tribunaux qui effectuent un contrôle judiciaire de conclure trop facilement que des facteurs implicites sont pertinents et que le défaut, premièrement, de les percevoir et, deuxièmement, de les prendre en considération, a pour effet de vicier une décision. Quels sont donc les facteurs pertinents en l'espèce?

Dans la présente affaire, la loi applicable ne dit pas grand-chose. Elle prévoit que les personnes désignées doivent être « compétentes pour agir en cette qualité [d'arbitre]. » Fait révélateur,

to act. In other words, the statute expressly contemplates that the Minister's opinion is important. I have already noted these words in determining the appropriate degree of deference. There are no relevant regulations, guidelines, or other instruments. Are there other relevant factors? In other words, can the reviewing court infer other factors relevant to the Minister in appointing a chairperson under s. 6(5) from the legislative context?

elle prévoit également que c'est « à son avis », c'est-à-dire de l'avis du ministre, que ces personnes doivent être compétentes pour agir en qualité d'arbitre. En d'autres termes, la loi prévoit expressément que l'avis du ministre est important. J'ai déjà souligné ces mots en déterminant le degré de déférence approprié. Il n'y a aucun règlement, aucune ligne directrice ni aucun autre instrument pertinents. Y a-t-il d'autres facteurs pertinents? En d'autres termes, le tribunal qui effectue le contrôle judiciaire peut-il inférer du contexte législatif l'existence d'autres facteurs pertinents aux fins de désignation ministérielle d'un président ou d'une présidente en vertu du par. 6(5)?

Binnie J. states that the "need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour" (para. 177). I am not persuaded that either repetition of this need by Ministers of Labour or the context in which particular labour relations expertise and broad acceptability may have appeared essential constitutes a basis for implying dominant factors, as if they were stipulated in regulations or guidelines. Nor are these factors obvious, like the fact, in *Roncarelli*, *supra*, that discretion to renew a liquor licence must not be wielded to punish a person who posts bail for fellow members of a religious minority.

31 Le juge Binnie dit que « les ministres du Travail qui se sont succédé [. . .] ont constamment réitéré le besoin d'expertise en relations du travail, d'indépendance et d'impartialité, que traduit la notion d'acceptabilité générale » (par. 177). Je ne suis pas convaincu que le fait que des ministres du Travail aient réitéré ce besoin, ou le contexte dans lequel une expertise particulière en matière de relations du travail et une acceptabilité générale peuvent avoir paru essentielles, justifie de supposer l'existence de facteurs dominants, comme s'ils étaient prévus dans des règlements ou des lignes directrices. Ces facteurs ne sont pas évidents non plus, comme le fait, dans l'arrêt *Roncarelli*, précité, que le pouvoir discrétionnaire de renouveler un permis d'alcool ne doit pas servir à punir une personne qui fournit un cautionnement pour des membres de la minorité religieuse à laquelle elle appartient.

I have already noted that a patently unreasonable decision is one marked by the immediacy or obviousness of the defect. Where the alleged defect is failure to consider relevant factors, I think it important that those factors must themselves be immediately identifiable or obvious. In accordance with their duty, counsel for the respondents have assiduously compiled a record that presents the need for labour relations expertise and broad acceptability in its best light. They have collected excerpts from various reports, the legislative history of the *HLDAA*, and statements by Ministers of Labour. The fact that these materials are neatly compiled in the respondents' record makes the significance of those

32 J'ai déjà fait remarquer qu'une décision manifestement déraisonnable est caractérisée par le caractère flagrant ou évident du défaut qu'elle comporte. Lorsque le défaut allégué est l'omission de tenir compte de facteurs pertinents, je pense qu'il est important que ces facteurs soient eux-mêmes flagrants ou évidents. Conformément à leur devoir, les avocats des intimés ont pris soin de constituer un dossier présentant sous son aspect le plus favorable le besoin d'acceptabilité générale et d'expertise en matière de relations du travail. Ils ont rassemblé des extraits de divers rapports, l'historique législatif de la *LACTH* ainsi que des déclarations de ministres du Travail. Le fait que

criteria obvious, or at least much more obvious, than it has ever been. I do not dispute that the respondents made a good case for the importance of reading those factors into the statute, but doing so was a difficult task. In my view, the general affirmations and aspirations Binnie J. refers to in para. 110 came nowhere near the evidentiary threshold for imposing a specific restriction on the wide discretion set out in s. 6(5). Would the factors Binnie J. relies upon have been obvious to a new Minister of Labour called on to exercise his discretion under s. 6(5)? Could the Minister have been expected to compile a thorough history of the *HLDAA* before acting? I do not believe so.

33 Binnie J. states that there is no need to impute to the Minister a knowledge of the *HLDAA*'s legislative history, because the Minister himself summarized the legislative intent in a letter. My difficulty with this comment is that the reviewing court's exercise is simply to determine what is required by the enabling statute. If, as I suggest, we could not reasonably expect that the bare text of s. 6(5) would give to a subsequent Minister of Labour an appreciation of all the factors that Binnie J. finds relevant, this is significant. Binnie J. also characterizes that letter of February 2, 1998, as having "defined" the Minister's mandate (para. 183). I do not think that statements by the Minister expressing his opinion as to his own role should be taken as constraining his discretion or as, effectively, writing new conditions into the statute. The Minister could not eliminate relevant statutory criteria by making a statement or writing a letter; I do not think that by the same means he can add any. The Minister's own letter does not constrain his discretion or define his mandate in the same way that, in *Baker*, official guidelines, the specific purposes of the Act, and the pertinent international instruments framed the relevant considerations for the administrative official. Indeed, the letter of February 2, 1998, is not inconsistent with the Minister's eventual appointments: the Minister was of the opinion that the parties must perceive the process as

ces documents soient soigneusement réunis dans le dossier des intimés rend l'importance de ces critères évidente ou, du moins, beaucoup plus évidente qu'elle ne l'a jamais été. Je ne conteste pas que les intimés ont bien démontré, non sans peine, l'importance de considérer que la loi en cause inclut ces facteurs. À mon avis, les affirmations et les aspirations générales que le juge Binnie mentionne au par. 110 sont loin de correspondre à la norme de preuve requise pour assujettir à une restriction particulière le large pouvoir discrétionnaire prévu au par. 6(5). Les facteurs sur lesquels s'appuie le juge Binnie auraient-ils été évidents aux yeux d'un nouveau ministre du Travail appelé à exercer le pouvoir discrétionnaire que lui confère le par. 6(5)? Pouvait-on s'attendre à ce que le ministre fasse l'historique complet de la *LACTH* avant d'agir? Je ne le crois pas.

Selon le juge Binnie, il n'est pas nécessaire de supposer que le ministre a une connaissance de l'historique de la *LACTH*, étant donné qu'il a lui-même résumé l'intention du législateur dans une lettre. Selon moi, le problème que pose ce commentaire réside dans le fait que le tribunal qui effectue le contrôle judiciaire est simplement tenu de déterminer ce qu'exige la loi habilitante. Cela serait important si, comme je l'indique, nous ne pouvions pas raisonnablement nous attendre à ce que le seul texte du par. 6(5) fournisse à un ministre du Travail subséquent une appréciation de tous les facteurs jugés pertinents par le juge Binnie. Le juge Binnie considère aussi que la lettre du 2 février 1998 « définissait » le mandat du ministre (par. 183). Je ne crois pas qu'il y ait lieu de considérer que les affirmations dans lesquelles le ministre exprime son avis au sujet de son propre rôle limitent son pouvoir discrétionnaire ou qu'elles ont pour effet d'ajouter d'autres conditions dans la Loi. Le ministre ne pouvait pas éliminer des critères légaux pertinents au moyen d'une affirmation ou d'une lettre; je ne crois pas non plus qu'il puisse en ajouter de la même façon. La lettre que le ministre a rédigée ne limite pas son pouvoir discrétionnaire ou ne définit pas son mandat de la même façon que, dans l'affaire *Baker*, les lignes directrices officielles, les objets particuliers de la Loi et les instruments internationaux pertinents énonçaient

credible; he was also, evidently, of the opinion that the persons he appointed were qualified to act.

les éléments pertinents que le fonctionnaire de l'organisme administratif devait prendre en considération. En fait, la lettre du 2 février 1998 n'est pas incompatible avec les désignations que le ministre a faites en définitive : le ministre était d'avis que les parties doivent percevoir le processus comme étant crédible; de toute évidence, il estimait aussi que les personnes qu'il a désignées étaient compétentes pour agir en qualité d'arbitre.

Binnie J. notes that the parties brought our attention to subsequent provincial legislation, the *Back to School Act (Toronto and Windsor), 2001*, S.O. 2001, c. 1, that explicitly enables a Minister to appoint a replacement arbitrator lacking certain characteristics. The unions suggested that where the legislature wishes to rule out relevant experience and the other *indicia* of an objectively qualified chairperson, it knows how to do so. I note that such a provision also shows that, where the legislature so intends, it knows how to specify in some detail the positive or negative attributes of potential chairpersons. In any event, it is an error, in my view, to assume, *a contrario*, that the term "in the opinion of the Minister, qualified to act" in the *HLDAA* requires the presence of characteristics that may be dispensed with under the later, unrelated statute.

34 Le juge Binnie fait observer que les parties ont attiré notre attention sur une loi provinciale subséquente, la *Loi de 2001 sur le retour à l'école (Toronto et Windsor)*, L.O. 2001, ch. 1, qui habilite explicitement un ministre à nommer un nouvel arbitre qui ne possède pas certains attributs. Les syndicats ont indiqué que, lorsque le législateur souhaite écarter l'expérience pertinente et les autres indices d'un président objectivement compétent, il sait comment s'y prendre. Je souligne qu'une telle disposition démontre également que, lorsque le législateur le souhaite, il sait comment préciser en détail les attributs positifs ou négatifs des présidents potentiels. De toute manière, j'estime qu'il est erroné de présumer au contraire que la condition « à son avis [c'est-à-dire de l'avis du ministre], est compétente pour agir en cette qualité », imposée dans la *LACTH*, exige la présence d'attributs dont il est possible de se passer en vertu de la loi susmentionnée qui n'a aucun lien avec la *LACTH*.

The Minister in the present appeal developed an opinion as to who was qualified to act. He determined that judging experience was relevant. He valued professional experience as an impartial decision maker. He recognized that judges are typically generalists who quickly learn the necessary substance within the context of each case. The Minister clearly gave experience in the health field less weight than some would have preferred; this is because he was dealing with parties unable to agree on a mutually acceptable qualified person and thought experience as an impartial decision maker was more crucial. All we can presume is that, all things considered, he found independence and experience at judicially resolving disputes to be more important. The *HLDAA* called for the

35 En l'espèce, le ministre s'est formé une opinion quant aux personnes qui étaient compétentes pour agir en qualité d'arbitre. Il a décidé que l'expérience en tant que juge était pertinente. Il a accordé de l'importance à l'expérience professionnelle acquise en tant que décideur impartial. Il a reconnu que les juges sont ordinairement des généralistes qui comprennent rapidement quels éléments de fond doivent être pris en considération dans chaque cas. Il est évident que le ministre a accordé moins d'importance à l'expérience acquise dans le domaine de la santé que l'auraient préféré certaines personnes, et ce, parce qu'il traitait avec des parties incapables de s'entendre sur le choix d'une personne compétente qui leur serait acceptable, et qu'il croyait que l'expérience en tant que décideur impartial était

Minister to reach his own opinion, not to consider a specific determining factor. In my view, Binnie J. has effectively read out of the provision one of its most important elements, that it is in the Minister's opinion, not viewed objectively by some constant standard, that persons are to be qualified. This is not to say that the opinion of the Minister is totally unfettered, as I will explain later in these reasons.

plus cruciale. Tout ce que nous pouvons présumer, c'est que, tout compte fait, il a jugé plus importantes l'indépendance et l'expérience en matière de règlement judiciaire des conflits. La *LACTH* exigeait que le ministre forme sa propre opinion et non qu'il prenne en considération un facteur déterminant particulier. J'estime qu'en réalité le juge Binnie a fait abstraction de l'un des plus importants éléments de cette loi, à savoir que les personnes doivent être compétentes de l'avis du ministre et non d'un point de vue objectif conforme à une norme fixe. Cela ne signifie pas que l'avis du ministre n'est assujetti à aucune limite, comme je l'expliquerai plus loin.

36 Given how much work it takes even to identify the factors at issue in this appeal (labour relations experience and broad acceptability) and to imply them into s. 6(5), I am reluctant to conclude that weighing them less heavily than another factor, also unwritten (judicial experience), vitiated the appointments as patently unreasonable. Using the language of Iacobucci J. in *Southam*, at para. 57, cited above, I would say that the Minister's appointments were not patently unreasonable because "it takes some significant searching or testing to find the defect", if there is one. More problematic for Binnie J.'s approach, in my view, is the fact that it takes "some significant searching" even to find the factors said to constrain the Minister. It is difficult to characterize the Minister's appointments as immediately or obviously defective, particularly when the factors are not themselves immediately or obviously ascertainable. The flaw cannot be explained simply and easily. Or to draw on Cory J.'s approach in *PSAC*, *supra*, at pp. 963-64, it is difficult to argue that the appointments were "evidently not in accordance with reason" or "clearly irrational". Turning to *Ryan*, when the compelling rationale for curial deference is borne in mind — in particular the Minister's superior expertise at labour relations — it becomes difficult to say that the appointments are "so flawed that no amount of curial deference" could justify letting them stand. Returning, finally, to *Suresh*, a failure to consider the proper factors, even if I were to accept them as determinative, fails to vitiate the Minister's decision because the factors themselves were not

Compte tenu de la somme de travail qui est nécessaire ne serait-ce que pour relever les facteurs en cause dans le présent pourvoi (expérience en relations du travail et acceptabilité générale) et supposer qu'ils sont prévus au par. 6(5), j'hésite à conclure que le fait de leur accorder moins d'importance qu'à un autre facteur, également tacite (l'expérience judiciaire), a vicié les désignations en les rendant manifestement déraisonnables. Pour reprendre les propos tenus par le juge Iacobucci dans l'arrêt *Southam*, précité, par. 57, je dirais que les désignations ministérielles n'étaient pas manifestement déraisonnables parce qu'« il faut procéder à un examen ou à une analyse en profondeur pour déceler le défaut » qu'elles comportent, à supposer que ce soit le cas. J'estime que la plus grande difficulté que soulève l'approche du juge Binnie est le fait qu'il faut procéder à « un examen en profondeur » ne serait-ce que pour déceler les facteurs qui, dit-on, restreignent la liberté d'action du ministre. Il est difficile de considérer que les désignations ministérielles comportent un défaut flagrant ou évident, particulièrement si les facteurs eux-mêmes ne sont pas flagrants ou évidents. Le défaut ne peut pas être expliqué simplement et facilement. Ou, pour reprendre l'approche du juge Cory dans l'arrêt *AFPC*, précité, p. 963, il est difficile de soutenir que les désignations étaient « de toute évidence non conforme[s] à la raison » ou « clairement irrationnelle[s] ». Quand à l'arrêt *Ryan*, si l'on tient compte de la justification impérieuse de la déférence judiciaire — notamment la plus grande expertise du ministre en matière de

obvious and uncontroversial. These are all different ways of expressing the conclusion that the appointments were not patently unreasonable.

relations du travail —, il devient difficile d'affirmer que les désignations sont « à ce point viciée[s] qu'aucun degré de déférence judiciaire » ne pourrait justifier de les maintenir. Enfin, pour revenir à l'arrêt *Suresh*, l'omission de prendre en considération les facteurs pertinents, même si je devais les reconnaître comme déterminants, ne vicie pas la décision du ministre parce que les facteurs eux-mêmes n'étaient pas évidents et ne soulevaient aucune controverse. Voilà autant de manières différentes de conclure que les désignations n'étaient pas manifestement déraisonnables.

This is not to say that others would have made the same appointments, nor is it to speculate whether, if polled, the electorate would or would not approve. But in light of the statutory scheme, the context, and the deference due the Minister, I cannot say that the appointments satisfied the "very strict test" (*PSAC*, *supra*, at p. 964) marking them as patently unreasonable. Moreover, the legislation requires us to give weight to the Minister's opinion of the factors, or at least of what would make someone qualified to act.

37 Cela ne signifie pas que d'autres auraient fait les mêmes désignations, et il ne s'agit pas non plus d'émettre des hypothèses quant à savoir si l'électorat les approuverait s'il était consulté. Cependant, compte tenu du régime législatif, du contexte et de la déférence à laquelle a droit le ministre, je ne puis affirmer que les désignations satisfaisaient au « critère très strict » (*AFPC*, précité, p. 964) qui permettrait de les qualifier de manifestement déraisonnables. La Loi nous oblige, en outre, à accorder de l'importance à l'avis du ministre concernant les facteurs ou concernant du moins ce qui rendrait une personne compétente pour agir en qualité d'arbitre.

Arguments made by both the appellant and the respondents impel me to make two related further comments.

38 Les arguments avancés à la fois par l'appelant et par les intimés m'incitent à faire deux autres remarques connexes.

First, my conclusion respecting the appointments challenged in this appeal does not endorse the appellant's submission that the sole factors that would disqualify a person from appointment as a chairperson under s. 6(5) are those explicitly set out in s. 6(12) of the *HLDAA*. That subsection precludes the Minister from appointing a person who has a pecuniary interest in the matters before the board or who has acted as counsel for one of the parties within the previous six months. I do not accept the appellant's argument that this is an exhaustive listing of all disqualifying factors or factors that would render an appointment patently unreasonable.

39 En premier lieu, en tirant ma conclusion relative aux désignations contestées en l'espèce, je ne retiens pas l'argument de l'appelant selon lequel les seuls facteurs qui rendraient une personne inhabile à être désignée à la présidence en vertu du par. 6(5) sont ceux qui sont explicitement énoncés au par. 6(12) *LACTH*. Ce paragraphe interdit au ministre de désigner une personne qui a un intérêt pécuniaire dans les questions dont le conseil est saisi ou qui a exercé des fonctions d'avocat pour l'une des parties au cours des six mois précédents. Je ne retiens pas l'argument de l'appelant voulant qu'il s'agisse là d'une liste exhaustive de tous les facteurs qui rendent une personne inhabile à être désignée ou des facteurs qui rendraient une désignation manifestement déraisonnable.

40 Second, as the respondents note, it is of course the case that the Minister's discretion to appoint is not unfettered and must be exercised within the scope of the Act: *Baker*, *supra*; *Padfield*, *supra*; *Roncarelli*, *supra*. My conclusions here do not authorize the Minister to decide to appoint only members of his own political caucus, hospital CEOs, or union business agents. These extreme examples are not, however, the facts before us in this appeal.

En second lieu, comme le font remarquer les intimés, il va de soi que le pouvoir de désignation discrétionnaire du ministre n'est pas illimité et qu'il doit être exercé conformément à la Loi : *Baker*, *Padfield* et *Roncarelli*, précités. Mes conclusions en l'espèce n'autorisent pas le ministre à désigner seulement des membres de son caucus politique, des directeurs généraux d'hôpitaux ou des agents d'affaires syndicaux. De tels exemples extrêmes ne correspondent toutefois pas aux faits dont nous sommes saisis en l'espèce.

III. Can the Unions Challenge the Boards' Independence and Impartiality Here?

III. Les syndicats peuvent-ils mettre en doute l'indépendance et l'impartialité des conseils en l'espèce?

41 Having decided that the appointments were patently unreasonable on the basis of irrelevant considerations, Binnie J. goes on to consider an alternative argument. He considers whether the Minister's appointments were also patently unreasonable on the basis that they resulted in arbitration boards possibly perceived as lacking institutional independence and impartiality.

Après avoir décidé que les désignations étaient manifestement déraisonnables pour le motif qu'elles reposaient sur des facteurs non pertinents, le juge Binnie examine ensuite un argument subsidiaire. Il se demande si les désignations ministérielles étaient également manifestement déraisonnables pour le motif qu'elles ont entraîné la constitution de conseils d'arbitrage susceptibles d'être perçus comme étant dépourvus d'indépendance et d'impartialité institutionnelles.

42 Binnie J. addresses this argument primarily on the basis that the Court of Appeal declared that the Minister "created a reasonable apprehension of bias and interfered with the independence and impartiality of boards of arbitration . . . contrary to the principles and requirement of fairness and natural justice" (para. 186).

Le juge Binnie examine cet argument principalement à la lumière du fait que la Cour d'appel a déclaré que le ministre [TRADUCTION] « a suscité une crainte raisonnable de partialité et compromis l'indépendance et l'impartialité des conseils d'arbitrage [. . .] contrairement aux principes et à l'obligation d'équité et de justice naturelle » (par. 186).

43 I agree with Binnie J. that neither concerns about institutional independence (the *ad hoc* tribunals' lack of security of tenure) nor institutional impartiality (appointment of persons from the class of retired judges) render the Minister's exercise of his appointment power patently unreasonable. The statutory scheme requires that the tribunals be *ad hoc*, constituted to resolve a particular dispute. Retired judges as a class cannot reasonably be seen as so partial that finding them to be "qualified to act" took the Minister outside the bounds of his

Je partage l'avis du juge Binnie selon lequel ni les préoccupations relatives à l'indépendance institutionnelle (l'inamovibilité des tribunaux administratifs *ad hoc*) ni celles relatives à l'impartialité institutionnelle (la désignation de personnes faisant partie de la catégorie des juges retraités) ne rendent manifestement déraisonnable l'exercice par le ministre de son pouvoir de désignation. Le régime législatif exige que les tribunaux administratifs soient *ad hoc*, c'est-à-dire constitués pour résoudre un différend particulier. En tant que catégorie,

statutory discretion: *Baker*, *supra*; *Padfield*, *supra*; *Roncarelli*, *supra*.

les juges retraités ne peuvent pas être raisonnablement perçus comme étant à ce point partiaux qu'en les qualifiant de « compétents pour agir » en qualité d'arbitre le ministre a excédé le pouvoir discrétionnaire que lui confère la Loi : *Baker*, *Padfield* et *Roncarelli*, précités.

I also agree with Binnie J. that the unsuccessful challenge to the institutional independence and impartiality of the boards as a group does not foreclose the possibility of a successful challenge to a particular board by a party on the basis of particular facts. Indeed, in my view, it is awkward to raise arguments relating to the boards' independence and impartiality in the context of a challenge to the exercise of the Minister's discretion. In exercising his power of appointment under s. 6(5), the Minister cannot be expected to anticipate and avoid the full set of factors that might, in the context of a particular board, run afoul of the duty of procedural fairness that will bear upon that board. Even for strategic purposes, I would have thought it best for the respondents to save arguments about the natural justice requirements of the boards for any eventual challenge to a particular board. As this Court has noted, attacks on the independence or impartiality of a board are most convincingly made with evidence of how that board operates in practice: *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, at para. 1; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paras. 117-23, *per* Sopinka J. My opinion on this point finds support in the decision of Binnie J. not to apply retrospectively a finding that the boards constituted by the Minister were not impartial.

44 Je conviens également avec le juge Binnie que l'échec de la contestation mettant en cause l'indépendance et l'impartialité institutionnelles des conseils, en tant que catégorie, n'empêche pas une partie de mettre en doute avec succès l'indépendance et l'impartialité institutionnelles d'un conseil en se fondant sur des faits particuliers. En fait, j'estime qu'il est malencontreux d'avancer des arguments concernant l'indépendance et l'impartialité des conseils dans le cadre d'une contestation de l'exercice du pouvoir ministériel discrétionnaire. On ne peut pas s'attendre à ce que, en exerçant le pouvoir de désignation que lui confère le par. 6(5), le ministre prévoie et évite tous les facteurs qui, dans le cas d'un conseil particulier, sont susceptibles de contrecarrer l'obligation d'équité procédurale qui incombe à ce conseil. Même pour des raisons stratégiques, je pense qu'il aurait mieux valu que les intimés réservent les arguments portant sur les exigences de la justice naturelle auxquelles les conseils doivent satisfaire pour attaquer éventuellement un conseil particulier. Comme la Cour l'a souligné, les contestations mettant en cause l'indépendance et l'impartialité d'un conseil sont très convaincantes lorsqu'elles s'accompagnent d'une preuve de la manière dont le conseil fonctionne en pratique : *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405, par. 1; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 117-123, le juge Sopinka. Mon opinion à ce sujet est étayée par la décision du juge Binnie de ne pas appliquer rétroactivement la conclusion que les conseils constitués par le ministre n'étaient pas impartiaux.

I note in passing that, in framing the allegations concerning the boards' independence and impartiality as a claim that the Minister exercised his power patently unreasonably, Binnie J. is generous. He presents this line of argument in by far its most favourable light. A reading of the respondents' factum easily suggests that they were making

45 Je note en passant qu'en formulant les allégations concernant l'indépendance et l'impartialité des conseils sous la forme d'une prétention que le ministre a exercé son pouvoir discrétionnaire d'une manière manifestement déraisonnable, le juge Binnie fait preuve de générosité. Il présente ce type d'argument sous son aspect de loin le plus favorable. Il n'y a pas

the argument that if the Minister appointed boards that would themselves, in operation, fall short of the demands of natural justice, he thereby breached his own duty of procedural fairness. This is certainly the implication from the respondents' arguments, in this context, that the duty of fairness required the Minister to exercise his appointment power in conformity with the principles of natural justice. As Binnie J. discusses, however, there is no sound argument in this case that the Minister acted unfairly in the sense of violating his duty of procedural fairness.

46 To conclude, a reviewing court should not, in my view, find too readily that a discretionary decision was patently unreasonable. To do so dilutes the value of the patent unreasonableness standard and promotes inappropriate judicial intervention. Recognition of the seriousness of quashing a decision as patently unreasonable is crucial to maintaining the discipline of judicial restraint and deference. This is especially the case where there were few indicators in the enabling legislation of the scope of the power and in an area where this Court has repeatedly counselled deference towards political and other expertise. I do not think that the Minister's appointments demand our intervention.

47 For the reasons given, I would allow this appeal.

The judgment of Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

48 BINNIE J. — In 1965, the Ontario legislature determined that collective bargaining rights must yield to the paramount needs of patient care. The result is that, at present, to avoid disruption in essential services, about 200,000 hospital and nursing home workers in Ontario and their several hundred employers around the province are required to resolve their differences over wages, benefits and other terms of their collective agreements through

de doute, à la lecture du mémoire des intimés, que ceux-ci prétendaient que si le ministre constituait des conseils qui, en pratique, ne satisferaient pas aux exigences de la justice naturelle, il manquerait, de ce fait, à sa propre obligation d'équité procédurale. Dans ce contexte, l'argumentation des intimés laisse certainement supposer que, de par son obligation d'équité, le ministre devait exercer son pouvoir de désignation conformément aux principes de justice naturelle. Comme l'affirme cependant le juge Binnie, rien ne justifie en l'espèce de soutenir que le ministre a agi injustement au sens d'avoir violé l'obligation d'équité procédurale qui lui incombait.

En conclusion, j'estime que le tribunal qui effectue un contrôle judiciaire ne doit pas conclure trop facilement qu'une décision discrétionnaire était manifestement déraisonnable. Agir de cette façon atténue l'importance de la norme du caractère manifestement déraisonnable et favorise une intervention judiciaire inappropriée. Si on veut maintenir le principe de la retenue et de la déférence judiciaires, il est essentiel de reconnaître la gravité d'annuler une décision pour le motif qu'elle est manifestement déraisonnable. Cela d'autant plus vrai lorsque la loi habilitante comporte peu d'éléments indiquant la portée du pouvoir conféré et lorsqu'il est question d'un domaine où la Cour a conseillé à maintes reprises de faire montre de déférence à l'égard de l'expertise politique et autre. Je ne crois pas que les désignations ministérielles requièrent notre intervention.

Pour les motifs exposés, j'accueillerais le présent pourvoi.

Version française du jugement des juges Gonthier, Iacobucci, Binnie, Arbour, LeBel et Deschamps rendu par

LE JUGE BINNIE — En 1965, l'Assemblée législative de l'Ontario a décidé que le droit à la négociation collective devait céder le pas aux besoins primordiaux en matière de soins aux malades. Il s'ensuit qu'à l'heure actuelle, pour éviter l'interruption des services essentiels, environ 200 000 employés d'hôpitaux et de maisons de soins infirmiers en Ontario, ainsi que leurs centaines d'employeurs dans la province, sont tenus de soumettre

compulsory arbitration. The Ontario Court of Appeal, in a unanimous judgment, concluded that the appointment by the Minister of Labour of retired judges in February 1998 as chairpersons of the boards of compulsory arbitration could "reasonably be seen as an attempt to seize control of the bargaining process" and "to replace mutually acceptable arbitrators with a class of persons seen to be inimical to the interests of labour" ((2000), 51 O.R. (3d) 417, at para. 101). The Minister, that court concluded, as a member of the provincial government, had a "significant financial interest" in the outcome of the very arbitration whose chairpersons he selected (para. 21). He was ordered not to make any further appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" compiled under s. 49(10) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 49(10) (para. 105).

à l'arbitrage leurs différends relatifs aux salaires, aux avantages sociaux et aux autres conditions de leurs conventions collectives. Dans un arrêt unanime, la Cour d'appel de l'Ontario a conclu que la désignation par le ministre du Travail, en février 1998, de juges retraités à la présidence des conseils d'arbitrage obligatoire pouvait [TRADUCTION] « raisonnablement être perçue comme une tentative de contrôler le processus de négociation » et « de substituer aux arbitres acceptables par les parties une catégorie de personnes perçues comme étant hostiles aux intérêts des travailleurs et des travailleuses » ((2000), 51 O.R. (3d) 417, par. 101). La cour a conclu que le ministre, en sa qualité de membre du gouvernement provincial, avait un [TRADUCTION] « intérêt financier important » dans l'issue des arbitrages mêmes dont il avait choisi les présidents (par. 21). Elle lui a interdit de faire d'autres désignations [TRADUCTION] « à moins que ces désignations ne soient faites à partir de la liste traditionnelle d'arbitres expérimentés en relations du travail », dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, ch. 1, ann. A (par. 105).

I would dismiss the appeal, albeit for reasons that differ somewhat from those of the Court of Appeal. The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("*HLDAA*"), was to provide an adequate substitute for strikes and lockouts. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998, "the parties must perceive the system as neutral and credible". I would reject the unions' contention that the Minister was required to proceed with the selection of chairpersons by way of "mutual agreement" or from the s. 49(10) roster. Nor do I think that retired judges as a "class" could reasonably be seen as biased against labour. I would nevertheless affirm the fundamental principle underpinning the Court of Appeal's judgment that the *HLDAA* required the Minister to select arbitrators from candidates who were qualified not only by their impartiality, but by their

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Je suis d'avis de rejeter le pourvoi, bien que ce soit pour des motifs différant quelque peu de ceux de la Cour d'appel. Le ministre était tenu, en droit, d'exercer son pouvoir de désignation d'une manière conforme aux fins et aux objets de la loi qui lui conférait ce pouvoir. L'un des objets fondamentaux de la *Loi sur l'arbitrage des conflits de travail dans les hôpitaux*, L.R.O. 1990, ch. H.14 (« *LACTH* »), était de prévoir un moyen adéquat de remplacer la grève et le lock-out. Pour que cet objet de la Loi puisse être réalisé, [TRADUCTION] « les parties doivent percevoir le système comme étant neutre et crédible », comme l'écrivait le ministre lui-même le 2 février 1998. Je suis d'avis de rejeter l'argument des syndicats selon lequel le ministre devait choisir les présidents des conseils d'arbitrage d'un « commun accord » ou à partir de la liste dressée en vertu du par. 49(10). Je ne pense pas non plus que, en tant que « catégorie », les juges retraités puissent raisonnablement être perçus comme ayant un parti pris contre les travailleurs et les travailleuses. Je suis néanmoins d'avis de confirmer le principe fondamental qui sous-tend l'arrêt de la Cour

expertise and general acceptance in the labour relations community.

50 The context here is very important. The *HLDAA* is not a broad policy vehicle. The Minister is given a narrow role. He is merely to substitute for the parties in naming a third arbitrator in case of their disagreement.

51 Given the context of the legislation, reinforced by its background and purpose disclosed in the legislative history, I do not think that any Minister, acting reasonably, could have rejected these limitations on his statutory mandate. His approach to his power of appointment on these occasions was, with respect, patently unreasonable.

I. Facts

A. *The Legislative Framework*

52 The *HLDAA* requires the hundreds of hospital boards and nursing homes within Ontario to bargain in good faith with the unions (if any) representing their respective employees to conclude a voluntary collective agreement. In the event the parties fail to reach an acceptable collective agreement, the *HLDAA* prohibits strikes or lockouts (s. 11(1)). Compulsory arbitration is imposed (s. 4). It takes place before a single arbitrator if the parties can agree (s. 5(1)), or before an arbitral panel of three members, two of whom are appointed by the parties, and a third member to be chosen by the other two members. If the designated members fail to agree on a third member, the *HLDAA* provides in s. 6(5) that "the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act".

53 A distinction must be drawn between "grievance arbitration", where the arbitrator(s) are required

d'appel, à savoir que la *LACTH* exigeait que le ministre désigne comme arbitres des personnes compétentes en raison non seulement de leur impartialité, mais aussi de leur expertise et de leur acceptabilité générale dans le milieu des relations du travail.

Le contexte est très important en l'espèce. La *LACTH* n'est pas un instrument d'orientation général. Le ministre se voit confier un rôle limité. Il est simplement substitué aux parties pour désigner un troisième arbitre en cas de désaccord de leur part.

Compte tenu du cadre dans lequel s'inscrit la Loi, que renforcent le contexte et l'objet ressortant de son historique législatif, je ne crois pas qu'un ministre, agissant de manière raisonnable, aurait pu rejeter les limites imposées à son mandat légal. En toute déférence, l'approche qu'il a adoptée relativement à son pouvoir de désignation dans les cas en question était manifestement déraisonnable.

I. Les faits

A. *Le cadre législatif*

Aux termes de la *LACTH*, les centaines de conseils d'hôpitaux et de maisons de soins infirmiers situés en Ontario et les syndicats (s'il en est) représentant leurs employés respectifs sont tenus de négocier de bonne foi afin de conclure de leur plein gré une convention collective. Si les parties ne parviennent pas à conclure une convention collective acceptable, la *LACTH* leur interdit de recourir à la grève ou au lock-out (par. 11(1)) et les oblige à aller en arbitrage (art. 4). L'arbitrage obligatoire se déroule devant un seul arbitre lorsque les parties peuvent s'entendre sur ce point (par. 5(1)), ou devant un conseil d'arbitrage composé de trois membres, dont deux sont désignés par les parties alors que le troisième est choisi par les deux membres désignés par les parties. Si les membres désignés ne s'entendent pas sur la désignation du troisième membre, le par. 6(5) *LACTH* prévoit que « [l]e ministre désigne comme troisième membre une personne qui, à son avis, est compétente pour agir en cette qualité. »

Il faut faire la distinction entre les « arbitrages de griefs », où les arbitres doivent interpréter une

to interpret a collective agreement previously arrived at, and "interest arbitration" in which the arbitrator(s) decide upon the terms of the collective agreement itself. The former is adjudicative; the latter is more or less legislative. According to the evidence of Professor Joseph Weiler, who has been actively involved in labour disputes since 1975, experience has shown that successful "interest" arbitrators come to their task familiar with the "current issues in labour relations" and the "bargaining history of the parties to various collective agreements in relevant public sector industries". Further, "[t]hey are familiar with seniority, compensation and job evaluation systems, work preservation practices, and other work rules. In short, they can readily understand how their judgments in arbitration awards will affect the workplace realities of employees, unions, and management. They do not have to start each arbitration by being 'educated' by the parties as to the intricacies of their particular workplaces."

convention collective déjà conclue, et les « arbitrages de différends », où les arbitres fixent les conditions de la convention collective elle-même. La première forme d'arbitrage est de nature décisionnelle alors que la seconde est de nature plus ou moins législative. Suivant le témoignage du professeur Joseph Weiler qui s'intéresse de près aux conflits de travail depuis 1975, l'expérience démontre que les bons arbitres de « différends » sont bien au fait [TRADUCTION] « des enjeux actuels en matière de relations du travail » et « de l'histoire des négociations menées par les parties à diverses conventions collectives dans des entreprises pertinentes du secteur public ». De plus, [TRADUCTION] « [i]ls ont une bonne connaissance des régimes d'ancienneté, de rémunération et d'évaluation des emplois, des pratiques de maintien des emplois et des autres règles concernant l'exécution du travail. Bref, ils peuvent comprendre facilement l'influence que leurs sentences arbitrales auront sur les réalités du milieu de travail des employés, des syndicats et du patronat. Les parties n'ont pas, au début de chaque arbitrage, à leur "enseigner" les subtilités de leurs milieux de travail particuliers. »

B. *Legislative History*

Evidence of a statute's history, including excerpts from the legislative record, is admissible as relevant to the background and purpose of the legislation.

Until 1965, hospital workers in Ontario were covered in the ordinary way by the *Labour Relations Act*, R.S.O. 1960, c. 202. They had the right to bargain collectively and, if no agreement was made, to strike. In the early 1960s, a significant strike occurred at the Trenton Memorial Hospital, which lasted from October 31, 1963 to February 5, 1964. The attendant controversy, fed by an earlier strike at a Windsor hospital, led to the establishment of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees "to inquire into and report upon the feasibility and desirability of applying compulsory arbitration in the settlement of disputes between Labour and Management over the negotiation and settlement of terms of collective

B. *L'historique législatif*

54 L'historique d'une loi, y compris des extraits du dossier législatif, est admissible en preuve en raison de sa pertinence quant au contexte et à l'objet de cette loi.

55 Jusqu'en 1965, les employés d'hôpitaux de l'Ontario étaient normalement régis par la *Labour Relations Act*, R.S.O. 1960, ch. 202. Ils avaient le droit de négocier collectivement et, à défaut de parvenir à une entente, de faire la grève. Au début des années 60, le Trenton Memorial Hospital a connu une grève importante qui a duré du 31 octobre 1963 au 5 février 1964. La controverse en ayant résulté, alimentée par une grève antérieure dans un hôpital de Windsor, a entraîné la mise sur pied de la Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees, chargée [TRADUCTION] « [d']enquêter et [de] faire rapport sur la possibilité et l'opportunité d'assujettir à l'arbitrage obligatoire les différends syndicaux-patronaux qui surviennent en matière de négociation

agreements affecting hospitals and their employees" (p. 5 of its Report).

56 The Commission, consisting of labour and management representatives and chaired by a County Court judge experienced in labour relations, heard submissions from a wide spectrum of opinions in the labour relations community, including reluctant encouragement towards compulsory arbitration from Professors H. W. Arthurs and J. H. G. Crispo, who wrote (at p. 16 of the Report):

> At the present time, unless the parties voluntarily agree to arbitrate their differences, a strike or lockout is the only alternative to settlement. However, hostile community opinion added to the normal risks of economic warfare, may force one party to accept an unjust or unrealistic settlement rather than wage war. The party which yields its just or realistic claim in the public interest is thus unfairly disadvantaged. Such settlements are bound to sow resentment which will yield a rich crop of future antagonisms. In this particular context, compulsory arbitration may actually strengthen collective bargaining.

57 With similar reluctance, a majority of the Commissioners (the labour designate dissenting) recommended compulsory arbitration "when patient care is adversely affected" (p. 50) or either party had been convicted of bad faith bargaining. The reluctance was made explicit in their report (at pp. 43-44):

> The members of this Commission have had experience sitting as arbitrators in negotiations disputes where their decisions were binding upon the parties . . . . We think it [is] undisputable . . . from our experience that the parties themselves are in a much better position to arrive at a proper and reasonable decision in these contract disputes than a board of arbitration no matter how much evidence the board hears or how carefully it considers the problems with which it is confronted.

58 Concluding, however, that hospitals were in a "special category" like police and firefighters, a majority of the Commissioners recommended the creation of a tripartite board, with representatives

et d'établissement des conditions des conventions collectives touchant les hôpitaux et leurs employés » (p. 5 de son rapport).

La Commission, composée de représentants syndicaux et patronaux et présidée par un juge de comté expérimenté en relations du travail, a entendu des arguments reflétant un large éventail d'opinions répandues dans le milieu des relations du travail, y compris l'appui peu enthousiaste donné à l'arbitrage obligatoire par les professeurs H. W. Arthurs et J. H. G. Crispo, qui ont écrit (à la p. 16 du rapport) :

> [TRADUCTION] À l'heure actuelle, à moins que les parties ne conviennent de soumettre leurs différends à l'arbitrage, la grève ou le lock-out constituent la seule possibilité qui s'offre à défaut d'un règlement. L'opinion hostile de la collectivité, conjuguée aux risques normaux d'une lutte économique, peut toutefois forcer une partie à accepter un règlement injuste ou irréaliste au lieu de déclencher une bataille salariale. La partie qui, dans l'intérêt public, abandonne une demande juste et réaliste se trouve donc injustement désavantagée. Ces règlements sèment inévitablement un ressentiment propice au déclenchement de nombreux autres affrontements. Dans ce contexte particulier, l'arbitrage obligatoire peut, en fait, renforcer la négociation collective.

Les commissaires majoritaires (le membre désigné par la partie syndicale étant dissident) ont manifesté la même réticence en recommandant l'arbitrage obligatoire [TRADUCTION] « lorsque les soins apportés aux malades s'en ressentent » (p. 50) ou que l'une ou l'autre partie a été reconnue coupable d'avoir négocié de mauvaise foi. Cette réticence est explicite dans leur rapport (aux p. 43 et 44) :

> [TRADUCTION] Les membres de la Commission ont déjà arbitré des différends en matière de négociation où leur décision liaient les parties [. . .] D'après notre expérience, nous croyons qu'il est [. . .] incontestable que les parties elles-mêmes sont beaucoup mieux en mesure qu'un conseil d'arbitrage de régler de manière convenable et raisonnable ces différends en matière de convention collective, et ce, peu importe le nombre de témoignages que le conseil entend ou le soin avec lequel il examine les problèmes qui se posent.

Concluant toutefois que les hôpitaux, comme la police et les pompiers, tombent dans une [TRADUCTION] « catégorie spéciale », les commissaires majoritaires ont recommandé la création d'un

of labour and management, as well as an independent chair, based on the *explicit* assumption that "the nominees of labour and management, presumably knowledgeable in hospital affairs, would be a safeguard against unreasonable awards. Only chairmen experienced in hospital affairs would be appointed" (Report, at p. 51 (emphasis added)).

conseil tripartite comprenant un représentant pour chacune des parties syndicale et patronale ainsi qu'un président indépendant, en tenant *explicitement* pour acquis que [TRADUCTION] « les personnes désignées par les parties syndicale et patronale, qui ont vraisemblablement une bonne connaissance du secteur hospitalier, constitueraient un rempart contre les sentences arbitrales déraisonnables. Seules seraient désignées à la présidence des personnes ayant de l'expérience en matière hospitalière » (rapport, p. 51 (je souligne)).

The Commissioners' emphasis on industry expertise was echoed in their recommendation to strengthen conciliation services with experienced people (at p. 55):

59 L'insistance des commissaires sur l'expertise en matière hospitalière se retrouve dans leur recommandation de renforcer les services de conciliation en recourant à des personnes expérimentées (à la p. 55) :

> The conciliation officer and the chairman of the conciliation board should be carefully selected from those qualified and experienced in hospital affairs. This policy, we believe, has been followed by the Department of Labour. [Emphasis added.]

> [TRADUCTION] Le conciliateur et le président de la commission de conciliation doivent être soigneusement choisis parmi les personnes compétentes qui ont de l'expérience en matière hospitalière. Cette politique a été, croyons-nous, suivie par le ministère du Travail. [Je souligne.]

The dissenting member of the Commission stated, somewhat prophetically (at p. 58):

60 Le membre dissident de la Commission a affirmé, d'une manière quelque peu prophétique, ce qui suit (à la p. 58) :

> . . . there is considerable evidence that compulsory arbitration simply cannot be made to work if the parties are not willing that it should.

> [TRADUCTION] . . . une preuve abondante indique que l'arbitrage obligatoire ne peut tout simplement pas fonctionner contre le gré des parties.

The government of the day concluded that *any* strike at a hospital (defined to include nursing homes) must inevitably affect patient care (the "paramount" consideration) and proposed that the *HLDAA* extend compulsory arbitration to prohibit *all* hospital strikes or lockouts, i.e., well beyond the more limited role foreseen in the Commissioners' recommendations.

61 Le gouvernement de l'époque a conclu que *toute* grève dans un hôpital (dont la définition inclut les maisons de soins infirmiers) compromet forcément les soins apportés aux malades (l'élément « primordial » devant être pris en considération) et a proposé que la *LACTH* étende l'arbitrage obligatoire de manière à interdire *toute* grève ou *tout* lock-out dans les hôpitaux, c'est-à-dire bien au-delà du rôle plus limité que lui réservaient les commissaires dans leur recommandation.

In the debate on the bill, the Minister of Labour told the legislature that "[s]ound labour relations are the product of mutual agreement" (*Legislature of Ontario Debates*, No. 35, 3rd Sess., 27th Leg., March 3, 1965, at p. 935). He brushed aside opposition concerns about the possibility a Minister could "pack" an arbitration board, given the

62 Au cours du débat sur le projet de loi, le ministre du Travail a déclaré à l'Assemblée législative que [TRADUCTION] « [l']établissement de saines relations du travail repose sur commun accord » (*Legislature of Ontario Debates*, n^{o} 35, 3^{e} sess., 27^{e} lég., 3 mars 1965, p. 935). Il a écarté du revers de la main les craintes de l'opposition qu'un ministre

government was a "vitally interested party financially in labour disputes in hospitals" (*Legislature of Ontario Debates*, No. 53, 3rd Sess., 27th Leg., March 22, 1965, at p. 1497), emphasizing the government's intention was to protect patients, not employers, and thereby to supplement, not hinder, free collective bargaining. The *HLDAA* became law on April 14, 1965.

C. *The 1972 Amendment*

63 Despite the prohibition on strikes and lockouts, problems persisted in the hospital sector. There were threats of strikes and several short walk-outs. A report prepared for the Minister of Labour in 1970 noted that "[t]hese are part of a continuing protest by union members generated by concern over their ability to achieve their bargaining goals while operating under the Act. All unions in the hospital industry are either demanding changes in or abolition of [the *HLDAA*]": K. McLeod, "The Impact of the Ontario Hospital Labour Disputes Arbitration Act, 1965: A Statistical Analysis", Ontario Department of Labour, Research Branch, November 1970, at p. 1.

64 Delays in making collective agreements were endemic. The Minister proposed a series of amendments to make compulsory arbitration speedier and more effective. Amongst other things, he assured the Legislature that *HLDAA* arbitrators would have relevant expertise as well as impartiality, stating "the bill provides for the [arbitration] commission to maintain a list of qualified arbitrators willing to act in hospital cases. This bill will improve the quality of decision-making in these cases by providing a roster of knowledgeable arbitrators experienced in the hospital sector" (*Legislature of Ontario Debates*, No. 134, 2nd Sess., 29th Leg., December 14, 1972, at p. 5760 (emphasis added)). Although s. 6(5) as originally enacted in 1972 included reference to a "register of arbitrators", the reference was deleted from the *HLDAA* in 1980.

puisse « noyauter » un conseil d'arbitrage étant donné que le gouvernement était [TRADUCTION] « une partie ayant un intérêt financier très important dans les conflits de travail en milieu hospitalier » (*Legislature of Ontario Debates*, nº 53, 3e sess., 27e lég., 22 mars 1965, p. 1497), soulignant que l'intention du gouvernement était de protéger les malades et non les employeurs, et ainsi, de compléter et non d'entraver la libre négociation collective. La *LACTH* a été adoptée le 14 avril 1965.

C. *La modification de 1972*

Malgré l'interdiction des grèves et des lock-out, les problèmes ont persisté dans le secteur hospitalier. Il y eut des menaces de grève et plusieurs débrayages de courte durée. Un rapport préparé, en 1970, pour le ministre du Travail indique que [TRADUCTION] « [c]es tactiques s'inscrivent dans un mouvement continu de protestation des syndiqués, qui découle de leur crainte d'être incapables d'atteindre leurs objectifs de négociation en respectant la Loi. Tous les syndicats du secteur hospitalier demandent de modifier ou d'abolir la [*LACTH*] » (K. McLeod, « The Impact of the Ontario Hospital Labour Disputes Arbitration Act, 1965 : A Statistical Analysis », ministère du Travail de l'Ontario, Direction de la recherche, novembre 1970, p. 1).

Les retards dans la conclusion des conventions collectives étaient endémiques. Le ministre a proposé une série de modifications destinées à accélérer l'arbitrage obligatoire et à en accroître l'efficacité. Il a notamment assuré à l'Assemblée législative que les arbitres désignés en vertu de la *LACTH* seraient impartiaux et auraient l'expertise voulue, déclarant que [TRADUCTION] « le projet de loi prévoit que le conseil [d'arbitrage] dressera une liste d'arbitres compétents disposés à agir dans les affaires mettant en cause des hôpitaux. Ce projet de loi améliorera la qualité du processus décisionnel dans ces cas en prévoyant l'établissement d'une liste d'arbitres compétents qui ont de l'expérience dans le secteur hospitalier » (*Legislature of Ontario Debates*, nº 134, 2e sess., 29e lég., 14 décembre 1972, p. 5760 (je souligne)). Bien que, dans sa version originale de 1972, le par. 6(5) ait mentionné notamment un « *register of arbitrators* » (registre des arbitres), cette mention a été retirée de la *LACTH* en 1980.

D. *1979 — The Roster of Arbitrators*

In 1979, the *Labour Relations Act*, R.S.O. 1970, c. 232, was amended to facilitate the approval of qualified arbitrators under what is now s. 49 of the *Labour Relations Act, 1995* which largely concerns itself with grievance arbitrations, and provides in subs. (10) as follows:

> (10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines. [Emphasis added.]

The Labour Management Advisory Committee ("LMAC") was duly formed. The Court of Appeal found that, since its inception, LMAC "has ensured that all persons on the list have expertise in the area of labour adjudication and are acceptable to both management and union. In addition to evaluating everyone seeking to be added to the list of arbitrators, LMAC plans and monitors an Arbitrator Development Program. Many persons are required to successfully complete this program before becoming eligible to be placed on the list. LMAC also conducts ongoing reviews of all the arbitrators on the list to ensure their continued acceptability. Its recommendations regarding additions to and removals from the list are invariably accepted by the Minister" (para. 12).

A contentious factual issue is the extent to which successive Ministers of Labour limited their appointments under s. 6(5) of the *HLDAA* to the s. 49(10) roster. There is nothing in the legislative history to suggest that the s. 49(10) list under the *Labour Relations Act* was intended by the legislature to substitute for the "register of arbitrators" dropped from the *HLDAA* in 1980. However, the unions contend that the third member of "interest" arbitration boards under the *HLDAA* ordinarily came from this list, even though the main focus of the roster was

D. *1979 — La liste d'arbitres*

65 En 1979, la *Labour Relations Act*, R.S.O. 1970, ch. 232, a été modifiée de manière à faciliter l'agrément d'arbitres compétents au sens de la disposition devenue l'art. 49 de la *Loi de 1995 sur les relations de travail*, qui traite surtout de l'arbitrage de griefs et prévoit ce qui suit, au par. (10) :

> (10) Le ministre peut dresser une liste d'arbitres agréés. Dans le but de le conseiller sur les personnes ayant les qualités requises pour remplir les fonctions d'arbitre et sur les questions relatives à l'arbitrage, il peut constituer un comité consultatif syndical-patronal, composé d'un président désigné par le ministre et de six membres dont trois représentent des employeurs et trois représentent des syndicats. Le lieutenant-gouverneur en conseil fixe la rémunération et les indemnités des membres du comité. [Je souligne.]

66 Le comité consultatif syndical-patronal (« CCSP ») a été dûment constitué. La Cour d'appel a conclu que, depuis sa création, le CCSP [TRADUCTION] « a veillé à ce que toutes les personnes inscrites sur la liste aient une expertise en matière d'arbitrage de conflits de travail et soient acceptables à la fois par le patronat et les syndicats. En plus d'évaluer chaque personne qui demande à être ajoutée à la liste d'arbitres, le CCSP planifie et supervise un programme de formation des arbitres, que de nombreux candidats doivent suivre et réussir pour pouvoir être inscrits sur la liste. Le CCSP procède également à l'évaluation continue de tous les arbitres inscrits sur la liste afin de s'assurer qu'ils sont toujours acceptables. Ses recommandations concernant des ajouts à la liste ou des retraits de celle-ci sont toujours entérinées par le ministre » (par. 12).

67 Sur le plan des faits, on ne s'entend pas sur la mesure dans laquelle les ministres du Travail qui se sont succédé ont limité leurs désignations fondées sur le par. 6(5) *LACTH* aux personnes inscrites sur la liste dressée en vertu du par. 49(10). Rien dans l'historique législatif n'indique que le législateur a voulu substituer la liste prévue au par. 49(10) de la *Loi sur les relations de travail* au « registre des arbitres » retiré de la *LACTH* en 1980. Les syndicats soutiennent cependant que le troisième membre des conseils d'arbitrage de « différends »

grievance (not interest) arbitrations. The Minister asserts that the roster was only one of many sources from which "interest" arbitrators were appointed. When the text of s. 6(5) was modified in the 1980 consolidation of Ontario statutes, there was no incorporation by reference to s. 49(10). The Court of Appeal, after reviewing the extensive evidentiary record, concluded that: "First, the main purpose of the machinery set up in 1979 was to produce persons qualified to do rights or grievance arbitrations who would be acceptable to both sides. Second, some of the persons so qualified are also skilled in interest arbitration. [Third,] for some years the vast majority of interest arbitrators has been appointed by the Minister or his or her delegate from amongst this second group. [Fourth], those appointed to chair interest arbitrations who were not from the group or roster were persons who were skilled and experienced in interest arbitration and were quite acceptable to the unions involved. They included such persons as Paul Weiler, Ray Illing, former Justice George Adams and [former] Chief Justice Alan Gold" (para. 16).

68 The evidence showed that in the normal course of government operations, senior officials, acting under delegated authority from the Ministers, would generally identify an appropriate arbitrator. This had the effect of distancing the Minister somewhat from the actual selection process.

E. *The 1997 Legislation*

69 Following the election of a new Progressive Conservative government in Ontario in 1995, a massive reorganization of municipalities, school boards, police stations, fire halls and other public sector institutions was undertaken. About 450,000 public sector employees were affected. As then Minister of

constitués en vertu de la *LACTH* était habituellement choisi à partir de cette liste, même si celle-ci était destinée principalement aux arbitrages de griefs (et non de différends). Le ministre affirme que la liste n'était qu'un des nombreux moyens utilisés pour désigner les arbitres de « différends ». Lorsque le libellé du par. 6(5) a été modifié dans le cadre de la refonte des lois de l'Ontario en 1980, il n'y a pas eu d'incorporation par renvoi au par. 49(10). Après avoir examiné la preuve abondante versée au dossier, la Cour d'appel a tiré les conclusions suivantes : [TRADUCTION] « Premièrement, le but principal du mécanisme établi en 1979 était de former des personnes compétentes — et acceptables par les deux parties — pour procéder aux arbitrages de droits ou de griefs. Deuxièmement, parmi ces personnes compétentes, il s'en trouve qui sont également qualifiées pour procéder à l'arbitrage de différends. [Troisièmement,] depuis un certain nombre d'années, la grande majorité des arbitres de différends désignés par le ministre ou son délégataire provient de ce second groupe de personnes. [Quatrièmement], les personnes désignées pour présider des arbitrages de différends, qui n'appartenaient pas à ce groupe ou qui n'étaient pas inscrites sur la liste, étaient qualifiées et expérimentées en la matière et étaient tout à fait acceptables par les syndicats en cause. Parmi ces personnes, on compte notamment Paul Weiler, Ray Illing, l'ancien juge George Adams et [l'ancien] juge en chef Alan Gold » (par. 16).

La preuve a démontré que, dans le cours normal des activités gouvernementales, les hauts fonctionnaires, qui exercent les pouvoirs qui leur sont délégués par les ministres, désignent généralement un arbitre compétent. Cela permet d'établir une certaine distance entre le ministre et le processus de sélection proprement dit.

E. *La loi de 1997*

L'élection, en 1995, d'un nouveau gouvernement progressiste-conservateur en Ontario, a marqué le début d'une réorganisation majeure des municipalités, des conseils scolaires, des postes de police, des casernes de pompiers et d'autres institutions du secteur public. Environ 450 000 employés du secteur

Labour, Elizabeth Witmer, explained on second reading of Bill 136 on August 25, 1997:

> More than 3,300 collective agreements could be part of the transition as municipalities, school boards and health care facilities merge, amalgamate or reorganize. School boards alone will decrease from 129 to just 72 at the beginning of the year. By January 1, Ontario will have reduced its number of municipalities from 815 to about 650, and in Toronto alone the Health Services Restructuring Commission has recommended that the 39 hospitals currently operating in 46 separate facilities be reduced to 24 organizations operating 31 inpatient sites and four outpatient sites.
>
> As you can appreciate, special processes are needed to ensure that these employees, whether they are unionized or not, are treated as fairly as possible as the changes unfold.

(Legislative Assembly of Ontario, *Official Report of Debates*, No. 218, August 25, 1997, at p. 11462)

As part of Bill 136, the government proposed the *Public Sector Dispute Resolution Act, 1997* to cover the fire, police and hospital/nursing home sectors. The centrepiece was to be a Dispute Resolution Commission, which the Minister was reported as saying would require members "with expertise in labor relations" (*The Record*, Kitchener-Waterloo, June 5, 1997, at p. B5) including academics and possibly judges. Quite apart from managing the effects of massive restructuring, the Commission was expected to address the problem of delay. The Minister claimed that

> [o]n average, arbitrated police agreements are concluded approximately 13 months after the expiry of the previous agreement. In the fire sector the figure is even longer, 20 months, and in the hospital sector agreements are finalized nearly two years after the expiry of a contract. This stands in stark contrast to the private sector where, as I indicated, it is all concluded within four months on average. This means that in some cases

public étaient touchés. Comme l'expliquait la ministre du Travail de l'époque, Elizabeth Witmer, lors de la deuxième lecture du projet de loi 136, le 25 août 1997 :

> [TRADUCTION] Plus de 3 300 conventions collectives pourraient être touchées au cours du processus de regroupement, de fusion ou de réorganisation des municipalités, des conseils scolaires et des établissements de santé. Au début de l'année, à eux seuls les conseils scolaires verront leur nombre passer de 129 à 72 seulement. Dès le 1er janvier, l'Ontario aura fait passer de 815 à environ 650 le nombre de ses municipalités, et pour la seule ville de Toronto, la Commission de restructuration des services de santé a recommandé que les 39 hôpitaux qui, à l'heure actuelle, sont exploités dans 46 établissements distincts soient ramenés à 24 organisations exploitant 31 centres pour malades hospitalisés et 4 cliniques de consultation externes.
>
> Comme vous pouvez le constater, des mécanismes spéciaux seront nécessaires pour assurer que ces employés, syndiqués ou non, seront traités aussi équitablement que possible au cours de ces changements.

(Assemblée législative de l'Ontario, *Journal des débats*, nº 218, 25 août 1997, p. 11462)

70

Dans le cadre du projet de loi 136, le gouvernement a proposé la *Loi de 1997 sur le règlement des différends dans le secteur public* destinée à régir les secteurs des incendies et de la police, ainsi que celui des hôpitaux et des maisons de soins infirmiers. L'élément essentiel de cette loi serait la création d'une commission de règlement des différends qui, d'après ce qu'aurait déclaré la ministre, devrait être composée de membres [TRADUCTION] « ayant une expertise en matière de relations du travail » (*The Record*, Kitchener-Waterloo, 5 juin 1997, p. B5), y compris des professeurs d'université et éventuellement des juges. En plus de gérer les effets d'une restructuration majeure, la commission était censée aborder le problème des délais. La ministre a fait valoir que

> [TRADUCTION] [e]n moyenne, la conclusion par voie d'arbitrage des conventions des policiers a lieu environ 13 mois après l'expiration de la convention précédente. En ce qui concerne les pompiers, le délai est même plus long, à savoir 20 mois, et dans le secteur hospitalier, les conventions sont conclues près de deux ans après l'expiration de la convention collective précédente. Cette situation contraste nettement avec celle du secteur privé où,

the employers and unions are learning the final result of an arbitration after the term of the arbitrated contract is over.

(Legislative Assembly of Ontario, *Official Report of Debates*, No. 218, August 25, 1997, at p. 11464)

71 Organized labour strongly opposed many aspects of Bill 136 and the respondents in particular dismissed the proposed Dispute Resolution Commission as a move to replace experienced and mutually acceptable interest arbitrators with government-appointed commissioners who lacked independence and impartiality. Union leaders were quoted in the press as saying that a "government-appointed dispute resolution commission would be management-oriented and likely to gut existing contracts" (Canadian Press, September 18, 1997). Massive strike action was threatened. Following negotiations between the government and the unions, the government dropped its proposed Dispute Resolution Commission. On September 23, 1997, during the hearings before the Standing Committee on Resources Development, the Minister announced "a return to the sector-based system of appointing arbitrators" (Legislative Assembly of Ontario, *Official Report of Debates*, No. R-69, Standing Committee on Resources Development, September 23, 1997, at p. R-2577). The unions took such assurances to mean that the government was going to return to what they claimed to be the *status quo ante*. Thus, in a letter dated January 7, 1998, the President of the Canadian Union of Public Employees ("CUPE") wrote to the Minister to "confirm" that the unions were to be consulted about the appointments and to request assurances that the government would only choose arbitrators from the s. 49(10) roster. He received no response.

72 On February 2, 1998, the Minister of Labour, now James Flaherty, wrote to the Ontario

comme je l'ai indiqué, tout se règle en moyenne en l'espace de quatre mois. Cela signifie que, dans certains cas, les employeurs et les syndicats prennent connaissance du résultat final d'un arbitrage après l'expiration de la convention collective conclue par voie d'arbitrage.

(Assemblée législative de l'Ontario, *Journal des débats*, n^{o} 218, 25 août 1997, p. 11464)

Le mouvement syndical s'est fortement opposé à maints éléments du projet de loi 136 et les intimés ont notamment rejeté le projet de création d'une commission de règlement des différends qu'ils percevaient comme une mesure destinée à remplacer des arbitres de différends expérimentés et acceptables par les parties par des commissaires désignés par le gouvernement et dépourvus d'indépendance et d'impartialité. La presse a rapporté les propos de chefs syndicaux selon lesquels [TRADUCTION] « une commission de règlement des différends dont les membres seraient désignés par le gouvernement privilégierait la partie patronale et serait portée à annuler les conventions collectives existantes » (Presse canadienne, 18 septembre 1997). Une menace de grève généralisée planait. À la suite de négociations avec les syndicats, le gouvernement abandonne son projet de création d'une commission de règlement des différends. Le 23 septembre 1997, pendant les audiences du Comité permanent du développement des ressources, le ministre a annoncé [TRADUCTION] « un retour au système sectoriel de désignation des arbitres » (Assemblée législative de l'Ontario, *Journal des débats*, n^{o} R-69, Comité permanent du développement des ressources, 23 septembre 1997, p. R-2577). Pour les syndicats, cette promesse signifiait que le gouvernement reviendrait à ce qu'ils considéraient comme le statu quo. C'est ainsi que, dans une lettre datée du 7 janvier 1998, le président du Syndicat canadien de la fonction publique (« SCFP ») a « confirmé » au ministre que les syndicats devraient être consultés au sujet des désignations et a sollicité une promesse que le gouvernement ne choisirait les arbitres qu'à partir de la liste dressée en vertu du par. 49(10). Sa lettre est restée sans réponse.

Le 2 février 1998, le ministre du Travail de l'époque, James Flaherty, écrivait à l'Ontario

Labour-Management Arbitrators' Association to outline the purpose of the changes to Bill 136:

> The Act reforms compulsory interest arbitration processes to stress negotiated solutions instead of arbitrated contracts, provide for expedited time lines and alternate dispute resolution mechanisms, and require arbitrators to consider criteria such as the employer's ability to pay, the economic situation in the municipality and province, and the extent to which services may have to be reduced if current funding and taxation levels remain unchanged.

Labour-Management Arbitrators' Association pour lui exposer le but des amendements apportés au projet de loi 136 :

> [TRADUCTION] La Loi réforme le processus d'arbitrage obligatoire des différends de manière à privilégier les solutions négociées plutôt que les conventions collectives conclues par voie d'arbitrage, à raccourcir les délais et à établir d'autres mécanismes de règlement des différends, en plus d'obliger les arbitres à tenir compte de critères tels que la capacité de payer de l'employeur, la situation économique de la municipalité et de la province ainsi que la mesure dans laquelle les services peuvent devoir être réduits si les niveaux actuels de financement et de taxation sont maintenus.

Although the Minister speaks here of "reforms", the legislature did not, in the end, amend the provisions of the *HLDAA* at issue in this case.

73 Même si le ministre parle ici de « réforme », l'Assemblée législative n'a pas, en fin de compte, modifié les dispositions de la *LACTH* qui sont en cause en l'espèce.

F. *The Contested Appointments*

F. *Les désignations contestées*

Early in 1998, the Minister decided to make his s. 6(5) appointments from amongst retired judges, a possibility earlier signalled to the parties by his predecessor, Elizabeth Witmer, in her June 5, 1997 press interview about the proposed Dispute Resolution Commission. One of the Minister's senior officials testified that he was instructed "to identify retired members of the judiciary who might be available to serve in the capacity of interest arbitrators".

74 Au début de 1998, le ministre a décidé de faire ses désignations fondées sur le par. 6(5) parmi des juges retraités, une possibilité que celle qui l'avait précédé, Elizabeth Witmer, avait déjà laissé entrevoir aux parties lors d'une entrevue accordée à la presse, le 5 juin 1997, au sujet du projet de création d'une commission de règlement des différends. Un des hauts fonctionnaires du ministre a témoigné qu'on lui avait demandé [TRADUCTION] « de trouver des membres retraités de la magistrature qui pourraient être disposés à agir en qualité d'arbitres de différends ».

On February 20, 1998, Labour Minister Flaherty appointed four retired judges — the Honourable Mr. Charles Dubin, the Honourable Mr. Lloyd Houlden, the Honourable Mr. Robert Reid and the Honourable Mr. McLeod Craig — to chair boards of interest arbitration to resolve a number of outstanding labour disputes at Ontario hospitals. The judges were not on the s. 49(10) roster, nor were the unions consulted about the appointments. A background statement was issued by the Ministry of Labour on the same day entitled "Interest Arbitration in the Hospital Sector", which noted:

75 Le 20 février 1998, le ministre du Travail Flaherty a désigné à la présidence de conseils d'arbitrage de différends quatre juges retraités — les honorables Charles Dubin, Lloyd Houlden, Robert Reid et McLeod Craig — qui seraient chargés de résoudre un certain nombre de conflits de travail touchant des hôpitaux ontariens. Ces juges n'étaient pas inscrits sur la liste dressée en vertu du par. 49(10) et les syndicats n'avaient pas été consultés au sujet de ces désignations. Un énoncé de données de base, publié le même jour par le ministère du Travail et intitulé « Arbitrage de différends dans le secteur hospitalier », précisait ce qui suit :

During this period of significant restructuring in the broader public sector . . . it is essential that parties to an arbitration have complete confidence in the objectivity and neutrality of arbitrators appointed by the Minister.

Au cours de cette importante période de restructuration dans le secteur parapublic [. . .] il est primordial que les parties à l'arbitrage soient entièrement assurées que les arbitres désignés par le ministre agiront de façon objective et impartiale.

On March 10, 1998, the President of the Ontario Federation of Labour ("OFL") wrote to the Minister alleging that the appointments breached the "understanding" about a return to the *status quo* "without even the pretence of consultation". Professor Joseph Weiler testified about the negative union reaction to the appointments of retired judges "as a class or group":

Le 10 mars 1998, le président de la Fédération du travail de l'Ontario (« FTO ») a écrit au ministre que ces désignations violaient [TRADUCTION] « [l']entente » concernant un retour au statu quo « sans qu'on ait même feint de procéder à des consultations ». Le professeur Joseph Weiler a témoigné au sujet de la réaction syndicale négative aux désignations de juges retraités « en tant que catégorie ou groupe » :

This reaction is not due to the merits of any individual former judge but rather to retired judges as a class or group, given the view and experience of unions concerning the role of the judiciary in labour relations. These retired judges do not have tenure as arbitrators and therefore do not have the kind of independence from government that they previously enjoyed when they served on the bench. They also have no expertise in industrial relations. Certainly they lack the deep and wide experience possessed by arbitrators familiar with the industrial relations community of Ontario.

[TRADUCTION] Cette réaction est attribuable non pas aux qualités d'un ancien juge en particulier, mais plutôt au fait qu'il s'agit de désignations de juges retraités en tant que catégorie ou groupe, compte tenu de l'opinion et de l'expérience des syndicats concernant le rôle du pouvoir judiciaire dans le domaine des relations du travail. En leur qualité d'arbitres, ces juges retraités ne sont pas inamovibles et ne sont donc pas aussi indépendants du gouvernement qu'ils étaient lorsqu'ils siégeaient comme juges. Ils n'ont également aucune expertise en matière de relations du travail. Ils n'ont sûrement pas la longue et vaste expérience que possèdent les arbitres qui connaissent bien le milieu des relations du travail en Ontario.

76 The four judges initially appointed declined to act. The Honourable Charles Dubin, for example, who had for many years acted as counsel to the Ontario Labour Relations Board, wrote to the parties to explain that, while he could not act because his firm had a conflict in the particular case, it was nevertheless his practice not to act as arbitrator unless he could assure himself that "[his] appointment was satisfactory to all parties". However, a number of other retired judges felt it appropriate to accept the appointments.

Les quatre juges désignés initialement ont refusé d'agir en qualité d'arbitres. Par exemple, l'honorable Charles Dubin qui, pendant de nombreuses années, avait agi comme avocat-conseil auprès de la Commission des relations de travail de l'Ontario a écrit aux parties pour leur expliquer que, même s'il ne pouvait pas agir parce que son cabinet était en conflit dans l'affaire en cause, il avait néanmoins coutume de ne pas agir en qualité d'arbitre à moins de pouvoir s'assurer que [TRADUCTION] « [s]a désignation convenait à toutes les parties ». Un certain nombre d'autres juges retraités ont cependant jugé bon d'accepter les désignations.

77 The unions further complained of a breach of procedural fairness. The Minister, they say, should not have abandoned a practice of delegating the task of the appointments to senior officials without, at least, full consultation.

Les syndicats se sont en outre plaints d'un manquement à l'équité procédurale. Selon eux, le ministre n'aurait pas dû abandonner la pratique consistant à déléguer à des hauts fonctionnaires la tâche de faire des désignations, sans avoir au moins procédé à des consultations complètes.

Although the Minister took the view that his new practice of appointing retired judges to chair *HLDAA* arbitral boards was entirely neutral, it was apparently welcomed by hospital employers. The Court of Appeal found that "in every arbitration involving CUPE in which a chair had been appointed, the employer requested a new appointment. In all cases, the new appointment was a retired judge. Further, since the Minister began appointing retired judges, employers have advised CUPE that they are not prepared to accept anyone on the roster and have refused to propose names of potential chairs. Consequently, there have been no consensual appointments of chairs in CUPE cases since at least February 1998" (para. 33). This finding laid the basis for the Court of Appeal's conclusion, as mentioned, that the appointment of retired judges "must reasonably be seen as an attempt to seize control of the [collective] bargaining process" (para. 101).

78 Bien que le ministre ait jugé tout à fait neutre sa nouvelle pratique consistant à désigner des juges retraités à la présidence des conseils d'arbitrage formés en vertu de la *LACTH*, cette pratique a apparemment été bien accueillie par les hôpitaux employeurs. La Cour d'appel a conclu que [TRADUCTION] « dans tout arbitrage mettant en cause le SCFP, où un président avait été désigné, l'employeur avait sollicité une nouvelle désignation. Dans tous les cas, la nouvelle désignation était celle d'un juge retraité. En outre, depuis que le ministre a commencé à désigner des juges retraités, les employeurs ont informé le SCFP qu'ils ne sont pas disposés à accepter quiconque est inscrit sur la liste et ont refusé de proposer des noms de candidats potentiels à la présidence. En conséquence, depuis au moins février 1998, il n'y a eu aucune désignation consensuelle de présidents dans les affaires mettant en cause le SCFP » (par. 33). La Cour d'appel s'est fondée sur cette conclusion pour statuer, comme nous l'avons vu, que la désignation de juges retraités [TRADUCTION] « doit raisonnablement être perçue comme une tentative de contrôler le processus de négociation [collective] » (par. 101).

G. *The Proceedings*

If the unions had sought judicial review of the specific appointments, it would have enabled the courts to deal with the legal issues raised by their challenge (including the independence and impartiality of particular appointees) on a case-by-case basis. Instead, the unions sought general relief by way of the series of general declarations already mentioned. The Minister was agreeable to this somewhat difficult procedure because, as his counsel explained, he did not want to be regarded as throwing technical roadblocks in the path of judicial review of his decisions. He did not, at least in this Court, seek to have the proceedings stopped on the basis of the privative clause in s. 7 of the *HLDAA*, perhaps because the challenge related broadly to the appointments process rather than to the composition of particular boards. As counsel for the unions put it in the oral hearing in this Court:

G. *Les procédures*

79 Si les syndicats avaient demandé le contrôle judiciaire des désignations en cause, les tribunaux judiciaires auraient pu aborder, au cas par cas, les questions de droit soulevées par leur contestation (dont celles de l'indépendance et de l'impartialité de certaines personnes désignées). Les syndicats ont plutôt sollicité une réparation globale au moyen de la série de déclarations générales mentionnées précédemment. Le ministre était favorable à cette procédure quelque peu complexe parce que, comme l'a expliqué son avocat, il ne souhaitait pas être perçu comme érigeant des obstacles procéduraux destinés à empêcher le contrôle judiciaire de ses décisions. Il n'a pas, du moins devant notre Cour, invoqué la clause privative de l'art. 7 *LACTH* pour demander l'arrêt des procédures, peut-être parce que la contestation portait sur le processus de désignation en général plutôt que sur la composition de certains conseils. Comme l'a affirmé l'avocat des syndicats lors de l'audience devant la Cour :

. . . it's not that retired judges were appointed. It is that the process by which individuals, who had been identified as mutually acceptable and credible, were, in one fell swoop, removed from participation in the arbitration process, and replaced by an entirely different group of individuals for whom, as the record subsequently established, experience in interest arbitration, experience in labour relations and experience in hospital funding was not a factor, in terms of their appointment.

80 The way these proceedings were formulated creates certain difficulties in the matter of remedy, as discussed below.

H. *The Subsequent Legislation*

81 The parties to the appeal in this Court drew our attention to the *Back to School Act (Toronto and Windsor) 2001*, S.O. 2001, c. 1, apparently enacted in response to the decision of the Ontario Court of Appeal in this case, which provides in s. 11(4) and (5):

11. . . .

(4) In appointing a replacement arbitrator, the Minister may appoint a person who,

(a) has no previous experience as an arbitrator;

(b) has not previously been or is not recognized as a person mutually acceptable to both trade unions and employers;

(c) is not a member of a class of persons which has been or is recognized as comprising individuals who are mutually acceptable to both trade unions and employers.

(5) In appointing a replacement arbitrator, the Minister may depart from any past practice concerning the appointment of arbitrators or chairs of arbitration boards, whether established before or after this Act comes into force, without notice to or consultation with any employers or trade unions.

82 The Minister says the subsequent legislation is irrelevant. The unions say only that this subsequent legislation manifests an explicit legislative intent to exclude the otherwise crucially relevant criteria of expertise and general acceptability. In their view, the new legislation shows the *HLDAA* as the Minister would like it to be, but is not. They say the new

[TRADUCTION] . . . ce n'est pas le fait d'avoir désigné des juges retraités. C'est la méthode utilisée pour empêcher des personnes reconnues de part et d'autre comme étant acceptables et crédibles de participer au processus d'arbitrage et les remplacer d'un seul coup par un groupe totalement différent de personnes à l'égard desquelles, comme l'a démontré subséquemment le dossier, ni l'expérience en arbitrage de différends ni l'expérience en matière de relations du travail et de financement hospitalier ne comptaient pour qu'elles puissent être désignées.

Comme nous le verrons plus loin, la façon dont ces procédures ont été formulées pose certaines difficultés sur le plan de la réparation.

H. *La mesure législative subséquente*

Les parties au pourvoi devant notre Cour ont attiré notre attention sur la *Loi de 2001 sur le retour à l'école (Toronto et Windsor)*, L.O. 2001, ch. 1, apparemment adoptée à la suite de la décision rendue en l'espèce par la Cour d'appel de l'Ontario. Cette loi prévoit ceci, aux par. 11(4) et (5) :

11. . . .

(4) Lorsqu'il nomme un nouvel arbitre, le ministre peut nommer une personne :

a) qui n'a pas d'expérience comme arbitre;

b) qui n'a jamais été reconnue comme une personne acceptable à la fois par les syndicats et les employeurs ou qui n'est pas reconnue comme telle;

c) qui n'appartient pas à une catégorie de personnes qui a été ou qui est reconnue comme étant composée de particuliers qui sont acceptables à la fois par les syndicats et les employeurs.

(5) Lorsqu'il nomme un nouvel arbitre, le ministre peut s'écarter de tout précédent concernant la nomination d'arbitres ou de présidents de conseil d'arbitrage, que ce précédent ait été établi avant ou après l'entrée en vigueur de la présente loi, sans préavis et sans consultation de tout employeur ou syndicat.

Le ministre affirme que la mesure législative subséquente n'est pas pertinente. Les syndicats prétendent simplement que cette mesure législative traduit l'intention explicite du législateur d'exclure les critères d'expertise et d'acceptabilité générale qui ont par ailleurs une pertinence cruciale. À leur avis, la nouvelle mesure législative présente la *LACTH*

Act is a clear and unmistakable departure from the *HLDAA* statutory scheme at issue in this appeal.

comme le ministre voudrait qu'elle soit, mais elle n'est pas ainsi. Ils affirment que la nouvelle loi marque une rupture claire et manifeste avec le régime de la *LACTH* qui est en cause dans le présent pourvoi.

II. Relevant Statutory Provisions

II. Les dispositions législatives pertinentes

Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14

Loi sur l'arbitrage des conflits de travail dans les hôpitaux, L.R.O. 1990, ch. H.14

6. . . .

(5) Where the two members appointed by or on behalf of the parties fail within ten days after the appointment of the second of them to agree upon the third member, notice of such failure shall be given forthwith to the Minister by the parties, the two members or either of them and the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act.

6 . . .

(5) Si les deux membres du conseil désignés par les parties ou en leur nom, dans les dix jours de la désignation du deuxième d'entre eux, ne s'entendent pas sur la désignation d'un troisième, les parties, les deux membres du conseil ou l'un d'eux en avisent sans délai le ministre. Le ministre désigne comme troisième membre une personne qui, à son avis, est compétente pour agir en cette qualité.

7. Where a person has been appointed as a single arbitrator or the three members have been appointed to a board of arbitration, it shall be presumed conclusively that the board has been established in accordance with this Act and no application shall be made, taken or heard for judicial review or to question the establishment of the board or the appointment of the member or members, or to review, prohibit or restrain any of its proceedings.

7 Si une personne a été désignée arbitre unique ou que les trois membres ont été désignés à un conseil d'arbitrage, la création du conseil est présumée, de façon irréfragable, s'être effectuée conformément à la présente loi. Est irrecevable une requête en révision judiciaire ou une requête en contestation de la création du conseil ou de la désignation de son ou ses membres, ou une requête visant à faire réviser, interdire ou restreindre ses travaux.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A

49. . . .

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines.

49. . . .

(10) Le ministre peut dresser une liste d'arbitres agréés. Dans le but de le conseiller sur les personnes ayant les qualités requises pour remplir les fonctions d'arbitre et sur les questions relatives à l'arbitrage, il peut constituer un comité consultatif syndical-patronal, composé d'un président désigné par le ministre et de six membres dont trois représentent des employeurs et trois représentent des syndicats. Le lieutenant-gouverneur en conseil fixe la rémunération et les indemnités des membres du comité.

III. Judgments

III. Les jugements

A. *Ontario Divisional Court* (1999), 117 O.A.C. 340

A. *Cour divisionnaire de l'Ontario* (1999), 117 O.A.C. 340

Southey J. noted that the respondents' claims were based on the Minister's abandonment of the roster, the Minister's personal appointments of chairs of

Le juge Southey fait observer que les demandes des intimés s'appuyaient sur le fait que le ministre avait abandonné la liste, qu'il avait personnellement

boards, and the Minister's failure to comply with an understanding respecting the appointment process allegedly reached by the parties while amendments to Bill 136 were being discussed. As the respondents had not claimed any breach of *Canadian Charter of Rights and Freedoms* rights, he concluded that "actions of the Minister, if authorized by statute, cannot be successfully attacked as being a denial of natural justice or lacking in institutional independence or impartiality" (para. 16). In his view, the actions of the Minister in appointing retired judges to chair arbitration boards fell squarely within the authority given to him by statute.

désigné les présidents des conseils et qu'il n'avait pas respecté une entente concernant le processus de désignation à laquelle les parties seraient parvenues lors des discussions portant sur les amendements apportés au projet de loi 136. Vu que les intimés n'avaient invoqué aucune violation des droits garantis par la *Charte canadienne des droits et libertés*, il a conclu que [TRADUCTION] « dans la mesure où le ministre a agi conformément à la loi, ses actes ne peuvent pas être contestés avec succès pour cause de déni de justice naturelle ou d'absence d'indépendance ou d'impartialité institutionnelle » (par. 16). À son avis, en désignant des juges retraités à la présidence des conseils d'arbitrage, le ministre a clairement agi conformément au pouvoir que lui confère la loi.

B. *Ontario Court of Appeal* (2000), 51 O.R. (3d) 417

B. *Cour d'appel de l'Ontario* (2000), 51 O.R. (3d) 417

85 Writing for a unanimous Court of Appeal, Austin J.A. for the court stated, at para. 2:

> The central issue in this appeal is whether the Minister, in changing the process [i.e., from making appointments from the s. 49 roster], violated the principles of natural justice by interfering with the impartiality and independence of the arbitrators and raising a reasonable apprehension of bias, and/or interfering with the legitimate expectations of the appellants.

Dans l'arrêt unanime qu'il a rédigé au nom de la Cour d'appel, le juge Austin affirme ce qui suit, au par. 2 :

> [TRADUCTION] La principale question qui se pose en l'espèce est de savoir si, en modifiant le processus [c'est-à-dire en abandonnant la désignation à partir de la liste dressée en vertu de l'art. 49], le ministre a violé les principes de justice naturelle en compromettant l'impartialité et l'indépendance des arbitres et en suscitant une crainte raisonnable de partialité, ou encore en frustrant les attentes légitimes des appelants.

86 In answering this question in the affirmative, Austin J.A. observed that the content of collective agreements between union and hospital does not involve "interpretation but rather fundamental matters determining the working conditions of union members. As such they are of vital concern to those members. Such matters are not essentially legal but practical and require the familiarity and expertise of a labour arbitrator rather than the skills of a lawyer or a judge" (para. 75).

En répondant par l'affirmative à cette question, le juge Austin a fait remarquer que le contenu d'une convention collective devant être conclue par un syndicat et un hôpital fait non pas intervenir un processus [TRADUCTION] « d'interprétation, mais plutôt des questions fondamentales déterminantes sur le plan des conditions de travail des syndiqués. À ce titre, elles revêtent une importance capitale pour ces syndiqués. De telles questions sont pratiques et non pas essentiellement juridiques, et requièrent les connaissances et l'expertise d'un arbitre en droit du travail plutôt que les compétences d'un avocat ou d'un juge » (par. 75).

87 Austin J.A. further noted that the government of Ontario has a substantial financial interest in the outcome of the arbitrations. The pre-existing system

Le juge Austin a ajouté que le gouvernement de l'Ontario a un intérêt financier important dans l'issue des arbitrages. Le système précédent semblait

appeared to have worked reasonably well and must be regarded as having been successful.

In his view, retired judges generally lack the expertise of the prior arbitrators, are not independent, have no security, have no assurance that they will be appointed to future arbitrations, and must decide questions in which the person who appointed them has a substantial financial interest. He held that abandoning the established practice gave rise to a reasonable apprehension of bias and an appearance of interference with the institutional independence and the institutional impartiality of the boards.

Accordingly, the appeal was allowed.

IV. Analysis

The Minister argues that the wording of his power of appointment makes it clear that he and not the courts was intended to have the last word on appointments to chair compulsory arbitration boards in hospital and nursing home disputes. He says that the *HLDAA* does not condition his power on following any particular process, and it was open to him, in furtherance of government policy, to proceed as he did. Thus viewed, the central issue in this case is statutory interpretation. The *HLDAA* enacts quite a complex scheme that covers 11 pages of the statute book. The s. 6(5) power of appointment is an important element of the scheme, but it is only an element, and the *HLDAA*, as any statute, must be read as a whole to ascertain the true legislative intent.

The Minister does not claim an absolute and untrammelled discretion. He recognizes, as Rand J. stated more than 40 years ago in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, that "there is always a perspective within which a statute is intended to operate".

avoir fonctionné raisonnablement bien et devait être considéré comme ayant donné de bons résultats.

88 À son avis, les juges retraités n'ont généralement pas l'expertise des anciens arbitres, ne sont pas indépendants, n'ont aucune sécurité ni aucune garantie qu'ils seront désignés pour d'autres arbitrages, et doivent trancher des questions dans lesquelles la personne qui les a désignés a un intérêt financier important. Il a conclu que l'abandon de la pratique établie a suscité une crainte raisonnable de partialité et engendré une apparence d'atteinte à l'indépendance et à l'impartialité institutionnelles des conseils.

89 En conséquence, l'appel a été accueilli.

IV. Analyse

90 Le ministre fait valoir que la manière dont est libellé son pouvoir de désignation indique clairement que, dans le cas des différends qui surviennent dans les hôpitaux et les maisons de soins infirmiers, c'est lui, et non les tribunaux judiciaires, qui est censé avoir le dernier mot en ce qui concerne les désignations à la présidence des conseils d'arbitrage obligatoire. Selon lui, la *LACTH* ne l'oblige pas à suivre un processus particulier dans l'exercice de son pouvoir, et il pouvait agir comme il l'a fait en appliquant la politique du gouvernement. Vue sous cet angle, la principale question qui se pose en l'espèce est une question d'interprétation législative. La *LACTH* établit un régime assez complexe qui occupe 11 pages du recueil de lois. Le pouvoir de désignation prévu au par. 6(5) est un élément important de ce régime, mais n'est qu'un élément et, comme cela doit être fait pour toute loi, il faut interpréter la *LACTH* dans son ensemble pour déterminer l'intention véritable du législateur.

91 Le ministre ne prétend pas avoir un pouvoir discrétionnaire absolu et sans entraves. Il reconnaît, comme l'a fait le juge Rand, il y a plus de 40 ans, dans l'arrêt *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140, qu'[TRADUCTION] « [u]ne loi est toujours censée s'appliquer dans une certaine optique ».

92 The decision in *Roncarelli*, despite the many factual differences, foreshadows, in part, the legal controversy in this case. There, as here, the governing statute conferred a broad discretion which the decision maker was accused of exercising to achieve an improper purpose. In that case, the improper purpose was to injure financially (by the cancellation of a liquor licence) a Montreal restauranteur whose activities in support of the Jehovah's Witnesses were regarded by the provincial government as troublesome. Here, the allegations of improper purpose behind the unions' challenge are that the Minister used his power of appointment to influence outcomes rather than process, to protect employers rather than patients, and, as stated by the Court of Appeal, to change the appointments process in a way "reasonably" seen by the unions as "an attempt to seize control of the bargaining process" (para. 101). Still, the Minister points to a number of reasons for his conduct which, unlike the situation in *Roncarelli*, were closely associated with the purpose of the statute, including, in particular, the chronic delay and cost associated with *HLDAA* arbitrations. He was looking for "[p]eople who had spent their professional lives as neutrals".

Malgré les nombreuses différences qu'il présente sur le plan des faits, l'arrêt *Roncarelli* laisse présager en partie la controverse juridique en l'espèce. Là comme ici, la loi applicable accordait au décideur un large pouvoir discrétionnaire qu'il était accusé d'avoir exercé dans le but de réaliser un objectif illégitime. Dans cette affaire, l'objectif illégitime était de nuire financièrement (par l'annulation d'un permis d'alcool) à un restaurateur montréalais dont l'appui donné aux Témoins de Jéhovah était mal vu par le gouvernement provincial. En l'espèce, les allégations d'objectif illégitime qui sous-tendent la contestation des syndicats veulent que le ministre se soit servi de son pouvoir de désignation pour influencer les résultats plutôt que le processus, pour protéger les employeurs au lieu des malades et, comme l'a dit la Cour d'appel, pour modifier le processus de désignation d'une façon [TRADUCTION] « raisonnablement » perçue par les syndicats comme étant « une tentative de contrôler le processus de négociation » (par. 101). Le ministre justifie pourtant sa conduite par un certain nombre de raisons qui, contrairement à la situation dans l'affaire *Roncarelli*, avaient un lien étroit avec l'objet de la Loi, dont les délais chroniques et le coût des arbitrages fondés sur la *LACTH*. Il cherchait [TRADUCTION] « [d]es personnes qui avaient été neutres pendant toute leur vie professionnelle ».

93 The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).

L'exercice d'un pouvoir discrétionnaire, de faire remarquer le juge Rand dans l'arrêt *Roncarelli*, [TRADUCTION] « doit se fonder sur l'examen des considérations reliées à l'objet de [l']administration [de la loi en cause] » (p. 140). En l'espèce, comme dans cette affaire, on allègue que le décideur a pris en considération des éléments non pertinents (par exemple, l'appartenance à la « catégorie » des juges retraités) et qu'il n'a pas tenu compte d'éléments pertinents (tels que l'expertise de la personne proposée à la présidence, et son acceptabilité générale dans le milieu des relations du travail).

94 In this case, the "perspective within which a statute is intended to operate" is that of a legislative measure that seeks to achieve industrial peace by substituting compulsory arbitration for the right to strike or lockout. The "perspective" is another way of describing the policy and objects of the statute.

En l'espèce, l'optique dans laquelle la loi est censée s'appliquer est celle d'une mesure législative destinée à maintenir la paix industrielle en substituant l'arbitrage obligatoire au droit de grève ou de lock-out. L'« optique » est une autre façon de décrire la politique générale et les objets de la loi.

In the language of Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030:

> . . . if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. [Emphasis added.]

Lord Reid added that "the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court" (p. 1030). See also: *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 264; D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 13:1221.

This appeal thus brings to the fore the importance of the scheme and purpose of an Act in construing the particular words used by the legislature to disclose its true intent. It also requires us to consider whether the legislative intent disclosed in this case is sufficient to override the principles of natural justice that would otherwise be implied by the courts to limit the discretion of the statutory decision maker, and, if so, in what respect.

A. *Some Preliminary Observations*

Given the range and variety of the unions' objections, it might be useful to do a little organization at the outset.

Although the net result of a s. 6(5) appointment is the naming of a particular individual as a chairperson, the appointment is inevitably the product of a number of issues or determinations, some of them

Lord Reid s'est exprimé en ces termes dans l'arrêt *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), p. 1030 :

> [TRADUCTION] . . . si, parce qu'il a mal interprété la Loi ou pour toute autre raison, le ministre exerce son pouvoir discrétionnaire de façon à contrecarrer la politique générale ou les objets de la Loi ou à aller à l'encontre de ceux-ci, alors notre droit accusera une grave lacune si les personnes qui en subissent des préjudices n'ont pas droit à la protection de la cour. [Je souligne.]

Lord Reid a ajouté que [TRADUCTION] « pour déterminer la politique générale et les objets de la Loi, il faut interpréter la Loi dans son ensemble et l'interprétation est toujours une question de droit qui relève de la cour » (p. 1030). Voir aussi : *Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 56; *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41; G. Pépin et Y. Ouellette, *Principes de contentieux administratif* (2e éd. 1982), p. 264; D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), par. 13:1221.

95 Le présent pourvoi fait donc ressortir l'importance de l'économie et de l'objet de la loi lorsqu'il s'agit d'interpréter les termes particuliers que le législateur a utilisés pour exprimer son intention véritable. Il nous oblige également à nous demander si — et le cas échéant, à quel égard — l'intention du législateur exprimée en l'espèce suffit pour l'emporter sur les principes de justice naturelle qui, pour les tribunaux judiciaires, seraient par ailleurs censés limiter le pouvoir discrétionnaire du décideur légal.

A. *Quelques observations préliminaires*

96 Compte tenu du nombre et de la diversité des objections formulées par les syndicats, il pourrait être utile, au départ, de mettre un peu d'ordre dans tout cela.

97 Bien qu'elle aboutisse à la nomination d'un président ou d'une présidente, la désignation fondée sur le par. 6(5) est inévitablement le fruit d'un certain nombre de questions ou de décisions, dont

having to do with procedural fairness (e.g., do I first have to consult with the parties?), some of them legal (e.g., to what extent is my choice constrained by the *HLDAA*?), some of them factual (e.g., what qualifications am I looking for?), and others of mixed fact and law (e.g., is this individual "qualified" within the range of choice permitted to me by the *HLDAA*?). The court's task on judicial review is not to isolate these issues and subject each of them to differing standards of review. The unions' attack is properly aimed at the ultimate s. 6(5) appointments themselves. Nevertheless, as a practical matter (and practicality is a welcome virtue in this area of the law), it is convenient to group these issues in order to facilitate the judicial review of the s. 6(5) decision.

98 The first order of business is to examine the legislative scheme of the *HLDAA* in general and s. 6(5) in particular. As Beetz J. pointed out, "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation": *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087 (emphasis deleted), quoting S. A. de Smith, H. Street and R. Brazier, *Constitutional and Administrative Law* (4th ed. 1981), at p. 558. The court's mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended.

99 In performing that mandate, of course, administrative law supplies certain inferences and presumptions. For example, as this Court recently affirmed in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, at para. 21, "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice". More broadly, it is presumed that the legislature intended the statutory decision maker to function within the established principles and constraints of administrative law.

certaines ont trait à l'équité procédurale (par exemple, dois-je d'abord consulter les parties?), au droit (par exemple, dans quelle mesure la *LACTH* limite-t-elle le choix que je peux faire?) et aux faits (par exemple, quelle sont les qualifications que je recherche?), alors que d'autres ont un caractère mixte de droit et de fait (par exemple, le candidat en question est-il une personne « compétente » que la *LACTH* m'autorise à choisir?). Dans le cadre d'un contrôle judiciaire, il n'appartient pas à la cour d'isoler ces questions et d'appliquer à chacune de celles-ci des normes de contrôle différentes. Ce à quoi s'en prennent à juste titre les syndicats, ce sont les désignations mêmes qui, en définitive, sont faites en vertu du par. 6(5). En pratique (le sens pratique étant une vertu appréciée dans ce domaine du droit), il convient néanmoins de regrouper ces questions pour faciliter le contrôle judiciaire de la décision fondée sur le par. 6(5).

La première étape consiste à étudier le régime général établi par la *LACTH* et, plus particulièrement, le par. 6(5) de cette loi. Comme l'a fait observer le juge Beetz dans *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1087, en citant l'ouvrage de S. A. de Smith, H. Street et R. Brazier, intitulé *Constitutional and Administrative Law* (4e éd. 1981), p. 558, [TRADUCTION] « [d]ans une large mesure, l'examen judiciaire d'un acte administratif est une division spécialisée de l'interprétation des lois » (soulignement omis). Le mandat de la cour en matière de contrôle judiciaire consiste à veiller à ce que le décideur légal respecte les limites prévues par le législateur.

Il va sans dire que le droit administratif fournit certaines inférences et présomptions utiles pour exécuter ce mandat. Ainsi, comme la Cour l'affirmait récemment dans l'arrêt *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 R.C.S. 781, 2001 CSC 52, par. 21, « les tribunaux judiciaires infèrent généralement que le Parlement ou la législature voulait que les procédures du tribunal administratif soient conformes aux principes de justice naturelle ». De manière plus générale, on présume que l'intention du législateur était que le décideur légal respecte les principes et les contraintes du droit administratif.

The second order of business is to isolate the Minister's acts or omissions relevant to procedural fairness, a broad category which extends to, and to some extent overlaps, the traditional principles of natural justice: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R 311, *per* Laskin C.J., at p. 325. The unions, for example, question whether the Minister was right to refuse to consult with them before making the appointments. These questions go to the procedural framework within which the Minister made the s. 6(5) appointments, but are distinct from the s. 6(5) appointments themselves. It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions. It is only the ultimate exercise of the Minister's discretionary s. 6(5) power of appointment itself that is subject to the "pragmatic and functional" analysis, intended to assess the degree of deference intended by the legislature to be paid by the courts to the statutory decision maker, which is what we call the "standard of review".

100 La deuxième étape consiste à isoler les actes ou omissions du ministre qui touchent à l'équité procédurale, une catégorie générale qui comprend et, dans une certaine mesure, chevauche les principes traditionnels de la justice naturelle : *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, p. 325, le juge en chef Laskin. Par exemple, les syndicats se demandent si le ministre a eu raison de refuser de les consulter avant de faire les désignations. Ces questions concernent le cadre procédural à l'intérieur duquel le ministre a fait les désignations fondées sur le par. 6(5), sans toutefois porter sur les désignations mêmes qui ont été faites en vertu de ce paragraphe. Il appartient aux tribunaux judiciaires et non au ministre de donner une réponse juridique aux questions d'équité procédurale. Seul l'exercice en dernière analyse du pouvoir discrétionnaire de désignation conféré au ministre par le par. 6(5) est assujetti à l'analyse « pragmatique et fonctionnelle » qui vise à déterminer le degré de déférence dont le législateur a voulu que les tribunaux judiciaires fassent montre à l'égard du décideur légal, lequel degré constitue ce qu'on appelle la « norme de contrôle ».

The third order of business, accordingly, is to determine the degree of judicial deference which, having regard to the *HLDAA* and all the relevant circumstances, the Minister is entitled to receive in the exercise of his discretionary s. 6(5) power. In assessing the Minister's appointments, the court may need to take into consideration some of the determinations made by the Minister as input into the exercise of his discretion. For example, if, as I believe, the Minister is entitled to make any appointment that is not patently unreasonable, his interpretation of the scope of his power of appointment under s. 6(5) will affect the reasonableness of his ultimate appointment: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 49.

101 La troisième étape consiste donc à déterminer le degré de déférence judiciaire auquel, compte tenu de la *LACTH* et de toutes les circonstances pertinentes, le ministre a droit dans l'exercice du pouvoir discrétionnaire qui lui est conféré par le par. 6(5). Lorsqu'elle apprécie les désignations ministérielles, la cour peut devoir tenir compte de certaines décisions que le ministre a prises en exerçant son pouvoir discrétionnaire. Par exemple, si, comme je le crois, le ministre a le droit de faire toute désignation qui n'est pas manifestement déraisonnable, son interprétation de l'étendue du pouvoir de désignation que lui confère le par. 6(5) influera sur le caractère raisonnable de la désignation qu'il fera en définitive : *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 49.

The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

102 L'équité procédurale concerne la manière dont le ministre est parvenu à sa décision, tandis que la norme de contrôle s'applique au résultat de ses délibérations.

103 On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself. Thus in *Baker*, *supra*, a case involving the judicial review of a Minister's rejection of an application for permanent residence in Canada on human and compassionate grounds, the Court looked at "all the circumstances" on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, at para. 23; standard of review, at para. 61); the statutory scheme (procedural fairness, at para. 24; standard of review, at para. 60); and the expertise of the decision maker (procedural fairness, at para. 27; standard of review, at para. 59). Other factors, of course, did not overlap. In procedural fairness, for example, the Court was concerned with "the importance of the decision to the individual or individuals affected" (para. 25), whereas determining the standard of review included such factors as the existence of a privative clause (para. 58). The point is that, while there are some common "factors", the object of the court's inquiry in each case is different.

B. *Issues*

104 With these preliminary observations, I turn to the issues that arise for determination in the resolution of this appeal:

(1) the statutory interpretation of s. 6(5) of the *HLDAA*;

(2) procedural fairness issues:

(a) the Minister's alleged lack of impartiality;

(b) the Minister's alleged failure to consult with the unions about the change in the process of appointments;

(c) the alleged violation of the doctrine of legitimate expectation in refusing to

La tentative de maintenir séparés ces différents genres de questions peut parfois engendrer une certaine confusion. Force est de constater que certains « facteurs » utilisés pour déterminer les exigences de l'équité procédurale servent également à déterminer la « norme de contrôle » applicable à la décision discrétionnaire elle-même. Ainsi, dans l'affaire *Baker*, précitée, qui portait sur le contrôle judiciaire du rejet par le ministre d'une demande de résidence permanente au Canada fondée sur des raisons d'ordre humanitaire, la Cour a examiné « toutes les circonstances » à ces deux égards, mais il y avait chevauchement de certains facteurs, dont la nature de la décision rendue (équité procédurale, par. 23; norme de contrôle, par. 61), le régime législatif (équité procédurale, par. 24; norme de contrôle, par. 60), et l'expertise du décideur (équité procédurale, par. 27; norme de contrôle, par. 59). Il est évident que d'autres facteurs ne se recoupaient pas. En ce qui concerne l'équité procédurale notamment, la Cour s'est intéressée à « l'importance de la décision pour les personnes visées » (par. 25), tandis que, pour déterminer la norme de contrôle applicable, elle a pris en considération des facteurs comme l'existence d'une clause privative (par. 58). Il reste que, même s'il existe certains « facteurs » communs, l'objet de l'examen du tribunal judiciaire diffère d'un cas à l'autre.

B. *Les questions en litige*

Ces observations préliminaires étant faites, j'aborde maintenant les questions qui doivent être tranchées en l'espèce :

(1) l'interprétation du par. 6(5) *LACTH*;

(2) les questions d'équité procédurale :

a) l'allégation de partialité de la part du ministre;

b) l'allégation voulant que le ministre n'ait pas consulté les syndicats au sujet de la modification du processus de désignation;

c) l'allégation de violation de la règle de l'expectative légitime en raison du refus

nominate only arbitrators who had been mutually agreed upon;

(3) an assessment of the standard of review of the Minister's appointments;

(4) when does a decision rise to the level of *patent* unreasonableness?

(5) whether the applicable standard of review was violated by the Minister's rejection of

(a) the s. 49(10) list as a requisite of appointment, or

(b) expertise and "broad acceptability within the labour relations community" as criteria for the selection of chairpersons;

(6) whether the Court of Appeal erred in finding that the arbitration boards, by reason of the impugned ministerial approach to s. 6(5) appointments, lacked the requisite institutional independence and impartiality;

(7) the appropriateness of the remedy granted by the Court of Appeal.

I will deal with each of these issues in turn.

(1) The Statutory Interpretation of Section 6(5) of the *HLDAA*

The appropriate approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, frequently cited with approval in this Court, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33). This contextual approach accords with the previously

de désigner uniquement des arbitres sur lesquels les parties s'étaient entendues;

(3) l'appréciation de la norme de contrôle applicable aux désignations ministérielles;

(4) quand une décision devient-elle *manifestement* déraisonnable?

(5) la question de savoir si la norme de contrôle applicable a été violée en raison du rejet par le ministre :

a) de la liste dressée en vertu du par. 49(10), qui doit être utilisée pour faire des désignations; ou

b) de l'expertise et de « l'acceptabilité générale dans le milieu des relations du travail » comme critères de sélection du président ou de la présidente;

(6) la question de savoir si la Cour d'appel a commis une erreur en concluant qu'en raison de l'approche contestée que le ministre a adoptée en matière de désignations fondées sur le par. 6(5), les conseils d'arbitrage étaient dépourvus de l'indépendance et de l'impartialité institutionnelles requises;

(7) le caractère convenable de la réparation accordée par la Cour d'appel.

Je vais examiner successivement chacune de ces questions. 105

(1) L'interprétation du par. 6(5) *LACTH*

En matière d'interprétation législative, il convient d'adopter l'approche suivante : [TRADUCTION] « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87. La Cour a souvent cité et approuvé ce passage, notamment dans les arrêts *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21 et 23, et *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33). Cette 106

mentioned *dictum* of Rand J. in *Roncarelli*, *supra*, that "there is always a perspective within which a statute is intended [by the legislature] to operate" (p. 140), and Lord Reid's caution in *Padfield*, *supra*, that the particular wording of a ministerial power is to be read in light of "the policy and objects of the Act" (p. 1030).

107 The *HLDAA* contemplates the appointment of "a person who is, in the opinion of the Minister, qualified to act". The Minister is a senior member of the government with a vital interest in industrial peace in the province. His work in pursuit of that objective in the hospital sector, supported by his officials, should not be micro-managed by the courts. Still, as Rand J. said in *Roncarelli*, *supra*, at p. 140, the discretionary power is not "absolute and untrammelled". The discretion is constrained by the scheme and object of the *HLDDA* as a whole, which the legislature intended to serve as a "neutral and credible" substitute for the right to strike and lock-out.

108 Compulsory arbitration is a fairly well-understood beast in the jungle of labour relations. Dickson C.J., dissenting on other grounds in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, pointed out, at p. 380:

> The purpose of such a mechanism [compulsory arbitration] is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

109 Labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. The intervener, National Academy of Arbitrators (Canadian Region), contended that "[a]rbitration

approche contextuelle concorde avec la remarque susmentionnée du juge Rand dans l'arrêt *Roncarelli*, précité, selon laquelle [TRADUCTION] « [u]ne loi est toujours censée s'appliquer dans une certaine optique [voulue par le législateur] » (p. 140), et avec la mise en garde de lord Reid dans l'arrêt *Padfield*, précité, voulant que le libellé d'un pouvoir ministériel doive être interprété à la lumière de [TRADUCTION] « la politique générale et [d]es objets de la Loi » (p. 1030).

La *LACTH* prévoit la désignation d'« une personne qui, à son avis [c'est-à-dire de l'avis du ministre], est compétente pour agir en cette qualité [d'arbitre] ». Le ministre est un membre supérieur du gouvernement et a un intérêt essentiel dans le maintien de la paix industrielle dans la province. Les tribunaux judiciaires ne devraient pas intervenir à outrance dans les efforts qu'il déploie, avec l'appui de ses fonctionnaires, pour atteindre cet objectif dans le secteur hospitalier. Pourtant, comme l'a affirmé le juge Rand dans l'arrêt *Roncarelli*, précité, p. 140, le pouvoir discrétionnaire n'est pas [TRADUCTION] « absolu et sans entraves ». Ce pouvoir discrétionnaire est limité par l'économie et l'objet de la *LACTH* dans son ensemble, laquelle loi établit un système qui, d'après l'intention du législateur, doit servir de moyen « neutre et crédible » de remplacer le droit de grève et de lock-out.

Dans la jungle des relations du travail, l'arbitrage obligatoire est une bête que l'on comprend assez bien. Le juge en chef Dickson, dissident pour d'autres motifs dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, a fait remarquer, à la p. 380 :

> Le but d'un tel mécanisme [l'arbitrage obligatoire] est d'assurer que la perte du pouvoir de négociation par suite de l'interdiction législative des grèves est compensée par l'accès à un système qui permet de résoudre équitablement, efficacement et promptement les différends mettant aux prises employés et employeurs.

L'arbitrage en matière de relations du travail en tant que mécanisme de règlement des différends repose traditionnellement et fonctionnellement sur le consentement, l'arbitre étant choisi par les parties ou étant acceptable par chacune d'elles. L'intervenante, la National Academy of Arbitrators

which is, or is seen to be, political rather than rigorously quasi-judicial is no longer arbitration". Moreover, the intervener contends:

> If arbitrators are, or are perceived to be, a surrogate of either party or of government, or appointed to serve the interests of either party or of government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability. . . . A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.

(Canadian Region), a fait valoir que [TRADUCTION] « [l]'arbitrage qui est ou qui est perçu comme étant politique plutôt que rigoureusement quasi judiciaire n'est plus un arbitrage ». L'intervenante ajoute ceci :

> [TRADUCTION] Si l'arbitre est l'agent de l'une ou l'autre partie ou du gouvernement ou s'il est perçu comme tel, ou encore s'il est désigné pour servir les intérêts de l'une ou l'autre partie ou du gouvernement, le système s'aliène la confiance des parties qui est essentielle à la paix et à la stabilité des relations du travail [. . .] L'absence de confiance dans l'arbitrage entraînerait des conflits de travail et l'interruption des services, lesquels représentent le problème même que l'arbitrage impartial des différends vise à prévenir.

As the Ontario legislature has considered the *HLDAA* over the years, it has demonstrated an awareness of the fact that workers who feel unfairly treated can manifest their grievances with slowdowns or other job actions, including illegal walkouts. Ministers emphasized that the purpose of the *HLDAA* was to protect patients, not to tilt the balance between employers and employees one way or the other. The "background and purpose" of the *HLDAA* includes the 1964 Report of the Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees, which led to the *HLDAA*, and recommended that "[o]nly chairmen experienced in hospital affairs would be appointed" (Report, at p. 51). The Minister proposing the 1972 amendment told the Ontario Legislature that the "quality of decision-making" would be improved by "knowledgeable arbitrators experienced in the hospital sector" (*Legislature of Ontario Debates*, December 14, 1972, at p. 5760). The 1979 amendment to the *Labour Relations Act* established what is now renumbered as the s. 49(10) roster of arbitrators who were considered to be impartial and knowledgeable in labour arbitrations (not necessarily hospital matters). Interest arbitrators were frequently, though by no means always, drawn from this roster between the early 1980s and 1997. The anchors that were seen to justify the parties' confidence in *HLDAA* arbitrations were impartiality, independence, expertise and general acceptability in the labour relations community. An individual who combines relevant expertise with independence

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Au fil des ans, l'Assemblée législative de l'Ontario a étudié la *LACTH* et a démontré qu'elle était consciente du fait que des travailleurs qui se sentent injustement traités peuvent exprimer leur mécontentement par des ralentissements de travail ou par d'autres moyens de pression, y compris les débrayages illégaux. Les ministres ont souligné que la *LACTH* avait pour objet de protéger les malades et non de faire pencher la balance en faveur des employeurs ou des employés. Au chapitre « du contexte et de l'objet » de la *LACTH*, il y a le rapport déposé en 1964 par la Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and their Employees qui a abouti à la *LACTH* et qui recommandait, à la p. 51, que [TRADUCTION] « [s]eules [soient] désignées à la présidence des personnes ayant de l'expérience en matière hospitalière ». En proposant la modification de 1972, le ministre a affirmé devant l'Assemblée législative de l'Ontario que la désignation [TRADUCTION] « d'arbitres compétents qui ont de l'expérience dans le secteur hospitalier » contribuerait à améliorer la « qualité du processus décisionnel » (*Legislature of Ontario Debates*, 14 décembre 1972, p. 5760). La modification apportée en 1979 à la *Labour Relations Act* a établi la liste — maintenant prévue au par. 49(10) — d'arbitres jugés impartiaux et compétents en matière d'arbitrage de conflits de travail (mais pas nécessairement en matière hospitalière). Depuis le début des années 1980 jusqu'en 1997, les arbitres de différends étaient souvent — quoique pas toujours — choisis à partir de

and impartiality can reasonably be expected to be experienced in the field, thus known to and broadly acceptable to both unions and management.

111 I conclude, therefore, that, although the s. 6(5) power is expressed in broad terms, the legislature intended the Minister, in making his selection, to have regard to relevant labour relations expertise as well as independence, impartiality and general acceptability within the labour relations community. By "general acceptability", I do not mean that a particular candidate must be acceptable to all parties all the time, or to the parties to a *particular HLDAA* dispute. I mean only that the candidate has a track record in labour relations and is generally seen in the labour relations community as widely acceptable to both unions and management by reason of his or her independence, neutrality and proven expertise.

112 I do not consider these criteria to be vague or uncertain. The practice of labour relations in this country has developed into a highly sophisticated business. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill these criteria. Some of them not only enjoy national reputations for their skills in resolving industrial conflicts but are retired judges. From the Minister's perspective, there exists not only a large pool of recognized candidates, but the *HLDAA* allows generous latitude to his selection (i.e., a candidate "who is, in the opinion of the Minister, qualified"). The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDAA*'s object and purposes.

cette liste. Les qualités qui semblaient justifier la confiance des parties dans l'arbitrage fondé sur la *LACTH* étaient l'impartialité, l'indépendance, l'expertise et l'acceptabilité générale dans le milieu des relations du travail. On peut raisonnablement s'attendre à ce qu'une personne qui cumule expertise pertinente, indépendance et impartialité ait de l'expérience dans le domaine concerné et qu'elle soit ainsi connue et généralement acceptable tant par les syndicats que par le patronat.

Je conclus donc que, même si le pouvoir conféré au par. 6(5) est énoncé en termes généraux, le législateur a voulu qu'en faisant son choix le ministre prenne en considération l'expertise pertinente en matière de relations du travail ainsi que l'indépendance, l'impartialité et l'acceptabilité générale dans le milieu des relations du travail. Lorsque je parle d'« acceptabilité générale », je ne veux pas dire que les candidats doivent toujours être acceptables par toutes les parties ou encore par les parties à un différend *particulier* visé par la *LACTH*. J'entends seulement par là que les candidats ont de l'expérience en matière de relations du travail et sont généralement perçus dans le milieu des relations du travail comme jouissant d'une grande acceptabilité auprès des syndicats et du patronat en raison de leur indépendance, de leur neutralité et de leur expertise confirmée.

Je ne considère pas que ces critères sont vagues ou incertains. Les relations du travail au pays sont devenues un domaine très spécialisé. Un grand nombre d'arbitres professionnels en droit du travail dépendent, pour leur subsistance, de leur capacité reconnue de satisfaire à ces critères. En plus d'être réputés à l'échelle nationale pour leur aptitude à résoudre des conflits de travail, certains d'entre eux sont des juges retraités. Du point de vue du ministre, non seulement y a-t-il une réserve importante de candidats reconnus, mais encore la *LACTH* lui accorde une grande latitude pour faire son choix (c'est-à-dire pour choisir le candidat « qui, à son avis, est compéten[t] »). Il en résulte un cadre tout à fait acceptable à l'intérieur duquel le législateur a voulu accorder au ministre une liberté d'action considérable, mais non illimitée, pour faire des désignations conformes aux fins et aux objets de la *LACTH*.

(2) Procedural Fairness

Under this heading, I group the challenges to the Minister's impartiality, the allegation that he violated procedural fairness by allegedly changing the "system" of appointments without prior consultation, and his alleged violation of the doctrine of legitimate expectation.

(a) *Was the Minister Impartial in the Exercise of the Power of Appointment?*

The unions say the Minister could not, as a member of a cost-cutting government, make the appointments impartially. He was therefore disqualified and ought to have delegated the appointments to senior officials.

The Minister says that he is not responsible for health costs or hospital administration. He is, however, a member of Cabinet and committed to government policy which, in 1997, included public sector "rationalization" and pay restraint. He was elected on a platform called "the Common Sense Revolution" and people would reasonably think he was committed to carrying it out.

The Ontario Court of Appeal concluded that the Minister had a "significant and direct interest" in the outcome of the arbitral awards (para. 21). As Austin J.A. pointed out, "[a]pproximately 75 per cent to 80 per cent of hospital budgets relate to labour costs and the government's primary method for controlling expenditures is wage control. Although nursing homes have sources of income that are not available to hospitals, they too are substantially dependent upon the government for funding" (para. 21). The Minister's response is that here, unlike in cases such as *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.), at pp. 869-71 and 884, neither he nor his government was a party to hospital sector arbitral proceedings. In the *MacBain* case, the Canadian Human Rights Commission appointed the members of the *ad hoc* tribunal to adjudicate the very dispute between the Commission and the person complained about. The Minister argues that his interest in hospital finance

(2) L'équité procédurale

113 Je regroupe sous cette rubrique les allégations de partialité de la part du ministre, l'allégation voulant qu'il ait manqué à l'équité procédurale en modifiant le « système » de désignation sans consultation préalable, et l'allégation voulant qu'il ait violé la règle de l'expectative légitime.

a) *Le ministre a-t-il été impartial dans l'exercice de son pouvoir de désignation?*

114 Les syndicats soutiennent que, à titre de membre d'un gouvernement prônant la réduction des dépenses, le ministre n'était pas en mesure de faire les désignations de manière impartiale. Il était donc inhabile à faire les désignations et il aurait dû confier à des hauts fonctionnaires le soin de le faire à sa place.

115 Le ministre affirme qu'il n'est responsable ni des coûts en matière de santé ni de l'administration des hôpitaux. Il fait néanmoins partie du Cabinet et est un défenseur de la politique du gouvernement qui, en 1997, consistait notamment à « rationaliser » le secteur public et à contrôler les salaires. Il a été élu en raison de la « Révolution du Bon Sens » qu'il promettait et la population pouvait raisonnablement penser qu'il était résolu à tenir cette promesse.

116 La Cour d'appel de l'Ontario a conclu que le ministre avait un [TRADUCTION] « intérêt important et direct » dans l'issue des arbitrages (par. 21). Comme l'a fait remarquer le juge Austin, [TRADUCTION] « [e]nviron 75 à 80 pour 100 du budget des hôpitaux est consacré à la masse salariale et le contrôle des salaires représente le principal moyen dont le gouvernement dispose pour contrôler les dépenses. Même si les maisons de soins infirmiers ont des sources de revenus dont ne disposent pas les hôpitaux, elles dépendent largement elles aussi du financement gouvernemental » (par. 21). Le ministre répond qu'en l'espèce, contrairement à des affaires comme *MacBain c. Lederman*, [1985] 1 C.F. 856 (C.A.), p. 869-871 et 884, ni lui ni son gouvernement n'ont participé aux procédures d'arbitrage dans le secteur hospitalier. Dans l'affaire *MacBain*, la Commission canadienne des droits de la personne avait désigné les membres du tribunal

is not "directly at stake" (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 100) and "too attenuated and remote to give rise to a reasonable apprehension of bias" (*Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 891). The local hospital boards could absorb higher unit labour costs by reducing services, thus keeping public funding requirements more or less constant. This approach, I think, is unrealistic. It underestimates the Minister's collective responsibility with his colleagues at a time of pitched confrontation with the unions over reductions in public sector staffing and financing. At the very least, there was an appearance that he had a significant interest in outcomes as well as process.

117 The legal answer to this branch of the unions' argument, however, is that the legislature specifically conferred the power of appointment on the Minister. Absent a constitutional challenge, a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice, as recently affirmed by this Court in *Ocean Port Hotel*, *supra*. In that case, the members of the provincial liquor licensing appeal board, who were empowered to impose penalties on liquor licences for non-compliance with the Act, were appointed to serve "at the pleasure" of the executive. Some licencees successfully argued before the British Columbia Court of Appeal that "at pleasure" appointees lacked the security of tenure necessary to ensure their independence. The Board's decisions were therefore set aside. On further appeal to this Court, however, it was held, *per* McLachlin C.J., that "like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication" (para. 22 (emphasis added)). Affirming the rule of interpretation that "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice" (para. 21), the Court never-

ad hoc chargé de se prononcer sur le conflit même qui opposait la Commission à la personne visée par la plainte en question. Le ministre soutient que son intérêt en matière de financement hospitalier n'est pas « directement en jeu » (*Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 100) et qu'il est « trop minime et trop éloigné pour donner lieu à une crainte raisonnable de partialité » (*Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, p. 891). Les conseils d'hôpitaux locaux pourraient éponger une hausse des coûts unitaires de main-d'œuvre en réduisant les services, et ainsi stabiliser plus ou moins les besoins de financement public. J'estime que cette approche n'est pas réaliste. Elle sous-estime la solidarité du ministre avec ses collègues à une époque d'affrontements intenses avec les syndicats au sujet des réductions de personnel et de financement dans le secteur public. Le ministre paraissait tout au moins avoir un intérêt important autant dans le processus que dans l'issue du processus.

Cependant, la réponse juridique à ce volet de l'argumentation des syndicats est que le législateur a expressément conféré le pouvoir de désignation au ministre. En l'absence de contestation constitutionnelle, un régime législatif qui porte sur ce sujet précis et qui est énoncé en des termes clairs et non équivoques prime sur les principes de justice naturelle de la common law, comme l'a récemment affirmé notre Cour dans l'arrêt *Ocean Port Hotel*, précité. Dans cette affaire, les membres de la commission d'appel des permis d'alcool provinciale, habilités à infliger des peines aux titulaires de permis d'alcool qui ne se conformaient pas à la Loi, étaient nommés « à titre amovible » par l'exécutif. Certains titulaires de permis ont fait valoir avec succès devant la Cour d'appel de la Colombie-Britannique que les personnes désignées « à titre amovible » étaient privées de l'inamovibilité nécessaire pour garantir leur indépendance. Les décisions de la commission ont donc été annulées. Cependant, à la suite du pourvoi formé devant notre Cour, il a été décidé, sous la plume de la juge en chef McLachlin, que « comme pour tous les principes de justice naturelle, le degré d'indépendance requis des membres du tribunal administratif peut être écarté par les termes exprès de la loi ou par déduction nécessaire » (par. 22 (je

theless concluded that "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction" (para. 22 (emphasis added)). Further, "[w]here the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence" (para. 27 (emphasis added)).

souligne)). Confirmant la règle d'interprétation selon laquelle « les tribunaux judiciaires infèrent généralement que le Parlement ou la législature voulait que les procédures du tribunal administratif soient conformes aux principes de justice naturelle » (par. 21), la Cour a néanmoins conclu qu'« [i]l n'est pas loisible à un tribunal judiciaire d'appliquer une règle de common law alors qu'il est en présence d'une directive législative claire » (par. 22 (je souligne)). De plus, « [l]orsque, comme en l'espèce, l'intention du législateur est sans équivoque, il n'y a pas lieu d'importer les théories de common law en matière d'indépendance » (par. 27 (je souligne)).

The courts will equally give effect in a proper case to exclusion by necessary implication. In *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, for example, the legislature had clearly and unequivocally conferred both investigatory and adjudicative functions on members of the Alberta Securities Commission. In the absence of any constitutional challenge, the Court affirmed that the overlap of functions was permissible, provided the official in question did not go beyond "fulfilling his statutory duties" (p. 315).

118 Lorsque le cas s'y prête, les tribunaux judiciaires appliquent également le principe de l'exclusion par déduction nécessaire. Par exemple, dans l'affaire *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301, le législateur avait confié clairement et sans équivoque des fonctions d'enquête et de décision aux membres de l'Alberta Securities Commission. En l'absence de contestation constitutionnelle, la Cour a affirmé que le cumul de fonctions était acceptable pourvu que le fonctionnaire en cause ait seulement « exercé les fonctions que lui impose la loi » (p. 315).

Ocean Port Hotel, *supra*, involved adjudication of licensing violations in the context of government liquor policy. As was stated at para. 33, "[The Board] is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. . . . The exercise of power here at issue falls squarely within the executive power of the provincial government."

119 L'arrêt *Ocean Port Hotel*, précité, concernait une décision relative à des violations de permis rendue conformément à une politique gouvernementale en matière d'alcool. Comme le précise le par. 33, « [la] fonction première [de la commission] est l'octroi de permis. La suspension qui a fait l'objet de la plainte se rattachait à l'exercice de cette fonction. [. . .] L'exercice du pouvoir en cause procède carrément du pouvoir exécutif du gouvernement provincial. »

Here, the context is quite different. The government has the power to legislate workers back to work but the *HLDAA* holds out the promise of a "neutral and credible" process to reconcile the interests of the employer and employees. As arbitrator O. B. Shime observed in *McMaster University and McMaster University Faculty Assn., Re* (1990), 13 L.A.C. (4th) 199, at p. 204:

120 Le contexte en l'espèce est totalement différent. Le gouvernement peut légiférer pour forcer le retour au travail, mais la *LACTH* promet un processus « neutre et crédible » permettant de concilier les intérêts de l'employeur et ceux des employés. Comme l'a fait remarquer l'arbitre O. B. Shime, à la p. 204 de la décision *McMaster University and McMaster University Faculty Assn., Re* (1990), 13 L.A.C. (4th) 199 :

Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy.

[TRADUCTION] Les arbitres et les arbitres des dernières offres ont toujours conservé leur indépendance par rapport aux politiques gouvernementales en matière de détermination de la rémunération dans le secteur public, et n'ont jamais adopté un point de vue qui en feraient des mandataires du gouvernement chargés d'appliquer une politique gouvernementale.

121 In the case of tribunals established, as here, to adjudicate "interest" disputes between parties, it is particularly important to insist on clear and unequivocal legislative language before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication.

Dans les cas semblables à la présente affaire où des tribunaux administratifs sont constitués pour régler des « différends » entre des parties, il est particulièrement important d'exiger un langage législatif clair et non équivoque pour conclure que le législateur a voulu écarter, soit expressément, soit par déduction nécessaire, l'exigence d'impartialité.

122 In this case, however, the legislature's choice of the Minister as the proper authority to exercise the power of appointment is clear and unequivocal.

En l'espèce, cependant, le choix par le législateur du ministre comme étant la personne compétente pour exercer le pouvoir de désignation est clair et non équivoque.

123 The unions contend that the Minister could have avoided the appearance of a conflict of interest. Over the years, the direct involvement of Ministers in s. 6(5) appointments was somewhat diminished by delegation of the selection of the third arbitrator to a senior public servant, whose recommendation was then, in most cases, accepted by the Minister. An express power of delegation is found in s. 9.2(1), but it is expressed as permissive, not mandatory. The practice of delegation, where followed, may have had as much to do with departmental efficiency as with sensitivity over the Minister's direct involvement. It was not a requirement.

Les syndicats prétendent que le ministre aurait pu éviter l'apparence de conflit d'intérêts. Au fil des ans, la délégation du pouvoir de choisir le troisième arbitre à un haut fonctionnaire dont la recommandation était, dans la plupart des cas, entérinée par le ministre a contribué à diminuer quelque peu la participation directe des ministres aux désignations fondées sur le par. 6(5). Le paragraphe 9.2(1) accorde expressément un pouvoir de délégation, mais celui-ci est énoncé de manière facultative et non impérative. Dans les cas où elle a été suivie, la pratique consistant à déléguer le pouvoir de désignation peut avoir répondu autant à un souci d'efficacité ministérielle qu'à un souci d'éviter la participation directe du ministre. Ce n'était pas une exigence.

124 In some provinces, the selection of a chairperson in public sector labour disputes is distanced from the Minister by being conferred on a Chief Justice or other disinterested authority. See, e.g., *Universities Act*, R.S.A. 2000, c. U-3, s. 32(*e*); *Teachers' Collective Bargaining Act*, R.S.N. 1990, c. T-3, ss. 17(2) and 22(2); and *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, c. 460, s. 26(2). This was clearly not an option that recommended itself to the Ontario legislature in the case of the *HLDAA*.

Dans certaines provinces, on dissocie le ministre du choix d'une personne à la présidence d'un conseil d'arbitrage de conflit de travail dans le secteur public en confiant à un juge en chef ou à une autre personne compétente neutre le soin de l'effectuer. Voir, par exemple, *Universities Act*, R.S.A. 2000, ch. U-3, al. 32*e*), *Teachers' Collective Bargaining Act*, R.S.N. 1990, ch. T-3, par. 17(2) et 22(2), et *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, ch. 460, par. 26(2). Le législateur de l'Ontario n'a manifestement pas jugé cette option acceptable dans le cas de la *LACTH*.

Even in 1965, when the *HLDAA* was enacted, provincial funding of health care was such that it was anticipated by opposition members of the legislature that Ministers of Labour would be interested (or would at least have the appearance of an interest) in outcomes as well as process. The legislature nevertheless proceeded to confer the power, perhaps to keep the Minister politically accountable for its exercise. For the court to require the Minister to delegate the choice to an official in his Ministry in the face of the text of s. 6(5) would amount, I think, to a judicial amendment of the legislation.

125 Même en 1965, au moment de l'adoption de la *LACTH*, le financement provincial des soins de santé était tel que les membres de l'opposition à l'Assemblée législative prévoyaient que les ministres du Travail auraient un intérêt (ou du moins l'apparence d'un intérêt) autant dans l'issue du processus que dans le processus même. Le législateur a néanmoins conféré le pouvoir en question, peut-être pour que le ministre demeure politiquement responsable de son exercice. J'estime que, compte tenu du libellé du par. 6(5), il y aurait modification judiciaire de la Loi si un tribunal judiciaire obligeait le ministre à déléguer son pouvoir de désignation à un fonctionnaire de son ministère.

I therefore conclude that the Minister's perceived interest in the outcome of s. 6(5) arbitrations does not bar him from exercising a statutory power of appointment conferred on him in clear and unequivocal language.

126 Je conclus donc que la perception selon laquelle le ministre a un intérêt dans l'issue des arbitrages fondés sur le par. 6(5) ne l'empêche pas d'exercer le pouvoir de désignation que la Loi lui confère de manière claire et non équivoque.

(b) *The Minister's Alleged Failure to Consult with the Unions About the Change in the Process of Appointments*

b) *L'allégation voulant que le ministre n'ait pas consulté les syndicats au sujet de la modification du processus de désignation*

The unions claim that they were the beneficiaries of a long-standing appointments process that was regarded by the parties as entrenched and was unfairly changed "in one fell swoop" to the unions' detriment without notice or consultation. If established, such circumstance might well give rise to a claim of breach of procedural fairness. As stated by Le Dain J. in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653:

127 Les syndicats font valoir qu'ils bénéficiaient depuis longtemps d'un processus de désignation que les parties considéraient comme bien enraciné, et que ce processus a été « d'un seul coup » injustement modifié à leur détriment, sans préavis ni consultation. S'il est établi, ce fait pourrait donner lieu à un recours pour manquement à l'équité procédurale. Comme l'a affirmé le juge Le Dain dans l'arrêt *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653 :

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. . . .

> Cette Cour a confirmé que, à titre de principe général de *common law*, une obligation de respecter l'équité dans la procédure incombe à tout organisme public qui rend des décisions administratives qui ne sont pas de nature législative et qui touchent les droits, privilèges ou biens d'une personne . . .

The issue here is consultation. The unions say that when the Minister changed an entrenched appointments process, his decision was of an administrative nature and affected the vital interest of union members, namely the earning of their livelihood. Their interest was not remote, but directly engaged by the selection of those to be put in power

128 C'est la question de la consultation qui est en litige dans la présente affaire. Les syndicats prétendent que, lorsque le ministre a modifié un processus de désignation bien enraciné, sa décision était de nature administrative et touchait l'intérêt essentiel que leurs membres ont à gagner leur vie. Loin d'être éloigné, cet intérêt qu'ils avaient était

over the terms of their collective agreement. They consider the situation to be comparable to the facts in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.).

129 Assuming the existence of a duty to consult in these circumstances, I think it was satisfied. All parties agree that there were extensive meetings at the time of Bill 136. Discussions were intense, sometimes strident, and at the highest levels. Both the Minister of Labour and the Deputy Minister signalled that the appointments process was subject to "reform" and that retired judges were potential candidates for s. 6(5) appointments. The unions made clear their opposition to anything short of a system based on mutual agreement. There was thus some notice of the proposed change and an opportunity to comment. I do not think, as a matter of general legal principle, that s. 6(5) imposed on the Minister a procedural requirement to consult with the parties to each arbitration from and after the general consultations in the fall of 1997. There was no history of such consultation in the past. As CUPE's witness Julie Davis testified:

> Q. And I take it there that it was understood that it would not be necessary to consult first before appointing someone like Adams or Gold who was not on the list, so long as they had this expertise and wide acceptability?
>
> A. That they could be appointed, yes. We didn't dispute people of that calibre; that's true.

130 It is evident from the cross-examinations filed in this case that the choice of hospital arbitrators was one of the flashpoints of the confrontation from June 1997 to February 1998 and continued to be so after the initial set of appointments of retired judges. The unions did not achieve their objective but they had no difficulty in making themselves heard. There was, with respect

directement touché par le choix des personnes qui exerceraient un pouvoir sur la détermination des conditions de leur convention collective. Ils jugent cette situation comparable aux faits de l'arrêt *Council of Civil Service Unions c. Minister for the Civil Service*, [1985] A.C. 374 (H.L.).

En supposant qu'une obligation de consulter existe dans ces cas, je crois que l'on s'en est acquitté. Toutes les parties reconnaissent que de nombreuses rencontres ont eu lieu à l'époque du projet de loi 136. Les discussions étaient animées, parfois mouvementées, et ont été tenues aux niveaux les plus élevés. Le ministre du Travail et le sous-ministre ont tous deux indiqué que le processus de désignation faisait l'objet d'une « réforme » et que les juges retraités étaient des candidats potentiels pour les désignations fondées sur le par. 6(5). Les syndicats se sont clairement opposés à tout système qui ne serait pas le fruit d'un commun accord. On a donc donné un avis du projet de modification ainsi que l'occasion de le commenter. Je ne pense pas que, depuis les consultations générales de l'automne 1997, le par. 6(5) impose au ministre l'obligation procédurale de consulter les parties à chaque arbitrage, et ce, à titre de principe juridique général. Aucune consultation semblable n'avait eu lieu dans le passé. Comme l'a affirmé le témoin du SCFP, Julie Davis :

[TRADUCTION]

> Q. Et là j'imagine qu'il était entendu qu'il ne serait pas nécessaire de consulter avant de désigner une personne comme M. Adams ou M. Gold, qui n'était pas inscrite sur la liste, pourvu qu'elle ait cette expertise et qu'elle jouisse d'une grande acceptabilité?
>
> R. Qu'ils pourraient être désignés, oui. Il est vrai qu'on ne contestait pas la désignation de personnes de ce calibre.

Il ressort clairement des contre-interrogatoires déposés en l'espèce que le choix des arbitres dans le secteur hospitalier a été l'un des éléments déclencheurs de l'affrontement qui a duré de juin 1997 à février 1998, et qu'il a continué d'en être ainsi après la première série de désignations de juges retraités. Les syndicats n'ont pas atteint leur objectif, mais ils n'ont eu aucune difficulté à se faire entendre. Il n'y

to the "changed process", no refusal of consultation.

(c) *The Alleged Violation of the Doctrine of Legitimate Expectation in Refusing to Nominate Only Arbitrators Who Had Been Mutually Agreed Upon*

The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; Brown and Evans, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

The Court of Appeal concluded, at para. 105, that "the Minister interfered with the legitimate expectations of the appellants and other affected unions, contrary to the principles and requirements of fairness and natural justice" and ordered the Minister to restrict his appointments to the s. 49(10) roster.

In my view, with respect, the conditions precedent to the application of the doctrine are not established in this case. The evidence of past practice is equivocal, and as a result the evidence of a promise to "return to" past practice is also equivocal. What Minister Elizabeth Witmer meant by "a return to the sector-based system of appointing arbitrators" (Standing Committee on Resources Development, *supra*, at p. R-2577), and what she was understood by the unions to mean, depends on what they now a eu, au sujet du « processus modifié », aucun refus de procéder à des consultations.

c) *L'allégation de violation de la règle de l'expectative légitime en raison du refus de désigner uniquement des arbitres sur lesquels les parties s'étaient entendues*

131 La règle de l'expectative légitime est « le prolongement des règles de justice naturelle et de l'équité procédurale » : *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, p. 557. Elle s'attache à la conduite d'un ministre ou d'une autre autorité publique dans l'exercice d'un pouvoir discrétionnaire — y compris les pratiques établies, la conduite ou les affirmations qui peuvent être qualifiées de claires, nettes et explicites — qui a fait naître chez les plaignants (en l'espèce, les syndicats) l'expectative raisonnable qu'ils conserveront un avantage ou qu'ils seront consultés avant que soit rendue une décision contraire. Pour être « légitime », une telle expectative ne doit pas être incompatible avec une obligation imposée par la loi. Voir : *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Baker*, précité; *Mont-Sinaï*, précité, par. 29; Brown et Evans, *op. cit.*, par. 7:2431. Lorsque les conditions d'application de la règle sont remplies, la cour peut accorder une réparation procédurale convenable pour répondre à l'expectative « légitime ».

132 La Cour d'appel a conclu, au par. 105, que [TRADUCTION] « le ministre a contrecarré les attentes légitimes des appelants et des autres syndicats touchés, contrairement aux principes et aux exigences de l'équité et de la justice naturelle », et lui a ordonné de ne désigner que des personnes inscrites sur la liste dressée en vertu du par. 49(10).

133 J'estime, en toute déférence, que l'existence des conditions préalables à l'application de cette règle n'est pas établie en l'espèce. La preuve de la pratique suivie antérieurement est équivoque et, partant, la preuve d'une promesse de « retour » à l'ancien système est, elle aussi, équivoque. Ce que la ministre Elizabeth Witmer entendait par [TRADUCTION] « retour au système sectoriel de désignation des arbitres » (Comité permanent du développement des ressources, *op. cit.*, p. R-2577), et ce que les

say were their respective prior understandings of "the system". The Minister says the "sector-based system" was the *HLDAA*, including the broad latitude afforded to him by s. 6(5). The unions say the "sector-based system" was the s. 49(10) roster.

134 The evidence shows, I think, that the "system" varied, both from Minister to Minister, and during the tenure of particular Ministers. Between 1982 and 1997 (considered by both parties to be the relevant period), the appointments of *HLDAA* chairpersons from the s. 49(10) list dropped from 100 percent in 1982/83 to a low of 66 percent in 1985/86 (and 66 percent again in 1986/87). The Deputy Minister testified that "in [1986/87], there were 58 ministerial appointments and of those 19 of the appointees were not on the list and in [1987/88], there were 80 ministerial appointments and 26 were not on the list" (emphasis added). The use of the s. 49(10) roster rose to 98 percent in 1996/97 before dropping back to 90 percent in 1997/98. CUPE witness Julie Davis testified that her union gladly accepted chairpersons such as Harry Waisglass and Ray Illing who were not on the s. 49(10) list:

> So we wouldn't have even questioned their appointment, whether they were on the list or not on the list, because we know them to be, as I said, well-respected people who understand workplace issues and labour relations — in a labour relations context and had high credibility in terms of being able to work with workplace parties.

135 As previously noted, there is no mention in the *HLDAA* of s. 49(10) even though numerous other sections of the *Labour Relations Act, 1995* are explicitly referenced. Whether or not successive Ministers or their delegates limited themselves to the list seems to have been a matter of policy and individual preference. I agree that the evidence

syndicats ont compris, dépend de la compréhension qu'ils affirment maintenant avoir respectivement eue du « système » dans le passé. Le ministre prétend que le « système sectoriel » était celui de la *LACTH* — avec la grande latitude que lui accorde le par. 6(5). Les syndicats rétorquent que le « système sectoriel » était celui de la liste dressée en vertu du par. 49(10).

À mon avis, la preuve démontre que le « système » a changé d'un ministre à l'autre, et pendant le mandat de certains ministres. Entre 1982 et 1997 (période que les deux parties jugent pertinente), le pourcentage des personnes inscrites sur la liste dressée en vertu du par. 49(10) qui ont été désignées à la présidence de conseils d'arbitrage constitués en application de la *LACTH*, qui était de 100 pour 100 en 1982-1983, est tombé à 66 pour 100 en 1985-1986 (demeurant à 66 pour 100 en 1986-1987). Le sous-ministre a témoigné que, [TRADUCTION] « [en 1986-1987], le ministre a désigné 58 personnes dont 19 n'étaient pas inscrites sur la liste, et [qu'en 1987-1988], il en a désigné 80 dont 26 n'étaient pas inscrites sur la liste » (je souligne). Le pourcentage de cas où la liste dressée en vertu du par. 49(10) a été utilisée a atteint 98 pour 100 en 1996-1997, pour ensuite tomber à 90 pour 100 en 1997-1998. Le témoin du SCFP, Julie Davis, a déclaré que son syndicat avait bien accueilli des présidents comme Harry Waisglass et Ray Illing, qui n'étaient pas inscrits sur la liste dressée en vertu du par. 49(10) :

> [TRADUCTION] Ainsi, nous n'aurions même pas contesté leur désignation, qu'ils aient ou non figuré sur la liste, parce que nous savons que ce sont, comme je l'ai dit, des personnes très respectées qui comprennent les enjeux du milieu de travail et des relations du travail — dans un contexte de relations du travail, et qui jouissaient d'une grande crédibilité sur le plan de leur capacité de travailler avec les parties en cause.

Comme nous l'avons vu, il n'y a aucune mention du par. 49(10) dans la *LACTH* même si on y trouve des renvois explicites à de nombreux autres articles de la *Loi de 1995 sur les relations de travail*. Le fait que les ministres qui se sont succédé ou leurs délégués s'en soient tenus ou ne s'en soient pas tenus à la liste semble avoir été une question de politi-

shows frequent resort of successive Ministers to the s. 49(10) list, but it equally shows considerable variation, which suggests that successive Ministers did not consider such resort to be obligatory. Moreover, as stated, not everyone on the s. 49(10) list, which was addressed primarily to "grievance" arbitrators, was thought by the parties to be suitable for "interest arbitrations". CUPE's witness, Julie Davis, in her reply affidavit, affirmed that "we were concerned that the Ministry might appoint arbitrators from the roster who have little or no experience in mediation". There thus appears to be no compelling basis in the evidence to restrict the *HLDAA* to the roster of candidates compiled under s. 49(10) of the *Labour Relations Act, 1995*.

que générale et de préférence individuelle. Certes, la preuve démontre que les ministres qui se sont succédé ont souvent eu recours à la liste dressée en vertu du par. 49(10), mais elle témoigne également d'une grande fluctuation qui indique que les ministres ne se considéraient pas tenus d'y recourir. De plus, je le répète, les parties ne considéraient pas que les personnes inscrites sur la liste dressée en vertu du par. 49(10) — qui était destinée surtout à l'arbitrage de « griefs » — étaient toutes aptes à faire des « arbitrages de différends ». Le témoin du SCFP, Julie Davis, a confirmé dans sa réponse sous forme d'affidavit que [TRADUCTION] « nous étions préoccupés par la possibilité que le ministre désigne éventuellement des arbitres inscrits sur la liste qui avaient peu ou pas d'expérience en matière de médiation ». Rien dans la preuve ne semble donc commander de limiter l'application de la *LACTH* à la liste de candidats dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*.

The evidentiary basis of the unions' contention that chairpersons were to be selected on the basis of mutual agreement is their contention that the Minister made routine resort to the s. 49(10) roster in which the unions had a voice through LMAC. If, as I have concluded, the s. 49(10) argument does not succeed on the facts, the unions' related argument that appointments were subject to mutual acceptability falls with it. For reasons already discussed, I believe that s. 6(5) contemplates the appointment of chairpersons broadly acceptable to labour and management, but that is different from the veto claimed by the unions on a case-by-case basis.

136 Les syndicats font valoir, à l'appui de leur affirmation selon laquelle les présidents et présidentes devaient être choisis d'un commun accord, que le ministre avait coutume de recourir à la liste dressée en vertu du par. 49(10), au sujet de laquelle ils pouvaient se faire entendre par l'intermédiaire du CCSP. Si, comme je l'ai conclu, l'argument fondé sur le par. 49(10) doit être rejeté à la lumière des faits, l'argument connexe des syndicats selon lequel les désignations devaient être acceptables par les parties échouera également. Pour les motifs déjà exposés, je crois que le par. 6(5) prévoit la désignation de présidents généralement acceptables par les syndicats et le patronat, ce qui est toutefois différent du veto dont les syndicats veulent se prévaloir dans chaque cas.

The evidence of an alleged promise to return to the *status quo* was equivocal. In her press release dated September 18, 1997, announcing the government's retreat on Bill 136, the Minister stated:

> The union movement has requested a return to the current legislative provision governing the appointment of arbitrators. Our amendments would do that. [Emphasis added.]

137 La preuve qu'il y aurait eu promesse de retour au statu quo était équivoque. Dans le communiqué de presse daté du 18 septembre 1997, où elle annonçait le retrait du projet de loi 136 par le gouvernement, la ministre déclarait :

> [TRADUCTION] Le mouvement syndical a demandé le retour à la disposition législative actuelle qui régit la désignation des arbitres. C'est ce que feraient nos modifications. [Je souligne.]

138 On September 23, 1997, the Minister told the legislative Standing Committee:

> After a very productive and lengthy consultation, the government has decided it will not proceed with establishing a dispute resolution commission to conduct interest arbitration in the police, fire and hospital sectors. Instead, the government is proposing a return to the sector-based system of appointing arbitrators to resolve disputes in these three particular areas and reforming the existing arbitration systems as they are set out in the Fire Protection and Prevention Act, the Police Services Act and the Hospital Labour Disputes Arbitration Act. [Emphasis added.]

(Standing Committee on Resources Development, *supra*, at p. R-2577)

At least to some extent, the Minister gave with one hand (a "return" to the "sector-based system" instead of a Dispute Resolution Commission) what she took away with the other (the existing system would be "reformed").

139 With respect to meetings between the unions and government representatives at the time of Bill 136, the Deputy Minister of Labour testified:

> Union representatives expressed concern at the lack of any assurances about how the appointments would be made. A lengthy and heated discussion took place about this issue. I recall the following exchange between Howard Goldblatt (speaking for the union representatives) and John Lewis and me (speaking for government representatives):
>
> Q: Will you seek our agreement before adding anyone to the pool?
>
> A: No.
>
> Q: Will you consult with us before adding someone to the pool?
>
> A: No.
>
> Q: Let's determine the list of arbitrators right now.
>
> A: No.

140 In her June 5, 1997 press interview, then Minister Witmer had indicated that academics and judges

Le 23 septembre 1997, la ministre déclarait devant le Comité législatif permanent :

> [TRADUCTION] Après avoir procédé à une longue et très fructueuse consultation, le gouvernement a décidé de ne pas créer une commission de règlement des différends qui serait chargée d'arbitrer les différends dans les secteurs de la police, des pompiers et des hôpitaux. Le gouvernement propose plutôt un retour au système sectoriel de désignation des arbitres pour régler les différends dans ces trois secteurs particuliers et une réforme des systèmes d'arbitrage existants énoncés dans la Loi sur la prévention et la protection contre l'incendie, la Loi sur les services policiers et la Loi sur l'arbitrage des conflits de travail dans les hôpitaux. [Je souligne.]

(Comité permanent du développement des ressources, *op. cit.*, p. R-2577)

La ministre a, dans une certaine mesure du moins, donné d'une main (le « retour » au « système sectoriel » au lieu d'une commission de règlement des différends) ce qu'elle a repris de l'autre (la « réforme » du système existant).

Au sujet des rencontres ayant eu lieu entre les syndicats et les représentants du gouvernement à l'époque du projet de loi 136, le sous-ministre du Travail a fait le témoignage suivant :

> [TRADUCTION] Les représentants syndicaux se sont dits préoccupés par l'absence de promesse concernant le mode de désignation. Une discussion longue et animée a eu lieu à ce sujet. Je me souviens de l'échange suivant entre Howard Goldblatt (au nom des représentants syndicaux) et John Lewis et moi (au nom des représentants du gouvernement) :
>
> Q. Nous demanderez-vous notre accord avant d'ajouter un nom à la réserve de candidats?
>
> R. Non.
>
> Q. Nous consulterez-vous avant d'ajouter une personne à la réserve de candidats?
>
> R. Non.
>
> Q. Dressons immédiatement la liste d'arbitres.
>
> R. Non.

Dans l'entrevue qu'elle accordait à la presse le 5 juin 1997, la ministre Witmer avait indiqué que

might be used to staff the dispute resolution commission (*The Record*, Kitchener-Waterloo, June 5, 1997, p. B5).

The Deputy Minister further testified that in his meetings with union representatives on September 20, 1997, he

> expressly stated that union representatives would see some new faces whom they had not seen before. I indicated that my personal best guess was that there would not be many such people, but that union representatives should expect such appointments.

Two possible "new faces" expressly mentioned were George Adams and Alan Gold, both of whom are retired judges.

The unions rely on an alleged "understanding" which was described in a letter to the Minister dated March 10, 1998 from Wayne Samuelson, President of the OFL:

> The understanding between labour and government [in the discussions about Bill 136] was that the government would not add to the existing roster of accepted and experienced labour arbitrators without consultation, and would appoint interest arbitrators only from those on the list of arbitrators who had conducted interest arbitrations in the past, unless the appointment was of an individual who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community. [Emphasis added.]

Apart from whether or not there was such a roster, the importance of this statement by the unions, speaking through the OFL, is that it would be quite acceptable to appoint "an individual who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community" apparently regardless of whether such an individual was on the s. 49(10) list or any other "list".

On April 6, 1998, Mr. Samuelson of the OFL again wrote to the Minister basing his complaint on the Minister's statement that:

des professeurs d'université et des juges pourraient éventuellement siéger à la commission de règlement des différends (*The Record*, Kitchener-Waterloo, 5 juin 1997, p. B5).

141 Le sous-ministre a ajouté qu'au moment où il avait rencontré les représentants syndicaux le 20 septembre 1997, il avait

> [TRADUCTION] précisé que les représentants syndicaux verraient de nouveaux visages qu'ils n'avaient jamais vus auparavant. J'ai indiqué que, d'après moi, il n'y en aurait pas beaucoup, mais que les représentants syndicaux devraient s'attendre à ce genre de désignations.

Les deux « nouveaux visages » possibles, mentionnés expressément, étaient George Adams et Alan Gold, tous deux juges retraités.

142 Les syndicats s'appuient sur une « entente » qui serait intervenue et que le président de la FTO, Wayne Samuelson, décrit dans une lettre adressée au ministre le 10 mars 1998 :

> [TRADUCTION] L'entente intervenue entre les syndicats et le gouvernement (lors des discussions portant sur le projet de loi 136), prévoyait que le gouvernement n'ajouterait aucun nom, sans consulter, à la liste existante d'arbitres en droit du travail acceptés et expérimentés, et qu'il désignerait les arbitres de différends uniquement parmi les personnes — inscrites sur cette liste — qui avaient déjà effectué des arbitrages de différends, sauf si la personne désignée possédait une vaste expérience comme arbitre de différends et si elle jouissait d'une grande acceptabilité dans le milieu des relations du travail. [Je souligne.]

143 Outre la question de savoir si une telle liste existait, l'importance de cette assertion des syndicats faite par l'entremise de la FTO réside dans le fait qu'il serait tout à fait acceptable de désigner « la personne [. . .] posséda[nt] une vaste expérience comme arbitre de différends et [. . .] jouissa[nt] d'une grande acceptabilité dans le milieu des relations du travail », peu importe, semble-t-il, que cette personne soit ou non inscrite sur la liste dressée en vertu du par. 49(10) ou sur toute autre « liste ».

144 Le 6 avril 1998, M. Samuelson de la FTO a de nouveau écrit au ministre en appuyant sa plainte sur la déclaration du ministre selon laquelle

The police and hospital sectors will continue under existing systems for appointment of arbitrators.

According to Mr. Samuelson:

This is as explicit and precise a statement as anyone could have hoped for. Indeed, this is precisely the point raised at our meeting with you at the OFL offices on March 10, 1998, and repeated in my letter to you of the same date, namely, that the understanding between labour and government was that the government would appoint interest arbitrators only from those on the list of arbitrators who had conducted interest arbitrations in the past.

This resurrects the s. 49(10) roster argument. Mr. Samuelson continued:

We further understood that should the government find it necessary to add further names to the existing roster of accepted and experienced labour arbitrators, it would only appoint persons with broad experience as an arbitrator. Should this latter case be necessary, it was agreed that the government would engage in genuine consultations on the matter.

145 Mr. Samuelson undoubtedly felt betrayed by the turn of events and attempted to make the best of a difficult situation. The evidence in support of the various agreements and "understandings" he alleges is not clear and it is certainly not unqualified or unambiguous. To bind the exercise of the Minister's discretion the evidence of the promise or undertaking by the Minister or on his behalf must generally be such as, in a private law context, would be sufficiently certain and precise as to give rise to a claim for breach of contract or estoppel by representation: *In re Preston*, [1985] A.C. 835 (H.L.), at p. 866, *per* Lord Templeman.

146 In my view, the evidence does not establish a firm "practice" in the past of appointing from a *HLDAA* list, or from the s. 49(10) list, or proceeding by way of "mutual agreement". A general promise "to continue under the existing system" where the reference to the system itself is ambiguous, and in any event

[TRADUCTION] [l]es secteurs de la police et des hôpitaux continueront d'être régis par le système existant de désignation des arbitres.

Selon M. Samuelson,

[TRADUCTION] [c]'est la déclaration la plus précise et la plus explicite que l'on pouvait espérer. En effet, il s'agit exactement de la question soulevée lors de notre rencontre du 10 mars 1998 dans les bureaux de la FTO, et réitérée dans la lettre que je vous adressais le même jour, à savoir que l'entente intervenue entre les syndicats et le gouvernement prévoyait que ce dernier désignerait les arbitres de différends uniquement parmi les personnes — inscrites sur la liste — qui avaient déjà effectué des arbitrages de différends.

Cela a pour effet de raviver l'argument fondé sur la liste dressée en vertu du par. 49(10). Monsieur Samuelson a ajouté :

[TRADUCTION] Nous avons en outre compris que, si le gouvernement jugeait nécessaire d'ajouter d'autres noms à la liste existante d'arbitres en droit du travail acceptés et expérimentés, il ne désignerait que les personnes possédant une vaste expérience comme arbitre. Il était entendu que, si cela s'avérait nécessaire, le gouvernement procéderait à de véritables consultations à ce sujet.

Monsieur Samuelson s'est sans doute senti trahi par la tournure des événements et a tenté de tirer le meilleur parti possible de cette situation délicate. La preuve présentée à l'appui des divers accords et « ententes » dont il allègue l'existence n'est pas claire et n'est sûrement pas nette ou explicite non plus. Pour obliger le ministre à exercer son pouvoir discrétionnaire, la preuve d'un engagement ou d'une promesse de sa part ou de la part d'une autre personne agissant en son nom doit généralement être telle que, dans un contexte de droit privé, elle serait assez indiscutable et précise pour donner lieu à une action pour inexécution de contrat ou à la préclusion résultant d'une affirmation : *In re Preston*, [1985] A.C. 835 (H.L.), p. 866, lord Templeman.

À mon avis, la preuve n'établit pas l'existence, dans le passé, d'une « pratique » bien établie consistant à faire les désignations à partir d'une liste dressée en vertu de la *LACTH* ou de celle dressée en vertu du par. 49(10), ou encore à les faire « d'un commun accord ». Une promesse générale de « maintenir le

was stated by the Minister to be subject to reform, cannot bind the Minister's exercise of his or her s. 6(5) discretion as urged by the unions under the doctrine of legitimate expectation.

I therefore turn to the attack on the appointments as such and, as a necessary preliminary step, the determination of the appropriate standard of review.

(3) The Standard of Review of the Minister's Appointments

The Court's response to the unions' challenge to the Minister's appointments will be conditioned in part on the answer to the *Bibeault* question:

> Did the legislator intend [*these* appointments] to be within the jurisdiction conferred on the [Minister]?

(*Bibeault*, *supra*, at p. 1087; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 16.)

To put the *Bibeault* question in its proper perspective, the courts have enlarged the inquiry beyond the specific formula of words conferring the statutory power. This "pragmatic and functional" approach to ascertain the legislative intent requires an assessment and balancing of relevant factors, including (1) whether the legislation that confers the power contains a privative clause; (2) the relative expertise as between the court and the statutory decision maker; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the question before the decision maker: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; and *Law Society of New Brunswick v.*

système existant » — alors que la mention du système lui-même est ambiguë et que le système était, en tout état de cause, sujet à une réforme, selon le ministre — ne saurait obliger le ministre à exercer le pouvoir discrétionnaire que lui confère le par. 6(5), comme le font valoir les syndicats, qui invoquent la règle de l'expectative légitime.

147 J'aborde donc la contestation des désignations proprement dites et, à titre d'étape préliminaire nécessaire, la détermination de la norme de contrôle applicable.

(3) La norme de contrôle applicable aux désignations ministérielles

148 La réponse que la Cour donnera à la contestation par les syndicats des désignations ministérielles dépendra en partie de celle donnée à la question posée dans l'arrêt *Bibeault* :

> Le législateur a-t-il voulu [que *ces* désignations] relève[nt] de la compétence conférée au [ministre]?

(*Bibeault*, précité, p. 1087; voir également *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890, par. 16.)

149 Afin de replacer la question de l'arrêt *Bibeault* dans son contexte, les tribunaux judiciaires ont poussé leur examen au-delà de la formulation utilisée pour conférer le pouvoir légal. Cette méthode « pragmatique et fonctionnelle » qui sert à déterminer l'intention du législateur exige l'appréciation et la conciliation de facteurs pertinents, notamment : (1) la présence ou l'absence d'une clause privative dans la loi conférant le pouvoir; (2) l'expertise du tribunal judiciaire relativement à celle du décideur légal; (3) l'objet de la disposition en cause et de la loi dans son ensemble; (4) la nature de la question soumise au décideur : voir *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 30; *Dr Q c. College of Physicians and Surgeons of British Columbia*,

Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 27. The examination of these four factors, and the "weighing up" of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.

[2003] 1 R.C.S. 226, 2003 CSC 19, par. 26; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, par. 27. L'examen de ces quatre facteurs, comme l'« évaluation » des éléments contextuels effectuée pour déterminer la norme de contrôle applicable, n'a rien de machinal. Compte tenu de la vaste gamme de décideurs discrétionnaires et d'organismes administratifs, le critère est forcément souple et fait appel à une analyse fondée sur des principes — plutôt qu'à des catégories — pour déterminer l'intention du législateur, qui doit nous guider.

150 The Court has also affirmed that the "pragmatic and functional approach" applies to the judicial review not only of administrative tribunals but of decisions of Ministers: *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 54; *Dr. Q*, *supra*, at para. 21; *Ryan*, *supra*, at para. 21.

La Cour a également confirmé que « la méthode pragmatique et fonctionnelle » s'applique au contrôle judiciaire des décisions non seulement des tribunaux administratifs mais aussi des ministres : *Baker*, précité; *Mont-Sinaï*, précité, par. 54; *Dr Q*, précité, par. 21; *Ryan*, précité, par. 21.

151 I would affirm at the outset that the precise wording of the power of appointment of "a person who is, in the opinion of the Minister, qualified to act" (s. 6(5)) is a strong legislative signal, coupled with the privative clause (s. 7), that the Minister is to be afforded a broad latitude in making his selection.

Je confirme, au départ, que la formulation utilisée pour conférer le pouvoir du ministre de désigner « une personne qui, à son avis, est compétente pour agir en cette qualité [d'arbitre] » (par. 6(5)), combinée à la clause privative (art. 7), est une solide indication du législateur que le ministre doit jouir d'une grande latitude dans l'exercice de son choix.

152 The Minister, with the assistance of his officials, knows more about labour relations and its practitioners (including potential arbitrators) than do the courts. The question before him was one of selection amongst candidates he regarded as qualified. These factors call for considerable deference. The Minister says his appointments should be upheld unless they can be shown to be patently unreasonable. As was said in *Mount Sinai*, *supra*, in the concurring reasons, at para. 58:

Le ministre, aidé de ses fonctionnaires, a une meilleure connaissance du domaine des relations du travail et de ses praticiens (y compris les arbitres potentiels) que les tribunaux judiciaires. Il s'agissait pour lui d'exercer un choix parmi les candidats qu'il considérait compétents. Ces facteurs commandent une grande déférence. Le ministre soutient que ses désignations devraient être maintenues à moins qu'on puisse démontrer qu'elles sont manifestement déraisonnables. Comme l'indiquent les motifs concordants de l'arrêt *Mont-Sinaï*, précité, par. 58 :

> Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers.

> La norme de retenue la plus élevée, celle du caractère manifestement déraisonnable, doit généralement être appliquée aux décisions que prennent des ministres en exerçant des pouvoirs discrétionnaires en contexte administratif. La présente affaire montre pourquoi il doit en être ainsi. Le permis délivré par le ministre a pour objet général de régir la prestation de services de santé conformément à « l'intérêt public ». Cela favorise l'adoption d'une norme de retenue élevée, tout comme le fait l'expertise du ministre et de ses conseillers, sans compter la

The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense.

Against the strong pull of these factors towards the highest degree of deference, the unions stake their case on the purpose of s. 6(5) and the *HLDAA* as a whole. In the weighing-up exercise, they say, the clearest guidance in this case to legislative intent is to focus on the job s. 6(5) was designed to do. The legal context is different from *Mount Sinai*. The Minister is not promulgating broad policy. He is asked to make an appointment which the parties, had they been able to agree, could have made for themselves. The specialized purpose of the *HLDAA* — to provide an adequate substitution for strikes and lockouts, and thereby to achieve industrial peace — provides a relatively narrow context, say the unions, within which the words of s. 6(5) must be understood. In this respect, they point to the standard of reasonableness *simpliciter* adopted in *Baker*, *supra*, at para. 62.

I accept the unions' distinction between this case and *Mount Sinai*, but a ministerial discretion need not be wide open to attract the protection of the patent unreasonableness standard. On the other hand, *Baker* was an unusual case because the decision was effectively delegated to lower ranking officials whose discretion was itself circumscribed in some detail by ministerial guidelines (paras. 13-17); see *Suresh*, *supra*, at paras. 36-37. It thus provides little authority for withholding the highest standard of deference from appointments that were clearly and unequivocally made by the Minister of Labour himself.

Nor is the Court's recent decision in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, of particular assistance to the unions. In that case, this Court, *per* Arbour J., reviewed "the interpretation given by the [Judicial]

position élevée que ce dernier occupe dans la hiérarchie des décideurs qui exercent une prérogative ou un pouvoir conféré par la loi. L'exercice du pouvoir dépend de ce que le ministre considère être dans l'intérêt public, ce qui est un excellent exemple de mesure touchant l'intérêt public.

153 À l'argument voulant que ces facteurs commandent fortement le plus haut degré de déférence, les syndicats opposent l'objet du par. 6(5) et de la *LACTH* dans son ensemble. Ils prétendent qu'en procédant à l'évaluation le meilleur moyen de déterminer l'intention du législateur en l'espèce est de se concentrer sur ce que le par. 6(5) avait pour but de réaliser. Le contexte juridique est différent de celui de l'affaire *Mont-Sinaï*. Le ministre n'édicte pas une politique générale. On lui demande de faire une désignation que les parties, si elles avaient pu s'entendre, auraient pu faire elles-mêmes. L'objet spécial de la *LACTH* — qui est de prévoir un moyen adéquat de remplacer la grève et le lock-out et de maintenir ainsi la paix industrielle — crée, au dire des syndicats, un contexte relativement étroit dans lequel les termes du par. 6(5) doivent être interprétés. À cet égard, ils attirent l'attention sur la norme de la décision raisonnable *simpliciter* adoptée dans l'arrêt *Baker*, précité, par. 62.

154 J'accepte la distinction que les syndicats établissent entre la présente affaire et l'affaire *Mont-Sinaï,* mais un pouvoir ministériel discrétionnaire n'a pas à être très large pour que la protection de la norme du caractère manifestement déraisonnable s'applique. Par ailleurs, l'affaire *Baker* était inhabituelle du fait que le soin de prendre une décision était délégué, en réalité, à des fonctionnaires subalternes dont le pouvoir discrétionnaire était lui-même assez circonscrit par des lignes directrices du ministère (par. 13-17); voir *Suresh*, précité, par. 36-37. Ainsi, l'arrêt *Mont-Sinaï* ne justifie guère le refus d'appliquer la norme de retenue la plus élevée aux désignations faites clairement et sans équivoque par le ministre du Travail lui-même.

155 L'arrêt récent de notre Cour *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11, n'est pas non plus d'un grand secours aux syndicats. Dans cette affaire, la Cour, sous la plume de la juge Arbour, a

Council to the scope of its mandate based on its interpretation of s. 6.11(4) of its enabling statute" according to the reasonableness *simpliciter* standard of review (para. 67). That having been done, however, Arbour J. moved to the "ultimate decision of the Council to recommend the removal", which she characterized as a question of mixed law and fact, and determined that the appropriate standard of review in *that* respect was patent unreasonableness (paras. 68-69). In that case, the decision maker's interpretation of its enabling statute had emerged as a distinct issue before all levels of court, and it was convenient to deal with the legal determination and the ultimate decision separately. Here, these issues are bundled.

156 This does not mean, however, that the limited nature of the Minister's mandate under s. 6(5) will be overlooked in the application of a patent unreasonableness standard. It must be an important factor, in this context, in assessing the reasonableness of his s. 6(5) appointments. As was pointed out in *Canadian Broadcasting Corp.*, *supra*, *per* Iacobucci J., at para. 49:

> While the Board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole.

In that case a CBC journalist, who was also president of the union representing CBC writers and performers, wrote an anti-free trade article in the union newspaper during the 1988 federal "free trade" election campaign. The CBC claimed that this publication was an act of partisan politics which compromised CBC journalistic ethics. The CBC forced him to choose between on-air journalism and the

examiné, en fonction de la norme de contrôle de la décision raisonnable *simpliciter*, « la façon dont le Conseil [de la magistrature] a conçu la portée de son mandat selon son interprétation du par. 6.11(4) de sa loi habilitante » (par. 67). Toutefois, la juge Arbour s'est ensuite penchée sur la « décision finale du Conseil de recommander la révocation », qu'elle a qualifiée de question mixte de droit et de fait, et a décidé que la norme de contrôle applicable à *cet* égard était celle du caractère manifestement déraisonnable (par. 68-69). Dans cette affaire, l'interprétation que le décideur avait donnée de sa loi habilitante avait été une question distincte devant toutes les instances, et il convenait de traiter séparément la décision portant sur une question de droit et celle qui a été prise en définitive. En l'espèce, ces questions sont groupées.

Toutefois, cela ne signifie pas que, dans l'application de la norme du caractère manifestement déraisonnable, il ne sera pas tenu compte du caractère limité du mandat que le par. 6(5) confie au ministre. Dans ce contexte, il faut accorder de l'importance à ce facteur en appréciant le caractère raisonnable de ses désignations fondées sur le par. 6(5). Comme le juge Iacobucci l'a souligné dans l'arrêt *Société Radio-Canada*, précité, par. 49 :

> Bien que le Conseil puisse être soumis à la norme du caractère correct dans l'interprétation isolée d'une loi autre que sa loi constitutive, la norme de contrôle applicable à l'ensemble de la décision, à supposer que celle-ci soit par ailleurs conforme à la compétence du Conseil, sera celle du caractère manifestement déraisonnable. Évidemment, la justesse de l'interprétation de la loi non constitutive pourra influer sur le caractère raisonnable global de la décision, mais cela tiendra à l'effet de la disposition législative en question sur la décision dans son ensemble.

Dans cette affaire, un journaliste de la SRC, également président du syndicat représentant les auteurs et les artistes, était l'auteur d'un article contre le libre-échange paru dans le bulletin du syndicat, au cours de la campagne électorale fédérale de 1988 qui avait été axée notamment sur le libre-échange. La SRC a prétendu que cette publication constituait un acte de politique partisane

presidency of the union. He chose journalism. The union complained about the CBC's conduct to the Canada Labour Relations Board. In assessing the union's complaint, the Board was required to consider the CBC's mandate set out in the *Broadcasting Act* (an "external" statute). On an application for judicial review to the Federal Court of Appeal, the Board's interpretation of the *Broadcasting Act* was an issue bound up with its determination of an unfair labour practice under s. 94(1)(*a*) of the *Canada Labour Code* (the Board's "enabling" statute). The Court treated the first issue as input to the second issue, which was in fact the decision sought to be judicially reviewed.

qui allait à l'encontre de son code de déontologie journalistique. Forcée par la SRC à choisir entre son poste de journaliste à la radio et la présidence du syndicat, la personne en question a opté pour le journalisme. Le syndicat s'est plaint de la conduite de la SRC auprès du Conseil canadien des relations du travail. En examinant la plainte du syndicat, le Conseil devait tenir compte du mandat de la SRC énoncé dans la *Loi sur la radiodiffusion* (une loi « non constitutive »). Lors d'une demande de contrôle judiciaire adressée à la Cour d'appel fédérale, la question de l'interprétation que le Conseil avait donnée de la *Loi sur la radiodiffusion* était liée à sa décision — fondée sur l'al. 94(1)*a*) du *Code canadien du travail* (la loi « habilitante » du Conseil) — qu'il y avait eu pratique déloyale. La cour a considéré que la première question était utile pour trancher la seconde question qui était, en réalité, la décision visée par la demande de contrôle judiciaire.

I conclude, therefore, that the answer to the *Bibeault* question in this case is that the legislature intended the Minister's s. 6(5) appointments to prevail unless his selection is shown to be patently unreasonable.

157 Je conclus donc que la réponse qui doit être donnée, en l'espèce, à la question de l'arrêt *Bibeault* est que le législateur a voulu que les désignations ministérielles fondées sur le par. 6(5) soient maintenues, sauf s'il est démontré que le ministre a fait un choix manifestement déraisonnable.

(4) When Does a Decision Rise to the Level of Patent Unreasonableness?

On what basis can the Minister's appointments be said not only to depart from a reasonableness standard, but to fail even the most deferential standard of *patent* unreasonableness?

(4) Quand une décision devient-elle manifestement déraisonnable?

158 Comment peut-on dire que les désignations ministérielles s'écartent non seulement de la norme de la décision raisonnable, mais encore qu'elles ne satisfont même pas à la norme du caractère *manifestement* déraisonnable qui commande la plus grande déférence?

In *Southam*, *supra*, Iacobucci J. described, at para. 57, how reasonableness *simpliciter* differs from patent unreasonableness:

159 Dans l'arrêt *Southam*, précité, par. 57, le juge Iacobucci a décrit ainsi la différence entre la décision raisonnable *simpliciter* et la décision manifestement déraisonnable :

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is

> La différence entre « déraisonnable » et « manifestement déraisonnable » réside dans le caractère flagrant ou évident du défaut. Si le défaut est manifeste au vu des motifs du tribunal, la décision de celui-ci est alors manifestement déraisonnable. Cependant, s'il faut procéder à un examen ou à une analyse en profondeur pour

unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. . . . But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

déceler le défaut, la décision est alors déraisonnable mais non manifestement déraisonnable. Comme l'a fait observer le juge Cory dans *Canada (Procureur général) c. Alliance de la fonction publique du Canada*, [1993] 1 R.C.S. 941, à la p. 963, « [d]ans le Grand Larousse de la langue française, l'adjectif manifeste est ainsi défini: "Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente" ». Cela ne veut pas dire, évidemment, que les juges qui contrôlent une décision en regard de la norme du caractère manifestement déraisonnable ne peuvent pas examiner le dossier. Si la décision contrôlée par un juge est assez complexe, il est possible qu'il lui faille faire beaucoup de lecture et de réflexion avant d'être en mesure de saisir toutes les dimensions du problème. [. . .] Mais une fois que les contours du problème sont devenus apparents, si la décision est manifestement déraisonnable, son caractère déraisonnable ressortira.

160 The Court recently returned to the distinction between reasonableness *simpliciter* and patent unreasonableness in *Ryan*, at para. 52:

In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

La Cour est revenue récemment, dans l'arrêt *Ryan*, précité, par. 52, sur la distinction entre la décision raisonnable *simpliciter* et la décision manifestement déraisonnable :

Dans *Southam*, précité, par. 57, la Cour explique que la différence entre une décision déraisonnable et une décision manifestement déraisonnable réside « dans le caractère flagrant ou évident du défaut ». Autrement dit, dès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. [. . .] Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.

161 The term "patent unreasonableness" predates *Bibeault* (1988), and the birth of the pragmatic and functional approach: see *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. It was intended to identify a highly deferential standard of review to protect administrative decision makers from excessive judicial intervention. In that sense, it was incorporated as the most deferential standard in the subsequent case law: see, e.g., *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Baker*, *supra*, at para. 56, and *Suresh*, *supra*, at para. 29. Patent unreasonableness simply

L'expression « décision (ou caractère) manifestement déraisonnable » est plus ancienne que l'arrêt *Bibeault* (1988) et l'analyse pragmatique et fonctionnelle : voir *Union internationale des employés des services, local nº 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382, et *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227. Elle devait servir à décrire une norme de contrôle commandant une très grande déférence qui permettrait de soustraire les instances décisionnelles administratives à l'intervention excessive des tribunaux judiciaires. C'est dans ce sens que la jurisprudence subséquente en a fait la norme commandant la plus grande déférence : voir, par exemple,

identifies the point where, as stated in *Ryan*, *supra*, "no amount of curial deference can justify letting [the decision] stand" (para. 52).

National Corn Growers Assn. c. Canada (Tribunal des importations), [1990] 2 R.C.S. 1324; *Baker*, précité, par. 56; *Suresh*, précité, par. 29. Le caractère manifestement déraisonnable décrit simplement le point où, comme le précise l'arrêt *Ryan*, précité, « aucun degré de déférence judiciaire ne peut justifier de [. . .] maintenir [la décision] » (par. 52).

When reviewing a decision on the less deferential reasonableness *simpliciter* standard, judges may obviously have to let stand what they perceive to be an incorrect decision.

162 Lorsqu'ils contrôlent une décision selon la norme de la décision raisonnable *simpliciter* qui commande moins de déférence, les juges peuvent évidemment devoir maintenir une décision qu'ils considèrent incorrecte.

If we could conclude on this record that different Ministers of Labour, acting reasonably, could have come to different conclusions about the need for expertise and general acceptability in the labour relations community to chair *HLDAA* boards, and that this Minister's approach was within such a range of reasonable opinions, we would be guided by the legislative intent, as assessed under the pragmatic and functional test, to defer to his choices.

163 Si, à la lecture du dossier, nous pouvions conclure, d'une part, que différents ministres du Travail, agissant raisonnablement, auraient pu arriver à différentes conclusions sur la nécessité de satisfaire à des critères d'expertise et d'acceptabilité générale dans le milieu des relations du travail pour pouvoir présider un conseil établi en vertu de la *LACTH*, et d'autre part, que l'approche adoptée, en l'espèce, par le ministre se situait dans cette fourchette d'opinions raisonnables, alors le recours à la méthode pragmatique et fonctionnelle pour déterminer l'intention du législateur nous amènerait à nous en remettre aux choix qu'il a faits.

However, applying the more deferential patent unreasonableness standard, a judge should intervene if persuaded that there is no room for reasonable disagreement as to the decision maker's failure to comply with the legislative intent. In a sense, like the correctness standard, the patently unreasonable standard admits only one answer. A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

164 Cependant, lorsqu'il applique la norme du caractère manifestement déraisonnable qui commande plus de déférence, le juge doit intervenir s'il est convaincu qu'il n'y a pas de place pour un désaccord raisonnable concernant l'omission du décideur de respecter l'intention du législateur. Dans un sens, une seule réponse est possible tant selon la norme de la décision correcte que selon celle du caractère manifestement déraisonnable. La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

A patently unreasonable appointment, then, is one whose defect is "immedia[te] or obviou[s]" (*Southam*, *supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no

165 Une désignation manifestement déraisonnable est donc celle qui comporte un défaut « flagrant ou évident » (*Southam*, précité, par. 57) et qui est à ce point viciée, pour ce qui est de mettre à exécution

amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52).

(5) Were the Minister's Appointments Challenged in This Case Patently Unreasonable?

166 Under this heading, I group the unions' two-pronged attack on the substance of the Minister's appointments, namely (a) that he did not restrict himself to the list of arbitrators established under s. 49(10) of the *Labour Relations Act, 1995*, and (b) that he rejected labour relations expertise and broad acceptability within the labour relations community as criteria for selection of chairpersons.

(a) *The Minister Did Not Restrict His Selections to the Section 49(10) List*

167 The Court of Appeal prohibited the Minister making s. 6(5) appointments "unless such appointments are made from the long-standing and established roster of experienced labour relations arbitrators" (para. 105). It seems the court was referring to the s. 49(10) list.

168 In a preceding discussion, I concluded that the Minister was not required, by reason of the doctrine of legitimate expectation, to limit his appointments to the s. 49(10) list, but the question at this later stage is whether it was patently unreasonable of him, as a matter of law, not to do so.

169 The principal CUPE witness, Julie Davis, in cross-examination, conceded that some of the arbitrators who are in fact on the s. 49(10) list were unacceptable to her union. The witness for the respondent Service Employees International Union, Marcelle Goldenberg, went even further in her affidavit:

> It is my understanding that a significant number of all arbitrators on the [s. 49(10)] roster (including both those who were required to complete the Arbitrator Development Program and those who were placed

l'intention du législateur, qu'aucun degré de déférence judiciaire ne peut justifier logiquement de la maintenir (*Ryan*, précité, par. 52).

(5) Les désignations ministérielles contestées en l'espèce étaient-elles manifestement déraisonnables?

Sous cette rubrique, je vais examiner les deux arguments de fond que les syndicats ont invoqués à l'encontre des désignations ministérielles, à savoir a) que le ministre ne s'en est pas tenu à la liste d'arbitres dressée en vertu du par. 49(10) de la *Loi de 1995 sur les relations de travail*, et b) qu'il a rejeté l'expertise en matière de relations du travail et l'acceptabilité générale dans le milieu des relations du travail comme critères de sélection des présidents ou présidentes.

a) *Le ministre ne s'en est pas tenu à la liste dressée en vertu du par. 49(10) pour faire ses choix*

La Cour d'appel a interdit au ministre de faire des désignations fondées sur le par. 6(5) [TRADUCTION] « à moins que ces désignations ne soient faites à partir de la liste traditionnelle d'arbitres expérimentés en relations du travail » (par. 105). La cour semblait alors parler de la liste dressée en vertu du par. 49(10).

J'ai conclu précédemment que la règle de l'expectative légitime, n'obligeait pas le ministre à s'en tenir à la liste dressée en vertu du par. 49(10) pour faire ses désignations, mais la question à cette étape-ci est de savoir si, en droit, il était manifestement déraisonnable qu'il ne le fasse pas.

Le principal témoin du SCFP, Julie Davis, a reconnu en contre-interrogatoire que certains arbitres effectivement inscrits sur la liste dressée en vertu du par. 49(10) étaient inacceptables par son syndicat. Marcelle Goldenberg, témoin de l'intimée l'Union internationale des employés des services, est même allée plus loin dans son affidavit :

> [TRADUCTION] Si je comprends bien, un nombre important d'arbitres inscrits sur la liste [dressée en vertu du par. 49(10)] (y compris ceux qui ont dû suivre et réussir le programme de formation des arbitres et ceux qui ont

directly on the roster) fail to meet the criteria of acceptability at their first review [four years after appointment] and are purged from the list.

Just as being on the s. 49(10) list is no guarantee of acceptability, so the unions' acceptance of non-s. 49(10) candidates, including Professor Weiler and Ray Illing, confirm the reasonableness of the Minister's view that candidates can qualify for s. 6(5) appointments without being on the s. 49(10) list.

The unions, speaking through the OFL, said that they would be satisfied with any individual "who had broad experience as an interest arbitrator and enjoyed wide acceptability in the labour relations community" (see para. 142 above). It would not be at all unreasonable for the Minister to adopt the same position. The Minister, accordingly, cannot be faulted for refusing to limit his selection to the s. 49(10) roster.

(b) *Rejecting the Criteria of "Labour Relations Expertise and Broad Acceptability Within the Labour Relations Community"*

Earlier in these reasons, I referred to Justice Rand's *dictum* in *Roncarelli* that the exercise of a discretion "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). I propose briefly to supplement that *dictum* by reference to our more recent case law, then consider it in relation to the test for "patent unreasonableness" on the facts of this case.

(i) Exclusion from Consideration of Relevant Criteria

The principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration

été inscrits directement sur la liste) ne satisfont pas aux critères d'acceptabilité au moment de leur première évaluation [quatre ans après leur désignation] et sont rayés de la liste.

Tout comme le seul fait d'être inscrit sur la liste dressée en vertu du par. 49(10) n'est pas une garantie d'acceptabilité, l'acceptation par les syndicats de candidats non inscrits sur cette liste, dont le professeur Weiler et Ray Illing, confirme le caractère raisonnable de l'opinion du ministre selon laquelle des candidats non inscrits sur la liste dressée en vertu du par. 49(10) peuvent tout de même remplir les conditions requises pour être désignés en vertu du par. 6(5).

170 Les syndicats, par l'intermédiaire de la FTO, ont déclaré que toute personne [TRADUCTION] « posséda[nt] une vaste expérience comme arbitre de différends et [. . .] jouissa[nt] d'une grande acceptabilité dans le milieu des relations du travail » leur conviendrait (voir par. 142 ci-dessus). Il ne serait nullement déraisonnable que le ministre soit du même avis. En conséquence, on ne saurait reprocher au ministre d'avoir refusé de s'en tenir à la liste dressée en vertu du par. 49(10) pour faire ses choix.

b) *Le rejet des critères « d'expertise en matière de relations du travail et d'acceptabilité générale dans le milieu des relations du travail »*

171 Plus tôt dans les présents motifs, j'ai mentionné la remarque du juge Rand dans l'arrêt *Roncarelli*, selon laquelle l'exercice d'un pouvoir discrétionnaire [TRADUCTION] « doit se fonder sur l'examen des considérations reliées à l'objet de [l']administration [de la loi en cause] » (p. 140). Je me propose de compléter brièvement cette remarque par un renvoi à notre jurisprudence plus récente, pour ensuite l'examiner en fonction du critère du « caractère manifestement déraisonnable » et à la lumière des faits de la présente affaire.

(i) L'exclusion de critères pertinents comme facteurs à prendre en considération

172 Le principe voulant que le décideur légal soit tenu de prendre en considération les critères pertinents, tout comme il se doit d'exclure ceux qui ne

irrelevant criteria, has been reaffirmed on numerous occasions. In *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, the issue was whether a municipal Council erred in refusing to consider an application for the subdivision of some land prone to flooding. Although the Council had considered that fact, it failed to consider the severity of those floods and excluded consideration of any possible solutions to the problem. Wilson J. stated, at pp. 174-75:

> More specifically, was [the Council] entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. . . . The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

173 Again, in *Reference re Bill 30, an Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1191, Wilson J. noted:

> It is, however, well established today that a statutory power to make regulations is not unfettered. It is constrained by the policies and objectives inherent in the enabling statute. A power to regulate is not a power to prohibit. It cannot be used to frustrate the very legislative scheme under which the power is conferred.

174 In my view, as will be seen, the appointment of retired judges as a class to chair *HLDAA* arbitration boards had the effect of frustrating "the very

le sont pas, a été réitéré à maintes reprises. Dans l'arrêt *Oakwood Development Ltd. c. Municipalité rurale de St. François Xavier*, [1985] 2 R.C.S. 164, il s'agissait de déterminer si un conseil municipal avait commis une erreur en refusant d'étudier une demande de lotissement de terres inondables. Bien que le conseil ait tenu compte de ce fait, il n'avait pas considéré la gravité des inondations et avait exclu toute solution possible au problème comme facteur à prendre en considération. La juge Wilson a affirmé, aux p. 174-175 :

> Plus précisément, le conseil était-il autorisé à tenir compte de la possibilité d'inondations et à fonder sur cette possibilité sa décision de rejeter la demande d'autorisation de lotissement? Comme le fait remarquer le juge Rand dans l'arrêt *Roncarelli v. Duplessis*, [1959] R.C.S. 121, à la p. 140, toute décision administrative résultant de l'exercice d'un pouvoir discrétionnaire doit [TRADUCTION] « se fonder sur l'examen des considérations reliées à l'objet de cette administration ». Pour les motifs que j'ai déjà exposés, j'estime que le conseil avait le droit de tenir compte du problème posé par la possibilité d'inondations. Cela ne règle toutefois pas le litige. Comme lord Denning l'a affirmé dans l'arrêt *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, à la p. 693, l'omission d'un organe de décision administrative de tenir compte d'un élément très important constitue une erreur au même titre que la prise en considération inappropriée d'un facteur étranger à l'affaire. [. . .] Il faut donc non seulement que la municipalité intimée ait tenu compte uniquement de facteurs qui relèvent de la compétence que lui a conférée la loi, mais aussi qu'elle ait pris en considération tous les facteurs dont elle doit tenir compte pour bien remplir la fonction de prise de décisions qu'elle a aux termes de la loi.

Puis, dans le *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148, la juge Wilson a fait observer, à la p. 1191 :

> Toutefois, il est bien établi de nos jours qu'un pouvoir légal de réglementation n'est pas illimité. Il est limité par les politiques et les objectifs inhérents à la loi habilitante. Un pouvoir de réglementation n'est pas un pouvoir d'interdiction. Il ne saurait être utilisé pour contrecarrer l'économie même de la loi qui le confère.

J'estime, comme nous le verrons, que la désignation de juges retraités, en tant que catégorie, à la présidence de conseils d'arbitrage établis en vertu de la

legislative scheme under which the power is conferred". See also *Baker*, *supra*, at para. 73.

More recently, in *Suresh*, at paras. 37-38, the Court restated this basic principle of administrative law:

> *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors. . . .
>
> . . . The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion. [Emphasis added.]

In applying the *patent* unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the *HLDAA* legislative scheme.

(ii) Application of These Principles to the Facts of This Case

The task before the arbitration boards was not to apply existing collective agreements to a fact situation (as in a grievance arbitration) but to write the essential and most controversial terms of the collective agreement itself. The need for labour relations expertise, independence and impartiality, reflected in broad acceptability, has been a constant refrain of successive Ministers of Labour to the Ontario legislature since the *HLDAA* was

LACTH a eu pour effet de contrecarrer « l'économie même de la loi qui [. . .] confère le [pouvoir] ». Voir également l'arrêt *Baker*, précité, par. 73.

175 Plus récemment, dans l'arrêt *Suresh*, précité, par. 37-38, notre Cour a réitéré ce principe fondamental du droit administratif :

> [L'arrêt *Baker*] n'a pas pour effet d'autoriser les tribunaux siégeant en révision de décisions de nature discrétionnaire à utiliser un nouveau processus d'évaluation, mais il repose plutôt sur une jurisprudence établie concernant l'omission d'un délégataire du ministre de prendre en considération et d'évaluer des restrictions tacites ou des facteurs manifestement pertinents . . .
>
> . . . Enfin, le rôle du tribunal appelé à contrôler la décision du ministre consiste à déterminer si celui-ci a exercé son pouvoir discrétionnaire conformément aux limites imposées par les lois du Parlement et la Constitution. Si le ministre a tenu compte des facteurs pertinents et respecté ces limites, le tribunal doit confirmer sa décision. Il ne peut l'annuler, même s'il aurait évalué les facteurs différemment et serait arrivé à une autre conclusion. [Je souligne.]

176 En appliquant le critère du caractère *manifestement* déraisonnable, nous ne devons pas réévaluer les facteurs en cause. Nous avons cependant le droit de tenir compte de l'importance des facteurs qui ont été totalement soustraits à la prise en considération. Selon la norme du caractère manifestement déraisonnable, les facteurs pertinents que le ministre n'a pas voulu prendre en considération n'ont pas tous un effet irrémédiable. Comme nous l'avons vu, le problème qui se pose en l'espèce est que le ministre a expressément exclu des facteurs qui étaient non seulement pertinents, mais qui allaient directement au cœur du régime de la *LACTH*.

(ii) Application de ces principes aux faits de la présente affaire

177 Les conseils d'arbitrage devaient non pas appliquer des conventions collectives existantes à une situation de fait (comme dans le cas de l'arbitrage de griefs), mais plutôt rédiger les conditions essentielles les plus controversées de la convention collective elle-même. Depuis l'adoption de la *LACTH* en 1965 et de ses diverses modifications subséquentes, les ministres du Travail qui se sont succédé à l'Assemblée législative de l'Ontario ont

introduced in 1965, and its various amendments thereafter.

178 I do not impute to the Minister a knowledge of the *HLDAA*'s legislative history. He himself aptly summarized the legislative intent when he wrote on February 2, 1998 that "the parties must perceive the [*HLDAA*] system as neutral and credible" (emphasis added).

179 His reading of the legislative intent is reinforced by the evidence of practice and experience in the labour relations field. I accept, as did the Court of Appeal, the testimony in this respect of Professor Joseph Weiler, whose affidavit was filed on behalf of the unions (at para. 36):

> The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security, but by training, experience and mutual acceptability. [Emphasis added.]

180 I agree too with the observation of the Ontario Court of Appeal in this case that the matters before a *HLDAA* "interest" arbitration were "not essentially legal but practical and require the familiarity and expertise of a labour arbitrator rather than the skills of a lawyer or a judge" (para. 75).

181 Given the role and function of the *HLDAA*, as confirmed by its legislative history, we look in vain for some indication in the record that the Minister was alive to these labour relations requirements.

182 Instead, there is an active disclaimer of any such requirement, by the Minister's senior advisor charged with the search for retired judges, who made clear in his cross-examination the Minister's rejection of both expertise and broad acceptability as qualifications:

> Q. And you didn't ask about any experience in the health care field?

constamment réitéré le besoin d'expertise en relations du travail, d'indépendance et d'impartialité, que traduit la notion d'acceptabilité générale.

Je ne suppose pas que le ministre avait une connaissance de l'historique de la *LACTH*. Il a lui-même bien résumé l'intention du législateur lorsqu'il a écrit, le 2 février 1998, que [TRADUCTION] « les parties doivent percevoir le système [établi par la *LACTH*] comme étant neutre et crédible » (je souligne).

Son interprétation de l'intention du législateur est renforcée par la preuve de la pratique et de l'expérience dans le domaine des relations du travail. À l'instar de la Cour d'appel, j'accepte le témoignage fait à cet égard par le professeur Joseph Weiler, qui a déposé son affidavit au nom des syndicats (au par. 36) :

> [TRADUCTION] L'indépendance et l'impartialité des arbitres ne sont garanties ni par le fait qu'ils ne sont pas touchés par le différend soumis à leur arbitrage, ni par leur inamovibilité et leur sécurité financière ou administrative, mais plutôt par leur formation, leur expérience et leur acceptabilité par les parties. [Je souligne.]

Je souscris également à l'observation de la Cour d'appel de l'Ontario, en l'espèce, voulant que les questions soumises à un conseil d'arbitrage de « différends » soient [TRADUCTION] « pratiques et non pas essentiellement juridiques, et requièrent les connaissances et l'expertise d'un arbitre en droit du travail plutôt que les compétences d'un avocat ou d'un juge » (par. 75).

Compte tenu du rôle et de la fonction de la *LACTH*, que confirme son historique législatif, rien dans le dossier n'indique d'une manière ou d'une autre que le ministre était au fait de ces exigences en matière de relations du travail.

Au contraire, le conseiller principal du ministre, chargé de trouver des juges retraités, a nié énergiquement l'existence de telles exigences et a clairement affirmé, en contre-interrogatoire, que le ministre rejetait l'expertise et l'acceptabilité générale comme qualifications requises :

> [TRADUCTION]
>
> Q. Et vous n'avez pas posé de questions au sujet d'une expérience dans le domaine des soins de santé?

A. No. This was not about finding people who had any past experience, relationships or — we weren't trying to come through to find people who would understand —

Q. Anything to do with the health field?

A. The health field or the labour field through some past involvement.

We were looking for neutral decision makers to provide mediation and arbitration.

I accept as correct the Minister's February 2, 1998 statement that the *HLDAA* process must be "perceive[d] . . . as neutral and credible". I also accept that neutrality, and the perception of neutrality, is bound up with an arbitrator's "training, experience and mutual acceptability" (as Professor Weiler testified). I conclude as well that the Minister's approach was antithetical to credibility because he excluded key criteria (labour relations expertise and broad acceptability) and substituted another criterion (prior judicial experience) which, while relevant, was not sufficient to comply with his legislative mandate even as he, in his February 2, 1998 letter, defined his mandate.

Speaking broadly, "the perspective" within which the *HLDAA* was intended by the legislature to operate (*Roncarelli*, at p. 140) is to secure industrial peace in hospitals and nursing homes. The *HLDAA* imposes a compulsory yet mutually tolerable procedure (if properly administered) to resolve the differences between employers and employees without disrupting patient care. In that context, appointment of an inexpert and inexperienced chairperson who is not seen as broadly acceptable in the labour relations community is a defect in approach that is both immediate and obvious. In my view, with respect, having regard to what I believe to be the legislative intent manifested in the *HLDAA*, the Minister's approach to the s. 6(5) appointments was patently unreasonable.

R. Non. Il ne s'agissait pas de trouver des gens qui avaient de l'expérience, des relations ou — nous ne tentions pas de trouver des gens qui comprendraient —

Q. Quelque chose à voir avec le domaine de la santé?

R. Le domaine de la santé ou le domaine des relations du travail en raison d'une participation antérieur.

Nous cherchions des décideurs neutres qui feraient de la médiation et de l'arbitrage.

183 Je considère juste l'affirmation du ministre datée du 2 février 1998, selon laquelle le processus établi par la *LACTH* doit être [TRADUCTION] « per[çu] [. . .] comme étant neutre et crédible ». Je conviens également que la neutralité — et la perception de neutralité — dépend [TRADUCTION] « [de la] formation, [de l']expérience et [de l']acceptabilité [d'un arbitre] par les parties » (comme l'a témoigné le professeur Weiler). Je conclus aussi que l'approche adoptée par le ministre était l'antithèse de la crédibilité du fait qu'il a exclu des critères clés (expertise en matière de relations du travail et acceptabilité générale) et leur a substitué un autre critère (expérience judiciaire antérieure) qui, bien que pertinent, ne permettait pas au ministre de se conformer à son mandat législatif, même selon la définition qu'il en donne dans sa lettre du 2 février 1998.

184 De manière générale, [TRADUCTION] « l'optique » dans laquelle le législateur a voulu que la *LACTH* s'applique (*Roncarelli*, précité, p. 140) est de maintenir la paix industrielle dans les hôpitaux et les maisons de soins infirmiers. La *LACTH* prescrit une procédure — obligatoire mais néanmoins tolérable par les parties (si elle est bien suivie) — de règlement des différends entre les employeurs et les employés, sans qu'il y ait interruption des soins aux malades. Dans ce contexte, la désignation au poste de président d'une personne inexperte ou inexpérimentée qui n'est pas perçue comme étant généralement acceptable dans le milieu des relations du travail comporte un défaut à la fois flagrant et évident. J'estime, en toute déférence, que, compte tenu de ce que je crois être l'intention du législateur qui ressort de la *LACTH*, l'approche que le ministre a adoptée en matière de désignations fondées sur le par. 6(5) était manifestement déraisonnable.

185 This is not to say that specific s. 6(5) appointees of the Minister do not also possess labour relations expertise and broad acceptability, coincidentally as it were, despite the Minister's documented lack of interest in these qualifications. We would properly exercise our discretion to decline to interfere, as did the Court of Appeal, with such (coincidentally) appropriate appointments. Thus the qualifications of specific s. 6(5) appointees will, if challenged, have to be assessed on a case-by-case basis. I will discuss this point further when I come to the issue of remedy.

Malgré le manque d'intérêt attesté du ministre pour ces qualifications, cela ne veut pas dire que les personnes désignées par le ministre en application du par. 6(5) n'ont pas non plus une expertise en matière de relations du travail et ne jouissent pas d'une acceptabilité générale, car il s'en trouve parmi elles qui remplissent ces conditions. Dans l'exercice de notre pouvoir discrétionnaire, nous pourrions légitimement refuser, comme l'a fait la Cour d'appel, d'intervenir à l'égard de ces désignations (par hasard) appropriées. Par conséquent, si elles sont contestées, les qualifications de certaines personnes désignées en vertu du par. 6(5) devront être évaluées cas par cas. Je m'attarderai davantage sur ce point au moment d'examiner la question de la réparation.

(6) Did the Court of Appeal Err in Finding that the Arbitration Boards, By Reason of the Impugned Ministerial Approach to Section 6(5) Appointments, Lacked the Requisite Institutional Independence and Impartiality?

(6) La Cour d'appel a-t-elle commis une erreur en concluant qu'en raison de l'approche contestée que le ministre a adoptée en matière de désignations fondées sur le par. 6(5), les conseils d'arbitrage étaient dépourvus de l'indépendance et de l'impartialité institutionnelles requises?

186 Having determined that the Minister's approach to the s. 6(5) appointments was patently unreasonable on other grounds, it is not, strictly speaking, necessary to address this further ground of appeal. I do so, however, for two reasons. Firstly, it is on this ground that the Court of Appeal granted the following declaration:

Après avoir décidé que l'approche que le ministre a adoptée en matière de désignations fondées sur le par. 6(5) était manifestement déraisonnable pour d'autres motifs, il n'est pas nécessaire, à vrai dire, d'examiner cet autre moyen d'appel. Je le fais toutefois pour deux raisons. En premier lieu, c'est pour ce motif que la Cour d'appel a rendu le jugement déclaratoire suivant :

1. THIS COURT DECLARES that the Minister created a reasonable apprehension of bias and interfered with the independence and impartiality of boards of arbitration established under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 ("*HLDAA*"), contrary to the principles and requirement of fairness and natural justice.

[TRADUCTION] 1. LA COUR DÉCLARE que le ministre a suscité une crainte raisonnable de partialité et compromis l'indépendance et l'impartialité des conseils d'arbitrage établis en vertu de la *Loi sur l'arbitrage des conflits de travail dans les hôpitaux*, L.R.O. 1990, ch. H.14 (« *LACTH* »), contrairement aux principes et à l'obligation d'équité et de justice naturelle.

187 Secondly, as will be seen when I address the issue of remedy, I propose to leave open (as did the Court of Appeal) the possibility of specific challenges by the parties to particular s. 6(5) appointments on a case-by-case basis. I would not want our Court's silence on this ground of attack, in light of its acceptance by the Court of Appeal, to encourage (or prolong) further litigation on this point. The parties have fought the issue of the independence

En second lieu, comme nous le verrons lorsque j'examinerai la question de la réparation, je propose (comme l'a fait la Cour d'appel) de laisser aux parties la possibilité de contester expressément, cas par cas, certaines désignations fondées sur le par. 6(5). Cependant, je ne voudrais pas que, compte tenu de l'acceptation par la Cour d'appel de ce moyen de contestation, le fait que notre Cour ne se prononce sur ce moyen contribue à encourager (ou à

and impartiality of the resulting arbitration boards, which is an objection generic to all of the impugned s. 6(5) appointments, for almost four years. Now that the issue has arrived at this Court, where it was fully argued, we should, I think, provide as much help as we can to assist the parties to resolve their outstanding differences without prolonging the delay and expense.

prolonger) un autre litige à cet égard. Les parties se livrent bataille, depuis presque quatre ans, sur la question de l'indépendance et de l'impartialité des conseils d'arbitrage constitués de la manière reprochée, cette question constituant l'objection commune à toutes les désignations contestées qui ont été faites en vertu du par. 6(5). Maintenant que cette question a été soumise à notre Cour, où elle a été débattue à fond, j'estime que nous devrions aider, autant que possible, les parties à résoudre leurs divergences d'opinions sans prolonger les délais ni poursuivre les dépenses.

The unions contend that the appointment of retired judges created arbitration boards that were neither impartial nor independent of the Minister, and that s. 6(5) did not authorize appointments that resulted in a tribunal that failed to meet the minimum standards of natural justice.

188 Les syndicats soutiennent que la désignation de juges retraités a engendré des conseils d'arbitrage qui n'étaient ni impartiaux ni indépendants du ministre, et que le par. 6(5) n'autorisait pas les désignations menant à la constitution d'un tribunal administratif ne respectant pas les normes minimales de justice naturelle.

It is now clear that the independence as well as the impartiality of the decision maker is a component of natural justice: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at p. 332, *per* Gonthier J.; *Matsqui Indian Band*, *supra*, at para. 79, *per* Lamer C.J.; and *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 283-84. As the purpose of the independence requirement is to establish a protected platform for impartial decision making, I will deal first with this objection.

189 Il est maintenant évident que l'indépendance et l'impartialité du décideur sont des composantes de la justice naturelle : *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, p. 332, le juge Gonthier; *Bande indienne de Matsqui*, précité, par. 79, le juge en chef Lamer; *R. c. Généreux*, [1992] 1 R.C.S. 259, p. 283-284. Je vais d'abord examiner l'objection fondée sur l'exigence d'indépendance, étant donné que cette exigence vise à établir un écran de protection favorisant la prise de décisions impartiales.

(a) *Institutional Independence*

a) *L'indépendance institutionnelle*

The *HLDAA* commands the use of *ad hoc* arbitration boards. The unions argue that such boards, in the context of "interest arbitrators", are flawed because they lack the usual indices of institutional independence such as security of tenure, financial security and administrative independence that rest on "objective conditions or guarantees": *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 115. However, as explained above, the Court cannot substitute a different tribunal for the one designed by the legislature. An *ad hoc* tribunal is by definition constituted on a case-by-case

190 La *LACTH* commande le recours à des conseils d'arbitrage *ad hoc*. Les syndicats soutiennent que, dans le cas des « arbitres de différends », de tels conseils sont viciés parce qu'ils sont dépourvus des signes habituels d'indépendance institutionnelle comme l'inamovibilité, la sécurité financière et l'indépendance administrative qui reposent sur des « conditions ou garanties objectives » : *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 689, et *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 115. Cependant, comme je l'expliquais plus haut, la Cour ne peut pas substituer un autre tribunal administratif à celui conçu par le législateur. Par

basis. Security of tenure does not survive the termination of the arbitration, and financial security is similarly circumscribed. Administrative independence has little formal protection. Professional labour arbitrators (including those on the s. 49(10) list) function successfully in such a structure even though there may be no guarantee of continuing work from any particular employer or union.

191 In addition to the *HLDAA*'s statutory command, the Court's assessment of structural independence should take into account the success with which *ad hoc* tribunals have long operated in labour relations in general and under the *HLDAA*'s scheme of compulsory arbitrations (prior to the appointments in question) in particular: *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, at para. 1. In this regard, as mentioned, Professor Joseph Weiler testified that: "The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security but by training, experience and mutual acceptability".

192 Accepting Professor Weiler's evidence on this point, it follows that if, as I have concluded, s. 6(5) requires the appointment of individuals as chairpersons who are qualified by training, experience and mutual acceptability, the proper exercise of the appointment power would lead to a tribunal which, in the context of labour relations, would satisfy reasonable concerns about institutional independence.

193 Accordingly, having regard both to general labour relations experience, as well as the explicit legislative provisions in the *HLDAA*, I would not give effect to the unions' generic objection directed to the issue of institutional independence. If additional facts are raised on a case-by-case challenge, they will have to be addressed at that time.

définition, un tribunal *ad hoc* est constitué cas par cas. L'inamovibilité ne subsiste pas à la fin de l'arbitrage et la sécurité financière est limitée de façon similaire. L'indépendance administrative bénéficie de peu de protection formelle. Les arbitres professionnels en droit du travail (y compris ceux inscrits sur la liste dressée en vertu du par. 49(10)) réussissent à fonctionner dans une telle structure même s'ils n'ont peut-être aucune garantie de travail permanent de la part d'un employeur ou d'un syndicat particulier.

En plus de l'exigence imposée par la *LACTH*, la Cour devrait, pour apprécier l'indépendance structurelle, tenir compte du succès que les tribunaux *ad hoc* connaissent depuis longtemps dans le domaine des relations du travail en général, et qu'ils connaissaient aussi depuis longtemps (avant les désignations contestées) dans le domaine des arbitrages obligatoires fondés sur la *LACTH* en particulier : *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405, par. 1. À ce propos, comme nous l'avons vu, le professeur Joseph Weiler a témoigné que [TRADUCTION] « [l]'indépendance et l'impartialité des arbitres ne sont garanties ni par le fait qu'ils ne sont pas touchés par le différend soumis à leur arbitrage, ni par leur inamovibilité et leur sécurité financière ou administrative, mais plutôt par leur formation, leur expérience et leur acceptabilité par les parties ».

Si l'on retient le témoignage du professeur Weiler à ce propos, il s'ensuit que, si, comme je l'ai conclu, le par. 6(5) exige la désignation de présidents compétents en raison de leur formation, de leur expérience et de leur acceptabilité par les parties, l'exercice approprié du pouvoir de désignation permettra de constituer un tribunal administratif qui, dans le contexte des relations du travail, répondra aux préoccupations raisonnables concernant l'indépendance institutionnelle.

En conséquence, compte tenu à la fois du critère de l'expérience générale en matière de relations du travail et des dispositions explicites de la *LACTH*, je suis d'avis de ne pas retenir l'objection commune formulée par les syndicats au sujet de l'indépendance institutionnelle. Si des faits additionnels sont soulevés dans le cadre d'une contestation sur une base individuelle, il faudra les examiner à ce moment là.

(b) *Impartiality*

Impartiality, on the other hand, raises different considerations. The *HLDAA* did not command the appointment of retired judges. Nor does the *HLDAA* contemplate biased arbitrators.

The test for institutional impartiality is whether a well-informed person, viewing the matter realistically and practically and having thought the matter through, could form a reasonable apprehension of bias in a substantial number of cases (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 44; *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, and *Matsqui Indian Band*, *supra*, at para. 67).

The Minister does not contest the requirement that his s. 6(5) appointees be impartial. He was, as stated, looking for "[p]eople who had spent their professional lives as neutrals".

Allegations of individual bias must necessarily be dealt with on a case-by-case basis. I am dealing here only with the general proposition that the Minister's appointment of retired judges to chair *HLDAA* boards did, by the fact of their appointment alone, doom the impartiality of the resulting boards.

To be sure, the unions now say that their challenge is not directed so much to the appointment of retired judges as to the sudden change of appointments process without prior consultation. Nevertheless, they still rely on the evidence of Professor Joseph Weiler who says that judges as a class have historically not been seen to be sympathetic or particularly fair to the cause of labour.

"Impartiality" is a state of mind. Some of the cases draw a distinction between an allegation of bias (or prejudice), i.e., that the s. 6(5) appointees come to their task with something less than an open mind, a predisposition for or against one of the parties, or a leaning towards a particular outcome, and an allegation of partiality. The allegation of

b) *L'impartialité*

194 Par contre, l'impartialité fait intervenir des considérations différentes. La *LACTH* n'exigeait pas la désignation de juges retraités. Et elle ne prévoit pas non plus la désignation d'arbitres partiaux.

195 Le critère de l'impartialité institutionnelle consiste à se demander si une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique pourrait éprouver une crainte raisonnable de partialité dans un grand nombre de cas (*2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919, par. 44; *R. c. Lippé*, [1991] 2 R.C.S. 114, p. 143; *Bande indienne de Matsqui*, précité, par. 67).

196 Le ministre ne conteste pas que les personnes qu'il désigne en vertu du par. 6(5) doivent être impartiales. Comme nous l'avons vu, il cherchait [TRADUCTION] « [d]es personnes qui avaient été neutres pendant toute leur vie professionnelle ».

197 Les allégations de partialité de la part d'une personne doivent nécessairement être examinées cas par cas. Je ne parle ici que de la proposition générale selon laquelle la désignation par le ministre de juges retraités à la présidence des conseils établis en vertu de la *LACTH* compromettait, à elle seule, l'impartialité des conseils qui en résultaient.

198 Certes, les syndicats affirment maintenant que leur contestation ne vise pas tant la désignation de juges retraités que le changement soudain, sans consultation préalable, du processus de désignation. Ils s'appuient néanmoins encore sur le témoignage du professeur Joseph Weiler, selon lequel les juges, en tant que catégorie, ne sont pas traditionnellement perçus comme étant favorables à la cause des travailleurs et des travailleuses ou comme étant particulièrement équitables à leur sujet.

199 L'« impartialité » est un état d'esprit. Certains arrêts établissent une distinction entre, d'une part, une allégation de préjugés consistant à reprocher aux personnes désignées en vertu du par. 6(5) de ne pas avoir l'esprit ouvert et d'avoir des opinions favorables ou défavorables à l'une des parties ou encore une préférence pour un résultat particulier,

partiality, according to these cases, takes the attack a significant step further by suggesting that the appointees are not only biased but will allow, either consciously or unconsciously, their biases to influence the decision they will be called on to make: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 105 *et seq.*, *per* Cory J.; *R. v. Williams*, [1998] 1 S.C.R. 1128, at paras. 9-10; *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 336, leave to appeal refused, [1994] 1 S.C.R. x. The Court of Appeal did not suggest that the retired judges were in fact prejudiced or partial but concluded that they might reasonably be seen to be "inimical to the interests of labour, at least in the eyes of the appellants" (para. 101). I agree with the Minister that the proper test is not so narrowly focussed. The test is not directed to the subjective perspective of one of the parties but to the reasonable detached and informed observer, i.e., "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude": *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394.

200 The unions contend that this Court should defer to the Court of Appeal's findings of fact. Reliance is placed on the observation of Gonthier J. that "[t]he principle of non-intervention on questions of fact is also applicable to a second appellate court such as this Court *vis-à-vis* a first appellate court" (*St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at para. 37). However, we are not thusly inhibited if the Court of Appeal applied the wrong test. The correct viewpoint is that of an informed observer who is detached from a personal interest in the controversy.

201 The fact is that retired judges as a class have no interest in the outcome of hospital collective bargaining disputes beyond that of other citizens. They pay provincial taxes at the same rates and aspire to a reasonable level of health care. They have personal experience of public sector pay restraint. They

et d'autre part, une allégation de partialité. D'après ces arrêts, l'allégation de partialité va beaucoup plus loin en laissant entendre que les personnes désignées ont non seulement des idées préconçues, mais que, consciemment ou inconsciemment, elles laisseront ces idées préconçues influencer la décision qu'elles seront appelées à rendre : *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484, par. 105 et suiv., le juge Cory; *R. c. Williams*, [1998] 1 R.C.S. 1128, par. 9-10; *R. c. Parks* (1993), 15 O.R. (3d) 324 (C.A.), p. 336, autorisation d'appel refusée [1994] 1 R.C.S. x. La Cour d'appel n'a pas indiqué que les juges retraités avaient, en fait, des préjugés ou un parti pris, mais elle a conclu qu'ils pourraient raisonnablement être perçus comme étant [TRADUCTION] « hostiles aux intérêts des travailleurs et des travailleuses, du moins aux yeux des appelants » (par. 101). Je partage l'avis du ministre selon lequel le critère applicable n'a pas une portée aussi étroite. Ce critère est axé non pas sur le point de vue subjectif de l'une des parties, mais sur celui de l'observateur raisonnable, neutre et renseigné, c'est-à-dire qu'il s'agit de se demander « à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique » (*Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, p. 394).

Les syndicats soutiennent que la Cour devrait s'en remettre aux conclusions de fait de la Cour d'appel. Ils s'appuient sur l'observation du juge Gonthier voulant que « [l]e principe de non-intervention dans les questions de fait s'applique aussi à un second niveau d'appel, comme notre Cour par rapport à une première cour d'appel » (*St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 37). Cependant, nous ne sommes pas liés par ce principe de non-intervention lorsque la Cour d'appel a appliqué le mauvais critère. Le bon point de vue est celui de l'observateur renseigné qui n'a aucun intérêt personnel dans la controverse.

Force est de constater que, en tant que catégorie, les juges retraités n'ont pas plus d'intérêt que les autres citoyens dans l'issue des différends concernant les négociations collectives en milieu hospitalier. Ils sont assujettis aux mêmes taux d'impôt provincial que les autres citoyens et, comme eux, ils

probably harbour as many different views of public sector wage policy as there are retired judges.

aspirent à des soins de santé raisonnables. Ils ont personnellement vécu le contrôle des salaires dans le secteur public. Le nombre d'opinions différentes qu'ils ont au sujet de la politique salariale dans le secteur public est probablement aussi élevé que celui des juges retraités.

There are no "substantial grounds" (*Committee for Justice and Liberty*, *supra*, at p. 395) to think that retired superior court judges, who enjoy a federal pension, would do the bidding of the provincial Minister, or make decisions to please the employers so as to improve the prospect of future appointments. Undoubtedly, there have been some judges predisposed toward management in the past, as well as some judges predisposed toward labour, but I do not think the fully informed, reasonable person would tar the entire class of presently retired judges with the stigma of an anti-labour bias.

202 Il n'y a aucun « motif sérieux » (*Committee for Justice and Liberty*, précité, p. 395) de penser que des juges de cour supérieure retraités, qui bénéficient d'une pension du gouvernement fédéral, se plieraient à la volonté du ministre provincial ou rendraient des décisions destinées à plaire aux employeurs afin d'améliorer leurs chances de désignation future. Il est indubitable que, dans le passé, il y eu des juges enclins à privilégier les employeurs et aussi des juges enclins à privilégier les travailleurs et travailleuses, mais je ne crois pas qu'une personne raisonnable et bien renseignée reprocherait à toute la catégorie des juges présentement retraités d'avoir un parti pris contre les travailleurs et les travailleuses.

The unions refute any "class" objection by their ready acceptance of retired judges Alan Gold and George Adams as chairpersons of "interest" arbitrations. The potential problem with some retired judges is not partiality but expertise.

203 Les syndicats réfutent toute objection fondée sur une « catégorie » du fait qu'ils acceptent volontiers que les juges retraités Alan Gold et George Adams président des arbitrages de « différends ». Le problème que peut poser le recours à certains juges retraités n'est pas tant un problème de partialité qu'un problème d'expertise.

While I would therefore reject this branch of the unions' challenge, I accept, of course, that a challenge might be made to the impartiality of a particular retired judge to a particular *ad hoc* tribunal, as indeed the impartiality of any other appointee could be questioned on a case-by-case basis.

204 Bien que je sois, par conséquent, d'avis de rejeter cet aspect de la contestation des syndicats, il va sans dire que je reconnais qu'il serait possible de contester l'impartialité d'un juge retraité nommé à un tribunal *ad hoc* particulier, tout comme il serait sûrement possible de contester, cas par cas, l'impartialité de toute autre personne désignée.

(7) The Proper Remedy

(7) La réparation convenable

The remedy of the Court of Appeal was predicated on its conclusion that the Minister created a reasonable apprehension of bias and interfered with the independence and impartiality of the *HLDAA* boards of arbitration, as well as the legitimate expectation of the unions contrary to the requirements of natural justice.

205 La réparation accordée par la Cour d'appel reposait sur sa conclusion que le ministre avait suscité une crainte raisonnable de partialité et porté atteinte à l'indépendance et à l'impartialité des conseils d'arbitrage établis en vertu de la *LACTH*, ainsi qu'à l'expectative légitime des syndicats, contrairement aux exigences de la justice naturelle.

206 I have indicated my reasons for respectful disagreement with the scope of that decision, while agreeing with the Court of Appeal's fundamental concern about the Minister's non-compliance with the legislative intent reflected in the *HLDAA* to appoint persons who were not only impartial and independent but possessed expertise and who were generally seen as acceptable to both labour and management in the labour relations community. I also share the Court of Appeal's reluctance, in a judicial review which did not focus on the circumstances of individual appointments, to give effect to the unions' request to set aside the Minister's appointments.

J'ai indiqué les motifs de mon désaccord avec la portée de cette décision, tout en partageant la préoccupation fondamentale de la Cour d'appel concernant le non-respect, par le ministre, de l'intention du législateur — qui ressort de la *LACTH* — de désigner des personnes qui sont non seulement impartiales et indépendantes, mais qui ont une expertise et qui sont généralement perçues, dans le milieu des relations du travail, comme étant acceptables à la fois par les syndicats et par le patronat. À l'instar de la Cour d'appel, j'hésite à accéder à la demande des syndicats d'annuler les désignations ministérielles dans le cadre d'un contrôle judiciaire non axé sur les circonstances de chacune des désignations.

207 It is common ground that some retired judges *do* have the necessary labour relations background (e.g., former judges Gold and Adams) and, of course, the fact they also happen to be members of the "class" of retired judges would not, in their case, be a ground of disqualification.

Nul ne conteste que certains juges retraités possèdent *effectivement* les antécédents requis en matière de relations du travail (par exemple, les anciens juges Gold et Adams), et il est évident que, dans leur cas, le fait d'appartenir également à la « catégorie » des juges retraités ne serait pas un motif d'incapacité.

208 In accordance with these reasons, the appeal should therefore be dismissed, but paragraphs 1, 2 and 3 of the order of the Court of Appeal should be varied to read:

> 1. The Court declares that the Minister is required, in the exercise of his power of appointment under s. 6(5) of the *HLDAA*, to be satisfied that prospective chairpersons are not only independent and impartial but possess appropriate labour relations expertise and are recognized in the labour relations community as generally acceptable to both management and labour.
>
> 2. This order speaks from the date hereof and does not invalidate completed arbitration awards.
>
> 3. Any challenges to continuing arbitrations, including those chaired by retired judges appointed by the Minister under s. 6(5) of the *HLDAA*, are subject to judicial review on a case-by-case basis.

Conformément à ces motifs, il y a lieu de rejeter le pourvoi, mais également de modifier de la façon suivante les paragraphes 1, 2 et 3 de l'ordonnance de la Cour d'appel :

> 1. La Cour déclare que, dans l'exercice de son pouvoir de désignation conféré par le par. 6(5) *LACTH*, le ministre doit être convaincu que les candidats à la présidence sont non seulement indépendants et impartiaux, mais également qu'ils ont une expertise appropriée en matière de relations du travail et sont reconnus, dans le milieu des relations du travail, comme étant généralement acceptables à la fois par le patronat et par les syndicats.
>
> 2. La présente ordonnance prend effet à compter de la date des présentes et n'invalide pas les sentences arbitrales déjà rendues.
>
> 3. Toute contestation des arbitrages en cours, y compris ceux présidés par des juges retraités désignés par le ministre conformément au par. 6(5) *LACTH*, pourra faire l'objet d'un contrôle judiciaire sur une base individuelle.

V. Conclusion

Except as aforesaid, the appeal is dismissed with costs.

Appeal dismissed with costs, McLachlin C.J. *and* Major *and* Bastarache JJ. *dissenting.*

Solicitor for the appellant: The Attorney General of Ontario, Toronto.

Solicitors for the respondents: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Bar Association: Koskie Minksy, Toronto.

Solicitor for the intervener the National Academy of Arbitrators (Canadian Region): Michel G. Picher, Toronto.

V. Conclusion

209 Sous réserve de ce qui précède, le pourvoi est rejeté avec dépens.

Pourvoi rejeté avec dépens, la juge en chef McLachlin *et les juges* Major *et* Bastarache *sont dissidents.*

Procureur de l'appelant : Le procureur général de l'Ontario, Toronto.

Procureurs des intimés : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Koskie Minksy, Toronto.

Procureur de l'intervenante National Academy of Arbitrators (Canadian Region) : Michel G. Picher, Toronto.