EB-2018-0270

ONTARIO ENERGY BOARD

IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation, made pursuant to section 86(2)(b) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking to include a rate rider in the current1 Board-approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to their Base Distribution Delivery Rates (exclusive of rate riders), made pursuant to section 78 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc., made pursuant to section 86(1)(a) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking cancellation of its distribution licence, made pursuant to section 77(5) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc. seeking an order to amend its distribution licence, made pursuant to section 74 of the *Ontario Energy Board Act, 1998*, to serve the customers of the former Orillia Power Distribution Corporation.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its rate order to Hydro One Networks Inc., made pursuant to section 18 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc., seeking an order to amend the Specific Service Charges in Orillia Power Distribution Corporation's transferred rate order made pursuant to section 78 of the *Ontario Energy Board Act.*

MOTION RECORD AND BOOK OF AUTHORITIES
OF THE
SCHOOL ENERGY COALITION

January 7, 2019

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30. *Chaudhry v. Canada (Attorney General),* 2012 FCA 113

31. Exhibit A, Tab 1, Schedule 1

32. EB-2016-0276, Procedural Order No.7 Submissions of Hydro One Inc,, February 15 2018

33. *Board Directions on Cost Allocation Methodology For Electricity Distributors - Cost Allocation Review* (EB-2050-0317), September 29, 2006 (Excerpt)

34. *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 S.C.R. 147

35. *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 28

36. *Decision and Order* (EB-2016-0255 - Milton Hydro Motion to Review), February 22 2018

37. *Decision and Order,* (EB-2009-0063 Brantford Power Inc,/Brant County Power Inc. Motion to Review), August 10, 2010

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Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B (Excerpt)

Board objectives, electricity
1 (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

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

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, including having regard to the consumer's economic circumstances.

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. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1; 2015, c. 29, s. 7.

Board objectives, gas
2 The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2.

Board's powers, general
Power to determine law and fact
19 (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference
(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties
(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception
(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998*or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive
(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Powers, procedures applicable to all matters
20 Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

Board's powers, miscellaneous
21 (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Conditions of orders
23 (1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application. 1998, c. 15, Sched. B, s. 23.

Appeal to Divisional Court
33 (1) An appeal lies to the Divisional Court from,

(a) an order of the Board;

(b) the making of a rule under section 44; or

(c) the issuance of a code under section 70.1. 2003, c. 3, s. 28 (1).

Nature of appeal, timing
(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code. 1998, c. 15, Sched. B, s. 33 (2); 2003, c. 3, s. 28 (2).

Board may be heard

(3) The Board is entitled to be heard by counsel upon the argument of an appeal. 1998, c. 15, Sched. B, s. 33 (3).

Board to act on court's opinion
(4) The Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with the opinion, but the order shall not be retroactive in its effect. 1998, c. 15, Sched. B, s. 33 (4).

Board not liable for costs
(5) The Board, or any member of the Board, is not liable for costs in connection with any appeal under this section. 1998, c. 15, Sched. B, s. 33 (5).

Order to take effect despite appeal
(6) Subject to subsection (7), every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise. 2006, c. 33, Sched. X, s. 1.

Court may stay the order
(7) The Divisional Court may, on an appeal of an order made by the Board,

(a) stay the operation of the order; or

(b) set aside a stay of the operation of the order that was ordered by the Board under subsection (6). 2006, c. 33, Sched. X, s. 1.

Order of Board required
36 (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 1998, c. 15, Sched. B, s. 36 (1).

Order of Board re Smart Metering Entity
(1.1) Neither the Smart Metering Entity nor any other person licensed to do so shall conduct activities relating to the metering of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 3.

Order re: rates
(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. 1998, c. 15, Sched. B, s. 36 (2).

Power of Board
(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate. 1998, c. 15, Sched. B, s. 36 (3).

Contents of order
(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates. 1998, c. 15, Sched. B, s. 36 (4).

Deferral or variance accounts

(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, from time to time, or as prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2017, c. 2, Sched. 10, s. 2 (3).

Same
(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, from time to time, or as prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2017, c. 2, Sched. 10, s. 2 (3).

Same
(4.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 30.

Same
(4.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (4.1) or (4.2) and the delay is due in whole or in part to the conduct of a gas distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 30.

Same
(4.5) If an amount recorded in a deferral or variance account of a gas distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 30.

Fixing other rates

(5) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 36 (5).

Burden of proof
(6) Subject to subsection (7), in an application with respect to rates for the sale, transmission, distribution or storage of gas, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 36 (6).

Order, motion of Board or at request of Minister
(7) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates for the sale, transmission, distribution or storage of gas by any gas transmitter, gas distributor or storage company are just and reasonable, the Board shall make an order under subsection (2) and the burden of establishing that the rates are just and reasonable is on the gas transmitter, gas distributor or storage company, as the case may be. 1998, c. 15, Sched. B, s. 36 (7).

Exception
(8) This section does not apply to a municipality or municipal public utility commission transmitting or distributing gas under the *Public Utilities Act* on the day before this section comes into force. 1998, c. 15, Sched. B, s. 36 (8).

Amendment of licence
74 (1) The Board may, on the application of any person, amend a licence if it considers the amendment to be,

(a) necessary to implement a directive issued under this Act; or

(b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 13.

Orders by Board, electricity rates
Order re: transmission of electricity
78 (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity
(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re the Smart Metering Entity
(2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998*except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 5 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Order re unit smart meter provider

(2.2) No unit smart meter provider shall charge for unit smart metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (12).

See: 2010, c. 8, ss. 38 (12), 40.

Order re unit sub-meter provider
(2.3) No unit sub-meter provider shall charge for unit sub-metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (13).

Rates
(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity, unit sub-metering or unit smart metering or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1); 2010, c. 8, s. 38 (14).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Rates, unit sub-metering and unit smart-metering

(3.0.0.1) The Board shall, in accordance with rules prescribed by the regulations, make orders approving or fixing separate rates for unit sub-metering and for unit smart metering,

(a) for classes of consumers, as may be prescribed by regulation; and

(b) for different circumstances, as may be prescribed by regulation. 2010, c. 8, s. 38 (15).

See: 2010, c. 8, ss. 38 (15), 40.

Rates
(3.0.1) The Board may make orders approving or fixing just and reasonable rates for the Smart Metering Entity in order for it to meet its obligations under this Act or under Part IV.2 of the *Electricity Act, 1998*. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts
(3.0.2) The Board may make orders permitting the Smart Metering Entity or distributors to establish one or more deferral or variance accounts related to costs associated with the smart metering initiative, in the circumstances prescribed in the regulations. 2006, c. 3, Sched. C, s. 5 (1).

Orders re recovery of smart metering initiative costs
(3.0.3) The Board may make orders relating to the ability of the Smart Metering Entity, distributors, retailers and other persons to recover costs associated with the smart metering initiative, in the situations or circumstances prescribed by regulation and the orders may require them to meet such conditions or requirements as may be prescribed, including providing for the time over which costs may be recovered. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts, s. 27.2
(3.0.4) The Board may make orders permitting the IESO, distributors or other licensees to establish one or more deferral or variance accounts related to costs associated with complying with a directive issued under section 27.2. 2009, c. 12, Sched. D, s. 12 (2); 2014, c. 7, Sched. 23, s. 6 (1).

Methods re incentives or recovery of costs
(3.0.5) The Board may, in approving or fixing just and reasonable rates or in exercising the power set out in clause 70 (2)(e), adopt methods that provide,

(a) incentives to a transmitter or a distributor in relation to the siting, design and construction of an expansion, reinforcement or other upgrade to the transmitter's transmission system or the distributor's distribution system; or

(b) for the recovery of costs incurred or to be incurred by a transmitter or distributor in relation to the activities referred to in clause (a). 2009, c. 12, Sched. D, s. 12 (2).

Annual rate plan and separate rates for situations prescribed by regulation
(3.1) The Board shall, in accordance with rules prescribed by the regulations, approve or fix separate rates for the retailing of electricity,

(a) to such different classes of consumers as may be prescribed by the regulations; and

(b) for such different situations as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Same
(3.2) The first rates approved or fixed by the Board under subsection (3.1) shall remain in effect for not less than 12 months and the Board shall approve or fix separate rates under subsection (3.1) after that time for periods of not more than 12 months each or for such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Rates to reflect cost of electricity

(3.3) In approving or fixing rates under subsection (3.1),

(a) the Board shall forecast the cost of electricity to be consumed by the consumers to whom the rates apply, taking into consideration the adjustments required under section 25.33 of the *Electricity Act, 1998* and shall ensure that the rates reflect these costs; and

(b) the Board shall take into account balances in the IESO's variance accounts established under section 25.33 of the *Electricity Act, 1998* and shall make adjustments with a view to eliminating those balances within 12 months or such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1); 2014, c. 7, Sched. 23, s. 6 (2).

Forecasting cost of electricity
(3.4) In forecasting the cost of electricity for the purposes of subsection (3.3), the Board shall have regard to such matters as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Imposition of conditions on consumer who enters into retail contract
(3.5) A consumer who enters into or renews a retail contract for electricity after the day he or she becomes subject to a rate approved or fixed under subsection (3.1) is subject to such conditions as may be determined by the Board. 2004, c. 23, Sched. B, 14 (1).

Rates
(4) The Board may make an order under subsection (3) with respect to the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998* even if the distributor is meeting its obligations through an affiliate or through another person with whom the distributor or an affiliate of the distributor has a contract. 1998, c. 15, Sched. B, s. 78 (4).

(5) Repealed: 2004, c. 23, Sched. B, s. 14 (2).

Same, obligations under s. 29 of *Electricity Act, 1998*
(5.0.1) In approving or fixing just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, the Board shall comply with the regulations made under clause 88 (1) (g.5). 2003, c. 8, s. 1.

Same, Hydro One executive compensation
(5.0.2) In approving or fixing just and reasonable rates for Hydro One Limited or any of its subsidiaries, the Board shall not include any amount in respect of compensation paid to the Chief Executive Officer and executives, within the meaning of the *Hydro One Accountability Act, 2018*, of Hydro One Limited. 2018, c. 10, Sched. 1, s. 10.

Same, Hydro One Inc. and subsidiaries
(5.1) In approving or fixing just and reasonable rates for Hydro One Inc. or a subsidiary of Hydro One Inc., the Board shall apply a method or technique prescribed by regulation for the calculation and

treatment of transfers made by Hydro One Inc. or its subsidiary, as the case may be, that are authorized by section 50.1 of the *Electricity Act, 1998*. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (2).

Same, statutory right to use corridor land
(5.2) In approving or fixing just and reasonable rates for a transmitter who has a statutory right to use corridor land (as defined in section 114.1 of the *Electricity Act, 1998*), the Board shall apply a method or technique prescribed by regulation for the treatment of the statutory right. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (3).

Conditions, etc.

(6) An order under this section may include conditions, classifications or practices, including rules respecting the calculation of rates, applicable,

(a) to the Smart Metering Entity in respect of meeting its obligations;

(b) to an activity prescribed for the purposes of subsection (3); and

(c) to the transmission, distribution or retailing of electricity or unit sub-metering or unit smart metering. 2009, c. 12, Sched. D, s. 12 (3); 2010, c. 8, s. 38 (16).

Deferral or variance accounts
(6.1) If a distributor has a deferral or variance account that relates to the commodity of electricity, the Board shall, from time to time, or as prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2017, c. 2, Sched. 10, s. 2 (4).

Same
(6.2) If a distributor has a deferral or variance account that does not relate to the commodity of electricity, the Board shall, from time to time, or as prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2017, c. 2, Sched. 10, s. 2 (4).

Same
(6.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 52 (4).

Same
(6.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (6.1) or (6.2) and the delay is due in whole or in part to the conduct of a distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 52 (4).

Same
(6.5) If an amount recorded in a deferral or variance account of a distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 52 (4).

Same
(6.6) Subsections (6.1), (6.2) and (6.4) do not apply unless section 79.6 has been repealed under section 79.11. 2003, c. 3, s. 52 (4).

Fixing other rates
(7) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 78 (7).

Burden of proof
(8) Subject to subsection (9), in an application made under this section, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 78 (8).

Order
(9) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates that the Board may approve or fix under this section are just and reasonable, the Board shall make an order under subsection (3) and the burden of establishing that the rates are just and reasonable is on the transmitter, distributor or unit sub-meter provider, as the case may be. 2010, c. 8, s. 38 (17).

Change in ownership or control of systems
86 (1) No transmitter or distributor, without first obtaining from the Board an order granting leave, shall,

(a) sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety;

(b) sell, lease or otherwise dispose of that part of its transmission or distribution system that is necessary in serving the public; or

(c) amalgamate with any other corporation. 2003, c. 3, s. 55 (1).

Same
(1.1) Subsection (1) does not apply with respect to a disposition of securities of a transmitter or distributor or of a corporation that owns securities in a transmitter or distributor. 2002, c. 1, Sched. B, s. 9 (1).

Acquisition of share control
(2) No person, without first obtaining an order from the Board granting leave, shall,

(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 10 per cent of the voting securities of the transmitter or distributor; or

(b) acquire control of any corporation that holds, directly or indirectly, more than 10 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation. 1998, c. 15, Sched. B, s. 86 (2); 2015, c. 29, s. 15 (1, 2).

Same
(2.1) Subsection (2) does not apply to,

(a) the Crown in right of Ontario;

(b) an underwriter (within the meaning of the *Securities Act*) who holds the voting securities solely for the purpose of distributing them to the public;

(c) any person or entity who is acting in relation to the voting securities solely in the capacity of an intermediary in the payment of funds or the delivery of securities or both in connection with trades in securities and who provides centralized facilities for the clearing of trades in securities; or

(d) any person or entity who holds the voting securities by way of security only. 2002, c. 1, Sched. B, s. 9 (2).

Significant asset
(3) For the purposes of subsection (2),

(a) an asset is a significant asset if its value is 10 per cent or more of the aggregate book value of the total assets of a person, determined on a consolidated basis in accordance with generally accepted accounting principles; and

(b) "control", with respect to a corporation, has the same meaning as in the *Business Corporations Act*. 1998, c. 15, Sched. B, s. 86 (3); 2015, c. 29, s. 15 (3).

Valuation of voting securities
(4) For the purpose of determining whether voting securities constitute a significant asset, the value of the voting securities shall be deemed to be,

(a) the market value of the securities if more than 10 per cent of the voting securities are publicly traded; and

(b) 115 per cent of the book value of the voting securities, as determined by the equity method of accounting, in all other cases. 1998, c. 15, Sched. B, s. 86 (4); 2015, c. 29, s. 15 (4).

Mortgages
(5) This section does not apply to a mortgage or charge to secure any loan or indebtedness or to secure any bond, debenture or other evidence of indebtedness. 1998, c. 15, Sched. B, s. 86 (5).

Transactions under *Electricity Act, 1998*
(5.1) This section does not apply with respect to a transaction described in section 50.1 or 50.2 of the *Electricity Act, 1998*. 2002, c. 1, Sched. B, s. 9 (2).

Leave
(6) An application for leave under this section shall be made to the Board, which shall grant or refuse leave. 1998, c. 15, Sched. B, s. 86 (6).

Void agreement
(6.1) An amalgamation agreement between the corporations that propose to amalgamate is void if the Board refuses to grant leave under this section, even if the amalgamation agreement has been adopted in accordance with subsection 176 (4) of the *Business Corporations Act*. 2003, c. 3, s. 55 (2).

Void certificate
(6.2) A certificate of amalgamation endorsed by the director appointed under section 278 of the *Business Corporations Act*is void if it is endorsed before leave of the Board for the amalgamation is granted. 2003, c. 3, s. 55 (2).

Sale of assets of OEFC to or by Hydro One Inc., etc.
(7) Despite subsection (1) and any order of the Board, the sale, lease, conveyance, transfer, assignment, assumption or other disposition of any of the assets, rights, liabilities or obligations of the Ontario Electricity Financial Corporation to or by Hydro One Inc. or a subsidiary of Hydro One Inc. after March 31, 1999, including any such sale, lease, conveyance, transfer, assignment, assumption or other disposition completed before this subsection came into force, does not require an order from the Board granting leave. 2002, c. 23, s. 4 (13).

Leave to construct, etc., electricity transmission or distribution line
92 (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection. 1998, c. 15, Sched. B, s. 92 (1).

Exception
(2) Subsection (1) does not apply to the relocation or reconstruction of an existing electricity transmission line or electricity distribution line or interconnection where no expansion or reinforcement is involved unless the acquisition of additional land or authority to use additional land is necessary. 1998, c. 15, Sched. B, s. 92 (2).

Order allowing work to be carried out
96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.

Applications under s. 92
(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.

Lieutenant Governor in Council, order re electricity transmission line
96.1 (1) The Lieutenant Governor in Council may make an order declaring that the construction, expansion or reinforcement of an electricity transmission line specified in the order is needed as a priority project. 2015, c. 29, s. 16.

Effect of order
(2) When it considers an application under section 92 in respect of the construction, expansion or reinforcement of an electricity transmission line specified in an order under subsection (1), the Board shall accept that the construction, expansion or reinforcement is needed when forming its opinion under section 96. 2015, c. 29, s. 16.

Obligations must be followed
(3) Nothing in this section relieves a person from the obligation to obtain leave of the Board for the construction, expansion or reinforcement of an electricity transmission line specified in an order under subsection (1). 2015, c. 29, s. 16.

2

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

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Jay Shepherd
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BY EMAIL and RESS

April 21, 2017
Our File No. 20160276

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2016-0276 – Hydro One/Orillia MAADs

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #5 in this matter, this letter represents our Final Argument in this proceeding.

This Final Argument is based on the evidence in this proceeding. However, it is also informed by the Application of Hydro One for distribution rates for the period 2018-2022, EB-2017-0049, which was filed on March 31, 2017. That application includes rates for three previous acquired service territories, Norfolk, Haldimand, and Woodstock.

Denial of Approval for the Transaction

Hydro One, among the least productive electricity distributors in the province, continues to throw bags of money at local councils, convincing them to sell their local distribution companies. In their pitch to local councils, and to this Board, Hydro One says that costs and rates will go down because of efficiencies arising out of these transactions. Everyone will be better off, they say.

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Hydro One has now filed a rate application – EB-2017-0049 - that proposes new rates for the customers in the last three of its acquired territories. As some predicted, rates are proposed to skyrocket, because costs have gone through the roof.

SEC has just done the calculation of the increases for local schools. In Norfolk, the distribution rates for schools are proposed to increase by 39%. In Haldimand, the schools face a proposed 87% rate increase. In Woodstock, Hydro One seeks to increase rates for schools by 104%.

And, there is more to come, because the proposed increases still get those customers only part of the way to Hydro One's rates for their other customers. The revenue to cost ratios for those new acquired classes are still low. To get all the way, as has been the case with all past acquired customers, would require further increases of 124% for Norfolk and Haldimand, and 48% for Woodstock.

Where are the savings promised to the acquired customers? Where are the benefits of the transactions to those customers that the Board believed – and said - would arise?

The more important question is: At what point will the Board stop believing what Hydro One says, and start believing that Hydro One's actions are more indicative of the real truth?

SEC submits that it is no longer possible for the Board to believe that the customers in acquired service territories "will be just fine", and the Board can leave ratepayer protection to future rate cases. They won't be just fine. They will be victimized by being "sold off" to an inefficient behemoth that cannot get its costs under control.

SEC submits that the Board has a mandate to protect ratepayers, and that the "no harm" test should be interpreted as an expression of that mandate. The last three acquisitions approved for Hydro One have now demonstrated conclusively that the ratepayers are in fact going to be harmed by the transactions. Hydro One has provided no evidence that this acquisition would be any different.

Therefore, SEC submits that approval for this transaction should be denied.

Further, SEC submits that the Board should make clear to Hydro One that, unless they take significant steps to get their own costs and productivity under control, they should not bother to come back to the Board for approval to acquire any more lower cost, more productive LDCs.

Cost Savings

In this proceeding, Hydro One argues that the cost to serve the customers in Orillia will go down as a result of the proposed transaction. This is summarized in the final

arguments, where for example Hydro One says (at page 3):

> *"Hydro One has provided evidence that the ongoing OM&A cost savings expected to result from the transaction are approximately $3.9 million per year – a 60% reduction in OPDC's 2015 OM&A costs. Capital expenditures are also expected to be reduced by roughly $0.6 million per year."*

This is the same argument that Hydro One made in the Norfolk, Haldimand, and Woodstock cases, and in each case the Board ultimately accepted the submissions of Hydro One.

Those submissions turned out to be incorrect, just as SEC and, in two of the cases, local residents, predicted would be the case. Now the ratepayers in those acquired territories are being asked to pay the price.

And the price? A total increase in allocated costs of 54%, which is a 46% increase on a per customer basis (about 5% per year). For the GS>50 class, such as the schools, it is even worse: a 110% increase in allocated costs, or 94% per customer (about 9% per year).

SEC notes that, in Exhibit A/2/2 of the EB-2017-0049 application, Hydro One says that, aside from the directives given to it in EB-2013-0321 (its last rate case), "There are no other outstanding OEB directives or undertakings from prior proceedings that are relevant to this Application."

This statement omits the Board directions in EB-2013-0087/96/98 (Norfolk), EB-2014-0244 (Haldimand), and EB-2014-0213 (Woodstock). In each of those decisions, the Board ordered Hydro One to file a comprehensive report showing how the costs to serve the acquired customers had declined over time, and quantifying the savings from the transaction. The report was to be filed "at such time as Hydro One applies for future rates for the existing customers of" the acquired utility.

A summary of the results that should have been reported to the Board in EB-2017-0049 is contained in Appendix A to this Final Argument

The case of Woodstock is instructive, although the other two tell the same story. Hydro One said that annual cost savings from the transaction would be at least $3 million per year, or around $200 per customer. This would have represented a drop in cost per customer of about 40%. Instead, costs from 2014 to the new 2022 cost allocation model in EB-2017-0049 for the AU classes go up from $7.8 million to $12.4 million, about 60%, and on a cost per customer basis they go up by $236 per customer, around 48%. **No savings are in fact being delivered to the former customers of Woodstock Hydro.**

For Norfolk and Haldimand, they were also promised cost savings, around $9 million per annum, more than $200 per customer, but instead their cost per customer for the AR and related classes go up from $565 to $824, a 46% increase. Total costs for those customers go from $23.1 million in 2014 to $35.2 million in 2022, about 52%. **No savings are in fact being delivered to the former customers of either Norfolk Power or Haldimand County Hydro.**

To a reasonable observer, the $47.6 million of costs currently allocated to those 59,700 customers of three acquired distributors is at least $22 million too high (assuming a 2% annual increase in costs, plus customer growth, less forecast cost savings from the acquisitions). Instead of being $12 million lower because of the transactions, the costs are $10 million higher. Hydro One's evidence in those cases was wrong.

But, of course, the costs are not "too high". This is Hydro One. Hydro One cannot control its costs, and the fact that all of the forecast savings, and more, have dissipated over the five years is not surprising.

Bottom line? There were no cost savings. There will be no cost savings for the ratepayers in Orillia, either. Indeed, Hydro One proposes in this case to have ten years to generate "savings" which, as here, will go in the wrong direction and end up with even higher rate increases at the end of the line. Orillia ratepayers will simply be the latest ones to be victimized by being handed over to Hydro One.

SEC submits that Hydro One has shown no credible evidence that it will be able to generate any savings by acquiring Orillia Power. The only credible evidence the Board has is that of the last three transactions: on the one hand, claims that paint a picture of cost savings, and on the other hand, a reality that is huge cost increases.

It is therefore submitted that, on the evidence, the Board cannot conclude that there will be cost savings from this proposed transaction. There will be cost increases. The "no harm" test will not be met.

Specific Rate Impacts for Orillia Power Customers

In EB-2017-0049, Hydro One has proposed that the two new sets of rate classes, Acquired Urban and Acquired General, apply to all acquisitions going forward. It is thus possible to calculate, with a fair degree of accuracy, the rates that are being proposed for the Orillia Power customers in 2027, when the deferral period is complete.

The 2016 distribution bills for average load customers in each of the three general service classes are shown in SEC #5 in this proceeding: $324.33 for residential, $988.19 for small commercial, and $11,438.49 for larger commercial, such as schools.

Appendix A to this Final Argument shows the costs per customer in 2022 for each of the same classes, as calculated from the evidence in EB-2017-0049. Assuming that costs escalate from 2022 at only 2% a year after that (which would be a first for Hydro One), the amount to be recovered from the average customer in each class in 2027 would be: $494.34 for residential, $1,555.35 for small commercial, and $20,310.20 for larger commercial. The increases in cost per customer for each class, and by implication the increases in rates, are therefore the following:

Residential	-	52.4%
Small commercial	-	57.4%
Larger commercial	-	77.6%

Of course, if Hydro One cost increases follow its normal pattern, these percentages would be much higher.

To put that in perspective, the total value of the 1% rate reduction, the freeze for five years, and the value of all "guaranteed" ESM savings, is about $14,000 over ten years for a school at the average for the GS>50 class, 171 kW. Hydro One then proposes that in 2027 it will increase that school's rates by about $8,900 per year (or more), thus recovering all of Hydro One's accumulated largesse over the next 19 months. After that, it will be all pain for the school: distribution bills significantly higher every year after that, and going up at a rapid rate because they will be served by a utility that has demonstrated its inability to control its costs.

Another way to look at that is the school saves $14,000 over ten years. Then it pays Hydro One an incremental $100,000 or more for the next ten years. Not really the greatest deal.

For a residential customer with a typical load in Orillia (736 kwh per month), the results are not as bad. In the first ten years, the customer gets just under $400 of cumulative savings. In the next ten years, the customer pays Hydro One an incremental $2,000.

For the small commercial customer at typical load (2,723 kwh per month) the results are $1,200 of savings in the first ten years, then incremental payments to Hydro One in the next ten years of more than $6,000.

The Board no longer has to guess at how much the ratepayers will be harmed from this transaction. Hydro One has finally been forced to disclose its plans for future rates for acquired customers, after resisting in all of the previous cases, and even in this one. Now we know.

And it is not pretty. Everyone gets whacked, and whacked hard.

SEC invites Hydro One, in its Reply Argument, to show where in its presentations to the Town of Orillia, or to Orillia residents, it disclosed the impacts of these future rate plans that have now been revealed in EB-2017-0049. SEC believes that, if the Town of Orillia had known how bad a deal this was for its residents, it could not have approved this transaction. Who would, faced with a small benefit over ten years, followed by a 52% to 78% rate increase, forever?

Conclusion

Prior to seeing the EB-2017-0049 application, SEC planned to provide submissions in this case focusing on the details of this Application. There are a lot of concerns about the individual components of this proposal. However, those concerns only arise on the assumption that the transaction will be approved, and the remaining issues thus relate to the shape of that approval, rather than the "whether".

That is no longer, in our submission, a tenable result under the Board's mandate.

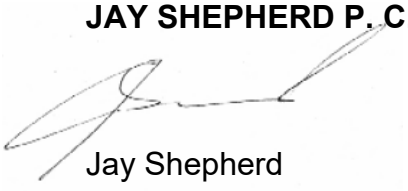
As with the last three transactions, there will be no cost savings. Costs will go up, as they have already for 59,000 other acquired customers. Rates will go up, and go up a lot.

These customers in Orillia will be harmed. This is no longer theory, or speculation. There is no doubt. The Board can see it.

Therefore, in our submission, the "no harm" test has not been satisfied, and the Board should deny approval of this transaction.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties

Cost Changes over Time - Woodstock, Norfolk and Haldimand

Woodstock (now AU classes)									
	2014			2022			Increases		
	Customers	Cost (Rev.)	Cost/Cust	Customers	Alloc. Cost	Cost/Cust	Customers	Cost (Rev.)	Cost/Cust
Residential (AUR)	14,299	4,840,407	$338.51	15,467	6,925,144	$447.74	8.17%	43.07%	32.27%
Small Commercial (AUGe)	1,247	1,147,887	$920.52	1,352	1,904,734	$1,408.83	8.42%	65.93%	53.05%
Larger Commercial (AUGd)	199	1,767,892	$8,883.88	194	3,569,003	$18,396.92	-2.51%	101.88%	107.08%
Totals	15,745	7,756,186	$492.61	17,013	12,398,881	$728.79	8.05%	59.86%	47.94%

Norfolk and Haldimand (now A classes)									
	2014			2022			Increases		
	Customers	Cost (Rev.)	Cost/Cust	Customers	Alloc. Cost	Cost/Cust	Customers	Cost (Rev.)	Cost/Cust
Residential (AR)	36,212	15,906,216	$439.25	38,018	22,899,733	$602.34	4.99%	43.97%	37.13%
Small Commercial (AGSe)	4,407	4,085,385	$927.02	4,337	5,527,086	$1,274.40	-1.59%	35.29%	37.47%
Larger Commercial (AGSd)	321	3,134,690	$9,765.39	371	6,774,560	$18,260.27	15.58%	116.12%	86.99%
Totals	40,940	23,126,291	$564.88	42,726	35,201,379	$823.89	4.36%	52.21%	45.85%

Aggregate of Three Acquired Distributors									
	2014			2022			Increases		
	Customers	Cost (Rev.)	Cost/Cust	Customers	Alloc. Cost	Cost/Cust	Customers	Cost (Rev.)	Cost/Cust
Residential	50,511	20,746,623	$410.73	53,485	29,824,877	$557.63	5.89%	43.76%	35.76%
Small Commercial	5,654	5,233,272	$925.59	5,689	7,431,820	$1,306.35	0.62%	42.01%	41.14%
Larger Commercial	520	4,902,582	$9,428.04	565	10,343,563	$18,307.19	8.65%	110.98%	94.18%
Totals	56,685	30,882,477	$544.81	59,739	47,600,260	$796.80	5.39%	54.13%	46.25%

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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.

ADDRESS

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E-mail: boardsec@oeb.ca
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Fax: 416-440-7656

DATED at Toronto, July 27, 2017

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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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

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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

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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.

ADDRESS

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

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

DATED at Toronto, February 5, 2018

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation, made pursuant to section 86(2)(b) of the Act;

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking to include a rate rider in the 2016 Board approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to 2016 base distribution delivery rates (exclusive of rate riders), made pursuant to section 78 of the Act;

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc., made pursuant to section 86(1)(a) of the Act;

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its rate order to Hydro One Networks Inc., made pursuant to section 18 of the Act;

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking cancellation of its distribution licence, made pursuant to section 77(5) of the Act;

AND IN THE MATTER OF an application made by Hydro One Networks Inc. seeking an order to amend its distribution licence, made pursuant to section 74 of the Act, to serve the customers of the former Orillia Power Distribution Corporation;

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

AFFIDAVIT OF JOANNE RICHARDSON

I, Joanne Richardson, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Director of Major Projects and Partnerships in the Regulatory Affairs department at Hydro One Networks Inc. ("Hydro One") and, as such, have knowledge of the matters contained in this affidavit.

2. As the Director of Major Projects and Partnerships, my responsibilities include review and approval for the filing of Hydro One's facilities applications to both the Ontario Energy Board ("OEB") and the National Energy Board ("NEB"). These include Leave to Construct, Service Area Amendments and MAAD applications, amongst others. I have been responsible for regulatory filings as they relate to Hydro One's application for leave to acquire the shares of Orillia Power Distribution Corporation ("Orillia Power"), including both the motion to which this affidavit relates and the motion in EB-2017-0320.

Underlying Cost Structure for Operating in Orillia Power's Service Territory

3. To consider the underlying cost structure for providing distribution service to the existing Orillia Power service territory beyond the 10-year deferral period proposed in EB-2016-0276, Hydro One calculated, for the 11th year following the planned closing date for the proposed transaction ("Year 11"), (i) the estimated revenue requirement for Orillia Power in the circumstances where the proposed transaction is not approved and the system continues to be owned and operated by Orillia Power, and (ii) the estimated revenue requirement, based on the residual cost to serve this territory, after accounting for the synergies and efficiency gains that are anticipated during the deferral period under the proposed transaction.

4. The estimated revenue requirement for Orillia Power in the circumstances where the proposed transaction is not approved and the system continues to be owned and operated by Orillia Power (the "Orillia Power Status Quo"), is based on a forecast of Orillia Power's OM&A costs and Rate Base in Year 11, based on the existing expenditures provided in Table 1 of Exhibit A, Tab 2, Schedule 1, and using Orillia Power's 2016 Audited Financial Statements as a starting point for net fixed assets. Year 11 OM&A and capital expenditures are calculated by inflating the Year 10 forecast by 1%. Further details on the assumptions used to calculate these numbers are found in Exhibit 'A'. Hydro One determined Orillia Power's Year 11 revenue requirement under the Orillia Power Cost to Serve Status Quo scenario to be approximately $11.8M.

Table 1 - Orillia Power Status Quo Scenario Year 11 Estimated Revenue Requirement ($000)	
OM&A	5,819
Depreciation	1,514
Cost of Capital – Debt Interest	1,889
Cost of Capital – Equity Return	1,894
Tax	682
Revenue Requirement	**11,798**

5. The estimated revenue requirement that is the residual cost to serve this territory after accounting for the synergies and efficiency gains by Hydro One anticipated during the deferral period (the "Residual Cost to Serve"), is based on the Hydro One forecast costs also provided in Table 1 of Exhibit A, Tab 2, Schedule 1. Year 11 OM&A and capital expenditures are calculated by inflating the Year 10 forecast by 1%. Further details on the assumptions used to calculate these numbers are found in Exhibit 'A'. As set out in Table 2, below, the Year 11 revenue requirement for serving the Orillia Power service territory, under the Residual Cost to Serve scenario, is calculated to be approximately $6.8M.

Table 2 - Residual Cost to Serve Scenario Year 11 Estimated Revenue Requirement ($000)	
OM&A	1,926
Depreciation	1,383
Cost of Capital – Debt Interest	1,201
Cost of Capital – Equity Return	1,718
Tax	620
Revenue Requirement	**6,848**

6. Based on the foregoing Orillia Power Status Quo revenue requirement and the Residual Cost to Serve after accounting for the synergies and efficiency gains, the Residual Cost to Serve

would be approximately $5.0M lower in Year 11 following the transaction than under the Orillia Power Status Quo scenario. This difference reflects the elimination of functions, resources and assets that are currently used to serve that service territory and which, for example, due to duplication, would no longer be needed to provide service. Examples of duplicated services include executive leadership, billing systems, system control staff/facilities and operations facilities that are specifically and solely dedicated to serving the Orillia Power service territory.

7. Orillia Power is currently an embedded distribution customer of Hydro One. Consequently, in addition to being charged base distribution rates that reflect Orillia Power's revenue requirement, Orillia Power's customers are also charged a Low Voltage (LV) charge on their monthly bills. The LV charge, which is approved by the OEB, reflects the charges incurred by Orillia Power for relying on Hydro One's upstream distribution assets to serve its customers. In 2017, Orillia Power's LV charges, payable to Hydro One, were approximately $0.7M. Although LV charges represent a real cost to Orillia Power customers under the Orillia Power Status Quo scenario and reflect costs incurred in providing distribution service to Orillia Power, LV charges are not part of Orillia Power's approved revenue requirement, or the estimated revenue requirement as set out in Table 1 above. Following rate harmonization, customers in the Orillia Power service area would no longer incur LV charges on their monthly bills. Rather, the ongoing upstream distribution costs necessary to provide service to the Orillia Power service area would be accounted for within the revenue requirement underlying the new distribution rates proposed by Hydro One for the Orillia Power service area following harmonization. This would be accomplished by allocating that portion of the upstream shared distribution costs to the former Orillia Power customers in addition to the Table 2 Residual Costs.

8. If the transaction is approved, the underlying cost structure for serving the Orillia Power service territory will be reduced by an estimated $5.0M to a residual revenue requirement of $6.8M. The $6.8M residual revenue requirement does not reflect Orillia customers paying any share of the costs for services that Hydro One would be providing to Orillia customers, which services are already provided to and paid for through rates by Hydro One's existing customer base. Hydro One considers the costs of the functions, resources and assets used to provide such services to be its "Shared Costs". More particularly, Hydro One's Shared Costs reflect (i) asset related costs such as upstream distribution facilities used by former Orillia Power customers (i.e.

costs formerly captured under LV charges); (ii) shared facilities used to provide operations and maintenance services (i.e. service centres and maintenance yards), billing and IT system costs, and other miscellaneous general plant; and (iii) OM&A costs associated with shared services, such as planning, finance, regulatory, human resources, information technology, customer services and corporate communications.

9. Upon harmonizing rates for customers in the Orillia Power service territory with Hydro One's rates for its existing customer base, following the 10-year deferral period, the underlying cost structure would not change - the synergies and efficiencies realized during the 10-year deferral period would continue to have a mitigating effect on rates for customers in the Orillia Power service territory. However, through rate harmonization following the 10-year deferral period, Hydro One would have an opportunity to begin allocating a portion of its Shared Costs to customers in the Orillia Power service territory. At that time, the prior Status Quo cost structures will have been reduced through synergies and efficiencies of the proposed consolidation. Given that those customers will receive benefits from the functions, resources and assets that are carried out or held centrally by Hydro One, it will be appropriate for those customers to bear responsibility for some of the Shared Costs. The manner in which Shared Costs will be allocated, and the amount that will ultimately be borne by customers in the Orillia Power service territory following the deferral period, will be matters for the OEB to consider and determine at such time that Hydro One proposes a rate structure and rate harmonization plan as part of its rebasing application following the 10-year deferral period.

10. At that time, Hydro One would determine the quantum of its Shared Costs, an appropriate methodology for allocating those Shared Costs among all of its customer groups, including its distribution customers in the Orillia Power service territory, and propose what it then believes to be an appropriate allocation of the Shared Costs to serve the customers in the (then former) Orillia Power service territory.

11. There are a number of factors that are likely to be taken into consideration at that time, both by Hydro One in developing its proposed methodology and by the panel of the OEB in considering that proposal and making a final determination on that methodology and the amount of Shared Costs to be included in rates for customers in the former Orillia Power service

territory. In particular, consideration would likely be given to factors such as the impact on rates for customers in the former Orillia Power service territory, the impact on rates for Hydro One's other customers, the OEB's cost allocation policies and preferred cost allocation practices at the time, as well as general principles of rate making.

Proposed Methodology for Allocating Costs After Deferral Period

12. Based on the foregoing and given the OEB's Decision and Order in EB-2016-0276 regarding the need for the cost allocation methodology following the deferral period to take a longer term view of underlying cost structures, Hydro One proposes that if the transaction is approved, then, in the harmonization and rebasing application following the deferral period, Hydro One would commit to seeking approval to allocate Shared Costs to the acquired customers in the former Orillia Power service territory in an amount less than the difference between (a) the Residual Cost to Serve Scenario, and (b) the Year 11 revenue requirement under the Orillia Power Status Quo scenario plus Year 11 LV charges. For instance, if the Year 11 LV charges are $0.8M and the Year 11 revenue requirement under the Orillia Power Status Quo scenario is $11.8M, for a total of $12.6M, then, given the revenue requirement under the Residual Cost to Serve scenario of $6.8M, Hydro One would allocate Shared Costs to the acquired customers up to a maximum of $5.8M. This would ensure that the acquired Orillia Power customers would pay rates based on the residual cost for Hydro One to serve them (thereby causing 'no harm' to Hydro One's legacy customers), while also ensuring that the acquired Orillia Power customers are paying no more than they would have paid in the absence of the transaction (thereby causing 'no harm' to the former Orillia Power customers).

13. An illustrative example of how this could be implemented is presented in Table 3, below. Though it will be up to Hydro One to propose (and the OEB to approve) an allocation of Shared Costs that Hydro One considers to be appropriate at such time that it files the harmonization and rebasing application following the deferral period, this illustrative example is based upon Hydro One splitting the transaction savings of $5.0M between former Orillia Power customers and Hydro One legacy customers on a 50:50 basis.

Table 3 – Illustrative Example of Potential Allocation of Shared Costs ($000s)	
Revenue Requirement – Orillia Power Status Quo	11,798
Estimated LV Charges[1] – Orillia Power Status Quo	800
Total Cost to Serve – Orillia Power Status Quo	12,598
Revenue Requirement – Residual Cost to Serve Former Orillia Power	6,848
Estimated Revenue Requirement for Providing LV Services[1] to Former Orillia Power	800
Transaction Savings to Hydro One Customers	4,950
50% of Transaction Savings (Based on Example of 50:50 Sharing Between Former Orillia Power and Hydro One Legacy Customers)	2,475
Total New Revenue Requirement to Serve Former Orillia Power Service Territory for Rate Making Purposes	10,123
Reduction in Shared Costs Allocated to Hydro One Legacy Customers.	2,475

[1] Year 11 LV charges would reflect Hydro One's costs of providing host distributor services.

14. In the illustrative example in Table 3, Hydro One would, in Year 11, propose to establish rates for customers in the former Orillia Power service territory that reflect a revenue requirement of $10.1M. For years subsequent to Year 11, Hydro One would propose to change the new revenue requirement for the former Orillia Power service territory by the same percentage change that the OEB approves for all other Hydro One Distribution customers.

15. In Year 11, to calculate the status quo forecast, Hydro One would use the forecast as provided in this application, however, that base amount would need to be adjusted to reflect any unknown or unforeseen costs that would be applicable to serving the former Orillia Power customers even if the transaction did not occur. For instance, if new legislative or OEB requirements or environmental regulations give rise to unanticipated costs, or unanticipated events such as storm damage results in the need for additional capital expenditures in the former Orillia Power service territory during the deferral period, those costs would have been incurred regardless of the transaction and would therefore need to be added to the Orillia Power status quo forecast. The base amount would also need to be adjusted to reflect the weighted average cost of capital applicable at that time.

16. For the ten year deferral period, Hydro One will continue to track the incremental costs to serve customers in the former Orillia Power service territory, and have their asset plans distinguished in Hydro One's Distribution System Plan until rate integration in Year 11.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on May 2, 2018

ORIGINAL SIGNED BY MICHAEL ENGELBERG

Commissioner for Taking Affidavits
(or as may be)

ORIGINAL SIGNED BY JOANNE RICHARDSON

(Signature of deponent)

Exhibit 'A'

Assumptions for Calculating Year 11 Estimated Revenue Requirements

Hydro One Networks Inc.

This Exhibit 'A' referred to in the affidavit of Joanne Richardson sworn before me this 2nd day of May, 2018.

ORIGINAL SIGNED BY MICHAEL ENGELBERG

_____

A Commissioner for Taking Affidavits

Assumptions for Calculating Year 11 Estimated Revenue Requirements

The model used for the calculation of the Revenue Requirements is based on the same model used by Hydro One in the calculation of the ESM sharing calculation presented in A-3-1 Table 1 of EB-2016-0276.

List of Assumptions:

- Year 11 OM&A and Capital expenditures are based on Exhibit A, Tab 2, Schedule 1, Table 1 of the EB-2016-0276 Application, inflated by 1% in Year 11.
- Rate Base based on OPDC's 2016 audited Financial Statements (forecast rate base equals the NBV of Property, Plant and Equipment ("PP&E") less capital contributions plus a calculation for working capital).
- Rate base applies the half-year rule. Capital expenditures are treated as 100% in-serviced in the year incurred.
- Working capital rate
    - Acquired scenario – 7.70% per Hydro One's Distribution's 2018-2022 rate application (EB-2017-0049)
    - Status Quo scenario– 7.5% per OEB's default working capital allowance[1]
- Annual depreciation on the forecast NBV value of OPDC assets.
    - Status Quo average OPDC depreciation rate used is 2.4%
    - Acquired scenario Hydro One's OEB-approved depreciation rates.
- Interest expense
    - Acquired scenario (Hydro One rates)[2]
        - Long Term – 4.33%
        - Short Term – 2.29%
    - Status Quo scenario (Orillia Power rates)[3]
        - Long Term – 6.25%
        - Short Term – 1.76%
- ROE – 9.0%
- Tax expense - federal and provincial tax rate of 26.5%.

[1] OEB letter to All Licensed Electricity Distributors, '*Allowance for Working Capital for Electricity Distribution Rate Applications*' June 3, 2015

[2] EB-2017-0049 – Exhibit D1, Tab 2, Schedule 1

[3] As approved in EB-2009-0273

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

DECISION AND ORDER

EB-2018-0171

HYDRO ONE INC.

ORILLIA POWER DISTRIBUTION CORPORATION

Motion to review and vary the Decision and Order on the acquisition of Orillia Power Distribution Corporation (EB-2016-0276)

BEFORE: Michael Janigan
Presiding Member

Christine Long
Vice Chair and Member

Allison Duff
Member

August 23, 2018

TABLE OF CONTENTS

1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) on motions filed by Hydro One Inc. (Hydro One) and Orillia Power Distribution Corporation (Orillia Power) to review and vary the OEB Decision and Order in which Hydro One's application to acquire Orillia Power was denied (the mergers, acquisitions, amalgamations and divestitures decision or the MAADs decision).[1]

The MAADs decision was issued on April 12, 2018. Hydro One and Orillia Power filed Notices of Motion to review and vary the MAADs decision on May 2, 2018. The OEB decided that it would hear the motions together. The motions filed by Hydro One and Orillia Power stated that the MAADs panel[2]:

a) Changed OEB policy on MAADs without notice
b) Erred in relying on evidence filed in the Hydro One distribution rate application[3]
c) Changed the standard to be met
d) Erred in ruling that Hydro One failed to file further evidence requested by the OEB
e) Considered new criteria

The OEB's *Rules of Practice and Procedure* provide that the OEB may, in respect of a motion filed, determine a threshold question of whether the matter should be reviewed before conducting any review on the merits of the motion. The OEB made provision for submissions and held an oral hearing on the threshold question.

For the reasons that follow, the OEB has determined that the Hydro One and Orillia Power motions to review fail the threshold test.

[1] EB-2016-0276.
[2] The OEB panel to the EB-2016-0276 MAADs application.
[3] EB-2017-0049.

2 THE PROCESS

Hydro One and Orillia Power filed Notices of Motion to review and vary the MAADs decision on May 2, 2018. The OEB decided that it would hear the motions together and assigned file number EB-2018-0171. The Notice of Hearing and Procedural Order No. 1 relating to the motions was issued on June 18, 2018. The OEB adopted all parties to the MAADs proceeding as parties to the motion proceeding.

Procedural Order No. 1 made provision for an oral hearing of the submissions on the threshold question and for the OEB to ask questions. Hydro One, Orillia Power, OEB staff, School Energy Coalition (SEC) and Mr. Frank Kehoe filed written summaries of their positions and made submissions on the threshold question at the oral hearing held on July 10, 2018.

3 THE MAADS PROCEEDING

Hydro One filed the MAADs application on September 27, 2016 under section 86(2) of the *Ontario Energy Board Act, 1998* (the Act). The application was subsequently revised and filed on October 11, 2016. The application sought the OEB's approval to purchase all of the shares of Orillia Power and related approvals.

The OEB's 2015 Report[4] permits consolidating distributors to defer rate rebasing for up to ten years from the closing of the merger transaction. As part of the share purchase, Hydro One proposed to defer rebasing for a period of ten years. Hydro One proposed that the 2016 base electricity distribution rates of Orillia Power's residential and general service classes be reduced by 1% and kept at this level for five years. Rates would be adjusted pursuant to the IRM formula (I-X) over the next five years. Hydro One also proposed an earnings sharing mechanism (ESM) in years six to ten of the deferred rebasing period. An ESM amount of $3.4 million was guaranteed. The application stated that the transaction would eliminate duplication of effort and drive down cost structures for both Hydro One and Orillia Power service areas.

SEC submitted[5] that the proposed acquisition should be denied, arguing that there were no cost savings evident for distributors previously acquired by Hydro One. SEC referred to the evidence on Norfolk Power Distribution Inc., Haldimand County Hydro and Woodstock Hydro Services Inc. in the concurrent Hydro One 2018-2022 distribution rate proceeding. Although the distribution rates application did not include Orillia Power (because the deferred rebasing period would not end until after the term of that application), SEC was concerned that if the MAADs application was approved, a similar fate would befall Orillia Power's customers once its deferred rebasing period ended. 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 MAADs panel issued Procedural Order No. 6, on July 27, 2017, in which it determined that the hearing of the MAADs application would be adjourned until a decision was rendered on Hydro One's distribution rate application. The MAADs panel found that Hydro One should defend its

[4] EB-2014-0138, *Report of the Board - Rate–Making Associated with Distributor Consolidation*, March 26, 2015.
[5] SEC Final Argument, April 21, 2017.

cost allocation proposal in the distribution rate application prior to determining if the Orillia Power acquisition was likely to cause harm to any of its 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 on the motions[6] (motion review decision), issued on January 4, 2018, the OEB granted the motions and referred the matter back to the MAADs panel for re-consideration.

Procedural Order No. 7 of the MAADs proceeding was issued on February 5, 2018. The OEB determined that it would re-open the record of the MAADs application. The MAADs panel 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.

The MAADs decision, issued on April 12, 2018, denied Hydro One's application to acquire the shares of Orillia Power. The MAADs panel was not satisfied that the "no harm test", as described in the *Handbook to Electricity Distributor and Transmitter Consolidations* (Handbook), had been met[7].

Both Hydro One and Orillia Power filed motions to review this decision.

[6] EB-2017-0320.

[7] The "no harm test" considers whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives, as set out in section 1 of the Act. These statutory objectives include the protection the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service and the promotion of economic efficiency and cost effectiveness (*Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, pp. 3-4).

4 THE THRESHOLD TEST

Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* requires anyone bringing a motion to review and vary an OEB order or decision to identify the grounds for the motion:

> 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.

Position of the Moving Parties

The moving parties submitted that their motions passed the threshold test described in Rule 43.01. Both applicants set out grounds that they allege raise a question of correctness of the MAADs decision and which therefore requires a review on the merits. The grounds advanced by the applicants are that the MAADs panel:

a) Changed OEB policy regarding the no-harm test and erred both in departing from its own guidance and in not providing notice of the change
b) Erred in relying on irrelevant evidence filed in the Hydro One distribution rate application[8]
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

[8] EB-2017-0049.

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 moving parties allege that the first three grounds result in breaches of procedural fairness. The final ground provides what, in their view, is the type of information that they now understand the OEB to require to make a proper assessment of whether the proposed acquisition meets the no harm test.

Positions of OEB Staff, Mr. Kehoe, and SEC

OEB staff, Mr. Kehoe and SEC submitted that the threshold test had not been met.

OEB staff submitted that the process was fair. Procedural Order No. 6 had explained why the OEB placed the Orillia case in abeyance. OEB staff also submitted that the MAADs policy, specifically the no harm test, has not changed. Although the OEB does not set rates in a MAADs application, OEB staff submitted that it does not mean that rates are irrelevant. OEB staff submitted that the MAADs panel was clear in having the expectation that lower cost structures should eventually lead to lower rates. OEB staff argued that the OEB's first objective is to consider price, and the only price customers will pay is the rate they will pay.

Mr. Kehoe, a residential customer of Orillia Power and former chair and board member of the former Orillia Water Light and Power, submitted that the merger would harm customers. Mr. Kehoe estimated that customers will receive $400 dollar in savings during the first 10 years, but will have to pay $2,000 in costs in years 10 to 20.

SEC submitted that the MAADs panel did not err. SEC argued that the applicants bear the burden of demonstrating that the transaction meets the no harm test. The OEB needs to ensure that customers are not harmed. If not, then the OEB is not meeting its statutory duty to protect customers with respect to price. Further, SEC submitted that because the applicants did not meet the onus of demonstrating that Orillia customers would not be harmed, the OEB was correct to deny the application on that basis.

Findings

Pursuant to Rule 43.01, a threshold determination must be made regarding whether the grounds raise a question as to the correctness of the order and whether the error is material and relevant to the outcome. The correctness of the decision may also be put in issue by new facts or facts that could not have been reasonably discovered at the time the decision was made.

In this case, there are a number of conclusions that the applicants urge the OEB to adopt to determine that there are grounds to doubt the correctness of the MAADs decision.

There is no challenge to the jurisdiction of the OEB in making the MAADs decision. Section 86 of the Act establishes that the OEB review a proposed share acquisition and approve the transaction if it is in the public interest. The MAADs decision applied the "no harm test" as set out in the Handbook in its assessment of the public interest.

The OEB has considered all of the grounds and has determined that both motions do not pass the threshold set out in Rule 43.01 to require a review on the merits. The OEB makes the following specific findings concerning the individual grounds relied upon by the moving parties.

a) Did the MAADs panel change OEB policy without notice and err in departing from its own guidance and not providing notice of the change?

Hydro One and Orillia Power maintain that the no harm test applied by the MAADs panel was inconsistent with the Handbook. They point to the sections of the Handbook that indicate that the no harm test is primarily directed to the impact on the underlying cost structures. For them, the MAADS panel changed policy by considering cost allocation and the effect on rates following the deferred rebasing period. They argued that cost allocation and rates are matters that must be dealt with by way of separate rate-setting applications following the deferred rebasing period,[9] not in the MAADs proceeding.

[9] The OEB provides "the opportunity for electricity distributors to defer rebasing for a period up to ten years following the closing of a consolidation transaction. This deferred rebasing period is intended to enable distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction." *Handbook to Electricity Distributor and Transmitter Consolidations*, pp. 8-9.

In their contention that a change of policy has taken place, Hydro One and Orillia Power have tried to differentiate regulatory terms that are inextricably linked. The OEB finds the applicants' attempt to distinguish prices from rates, and cost structures from cost allocation, to be insufficient grounds by which to conclude that the MAAD's decision changed policy or was in error.

The no harm test is a broad one. The Handbook's reference to cost structures was not intended to exclude considerations of cost allocation, diminish consideration of future rate impacts or constrain the application of the no harm test.

The Handbook states the expectation is that merged customers should enjoy lower costs per customer. The Handbook further emphasizes that the rate implications for customers of the acquired utility will be the primary consideration in applying the test.

> 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.[10]

The Handbook also states that the OEB will consider 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".[11] These objectives, of course include the protection of the interests of consumers with respect to prices.

The OEB finds that the MAADs panel's determination that future rate impacts (i.e. prices) are relevant to the no harm test is not inconsistent with the Handbook.

The moving parties also argued that the MAADs decision represents a new approach from prior guidance provided in MAADs decisions to date. They argued that prior decisions did not focus on rates or rate-setting expectations following the deferred rebasing period.

The OEB finds the MAADs panel inquiry was a reasonable, legitimate response to concerns raised by SEC regarding the proposed rates of previously acquired utilities by Hydro One, once the deferred rebasing period ended. Time had passed since those utilities were acquired. It bears repeating that no two cases are identical. This inquiry may have been more intensive in the information on rate impacts that was sought than previous MAADs examinations, but it was a not a departure from the overarching

[10] *Handbook to Electricity Distributor and Transmitter Consolidations*, p. 7.
[11] *Handbook to Electricity Distributor and Transmitter Consolidations*, pp. 1, 4.

mandate to protect the public interest that is inherent in the making of MAADs decisions. The fact that the MAADs panel considered matters not raised in some previous cases does not amount to an error. Further, the OEB is entitled to seek information it considers relevant in carrying out its statutory duties and responsibilities.

The moving parties also argued that the MAADS panel erred in not providing notice given it changed policy and departed from prior guidance. The OEB addresses the submission regarding notice later in this Decision (see Question d).

b) Did the MAADs panel err in relying on irrelevant evidence filed in the Hydro One distribution rate application?

The moving parties argue that the MAADs panel based the potential for rate increases to Orillia Power customers on the Hydro One distribution rates application. The distribution rates application proposed rates for customers of three utilities acquired following the end of the deferred rebasing periods. And while section 21(6.1) of the Act permits consideration of this evidence, it was submitted that notice of an intention to rely on such evidence must precede its consideration.

The OEB finds that the MAADs panel did not improperly rely on evidence taken from the Hydro One distribution rates application. The MAADs panel was certainly aware of some of the record from that proceeding: it was discussed in SEC's argument and Hydro One's reply argument, and charts using data from the distribution case were filed in the MAADs proceeding as well. It can also be said that information from the distribution application was of concern to the MAADs panel, and provoked the inquiry from the MAADs panel regarding the implications for Orillia Power's customers following its deferred rebasing period. The MAADs panel's concern was based on the apparent disconnect between the cost savings that were promised to the customers of the three acquired utilities and the evidence provided in the application. The OEB finds it reasonable that the MAADs panel inquired whether future results would be potentially unfavourable to Orillia Power customers in applying the requisite no harm test. It does not imply the MAADs panel relied on the evidence, relevant or irrelevant, in another proceeding.

The MAADs panel indicated that it "was not satisfied" that no harm test had been met. There is no mention of the Hydro One distribution rates application in the MAADs decision's conclusion. The OEB concludes that although the MAADs panel was informed by the Hydro One distribution rates proceeding, its decision was based on the record that was before it in the MAADs case. Based on that record, the MAADs panel was not satisfied that the no harm test had been met.

The OEB finds that the MAADs panel did not err as it did not rely on irrelevant evidence.

c) Did the MAADs panel err by changing 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 would be in the absence of the acquisition?

Orillia Power submitted in its Notice of Motion that the MAADs panel applied a novel and higher standard by requiring that the OEB must be "assured" that underlying cost structures would be no greater than they would be in the absence of the acquisition rather than the Handbook's requirement that there must only be a "reasonable expectation" that the post-acquisition cost structures would be no greater.

This ground was not argued at the oral hearing of submissions. In any event, there is no suggestion that the word "assured" in the same paragraph as "satisfied" had a material effect upon the MAADs decision result, or was intended to introduce a higher standard. To the contrary, the MAADs panel indicated that its "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."[12] [emphasis added]

d) Did the MAADs panel err in ruling that Hydro One failed to file further evidence as requested?

The moving parties submit that insufficient notice was given concerning the case they had to make to show no harm, prior to the MAADs decision. They note that the ability to file new evidence was only one of the options in the Order section of Procedural Order No. 7 as it indicated:

> 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…

Hydro One responded to Procedural Order No. 7 by filing a submission. The moving parties also allege that Procedural Order No. 7 only referenced cost structures following the deferral period and not issues associated with cost allocation and possible rate increases.

[12] EB-2016-0276, Decision and Order, April 12, 2018, p. 12.

Procedural Order No. 6, where the MAADs panel put the entire proceeding on hold, was the subject of a motion by the same moving parties. The motion review decision overturned Procedural Order No. 6 on the grounds that the MAADs panel would be able to obtain information about impacts on Orillia Power's customers in the MAADs proceeding itself, and it did not need to await the outcome of the Hydro One distribution rate case. The motion review decision specifically contemplated re-opening the record to obtain additional information.

Procedural Order No. 7, while not copying verbatim the language of Procedural Order No. 6, specifically noted that, in response to the motion review 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 deferral period and the impact on Orillia Power customers. [emphasis added]

There was no new evidence provided in the MAADs proceeding, despite the opportunity to do so, to address the issue specifically referenced in Procedural Order No. 7, and the concern set out in Procedural Order No. 6. While Hydro One made submissions following the issuance of Procedural Order No. 7, they were largely to the effect that it intended to follow the OEB's Filing Requirements and Cost Allocation Model. It should have been clear to the applicants what was at issue. The OEB finds that adequate notice was provided to Hydro One in Procedural Order No. 6 and 7, prior to the issuance of the MAADs decision.

The OEB finds that the MAADs panel did not err as it provided the applicants with adequate notice of the type of information required.

e) Did the MAADs panel err by considering 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?

Hydro One submitted that the OEB's consideration of rate impacts following the deferred rebasing period in a MAADs application means that the OEB would be fettered in setting rates at that time by any cost allocation methodology adopted in the merger application. Such methodology would be associated with the applicant's onus in showing that there will be no harm to customers of the acquired utility in terms of rate impacts.

It is the OEB's expectation that customers of the acquired utility will be no worse off as a result of the acquisition. This expectation arises whether there is evidence provided of the rate impacts following the deferred rebasing period or simple reliance on improved cost structures within the deferral period. In both circumstances, there will be an onus on the merged entity to explain why the rates are not congruent with the expectation of no harm. The rate setting panel, after the deferred rebasing period, is not "fettered" by the operative expectation in either case, and may set rates in accordance with the OEB statutory powers and objectives.

As noted herein, the MAADs decision does not depart from the established policy of the OEB with respect to merger applications and the practical considerations associated with meeting the no harm test applied in the MAADs proceeding do not fetter the discretion of a future panel.

Affidavit of Ms. Joanne Richardson

Hydro One submitted an affidavit in support of its motion. During the oral hearing of the motion, Hydro One took the position that the affidavit contained information that was new and not available at the time of Procedural Order No. 7. However, Hydro One did not submit that the affidavit provided grounds that raised a question as to correctness of the MAADs decision pursuant to Rule 42.01 (a) (iii) or (iv). Even if that argument had been made, the OEB is of the view that the affidavit consists of information that could have been presented during the MAADs proceeding in response to Procedural Order No. 7. The affidavit includes two scenarios of Orillia Power's status quo revenue requirement and cost to serve revenue requirement in Year 11. The scenarios appear to be based on 2016 audited financial statements and inflation factors added to the Year 10 forecasts. It does not present new facts that have arisen or facts that could not have been discovered by reasonable diligence. The affidavit does not assist the moving parties with meeting the threshold test required by Rule 43.01.

Conclusion

The OEB finds that the grounds for the applicants' motions to review and vary the MAADs decision dated April 12, 2018 do not show an identifiable error in the decision as the findings were reasonable and correct concerning the issues that form the grounds for these motions. As a result, the motions fail to satisfy the threshold set out in Rule 43.01 for a review on the merits and are dismissed.

5 COST AWARDS

The OEB's Notice of Hearing and Procedural Order No. 1 indicated that any party eligible for an award of costs in the EB-2016-0276 proceeding shall be eligible for costs in this proceeding.

The OEB finds that Hydro One Inc. and Orillia Power Distribution Corporation shall be equally responsible for the payment of approved cost claims. The OEB makes provision for the filing of cost claims in this Decision. 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.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Hydro One Inc. and Orillia Power Distribution Corporation's motions to vary the OEB Decision and Order in EB-2016-02276 are denied.

2. Intervenors eligible for cost awards shall file with the OEB and forward to Hydro One Inc. and Orillia Power Distribution Corporation their respective cost claims by **September 6, 2018**.

3. Hydro One Inc. and Orillia Power Distribution Corporation shall file with the OEB and forward to intervenors any objections to the claimed costs by **September 17, 2018**.

4. Intervenors shall file with the OEB and forward to Hydro One Inc. and Orillia Power Distribution Corporation any responses to any objections for costs claimed by **September 24, 2018**.

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-2018-0171**, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at https://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 USB flash drive in PDF format, along with two paper copies. Those who do not have computer access are required to file seven 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.

ADDRESS

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

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

DATED at Toronto August 23, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

9

Ontario

Français

Judicial Review Procedure Act

R.S.O. 1990, CHAPTER J.1

Consolidation Period: From June 22, 2006 to the e-Laws currency date.

Last amendment: 2006, c.19, Sched. C, s.1 (1).

Legislative History: [+]

Definitions

1 In this Act,

"application for judicial review" means an application under subsection 2 (1); ("requête en révision judiciaire")

"court" means the Superior Court of Justice; ("Cour")

"licence" includes any permit, certificate, approval, registration or similar form of permission required by law; ("autorisation")

"municipality" has the same meaning as in the *Municipal Affairs Act*; ("municipalité")

"party" includes a municipality, association of employers, a trade union or council of trade unions which may be a party to any of the proceedings mentioned in subsection 2 (1); ("partie")

"statutory power" means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(b) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; ("compétence légale")

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court. ("compétence légale de décision") R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Error of law

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision. R.S.O. 1990, c. J.1, s. 2 (2).

Lack of evidence

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (3).

Power to set aside

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision. R.S.O. 1990, c. J.1, s. 2 (4).

Power to refuse relief

(5) Where, in any of the proceedings enumerated in subsection (1), the court had before the 17th day of April, 1972 a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (5).

Where subs. (5) does not apply

(6) Subsection (5) does not apply to the discretion of the court before the 17th day of April, 1972 to refuse to grant relief in any of the proceedings enumerated in subsection (1) on the ground that the relief should have been sought in other proceedings enumerated in subsection (1). R.S.O. 1990, c. J.1, s. 2 (6).

Defects in form, technical irregularities

3 On an application for judicial review in relation to a statutory power of decision, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and, where the decision has already been made, may make an order validating the decision, despite such defect, to have effect from such time and on such terms as the court considers proper. R.S.O. 1990, c. J.1, s. 3.

Interim order

4 On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application. R.S.O. 1990, c. J.1, s. 4.

Extension of time for bringing application

5 Despite any limitation of time for the bringing of an application for judicial review fixed by or under any Act, the court may extend the time for making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay. R.S.O. 1990, c. J.1, s. 5.

Application to Divisional Court

6 (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice. R.S.O. 1990, c. J.1, s. 6 (2); 2006, c. 19, Sched. C, s. 1 (1).

Transfer to Divisional Court

(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (3).

Appeal to Court of Appeal

(4) An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2). R.S.O. 1990, c. J.1, s. 6 (4); 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Summary disposition of mandamus, etc.

7 An application for an order in the nature of mandamus, prohibition or certiorari shall be deemed to be an application for judicial review and shall be made, treated and disposed of as if it were an application for judicial review. R.S.O. 1990, c. J.1, s. 7.

Summary disposition of actions

8 Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue in the action, a judge of the Superior Court of Justice may on the application of any party to the action, if he or she considers it appropriate, direct that the action be treated and disposed of summarily, in so far as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 6 (2). R.S.O. 1990, c. J.1, s. 8; 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y) [+]

Sufficiency of application

9 (1) It is sufficient in an application for judicial review if an applicant sets out in the notice the grounds upon which he is seeking relief and the nature of the relief that he seeks without specifying the proceedings enumerated in subsection 2 (1) in which the claim would have been made before the 17th day of April, 1972. R.S.O. 1990, c. J.1, s. 9 (1).

Exerciser of power may be a party

(2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application. R.S.O. 1990, c. J.1, s. 9 (2).

Idem

(3) For the purposes of subsection (2), any two or more persons who, acting together, may exercise a statutory power, whether styled a board or commission or by any other collective title, shall be deemed to be a person under such collective title. R.S.O. 1990, c. J.1, s. 9 (3).

Notice to Attorney General

(4) Notice of an application for judicial review shall be served upon the Attorney General who is entitled as of right to be heard in person or by counsel on the application. R.S.O. 1990, c. J.1, s. 9 (4).

Record to be filed in court

10 When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made. R.S.O. 1990, c. J.1, s. 10.

References in other Acts, etc.

11 (1) Subject to subsection (2), where reference is made in any other Act or in any regulation, rule or by-law to any of the proceedings enumerated in subsection 2 (1), such reference shall be read and construed to include a reference to an application for judicial review. R.S.O. 1990, c. J.1, s. 11 (1).

Proceedings under *Habeas Corpus Act*

(2) Nothing in this Act affects proceedings under the *Habeas Corpus Act* or the issue of a writ of certiorari thereunder or proceedings pursuant thereto, but an application for judicial review may be brought in aid of an application for a writ of *habeas corpus*. R.S.O. 1990, c. J.1, s. 11 (2).

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FUTURE COST STRUCTURES

1.0 PREAMBLE

In EB-2016-0276 the Board wrote in its Decision[1]:

> "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. . . . 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."

Based on the above, Hydro One is providing evidence on "Future Cost Structures" for OPDC in relation to revenue requirement and a general explanation as to how costs would be allocated beyond the deferred rebasing period.

2.0 UNDERLYING COST STRUCTURES TO SERVE OPDC'S SERVICE TERRITORY

To understand if the cost structures and/or rates for the acquired customers, beyond the 10-year deferral period proposed in this Application, are no higher than they would have been in absence of the transaction, (a) OPDC has calculated for Year 11 the estimated revenue requirement for

[1] Decision and Order, page 13

the Orillia service territory in the circumstances where the system continues to be owned and operated by OPDC (i.e. the "Status Quo" scenario) and (b) Hydro One has calculated the estimated revenue requirement, based on the residual cost to serve (i.e. the "Residual" scenario) this territory, after accounting for the synergies and efficiency gains that are anticipated during the deferral period under the proposed transaction.

2.1 OPDC "STATUS QUO" REVENUE REQUIREMENT

Table 1 below reflects OPDC's Status Quo revenue requirement for Year 11.

Table 1 **Orillia Distribution Status Quo Scenario** **Year 11 Estimated Revenue Requirement ($000's)**	
Average NBV of Assets	49,244
Working Capital	4,434
Rate Base[2]	53,678
OM&A	$6,754
Depreciation	$2,882
Cost of Capital – Debt Interest	$1,300
Cost of Capital – Equity Return	$1,932
Tax	$575
Revenue Requirement	**$13,443**

To calculate Year 11 rate base, OPDC started with their audited 2017 Financial Statements and factored the annual capital expenditures forecast in Table 1 of **Exhibit A, Tab 2, Schedule 1**. **Attachment 18** provides further details of the forecast for OPDC rate base growth, since the

[2] Rate Base is the average of the current and prior year closing NBV of assets plus the current year Working Capital

time of the last rebasing, through to Year 11. The OPDC rate base is forecast to increase from the 2010 OEB approved amount[3] of $20.8M to $53.7M by 2030, an increase of $32.9M or approximately 158% over the 20 years from the last approved rebasing in 2010.

This level of rate base increase, over a 20 year period, aligns with the increases approved by the OEB in recent 2017 and 2018 distributor rebasing applications submitted after their Incentive Rate Making ("IRM") period. **Attachment 19** shows the average OEB-approved five year increase in rate base is approximately 26% going up to over 60% for some distributors. At the time of the next proposed rebasing, in 2030, OPDC will not have rebased their rates for 20 years - a fourfold period compared to the analysis provided for the 2017 and 2018 rebasing entities in **Attachment 19**.

Further details on the assumptions used to calculate these Year-11 numbers are found in **Exhibit A, Tab 4, Schedule 1, Attachment 20**. As set out in Table 1 above, the Year 11 revenue requirement for OPDC operating Status Quo is $13.4 million.

2.1.1 LV Rates

OPDC is currently an embedded distribution customer of Hydro One. Consequently, in addition to being charged base distribution rates that reflect OPDC's revenue requirement, OPDC's customers also currently pay a Low Voltage ("LV") charge on their monthly bills. The LV charge, which is an OEB-approved rate, reflects Hydro One's upstream distribution cost to serve embedded customers. Therefore, LV charges are not part of OPDC's forecast revenue requirement, as set out in Table 1 above, however they do represent a real distribution cost to OPDC's customers. In 2017, OPDC's LV charges, payable to Hydro One, were approximately $0.7M, and Hydro One estimates these costs will be approximately $1.0M by 2030. Following rate harmonization, customers in the former OPDC service area would no longer incur LV

[3] (EB-2009-0273)

charges on their monthly bills. Rather, the ongoing upstream distribution costs necessary to provide them service would be accounted for within the revenue requirement underlying the new distribution rates proposed by Hydro One for the OPDC service area following harmonization – in other words, customers of Hydro One do not pay a separate LV rate as part of their monthly bill. Therefore to fairly compare OPDC and Hydro One distribution rates, the LV charges must be added to OPDC's Status Quo revenue requirement.

Table 2 **Status Quo to Serve OPDC customers** **Year - 11 ($000s)**	
Revenue Requirement	13,443
LV Charges	1,005
Total Cost to Serve	14,448

2.2 OPDC "RESIDUAL" REVENUE REQUIREMENT

Table 3 below reflects the scenario for Hydro One's forecast revenue requirement of the Residual Cost to Serve the OPDC territory, after accounting for the synergies and efficiency gains anticipated during the deferral period, assuming the proposed transaction is approved and the distribution system is owned and operated by Hydro One.

Table 3 **Residual Cost to Serve Scenario** **Year 11 Estimated Revenue Requirement ($000's)**	
Average NBV of Assets	49,181
Working Capital	3,725
Rate Base[4]	52,906

[4] Rate Base is the average of the current and prior year closing NBV of assets plus the current year Working Capital

OM&A	1,921
Depreciation	1,433
Cost of Capital – Debt Interest	1,373
Cost of Capital – Equity Return	1,905
Tax	687
Revenue Requirement	**7,319**

The OM&A and capital expenditures are based on the Hydro One forecast provided in Table 1 of **Exhibit A, Tab 2, Schedule 1**. Year 11 OM&A and capital expenditures are calculated by inflating the Year 10 forecast by 2%[5]. Further details on the assumptions used to calculate these numbers are found in **Attachment 20** to this exhibit. As set out in Table 3 above, the Year 11 revenue requirement for serving the OPDC service territory, under the Residual Cost to Serve scenario, is approximately $7.3M.

2.3 SUMMARY OF "STATUS QUO" COST TO SERVE VS. "RESIDUAL" COST TO SERVE

As illustrated in Tables 2 and 3 above, the Residual Cost to Serve customers of OPDC, excluding Shared Cost, would be approximately $7.1M ($14.4M SQ cost less $7.3M Residual cost) lower in Year 11 following the transaction than under the OPDC Status Quo scenario. This difference reflects the elimination of functions, resources and assets that are currently used to serve that service territory and which, for example, due to duplication, would no longer be needed to provide service. Examples of duplicated services include Board of Director's fees, executive leadership, system control staff/facilities and operations facilities that are specifically, planning, finance, regulatory, human resources, information technology etc.

[5] Ontario CPI growth rate forecast. Source: IHS Global Insight, April 2018.

The analysis in Tables 1 through 3 above provide a clear illustration of benefits the former OPDC service territory customers can expect to flow to them as a result of this transaction by lowering the cost structures of the former OPDC service territory to $7.3M, compared to the revenue requirement OPDC have forecast in their Status Quo scenario, $13.4M (not including the LV Charge).

3.0 HYDRO ONE SHARED COSTS

If the transaction is approved, the underlying cost structures for serving the former OPDC customers will be reduced by an estimated $7.1M to a revenue requirement of $7.3M under the Residual scenario. The $7.3M Residual revenue requirement does not reflect OPDC customers paying their full share of the costs for services that Hydro One would be providing to OPDC customers. Hydro One considers the costs of the functions, resources and assets used to provide such services to be its "Shared Costs". More particularly, Hydro One's Shared Costs reflect (i) shared facilities used to provide operations and maintenance services (i.e. service centres and maintenance yards), billing and IT system costs, and other miscellaneous general plant; (ii) OM&A costs associated with shared services, such as planning, finance, regulatory, human resources, information technology, customer services and corporate communications; and (iii) asset and related OM&A costs associated with upstream distribution facilities used by former OPDC customers (i.e. costs formerly captured under LV charges).

In Year 11, upon harmonizing rates for customers in the OPDC service territory with Hydro One's rates for its existing customer base, the underlying cost structures would continue, as illustrated in Table 1 of **Exhibit A, Tab 2, Schedule 1.** The synergies and efficiencies realized during the 10-year deferral period would continue to have a mitigating effect on rates for customers in the former OPDC service territory. However, through rate harmonization (post 10-year deferral period), Hydro One would have an opportunity to begin collecting a portion of its Shared Costs from customers in the former OPDC service territory. At that time, the prior Status Quo cost structures will have been reduced through synergies and efficiencies of the proposed

consolidation. Given that those customers will receive benefits from the functions, resources and assets that are carried out or held centrally by Hydro One, it will be appropriate for those customers to bear responsibility for some of the Shared Costs. The manner in which Shared Costs will be allocated, and the amount that will ultimately be borne by former OPDC customers following the deferral period, will be matters for the OEB to consider and determine at such time that Hydro One proposes a rate structure and rate harmonization plan as part of its rebasing application following the 10-year deferral period.

At that time, Hydro One would determine the quantum of its Shared Costs and the appropriate methodology for allocating those Shared Costs among all of its customer groups, including its distribution customers in the former OPDC service territory, resulting in what it then believes to be an appropriate amount of Shared Costs to be collected from the former OPDC customers.

There are a number of factors that are likely to be taken into consideration at that time, both by Hydro One in developing its proposed methodology and by the panel of the OEB in considering that proposal and making a final determination on that methodology and the amount of Shared Costs to be included in rates for former OPDC customers. In particular, consideration would likely be given to factors such as the impact on rates for former OPDC customers, the impact on rates for Hydro One's other customers, the OEB's cost allocation policies and preferred cost allocation practices at the time, the outcome from the pending EB-2017-0049 Decision as it relates to Hydro One's previous Acquired Customers, as well as general principles of rate making.

3.1 PROPOSED METHODOLOGY FOR ALLOCATING COSTS AFTER DEFERRAL PERIOD

After the deferral period, Hydro One will allocate costs to serve the former OPDC customers using the OEB's cost allocation model, adjusted to reflect the cost to serve the acquired OPDC

customers. Hydro One proposes within the harmonization and rebasing application following the deferral period, that it would ensure that the total cost, including a portion of Hydro One's Shared costs, to be collected from the former OPDC customers would be between, (a) the Residual Cost to Serve Scenario plus LV charges (totaling $8.3M), and (b) the Year 11 revenue requirement under the OPDC Status Quo scenario plus Year 11 LV charges (totaling $14.4M).

Table 4 below provides the calculation of these two costs.

Table 4
Calculation of Residual and Status Quo Costs ($000s)

Revenue Requirement – OPDC Status Quo	13,443
Estimated LV Charges[6] – OPDC Status Quo	1,005
Total Cost to Serve – OPDC Status Quo	**14,448**
Revenue Requirement – Residual Cost to Serve Former OPDC	7,319
Estimated Revenue Requirement associated with providing LV services to Former OPDC	1,005
Total Residual Cost to Serve	**8,324**

As illustrated above, Hydro One could collect from the former OPDC customers a revenue requirement as low as $8.3M. This would mean that all savings from the transaction would accrue to the former customers of OPDC. Hydro One's legacy customers would not be harmed, as the former OPDC customers would be paying for their residual cost to serve. On the other hand, Hydro One could collect from the former OPDC customers a revenue requirement of up to $14.4M, and still be at or below their Status Quo cost to serve. This would mean that all savings from the transaction would accrue to Hydro One legacy customers. Any revenue requirement collected from the former OPDC customers between these two amounts (i.e. between $8.3M and $14.4M), would result in a sharing of the benefits between the two customer groups.

[6] Year 11 LV charges would reflect Hydro One's costs of providing host distributor services.

At this time, Hydro One is not in a position to determine the specific amount of costs that would be collected from OPDC's customers, as that will depend on the cost allocation and rate design proposed for the harmonized rate classes in Year 11. However, any adjustments to the OEB's cost allocation model to reflect the cost to serve the acquired OPDC customers in Year 11 would remain in place for subsequent years.

In Year 11, to calculate the status quo forecast, Hydro One would use the forecast as provided in this Application. However, that base amount would need to be adjusted to reflect any unknown or unforeseen costs at that time that would be applicable to serving the former OPDC customers if the transaction did not occur. For instance, if new legislative or OEB requirements or environmental regulations give rise to unanticipated costs, or unanticipated events such as political change (e.g. trade tariffs impacting costs) or storm damage results in the need for additional capital expenditures in the former OPDC service territory during the deferral period, those costs would have been incurred regardless of the transaction and would therefore need to be added to the OPDC status quo forecast. The base amount would also need to be adjusted to reflect the weighted average cost of capital applicable at that time.

For the ten year deferral period, Hydro One will track the incremental costs (OM&A and Capital) to serve customers in the former OPDC service territory, and have their asset plans distinguished in Hydro One's Distribution System Plan until rate integration in Year 11.

4.0 SUMMARY OF FUTURE COST STRUCTURES

Hydro One has provided evidence that the Residual cost to serve the former customers of OPDC integrated into Hydro One is less than it would have been under OPDC's Status Quo scenario. The underlying cost structures to serve the former OPDC service territory area will be reduced by approximately $6.1 million prior to an allocation of Shared Costs.

Evidence showing that the former customers of OPDC will benefit from this transaction includes:

- Former OPDC customer rates will not be rebased via a Cost of Service Rate application until 2030. This is a 20 year period from the time their rates were last rebased[7].

- As of December 2017, $20.7M capital expenditures[8] have been added to OPDC's rate base since their last rate rebasing in 2010, a period of seven years (2011 to 2017). These are not reflected in its current OEB-approved rate base, which is the basis for the rates that Orillia customers will continue to pay until Year 11.

- OPDC will continue to incur capital expenditures in 2018 and 2019 until the time the proposed acquisition is forecast to close, followed by Hydro One incurring capital expenditures to maintain service reliability and system capital requirements for the 10-year deferral period. None of these capital expenditures[9] will be reflected in the rate base that underpins the rates the former customers of OPDC will be charged, yet customers have received and will receive benefits from these capital expenditures.

- Hydro One emphasizes that under OPDC's Status Quo scenario OPDC's customers rates would increase as a result of the growth in rate base compared to the rates these customers will receive as a result of this transaction. Hydro One maintains it is a reasonable assumption to expect that rate base will increase, under both Status Quo and Residual scenarios given that the OPDC service territory's rates will not have been rebased for a 20-year period.

[7] OPDC rates were last rebased in 2010 (EB-2009-0273)
[8] 2017 OPDC F/S
[9] This excludes any capital expenditures that may be undertaken and approved by the OEB through an ICM applications

- OPDC has already made it public that its current rates are not sufficient to sustain its electricity distribution operations over the long term.

> "If the sale to Hydro One is not approved, OPDC will be required to file for a distribution rate increase (known as a Cost of Service rate application) with the OEB at least twice over the next 10 years. It is estimated that distribution rates will increase by an average annual rate of 2-4% over the next 10-year period[10]."

This message was included in a bill insert to customers from OPDC in May 2018.

- OPDC has not adjusted their rates through the Board's IRM mechanism since 2016.[11] This further confirms that OPDC ratepayers have benefited from this transaction.

- Hydro One is confident that it can produce savings and synergies operating and managing the former OPDC service territory under OPDC's OEB-approved revenue requirement, effectively reducing the cost structures for the OPDC service territory compared to the Status Quo. This benefits the ratepayers, not only by decreasing their Base Distribution Delivery Rates by 1% and freezing those reduced rates for five years, but it avoids at least two cost of service rebasing events over the ten year deferral period, that OPDC would otherwise require.

Hydro One is providing former OPDC customers a guaranteed ESM. This protects these customers to ensure they share in any increased benefits from consolidation during the deferred rebasing period. The ESM is based on only the incremental cost to serve customers in the former OPDC service territory.

[10] Provided to Orillia customers as a bill insert by OPDC (refer to Attachment 21)
[11] EB-2015-0286

With respect to former OPDC customers, Hydro One anticipates transitioning those customers to one of its proposed new Acquired Rate Classes or to a new rate class to be proposed after the deferred rebasing period has elapsed. At the time of that rate proposal, Hydro One will determine an appropriate rate class for the former OPDC customers (e.g. taking into account density characteristics and bill impacts). Hydro One, as has been directed in previous MAAD decisions[12], will ensure the new proposed rates will reflect the cost to serve the newly acquired customers in the former OPDC service territory. To achieve this, at the time of rebasing, Hydro One will examine the cost to serve these customers to ensure that they will only be charged for the assets that are used to serve them.

Hydro One has also provided an illustration of how Shared Costs could be collected from customers of the former OPDC post the 10-year deferral period. This evidence shows that both legacy customers and the acquired customers will benefit from this transaction. If the revenue collected from the former OPDC's customers through rates is equal or less than OPDC's Status Quo revenue requirement plus LV costs, then customers will not be harmed. If Hydro One's legacy customers' rates are not increased as a result of the transaction, they too are not harmed by the transaction. The annual savings of $6.1 million expected from this transaction can be shared by these two customers groups such that each group will have rates derived from a lower revenue requirement that would have otherwise applied in Year 11 and beyond. Therefore, the transaction meets the No Harm Test.

[12] EB-2013-0187/0196/0198, EB-2013-0213, EB-2013-0244

11

IMPACT OF THE PROPOSED TRANSACTION

1.0 INTRODUCTION

This exhibit provides HOI's impact assessment of the proposed transaction and also provides a discussion of the impact of the transaction on OPDC's and Hydro One's future operations in relation to the OEB's statutory objectives. It elaborates on how the transaction promotes economic efficiency and cost-effectiveness in the distribution sector and also discusses other related matters pertaining to this transaction.

2.0 IMPACT OF THE PROPOSED TRANSACATION

The Handbook's *Filing Requirements for Consolidation Applications* requires applicants to provide evidence to demonstrate the impact of the proposed transaction with respect to the OEB's first two statutory objectives. The Handbook recognizes that there are other instruments and tools that will ensure that the OEB's remaining statutory objectives, relating to conservation and demand management, implementation of smart grid and the use and generation of electricity from renewable resources, will not be adversely impacted by a consolidation. Therefore, the Board has determined that there is no need or merit in further review of these statutory objectives as part of a consolidation transaction[1].

SECTION 2.1: OBJECTIVE 1 – PROTECT CONSUMERS WITH RESPECT TO PRICE AND ADEQUACY, RELIABILITY AND QUALITY OF ELECTRICITY SERVICE

This Application demonstrates that the cost structures from proceeding with the transaction will result in expected ongoing operations, maintenance and administrative ("OM&A") savings of

[1] Handbook, Page 6

approximately $3.9 million per year and reductions in capital expenditures of approximately $0.6 million per year (based on the level of savings achieved by Year 10). These efficiencies, representing an ongoing OM&A reduction of approximately 60% of OPDC's 2015 OM&A costs (65% of the Year 10 status quo forecast), will result in downward pressure on OPDC's cost structures relative to the status quo and will be realized while maintaining adequacy, reliability and quality of electricity service. Table 1 illustrates the projected cost savings from this transaction. These will be further discussed in Section 2.2.

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**

Hydro One's 2015 OM&A cost to serve customers in its high density residential rate class (UR) is $173/customer[2], compared to OPDC's cost of $362/customer[3]. Hydro One's urban rate class covers areas containing 3,000 or more customers with a density of at least 60 customers per kilometer. As such, it is reasonable to believe that if this transaction proceeds, Hydro One will be able to serve OPDC's service area, which has about 13,500 customers and a density of 58

[2] EB-2013-0416, 2015 Draft Rate Order Filed April 10, 2015
[3] As shown in the 2015 OEB Yearbook

customers per km of line, at a cost that is comparable to Hydro One's UR rate class (approximately 90% of OPDC's customers are residential).

Price of Electricity Service

The acquired OPDC customers will have rates adjusted in the next ten years as discussed below.

Rate-setting in Years 1-5 of the Deferred Rebasing Period

2016 base distribution delivery rates will be reduced by 1% and frozen for a period of five years from closing of this transaction[4].

Table 2 shows the customer bill impact of this reduction applied to the average consumption levels for residential and general service rate classes. The impacts on total bill as well as distribution rates are provided. The rate reductions vary slightly from the 1% reduction as a result of rounding errors from using two decimal places for fixed charges and four decimal places for volumetric charges, as prescribed by the Board, and also due to the fact that the 1% rate reduction does not apply to other existing rate riders or LV rates included in the table below under distribution rates.

Table 2: Bill Impacts for OPDC Customers

Rate Class[5]	Change in Distribution Delivery Rates	Change in Total Bill (%)
Residential	(0.92%)	(0.20%)
General Service less than 50 kW	(1.08%)	(0.23%)
General Service 50 to 999 kW	(0.97%)	(0.07%)

[4] A negative rate rider that will result in a 1% reduction of 2016 base delivery rates as approved by the OEB in EB-2015-0024 will be implemented over that term.
[5] The proposed 1% rate reduction does not apply to the other rate classes.

At the same time, OPDC's residential distribution rates will continue to be adjusted to move to a fully fixed distribution charge, per OEB Policy "*A New Distribution Rate Design for Residential Customers*" (EB-2012-0410). In EB-2015-0024, the OEB approved a four-year transition period for OPDC to move to fixed rates, beginning in 2016.

Detailed calculations of customer bill impacts and the determination of the rate riders can be found in **Attachment 7** and **Attachment 8**. The proposed rate schedules, which include the requested rate rider for the area currently served by OPDC, effective after closing, are filed as **Attachment 9.**

The cost of providing this rate rider (approximately $79,000 per year[6]) will be recovered from synergies that are generated from consolidating OPDC's operations into Hydro One. This negative rate rider will be discontinued at the end of Year 5.

All other OPDC tariffs will remain as approved in OPDC's last rate order[7], with the exception of Specific Service Charges. Customers of the former OPDC using these services will be charged the rates approved for Hydro One Distribution in rate order EB-2015-0079.

Rate-setting in Years 6-10 of the Deferred Rebasing Period

Beginning in year six through to year ten, rates for the former customers of OPDC will be set using the Price Cap adjustment mechanism, outlined in the Amended Report. At the commencement of year six, Hydro One will apply the OEB's Price Cap Index formula utilizing the former OPDC's efficiency cohort factor (0.3%). This will be anchored to the current OPDC base distribution delivery rates as approved by the OEB in EB-2015-0024.

[6] 2015 OPDC FS – OPDC Distribution Revenue ($7,857k) multiplied by 1%
[7] EB-2015-0024

Earnings Sharing Mechanism

Since Hydro One is requesting a 10-year deferred rebasing period, Hydro One will also be implementing an ESM, in accordance with the Amended Report. As outlined in the Handbook, the ESM as set out in the Amended Report may not achieve the intended objectives for all types of consolidation proposals. Hydro One is therefore proposing an ESM that protects OPDC customer interests during the extended deferred rebasing period. Further details on Hydro One's proposed ESM are found in **Exhibit A, Tab 3, Schedule 1**.

Hydro One Legacy Customers

The proposed transaction also protects Hydro One's existing customers. On March 12, 2015, Hydro One received approval for rates effective from January 1, 2015, to December 31, 2017. That application was based on Hydro One's existing customer base: in other words, it did not include any capital or OM&A costs associated with serving customers or with maintaining or operating assets in the service territory of any acquired local distribution company ("LDC"), including OPDC. As such, this transaction will not impact Hydro One's existing customers with respect to price.

In 2017, Hydro One intends to file a five-year Custom Incentive Regulation application for rates effective from 2018 through to 2022. That application will not include any costs associated with serving the customers of OPDC. Costs to serve these customers will not be included in any Hydro One revenue requirement application until the deferred rebasing period has expired.

Once the deferred rebasing period has expired, Hydro One's existing customers are expected to derive a small price benefit, as the company's fixed costs of operations will be spread over a wider customer base.

12

IMPACT OF THE PROPOSED TRANSACTION

1.0 INTRODUCTION

This exhibit provides HOI's impact assessment of the proposed transaction and also provides a discussion of the impact of the transaction on OPDC's and Hydro One's future operations in relation to the OEB's statutory objectives. It elaborates on how the transaction promotes economic efficiency and cost-effectiveness in the distribution sector and also discusses other related matters pertaining to this transaction.

2.0 IMPACT OF THE PROPOSED TRANSACTION

The *Handbook to Electricity Distributor and Transmitter Consolidations* (the "Handbook"), Schedule 2 Filing Requirements requires applicants to provide evidence to demonstrate the impact of the proposed transaction with respect to the OEB's first two statutory objectives. The Handbook recognizes that there are other instruments and tools that will ensure that the OEB's remaining statutory objectives, relating to conservation and demand management, implementation of smart grid and the use and generation of electricity from renewable resources, will not be adversely impacted by a consolidation. Therefore, the Board has determined that there is no need or merit in further review of these statutory objectives as part of a consolidation transaction[1].

SECTION 2.1: OBJECTIVE 1 – PROTECT CONSUMERS WITH RESPECT TO PRICE AND ADEQUACY, RELIABILITY AND QUALITY OF ELECTRICITY SERVICE

This Application demonstrates that the ongoing cost structures following the closing of the transaction will result in expected ongoing operations, maintenance and administrative

[1] Handbook, Page 6

("OM&A") savings of approximately $4.7 million per year and reductions in capital expenditures of approximately $0.2 million per year (based on the level of savings achieved by Year 10). These efficiencies represent an ongoing OM&A reduction of approximately 70% of OPDC's Year 10 status quo forecast. This will result in downward pressure on OPDC's cost structures relative to the status quo and will be realized while maintaining adequacy, reliability and quality of electricity service. These savings are expected to continue beyond the 10-year deferred rebasing period. Table 1 illustrates the projected cost savings from this transaction. How these savings will be attained is further discussed in Section 2.2.

Table 1 savings, illustrated below, are based on a comparison of OPDC's operations as a stand-alone distribution company relative to the costs of operating OPDC's service territory once it is integrated within Hydro One. Year 1 in the table represents a 12 month period post-closing of the transaction. This period is assumed to most closely align with calendar year 2020.

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	5.5	5.7	5.8	5.9	6.0	6.1	6.2	6.4	6.5	6.6
Hydro One Forecast	4.1	2.0	2.1	1.7	1.7	1.7	1.8	1.8	1.8	1.9
Projected Savings	**1.4**	**3.7**	**3.7**	**4.2**	**4.3**	**4.4**	**4.4**	**4.6**	**4.7**	**4.7**
Capital										
Status Quo Forecast	3.2	4.3	1.5	1.8	2.8	2.8	2.9	3.0	11.1	3.2
Hydro One Forecast	3.4	2.4	2.4	2.5	2.6	2.8	2.8	2.9	2.9	3.0
Projected Savings	**(0.2)**	**1.9**	**(0.9)**	**(0.7)**	**0.2**	**0.0**	**0.1**	**0.1**	**8.2**	**0.2**

Hydro One's 2017 OM&A cost to serve customers in its high density residential rate class (UR) is $179/customer[2], compared to OPDC's cost of $352/customer[3]. Hydro One's urban rate class covers areas containing 3,000 or more customers with line density of at least 60 customers per circuit kilometre. As such, it is reasonable to believe that if this transaction proceeds, Hydro One will be able to serve OPDC's service area, which has approximately 13,800 customers and a density of 57 customers per km of line, at a cost that is comparable to Hydro One's UR rate class.

Price of Electricity Service

The acquired OPDC customers will have rates adjusted in the next ten years as discussed below.

Rate-setting in Years 1-5 of the Deferred Rebasing Period

OPDC's current Base Distribution Delivery Rates[4] will be reduced by 1%, for residential and general service customers of OPDC, and frozen for a period of five years from closing of this transaction[5].

Table 2 shows the customer bill impact of this reduction applied to the average consumption levels for residential and general service rate classes. The impacts on total bill as well as distribution rates are provided. The rate reductions vary slightly from the 1% reduction as a result of rounding from using two decimal places for fixed charges and four decimal places for volumetric charges, as prescribed by the Board, and also due to the fact that the 1% rate

[2] EB-2016-0081, 2017 Draft Rate Order Filed November 18, 2016
[3] Average value for all OPDC customers as shown in the 2017 OEB Yearbook. For the OPDC residential class (which comprises ~ 90% of their customers), the cost to serve is estimated to be $208/customer.
[4] As defined in Exhibit A, Tab 1, Schedule 1, page 3, Footnote 2.
[5] A negative rate rider will result in a 1% reduction to OPDC's Base Distribution Delivery Rates, as approved by the OEB at the time of closing, will be implemented over that term.

13

Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460

Supreme Court Reports

Supreme Court of Canada

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

2000: October 31 / 2001: July 12.

File No.: 27118.

[2001] 2 S.C.R. 460 | *[2001] 2 R.C.S. 460* | *[2001] S.C.J. No. 46* | *[2001] A.C.S. no 46* | *2001 SCC 44*

Mary Danyluk, appellant; v. Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson, respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (82 paras.)

Case Summary

Administrative law — Issue estoppel — Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions — Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions — Employment standards officer dismissing employee's complaint — Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel — Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel — Whether preconditions to application of issue estoppel satisfied — If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the Employment Standards Act ("ESA") seeking [page461] unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

[page462]

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in Harelkin and collateral attack in Maybrun.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a matter [page463] of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

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Considered: Angle v. Minister of National Revenue, *[1975] 2 S.C.R. 248*; disapproved in part: Rasanen v. Rosemount Instruments Ltd. *(1994), 17 O.R. (3d) 267*; referred to: Re Downing and Graydon *(1978), 21 O.R. (2d) 292*; Farwell v. The Queen *(1894), 22 S.C.R. 553*; Wilson v. The Queen, *[1983] 2 S.C.R. 594*; R. v. Litchfield, *[1993] 4 S.C.R. 333*; R. v. Sarson, *[1996] 2 S.C.R. 223*; Robinson v. McQuaid (1854), 1 P.E.I.R. 103; Bell v. Miller *(1862),*

9 Gr. 385; Raison v. Fenwick *(1981), 120 D.L.R. (3d) 622*; Wong v. Shell Canada Ltd. *(1995), 15 C.C.E.L. (2d) 182*; Machin v. Tomlinson *(2000), 194 D.L.R. (4th) 326*; Hamelin v. Davis *(1996), 18 B.C.L.R. (3d) 112*; Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273; R. v. Consolidated Maybrun Mines Ltd., *[1998] 1 S.C.R. 706*; McIntosh v. Parent, *[1924] 4 D.L.R. 420*; British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. *(1998), 50 B.C.L.R. (3d) 1*; Schweneke v. Ontario *(2000), 47 O.R. (3d) 97*; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund *(1999), 176 N.S.R. (2d) 173*; Guay v. Lafleur, *[1965] S.C.R. 12*; Thoday v. Thoday, *[1964] P. 181*; Machado [page464] v. Pratt & Whitney Canada Inc. *(1995), 12 C.C.E.L. (2d) 132*; Randhawa v. Everest & Jennings Canadian Ltd. *(1996), 22 C.C.E.L. (2d) 19*; Heynen v. Frito-Lay Canada Ltd. *(1997), 32 C.C.E.L. (2d) 183*; Perez v. GE Capital Technology Management Services Canada Inc. *(1999), 47 C.C.E.L. (2d) 145*; Munyal v. Sears Canada Inc. *(1997), 29 C.C.E.L. (2d) 58*; Alderman v. North Shore Studio Management Ltd., *[1997] 5 W.W.R. 535*; R. v. Nat Bell Liquors Ltd., *[1922] 2 A.C. 128*; Harelkin v. University of Regina, *[1979] 2 S.C.R. 561*; Poucher v. Wilkins *(1915), 33 O.L.R. 125*; Minott v. O'Shanter Development Co. *(1999), 42 O.R. (3d) 321*; Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. *(1988), 22 B.C.L.R. (2d) 89*; General Motors of Canada Ltd. v. Naken, *[1983] 1 S.C.R. 72*; Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41; Susan Shoe Industries Ltd. v. Ricciardi *(1994), 18 O.R. (3d) 660*; Iron v. Saskatchewan (Minister of the Environment & Public Safety), *[1993] 6 W.W.R. 1*.

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Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. idem, s. 9(2)] 67(1) [am. idem, s. 10(1)], (2) [rep. & sub. idem, s. 10(2)], (3) [ad. idem], (5) [idem], (7) [idem], 68(1) [am. idem, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).
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APPEAL from a judgment of the Ontario Court of Appeal *(1998), 42 O.R. (3d) 235*, *167 D.L.R. (4th) 385*, *116*

O.A.C. 225, *12 Admin. L.R. (3d) 1*, *41 C.C.E.L. (2d) 19*, *27 C.P.C. (4th) 91*, *[1998] O.J. No. 5047* (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and J. Michael Mulroy, for the appellant. John E. Brooks and Rita M. Samson, for the respondents.

Solicitors for the appellant: Lang Michener, Toronto. Solicitors for the respondents: Heenan Blaikie, Toronto.

The judgment of the Court was delivered by

BINNIE J.

1 The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice [page466] should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed [page467] damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The

employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs [page468] from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. Ontario Court (General Division) (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following Rasanen v. Rosemount Instruments Ltd. *(1994), 17 O.R. (3d) 267* (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. Court of Appeal for Ontario *(1998), 42 O.R. (3d) 235*

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision [page469] should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the

rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered Re Downing and Graydon *(1978), 21 O.R. (2d) 292* (C.A.), to be "determinative of this issue" (p. 249).

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider [page470] and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

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III. Relevant Statutory Provisions

17 Employment Standards Act, R.S.O. 1990, c. E.14

> 1. In this Act,
>
> ...
>
> "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,
>
> (a) tips and other gratuities,

(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c) travelling allowances or expenses,

(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

...

6. -- (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. -- (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the [page472] Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

...

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

...

67. -- (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

...

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

...

[page473]

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

68. -- (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

...

(3) The Director shall select a referee from the panel of referees to hear the review.

...

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of [page474] justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen *(1894), 22 S.C.R. 553*, at p. 558; Angle v. Minister of National Revenue, *[1975] 2 S.C.R. 248*, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: Wilson v. The Queen, *[1983] 2 S.C.R. 594*; R. v. Litchfield, *[1993] 4 S.C.R. 333*; R. v. Sarson, *[1996] 2 S.C.R. 223*.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended,

with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making [page475] process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in The Doctrine of Res Judicata in Canada (2000), at p. 94 et seq., including Robinson v. McQuaid (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and Bell v. Miller *(1862), 9 Gr. 385* (U.C. Ch.), at p. 386. The modern cases at the appellate level include Raison v. Fenwick *(1981), 120 D.L.R. (3d) 622* (B.C.C.A.); Rasanen, supra; Wong v. Shell Canada Ltd. *(1995), 15 C.C.E.L. (2d) 182* (Alta. C.A.); Machin v. Tomlinson *(2000), 194 D.L.R. (4th) 326* (Ont. C.A.); and Hamelin v. Davis *(1996), 18 B.C.L.R. (3d) 112* (C.A.). See also Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, inter alia, to their legal nature and the position within the state structure of the institutions that issue them": R. v. Consolidated Maybrun Mines Ltd., *[1998] 1 S.C.R. 706*, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on [page476] the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, *[1924] 4 D.L.R. 420*, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that [page477] were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost

jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel per rem judicatem in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum [page478] employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There [page479] are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director [page480] does

appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "peut nommer un arbitre de griefs pour tenir une audience" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim de novo and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

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B. The Applicability of Issue Estoppel

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. *(1998), 50 B.C.L.R. (3d) 1* (C.A.), at para. 32; Schweneke v. Ontario *(2000), 47 O.R. (3d) 97* (C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund *(1999), 176 N.S.R. (2d) 173* (C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in Angle, supra, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, The Doctrine [page482] of Res Judicata (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged res judicata was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is

> important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.
>
> (Spencer Bower, Turner and Handley, supra, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent ex curia statement of Handley J. (the current editor of The Doctrine of Res Judicata) that:

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to res judicata estoppels.
>
> ("Res Judicata: General Principles and Recent Developments" (1999), 18 Aust. Bar Rev. 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard capable of supporting an issue [page483] estoppel? In my opinion, the answer to this question is yes.

(a) The Institutional Framework

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: Re Downing and Graydon, supra, per Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important indicia of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 23*(1), and *O. Reg. 626/00, s. 1*(1).

(b) The Nature of ESA Decisions Under Section 65(1)

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative [page484] from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in Guay v. Lafleur, *[1965] S.C.R. 12*, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in Thoday v. Thoday, *[1964] P. 181* (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (1998), vol. 2, s. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) Particulars of the Decision in Question

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision ought to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in Rasanen, supra, per Abella J.A., at p. 280:

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> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: Machado v. Pratt & Whitney Canada Inc. *(1995), 12 C.C.E.L. (2d) 132* (Ont. Ct. (Gen. Div.)); Randhawa v. Everest & Jennings Canadian Ltd. *(1996), 22 C.C.E.L. (2d) 19* (Ont. Ct. (Gen. Div.)); Heynen v. Frito-Lay Canada Ltd. *(1997), 32 C.C.E.L. (2d) 183* (Ont. Ct. (Gen. Div.)); Perez v. GE Capital Technology Management Services Canada Inc. *(1999), 47 C.C.E.L. (2d) 145* (Ont. S.C.J.). The statement of Métivier J. in Munyal v. Sears Canada Inc. *(1997), 29 C.C.E.L. (2d) 58* (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position:

> The plaintiff relies on [Rasanen] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In Wong, supra, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also Alderman v. North Shore Studio Management Ltd., *[1997] 5 W.W.R. 535* (B.C.S.C.).

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47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as R. v. Nat Bell Liquors Ltd., *[1922] 2 A.C. 128* (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: Harelkin v. University of Regina, *[1979] 2 S.C.R. 561*, at pp. 584-85. The decision

remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel per rem judicatem is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in Harelkin, supra. In that case a university student failed in his judicial review application to quash the decision of a [page487] faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the Harelkin barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though Maybrun, supra, says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to Maybrun, on which forum [page488] the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law [page489] governing judicial review in Harelkin, supra, and collateral attack in Maybrun, supra.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in Angle, supra, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) That the Same Question Has Been Decided

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins *(1915), 33 O.L.R. 125* (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law [page490] that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) That the Judicial Decision Which Is Said to Create the Estoppel Was Final

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike Harelkin, supra, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA [page491] decision must nevertheless be treated as final for present purposes.

(c) That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: Machin, supra; Minott v. O'Shanter Development Co. *(1999), 42 O.R. (3d) 321* (C.A.), per Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. *(1988), 22 B.C.L.R. (2d) 89* (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, supra, at 21 s. 24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

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61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In General Motors of Canada Ltd. v. Naken, *[1983] 1 S.C.R. 72*, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In Bugbusters, supra, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel per rem judicatem is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s dictum was adopted and applied by the Ontario Court of Appeal in Schweneke, supra, at paras. 38 and 43:

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> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist... . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask -- is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> ...
>
> ... The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also Braithwaite, supra, at para. 56.

64 Courts elsewhere in the Commonwealth apply similar principles. In Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, per Lord Keith of Kinkel, at p. 50:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result ... .

65 In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise.

He simply concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view it was an error of principle not to address the factors for and against the exercise of [page494] the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in Maybrun in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in Minott, supra. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) The Wording of the Statute from which the Power to Issue the Administrative Order Derives

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: Rasanen, supra, per Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

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70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings -- including any available appeals -- has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) The Purpose of the Legislation

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In Bugbusters, supra, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. Forest Act, R.S.B.C. 1979, c. 140. The expense claim was allowed despite an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, per Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the Forest Act].

A similar point was made in Rasanen, supra, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery [page496] and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American Restatement of the Law, Second: Judgments 2d (1982), vol. 2 s. 83(2)(e), which refers to

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages... .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) The Availability of an Appeal

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: Harelkin, supra, at p. 592. Here the employee had no right of appeal, but the existence of a potential administrative review and her failure to take advantage of it [page497] must be counted against her: Susan Shoe Industries Ltd. v. Ricciardi *(1994), 18 O.R. (3d) 660* (C.A.), at p. 662.

(d) The Safeguards Available to the Parties in the Administrative Procedure

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in Rasanen, supra, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in Minott, supra, at pp. 341-42.

(e) The Expertise of the Administrative Decision Maker

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (Maybrun, supra, at para. 50):

> ... where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or raison d'être, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in Minott, supra, at pp. 341-42:

> ... employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them ... .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) The Potential Injustice

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the [page499] problem identified by Jackson J.A., dissenting, in Iron v. Saskatchewan (Minister of the Environment & Public Safety), *[1993] 6 W.W.R. 1* (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

14

In the Court of Appeal of Alberta

Citation: Enmax Energy Corporation v TransAlta Generation Partnership, 2015 ABCA 383

Date: 20151209
Docket: 1501-0082-AC
Registry: Calgary

Between:

Enmax Energy Corporation

Respondent (Plaintiff)

- and -

TransAlta Generation Partnership

Appellant (Defendant)

The Court:

The Honourable Madam Justice Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald

Reasons for Judgment Reserved of
the Honourable Mr. Justice McDonald
Concurred in by the Honourable Madam Justice Paperny
Concurred in by the Honourable Mr. Justice Slatter

Appeal from the Decision by
The Honourable Mr. Justice M.D. Gates
Dated the 30th day of March, 2015
Filed on the 2nd day of April, 2015
(2015 ABQB 185, Docket: 1301-11879)

Reasons for Judgment Reserved of
the Honourable Mr. Justice J.D. Bruce McDonald

The Court:

Introduction

[1] The appellant, TransAlta Generation Partnership, appeals that portion of the chambers judge's decision where he held that the parties to an arbitration are not bound by a prior arbitration award involving the same parties, that a party (in this case, the respondent) is not estopped from taking certain positions in the Current Arbitration as a result of the Prior Arbitration Decision, and that the doctrines of *res judicata* and issue estoppel do not apply to arbitration awards.

[2] For the reasons set out below, the appeal is allowed.

Background Facts

[3] The appellant is a power producer. It operates a generating plant at Keephills and is party to a power purchase arrangement (the Keephills Power Purchase Arrangement) with the respondent Enmax Energy Corporation under which it sells electricity generated by the plant to the respondent.

[4] The Keephills Power Purchase Arrangement is a regulation under the *Electric Utilities Act* (*Power Purchase Arrangements Determination Regulation*, AR 167/2003) that sets out the regulated terms for the wholesale purchase and sale of electricity between power producers such as the appellant and power purchasers such as the respondent. Power Purchase Arrangements were developed by a statutory body, the Independent Assessment Team.

[5] After approval by the then Energy and Utilities Board, Power Purchase Arrangements were enacted in the *Power Purchase Arrangement Determination Regulation* and came into effect on January 1, 2001. Subsequently Power Purchase Arrangements were given statutory force pursuant to the *Electric Utilities Act*, SA 2003, c E-5.1, section 96.

[6] Power Purchase Arrangements require certain payments to be made by the power purchasers to the power producer to cover specified capital costs and costs of operation. The owners' allowances for operating and capital costs were estimated 20 years into the future and set out by the Independent Assessment Team, in 1990 dollars, in schedules attached to the Power Purchase Arrangements. The Power Purchase Arrangements require the use of Statistics Canada Indices in order to escalate those payments to present day values.

[7] A dispute arose between the appellant and the respondent regarding the application of certain Statistics Canada indices by the appellant in its billings to the respondents as a result of Statistics Canada updating those indices in 2010 (the Current Arbitration).

[8] Article 4.2 of the Keephills Power Purchase Arrangement governs the use of the indices. The parties agree that Article 4.2(b) applies to the Current Arbitration:

> If any index referred to in any Schedule is changed or modified in any way, including a change in the reference base used in the compilation of such index, the Parties shall use such changed modified index if the changes or modifications to such index are consistent with or produce results which are consistent with the intent of use of the original index; otherwise, use of such index shall be modified so that calculations based on such index shall produce as nearly as possible the same results as are consistent with the intent of use of the original index.

However, the parties disagree on whether Article 4.2(f) also applies to the Current Arbitration. Article 4.2(f) provides:

> A changed or modified index or a substituted index shall be used for all calculations required to be made pursuant to this Arrangement from and after the time that the use of such changed, modified or substituted index has been agreed upon by the Parties. Such changed, modified or substituted index shall be linked to the previously used index so as to avoid retrospective adjustments and shall be used to measure inflation in a variable from the level of the variable at the time the previously used index was modified, changed or substituted.

The respondent served a Notice to Arbitrate to begin the Current Arbitration.

[9] The appellant served a Reply to Notice to Arbitrate, in which it pleaded the position (among others) that:

(a) the Parties have already arbitrated over the application of Articles 4.2(b) and 4.2(f) of the Keephills Power Purchase Arrangement in the context of facts substantially similar to those in the Current Arbitration; and

(b) ENMAX (the respondent) is estopped from taking the position that linking is required pursuant to Article 4.2(f) given the findings made in the prior arbitration.

[10] The respondent and the appellant were involved in a prior arbitration (the Prior Arbitration) involving updates made by Statistics Canada to the Survey of Employment, Payrolls and Hours (the SEPH) in 2009, which affected certain indices the appellant used in its billings to the respondent.

[11] In the Prior Arbitration, the respondent claimed that the indices based on SEPH were updated or modified pursuant to Article 4.2(b) of the Keephills Power Purchase Arrangement and were required to be linked to the previous indices pursuant to Article 4.2(f) of the Keephills Power Purchase Arrangement. The arbitration panel in the Prior Arbitration issued an award (the Prior Arbitration Decision) in which it specifically determined that the parties are to simply apply the updated SEPH Indices on a go-forward basis without linking:

> ... the 2009 SEPH Indices, as published by Statistics Canada, are to be used by TransAlta for billing purposes commencing in the month of January, 2010 for the remaining term of the PPA, without linking or other adjustment.

Alternatively, it found that even if Article 4.2(f) applied, any required linking was already provided by Statistics Canada in the updated indices:

> ... even if Article 4.2(f) is applicable, the PPA would not require a linking or any other adjustment to the Index values produced by Statistics Canada using the 2009 SEPH methodology as ENMAX has contended.

It is these findings (and others) that the appellant pleads give rise to *res judicata* and issue estoppel in the Current Arbitration.

[12] The respondent subsequently filed a Statement of Claim seeking declarations on three questions of law, including whether findings in the Prior Arbitration Decision were binding on the parties to the Current Arbitration.

[13] The issue said to give rise to an issue estoppel was described by the parties as the "Discrete Finding". The exact scope of the dispute is best illustrated by the pleadings. In its Statement of Claim, the respondent alleged:

> 15. In the Current Arbitration, TransAlta alleges that one finding made by the Panel in the Prior Arbitration (the Discreet Finding) is somehow binding upon the parties in the current Arbitration and TransAlta claims that it somehow estops ENMAX from taking certain positions in the Current Arbitration. TransAlta wrongly seeks to "cherry-pick" that finding and alleges that the Discreet Finding is somehow binding in the current Arbitration despite the fact that, as noted above:
>
> (a) the Current Arbitration involves indices that are completely different and distinct from those at issue in the Prior Arbitration; and

(b) the nature and extent of the changes to the indices in the current Arbitration and the Prior Arbitration are materially different and distinct.

16. Permitting the Discreet Finding to be adduced into evidence or considered by the Current Arbitration will, among other things:

(a) unfairly influence the decision making process of the arbitrators in the Current Arbitration either consciously or subconsciously;

(b) negatively affect and undermine the independence of the arbitrators in the Current Arbitration;

(c) result in the manifestly unfair and/or unequal treatment of ENMAX in the Current Arbitration; and

(d) such further and other grounds as counsel may advise and this Honourable Court may permit.

[14] In its amended cross-application, the appellant responded as follows:

6. The Current Arbitration involves two issues. The first issue involves changes made by Statistics Canada to certain indices used in the PPA (the Multi-Index Issue). The second issue involves the replacement of one index, Index 9, pursuant to s. 4.2(a) of the PPA on the basis that it is no longer reasonably tracking escalation in Capital Additions costs (the Index 9 Issue).

7. In the Multi-Index Issue, TransAlta seeks to rely on a finding of the Panel in the Prior Arbitration and takes the position that this finding binds the Parties and estops ENMAX from taking certain positions in the Current Arbitration.

8. As a result, ENMAX seeks to have the Court determine:

8.1 Whether or not the finding from the Prior Arbitration is binding upon the Parties in the Current Arbitration and whether it estops ENMAX from taking certain positions in the Current Arbitration; and

8.2 If TransAlta is entitled to rely on the Prior Arbitration, whether or not any prior arbitral decisions which may exist in connection with the same or similar issues constitute Confidential Information

> pursuant to the terms of the PPA, and, if so, whether they fall within the exceptions to revealing Confidential Information or should otherwise be produced as a matter of fairness or otherwise.

It is in this context that the present application came before the chambers judge.

Decision of the Chambers Judge

[15] The chambers judge described the issues before him to be as follows:

> (i) whether the court had jurisdiction to determine the questions raised by the respondent and in particular do the questions raise questions of law, mixed law and fact, or fact?;
>
> (ii) does a dispute arise under an agreement, where only one of the parties disputes the use of a particular index?;
>
> (iii) is the Prior Arbitration relating to multiple indices and specifically the Discrete Finding binding upon the parties in the Current Arbitration, and does it estop the respondent from taking certain positions in the Current Arbitration?; and
>
> (iv) if the Prior Arbitration Decision and the Discrete Finding are permitted in the Current Arbitration, can other arbitral decisions be admitted?

[16] The Keephills Power Purchase Arrangement permits a court to determine questions of law. The respondent relied upon section 6(c) of the *Arbitration Act* to bring an application to determine certain issues relevant to the Current Arbitration. Section 6(c) of the *Arbitration Act* provides:

> 6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> ...
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

The chambers judge answered the first question by holding that section 6(c) gave the court jurisdiction and was not limited only to questions of law. In considering the issues raised, the chambers judge answered the second question by finding that there was a dispute for the purposes of the Keephills Power Purchase Arrangement, namely, the need to substitute one of the indices in the Power Purchase Arrangement. No appeal was taken from this portion of the chambers judge's decision.

[17] On whether the Prior Arbitration Decision is binding and whether it estops the respondent from taking certain positions in the Current Arbitration, the chambers judge held that prior arbitration decisions do not bind other arbitral panels and the doctrine of *stare decisis* does not apply. He further held that *res judicata* does not apply to private arbitrations and that in the case at bar, the respondent was not estopped from taking certain positions in the Current Arbitration as a result of the Prior Arbitration Decision. He ruled however that an arbitration panel can decide that a prior arbitration decision can be "evidence".

[18] The chambers judge concluded in part as follows:

> The questions of whether prior decisions are binding in future arbitrations and whether *res judicata* applies to arbitrations are questions of law. I find that [the respondent] is not bound by the prior arbitration decision, and is not estopped from taking certain positions in the current arbitration as a result of the prior arbitration decision, and that *res judicata* does not apply to private arbitrations. [The appellant] may seek to introduce the prior arbitration decision as evidence on the current arbitration, and it will be for the Panel to decide whether it is admissible as evidence, determine its relevance and to assess the weight to be given. (para 132)

This appeal was then launched.

Grounds of Appeal

[19] The appellant is appealing only a portion of the chambers judge's decision. In particular, the appellant argues that the chambers judge erred:

> (i) by finding that the respondent and appellant are not bound by the Prior Arbitration Decision despite the *Arbitration Act* and the terms of the Keephills Power Purchase Arrangement;
>
> (ii) in declaring that the doctrines of *res judicata* and issue estoppel do not apply to arbitration awards; and
>
> (iii) by deciding a question of mixed fact and law (namely whether the respondent was estopped from taking certain positions in the Current Arbitration) that he had previously found was beyond his jurisdiction as being a matter of mixed fact and law.

Standard of Review

[20] Questions of law decided by the chambers judge are reviewed on a standard of correctness, and questions of fact or mixed fact and law are reviewed on a standard of palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 8 and 10. Whether the parties are bound by a prior arbitration decision due to the provisions of the *Arbitration Act* is a question of law. Whether *res judicata* and issue estoppel apply to arbitration awards is also a question of law. Whether the chambers judge decided an issue beyond his jurisdiction also is reviewed on a standard of correctness.

[21] The presumption is that the superior courts have a limited role in arbitrations. The *Arbitration Act* and the case law significantly limit the involvement of the courts in reviewing arbitral decisions: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 89, 104, [2014] 2 SCR 633. The arbitrators even have the presumptive jurisdiction to decide the scope of their own mandate: *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 84, [2007] 2 SCR 801. This litigation is, however, an exception to those general principles.

[22] The present dispute arises under the Keephills Power Purchase Arrangement. While this "Arrangement" looks in many respects like a contract, as noted it is actually a regulated form of arrangement that was settled and is enforceable under Part 4.1 of the *Electric Utilities Act*. Article 19 of the Arrangement contains a tiered system of dispute resolution. Disputes that cannot be resolved by "senior management" may be arbitrated or litigated:

> **19.3 Litigation**
>
> Either Party may commence litigation with respect to any question of law or the recovery of any liquidated damages arising in relation to this Arrangement, within the limitation periods set out in the *Limitation of Actions Act* (Alberta), and any successor or replacement legislation.
>
> **19.4 Submission to Arbitration**
>
> Subject to Section 19.3, all disputes with respect to this Arrangement shall, after the provisions of Section 19.2 [submission to senior management] have been followed, be forwarded to and resolved by binding arbitration in accordance with the *Arbitration Act* S.A. 1991, c. A-43 (the "Arbitration Act"), by a board of arbitrators in accordance with the following provisions: . . .
>
> (f) except as expressly provided in this Arrangement, any majority decision by the board of arbitrators shall be final, binding and non-appealable. Any such decision may be filed in any court of competent jurisdiction and may be enforced by either Party as a

> final judgment in such court. There shall be no grounds for appeal of any arbitration award hereunder; . . .
>
> (i) either Party may refer a question of law to a court of competent jurisdiction for final and binding determination notwithstanding that it may be part of a dispute before the board of arbitrators.

These provisions displace the normal presumption that the superior courts should defer to the arbitrators.

[23] First of all, the dispute resolution provisions (Articles 19.3 and 19.4(i)) clearly give the parties the option of litigation or arbitration; arbitration is not the exclusive process as is often the case. The arbitration provisions in Article 19.4 are expressly made "subject to" the litigation option in Article 19.3. Thus, the Arrangement displaces the normal "competence-competence" principle. These exceptional provisions explain how the issues came before the chambers judge.

[24] The structure of these dispute resolution provisions have also influenced the nature of the questions placed before the court. Because Article 19.4(f) states that there is "no appeal" from the final decision of the arbitrators, any party that wishes to establish a point of law must do so before that final decision is rendered. This can be done under Article 19.3, by referring an issue to the court prior to the arbitration, or under Article 19.4(i) by referring an issue to the court during the arbitration.

[25] The structure of these provisions has thus influenced the nature of the questions placed before the court. Because issues that are litigated must be "questions of law", and because they must be submitted to the court prior to the fact-finding decision of the arbitrators, the questions will tend to be general. In this case, the questions invited the court to provide declarations of broad principles of law, detached from the facts. It is for this reason that the court was invited to declare, in broad, general terms, that "issue estoppel does not apply in arbitrations". The abstractness is perhaps unavoidable, but care should still be taken in how such general questions are answered.

The Effect of Prior Arbitral Awards

[26] The first two grounds of appeal are inextricably intertwined and will therefore be considered together.

[27] The appellant's position is that under the terms of the Keephills Power Purchase Arrangement, arbitration awards are binding and may be filed with the court as a final judgment. It also asserts that an arbitration award should be treated as a final judgment. Additionally, the *Arbitration Act* states that all arbitration awards are final and binding. The appellant therefore argues that the chambers judge erred in finding that the parties did not agree to be bound by the Prior Arbitration Decision.

[28] The appellant then argues that the chambers judge erred in relying upon the doctrine of *stare decisis* and confusing it with the doctrine of *res judicata*. The appellant also argues further that the chambers judge erred in stating that arbitration panels do not have to apply the law. This resulted in the chambers judge being mistaken about the binding effect of an arbitration award.

[29] The appellant argues that the doctrines of *res judicata* and issue estoppel apply and that the arbitrator(s) must decide if the Prior Arbitration Decision dealt with the same issues that are involved in the Current Arbitration. The appellant cited policy arguments in support of its position including the need for enforcement and avoiding relitigation.

[30] For its part, the respondent submits that the chambers judge was correct in finding prior arbitration decisions are not binding in future arbitrations and that *stare decisis* does not apply to arbitrations. The respondent further argues that civil litigation principles cannot be imported into private arbitration, and that section 49 of the *Arbitration Act* provides the mechanism to enforce an arbitration award and therefore the doctrine of *res judicata* is not required to enforce such an award.

[31] In his decision analyzing whether *res judicata* and issue estoppel apply to private arbitrations, the chambers judge did not refer to either Article 19.4(f) of the Keephills Power Purchase Arrangement or section 37 of the *Arbitration Act*, even though both the Prior Arbitration and the Current Arbitration are governed by the provisions of the *Arbitration Act*. Article 19.4(f) of the Keephills Power Purchase Arrangement states as follows:

> [E]xcept as expressly provided in this Arrangement, any majority decision by the board of arbitrators shall be final, binding and non-appealable. Any such decision may be filed in any court of competent jurisdiction and may be enforced by either Party as a final judgment in such court. There shall be no grounds for appeal of any arbitration award hereunder;

Section 37 of the *Arbitration Act* in turn provides:

> 37. An award binds the parties unless it is set aside or varied under section 44 or 45.

The appellant relies on these provisions in support of its argument.

[32] The *Arbitration Act* is based upon the Uniform Arbitration Act that was produced as a result of the efforts of the Uniform Law Conference of Canada. That body in turn considered the recommendations of the Law Reform Commission of British Columbia, *Report on Arbitration* (British Columbia: LRC, 1982), and the subsequent study of the Institute of Law Research and

Reform in Alberta entitled *Proposals for a New Alberta Arbitration Act*, Report No 51 (Edmonton: ALRI, 1988).

[33] Although not conclusive, it is instructive to review the comments contained in both reports. In its report, the Law Reform Commission of British Columbia stated in Chapter VIII:

> As between the parties to a submission, the award gives rise to an estoppel *inter partes* with regard to the matters decided, analogous to that created by a judgment in an action *in personam*. Thus, if the award was in respect of a breach of contract, it may bar further proceedings even though fresh damage has flowed from the breach.

The Law Reform Commission of British Columbia then went on to recommend the enactment of the following provision:

> 23. Every arbitration agreement should be deemed to include a provision that, subject to the provisions of the *Arbitration Act*, the award is final and binding on the parties and those claiming under or through them, unless the parties agree otherwise.

[34] For its part, the Alberta Institute of Law Research and Reform recommended at para 72 a provision to the effect:

> Except as provided in section 34, an award made in an arbitration to which this Act applies is final and binding on the parties and persons claiming through or under them.

This recommendation found its way into section 37 of the statute.

[35] In England, it is clear law "... that the expression 'final and binding', in the context of arbitration, and arbitration agreements, has long been used to state the well-recognized rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a *res judicata* between parties": *Shell Egypt West Manzala Gmbh & Anor v Dana Gas Egypt Ltd*, [2009] 2 CLC 481 at para 38. See also *Fidelitas Shipping Co Ltd v V/O Exportchleb*, [1965] 2 All ER 4 at 10.

[36] Section 37 the *Arbitration Act* means precisely what it states, namely that the Prior Arbitration Decision is binding upon the parties to the Prior Arbitration. The parties here did not expressly provide that section 37 would not apply; furthermore, Article 19.4(f) of the Keephills Power Purchase Arrangement stipulated that the decision of the majority of the board of arbitrators shall be "final, binding and non-appealable". The appellant and the respondent are therefore bound by the Prior Arbitration Decision.

[37] The respondent argues that *res judicata* and issue estoppel are not necessary in the arbitration context because arbitral awards can be enforced under section 49 of the *Arbitration Act*. Enforceability however is distinct from the doctrines of *res judicata* and issue estoppel. The latter are designed to bring finality to litigation and they apply whether or not the prior arbitration award has been satisfied or enforced.

[38] However, the respondent argued that in Canada, *res judicata* and issue estoppel do not apply to commercial arbitrations and therefore, the respondent is not bound or estopped from taking certain positions in the Current Arbitration.

[39] In the course of his reasons, the chambers judge had stated in part:

> The first part, whether a prior arbitration decision is binding upon the parties in a subsequent arbitration, is a question of law. It relates to the applicability of *stare decisis* to arbitration decisions, and does not require an application of facts to determine the question. (para 58)

It is trite law that *stare decisis* and *res judicata* are two separate and distinct doctrines. *Res judicata* prevents either party from relitigating an issue that has been decided previously in litigation between those parties. *Stare decisis* is a rule that lower courts are bound by the decisions of higher courts: *L'Hirondelle v Alberta* (*Minister of Sustainable Resource Development*), 2013 ABCA 12 at para 31, 542 AR 68. *Stare decisis* simply has no applicability to this case: *Loewen v Manitoba Teacher's Society*, 2015 MBCA 13 at para 80, 315 Man R (2d) 123.

[40] On the other hand, there is ample authority for the proposition that the doctrine of *res judicata* and issue estoppel apply to arbitration proceedings: *Scotia Realty Ltd v Olympia & York SP Corp* (1992), 9 OR (3d) 414 (Gen Div); *Huck v Komol Plastics Co*, 1996 CarswellBC 3825 (SC); *Yee v Gim* (1978), 87 DLR (3d) 67, [1978] 3 WWR 733 (BCSC). In *Loewen v Manitoba Teachers' Society* the Manitoba Court of Appeal stated at para 107:

> In short, the decision of the Second Arbitrator with respect to the application of the doctrines of *res judicata*, issue estoppel and abuse of process, is unreasonable because it failed to properly consider the factual and legal context with respect to the First Arbitrator's Award and, **ultimately, failed to conclude that the First Arbitrator's Award was a final one which was subject to the doctrines of issue estoppel and abuse of process by relitigation**.
>
> (emphasis added)

This is consistent with the English position: *Fidelitas Shipping Co., Ltd. v V/O Exportchleb*, [1966] 1 QB 630 (CA); *1041 Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Co. of Zürich*, [2003] UKPC 11, [2003] 1 WLR 1041.

[41] In coming to his conclusion that *res judicata* and issue estoppel do not apply to arbitral proceedings in Canada, the chambers judge relied heavily upon the decision of the Supreme Court of Canada in *Canada Safeway Limited v Manitoba Food and Commercial Workers Union, Local 832*, [1981] 2 SCR 180, where that court simply stated, "We agree substantially with the reasons of Monnin JA [dissenting] and would accordingly allow the appeal".

[42] It is difficult to read too much into this decision. The matter being litigated before the Manitoba Court of Appeal involved a labour arbitration award dealing with Safeway's "no beard" policy. Complicating matters, there had been a previous arbitration award involving the same policy but a different employee, a different arbitration panel and a different result, i.e., there was no proper cause to discipline the employee for breaching the "no beard" policy unless Safeway could show that its business interests were thereby prejudiced. On somewhat different evidence, the majority of the second arbitration panel held that the "no beard" policy was a proper cause for disciplinary action under the terms of the collective agreement.

[43] The union thereafter advanced a number of applications before the Court of Queen's Bench of Manitoba to attack the second arbitration award including the argument that the second arbitration panel was bound by the doctrines of *res judicata* and issue estoppel and ought to have come to the same decision as had the first arbitration panel. The majority of the Manitoba Court of Appeal allowed the appeal for reasons that are not germane to this appeal. However, in dissent, Monnin JA stated in part:

> There is little resemblance in a dispute between an employer and employees and that of ship owners and charterers. In England there is provision for awards and interim awards to be made by an umpire under the control of the Court. It is as a result of the reopening of that interim award that the question of res judicata arose**. I do not think that the principles discussed in the *Fidelitas* case (supra) should be transferred to labour relations in this province.**
>
> (emphasis added)

(*Manitoba Food and Commercial Workers Union, Local 832 v Canada Safeway Ltd* (1981), 120 DLR (3d) 42, 7 Man R (2d) 238 at para 66)

Accordingly, Monnin JA's comments regarding the inapplicability of *res judicata* were limited to labour arbitrations in the province of Manitoba and in no way purported to apply to commercial arbitrations (paras 66 – 68).

[44] Also noteworthy is that the Manitoba Court of Appeal in its subsequent decision in *Loewen* (which was also a labour arbitration) accepted that the doctrines of issue estoppel and abuse of process can as a matter of law apply to labour arbitrations in that province (at para 40 above). The decision in *Canada Safeway* is perhaps best seen as an exercise of the residual discretion not to apply issue estoppel in particular cases because individual employees who commence grievances have limited ability to control the arbitration or challenge the result. Only the union and the employer are full parties to the arbitration: *Noël v Société d'énergie de la Baie James*, 2001 SCC 39 at paras 45, 62, [2001] 2 SCR 207; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 48, [2011] 3 SCR 616.

[45] Furthermore, in the Supreme Court of Canada's more recent decision in *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460, Binnie J made the following observation with respect to doctrines such as issue estoppel and cause of action estoppel:

> **These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals.** In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.
>
> The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada (2000)*, at p. 94 et seq. . . . (emphasis added)
>
> (paras 21 and 22)

See also *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paras 27, 34, 46, [2011] 3 SCR 422; where the Supreme Court of Canada discusses the pre-conditions for the application of issue estoppel, abuse of process and collateral attacks in tribunal hearings.

[46] In his reasons, the chambers judge stated in part, "Further, panels do not have to apply the law or find facts based on evidence" and cited in support of that proposition Genevieve Chornenki and Christine E. Hart, *Bypass Court: A Dispute Resolution Handbook*, 4th ed (Markham, Ont: Lexis Nexis, 2011).

[47] Two comments are in order with respect to this statement. Firstly, section 31 of the *Arbitration Act* expressly provides:

> 31. An arbital tribunal shall decide a matter in dispute in accordance with the law, including equity, and may order specific performance, injunctions and other equitable remedies.

It is clear that the reference to "the law" is not restricted to statutory law but rather to the law generally. In considering the equivalent section in the Ontario *Arbitration Act*, Pepall J (as she then was) stated in *Omers Realty Corp v Sears Canada Inc* (2005), 74 OR (3d) 423, as follows:

> Section 31 of the *Arbitration Act 1991* provides that an arbital tribunal is to decide a dispute in accordance with the law. The arbitration represents a process to address a dispute; it does not confer jurisdiction to ignore or re-write the law and establish legal principles. Put differently, the arbitration provision does not confer on the arbitrators the ability to do what they please unencumbered by applicable legal principles. (para 22)

This decision was upheld by the Ontario Court of Appeal: (2006), 80 OR (3d) 561.

[48] Secondly, Chornenki and Hart expressly state in their text at 202:

> The law is a standard that the arbiter applies by default but parties can change this by explicit or implicit agreement.

There is no suggestion that this was done in the Current Arbitration. Therefore, the chambers judge erred in making the statement he did. An arbitration panel is bound by the law unless the parties expressly agree to the contrary.

[49] The chambers judge also referred to this court's recent decision in *Hnatiuk v Assured Development Ltd*, 2012 ABCA 97, 522 AR 3. The facts in *Hnatiuk* involved an ongoing series of disputes between a house builder and his former customers. The first dispute involved a certain set of complaints and was the subject of both an arbitration proceeding and a civil action (the latter being subsequently discontinued). A subsequent set of complaints was later advanced by way of a civil action. Simply put, in *Hnatiuk*, this court did not even consider the question of whether *res judicata* applies in a situation such as the one in the case at bar, much less did it decide that *res judicata* cannot apply as a matter of law in a subsequent arbitration proceeding.

[50] In *Danyluk*, the Supreme Court of Canada explained the rationale for the doctrine of *res judicata* and its related doctrines (issue estoppel, cause of action estoppel, and abuse of process) to be as follows:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do

> so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. . . . An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. (para 18)

The doctrines of *res judicata* and issue estoppel can apply to arbitration proceedings governed by the provisions of the *Arbitration Act*. That is particularly so for arbitrations under the power purchase arrangements which, as noted, are regulatory mechanisms set by statute. Further, the rationale for *res judicata* and its related doctrines may apply by analogy to arbitration proceedings that have a consensual origin in private contracts.

[51] Notwithstanding these general principles, the respondent argues that *res judicata* and issue estoppel are inappropriate for arbitrations, because those legal concepts are too complex and would overwhelm the arbitrators. The respondent suggests that if prior arbitral decisions on similar issues were disclosed to the arbitrators, they would be so over-influenced by the results achieved that the arbitrators would lose the ability to resolve the issues before them. There is no merit to this argument. It should generally be presumed that all bodies appointed to resolve issues have the institutional competence to do so. Arbitrators are selected by the parties, and the law assumes that the parties have selected arbitrators who have the skill-sets necessary to resolve the issues that will arise: *Sattva Capital Corp* at para 105. If it can reasonably be anticipated that legal issues will arise in an arbitration, presumably the parties will appoint arbitrators who can handle those issues. In any event, the dispute resolution provisions of the Keephills Power Purchase Arrangement allow the parties to refer issues of law to the court, and if a legal issue beyond the apparent competence of the arbitrators should arise, that option is always available.

[52] It is axiomatic to our common law legal system that reference will be made to prior decisions raising similar issues. It has never been suggested that precedents should not be cited in argument because the court or tribunal would be overwhelmed by previous decisions. Labour arbitration decisions, for example, are systematically reported and routinely cited when similar issues arise. Even though the doctrine of *stare decisis* does not apply to arbitrations, there is still merit in having like cases decided in a like manner. Later arbitrators can benefit from the reasoning of earlier arbitral decisions, either because they reveal compelling lines of analysis, or they disclose flaws in the reasoning of one party or the other.

[53] The respondent argues that allowing reliance on the principles of *res judicata* and issue estoppel would permit the appellant to "cherry pick" the prior arbitration decisions it likes, and disregard the others. That is not so. If the issues raised in the present arbitration, when compared to the issues raised in the previous arbitration, meet either the test for *res judicata* or issue estoppel, then those doctrines will prevent re-litigation of the issues. If the test is not met, these principles of finality are not engaged. Neither party has any unilateral ability to pick and choose which issues

are now estopped; either party can plead issue estoppel, and both parties are bound by any prior decisions. If by this argument the respondent merely means that the appellant could argue that the test for *res judicata* and issue estoppel are not met with respect to some issues, that does not amount to "cherry picking".

[54] Further, the application of the doctrines of *res judicata* and issue estoppel should not be confused with arguing that a prior arbitral decision has precedential weight, and might be helpful in deciding the present arbitration. The process of relying on or distinguishing prior decisions is well established in our system of legal analysis, whether it be described as "cherry picking" or not. If one party to an arbitration fails to refer to a persuasive precedent, it is always open to the other party to put it before the arbitrators.

[55] As a result, the chambers judge erred in deciding that the doctrine of *res judicata* and issue estoppel cannot apply in the Current Arbitration.

Did the chambers judge err in declaring that the respondent is not estopped from taking certain positions in the Current Arbitration as this is a question of mixed fact and law and he had previously found that a question of mixed fact and law to be beyond his jurisdiction as a result?

[56] The chambers judge observed as follows:

> While the Prior Arbitration Decision is not binding upon the parties and *res judicata* does not apply to arbitrations, it is for the Panel to decide if it is admissible and relevant evidence in the arbitration, and what weight, if any, it should carry. In considering this issue, the Panel will, I expect, receive the parties' submissions related to the admissibility, relevance and weight to be given to such evidence. (para 115)

The chambers judge then went on to decide:

> The questions of whether prior decisions are binding in future arbitrations and whether *res judicata* applies to arbitrations are questions of law. I find that [the respondent] is not bound by the Prior Arbitration Decision, and is not estopped from taking certain positions in the Current Arbitration as a result of the Prior Arbitration Decision, and that *res judicata* does not apply to private arbitrations ... (para 132)

The chambers judge's error set forth in the above paragraphs flows from his earlier error that *res judicata* does not apply in subsequent arbitration proceedings. The doctrines of *res judicata* and issue estoppel can, as a matter of law, apply in subsequent arbitration proceedings.

[57] However, the appellant argued that deciding whether issue estoppel applies is a mixed question of fact and law, and accordingly the trial court had no jurisdiction to consider that issue. The argument is based on Article 19.3 of the Keephills Power Purchase Arrangement, which only permits: "... litigation with respect to any **questions of law** or the recovery of any liquidated damages ...". (emphasis added) In accordance with this wording, any issue that is a mixed question of fact and law would be within the mandate of the arbitrators: *Sattva Capital Corp* at paras 66-67.

[58] The test for the application of issue estoppel is (1) the same question, decided (2) in an earlier final decision, between (3) the same parties. Whether issue estoppel applies is determined by comparing:

> (a) the pleading or other initiating document leading up to the first decision, the reasons for that decision, and the final order or award,
>
> with
>
> (b) the pleading or other initiating document that has initiated the second proceeding.

A comparison of these legal documents will determine if the test for issue estoppel is met: *Quinlan v Newfoundland (Minister of Natural Resources)*, 2000 NFCA 49 at para 12, 192 Nfld & PEIR 144; *Quadrangle Holdings Ltd v Coady*, 2015 NSCA 13 at paras 52-3, 355 NSR (2d) 324. In *R v Punko*, 2012 SCC 39 at para 9, [2012] 2 SCR 396 the application of the doctrine of issue estoppel was described as "a question of logic and law".

[59] One could describe the initial pleading, or the initial decision as "facts", but that is an unduly narrow characterization. There is generally no dispute about the identity of those documents. Whether a particular decision is "final" is a pure question of law. Sometimes an issue may arise whether one party is a "privy" of another, but even that is dominated by questions of law. The real question is usually whether the issue now being litigated is one that was or could have been raised in the first litigation. It is the legal interpretation or characterization of the indicia of the prior decision that is involved, and that too is more appropriately characterized as an issue of law.

[60] What should be considered a question of law, as compared to a question of mixed fact and law, must be decided within the particular legal context: *R v Biniaris*, 2000 SCC 15 at paras 21-3, [2000] 1 SCR 381. As noted in *Sattva Capital Corp*:

> 51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the

> role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal. . . .

As noted, the Keephills Power Purchase Arrangement is not a private contract. It is established by regulation, and has a public component to it. As previously discussed, the Keephills Power Purchase Arrangement recognizes a role for both the courts and arbitrators in resolving disputes under the Arrangement. The legal principles under which the Arrangement should be enforced and implemented have a broader public reach. The ability of the parties to seek judicial rulings on legal points specifically set out in the Arrangement should not be unduly limited.

[61] An examination of cases which have applied the doctrine of issue estoppel leads to the conclusion that the courts in them were not engaged in "fact-finding", nor in what could properly be described as the application of the law to fixed facts; for example: *Danyluk*; *British Columbia (Workers' Compensation Board) v Figliola*; *Angle v Minister of National Revenue*, [1975] 2 SCR 248; *Boucher v Stelco Inc*, 2005 SCC 64, [2005] 3 SCR 279. These cases almost entirely concern legal analyses. The issues raised are those that are properly intended to be referred to a court under Articles 19.3 and 19.4(i). Applying the doctrine of issue estoppel does not require fact finding or determining questions of mixed fact and law.

[62] The parties are both estopped from relitigating issues in the Current Arbitration that were decided in the Prior Arbitration Decision. The estoppel does not, however, extend beyond issues that were actually decided in the Prior Arbitration Decision, or that were necessarily incidental to it: *Hnatiuk v Assured Developments Ltd*., 2012 ABCA 97 at paras 22-4, 522 AR 3; *Boxer Capital Corp v JEL Investments Ltd*, 2015 BCCA 24, 379 DLR (4th) 712. As such, it can be stated that the Discrete Finding (whatever it was) is binding on both parties in the Current Arbitration.

[63] Not relitigating the Discrete Finding does not, however, necessarily resolve the dispute between the parties in the Current Arbitration. The Prior Arbitration Decision found that certain indices were appropriate for use during a certain period of time. To the extent that the same issues arise in the Current Arbitration, an issue estoppel applies. However, it is not clear that the Prior Arbitration Decision decided whether the present indices, as reformulated by Statistics Canada, remain appropriate, or whether the decision on the SEPH index applies in the context of the Current Arbitration. The record is not clear enough for this Court to determine these issues. The scope of any issue estoppel will have to be referred to the arbitrators.

[64] What is clear is that either party is entitled to plead *res judicata* or issue estoppel in the Current Arbitration. The arbitrators can (and must) have reference to the Prior Arbitration Decision to determine what it decided, and specifically to determine the scope of the Discrete

Finding. With respect to other arbitral decisions on the same or similar topics, they would be "authorities" from which the present arbitrators might derive some assistance; it would not be accurate to describe them as "evidence".

Other Issues

[65] The parties referred other issues to the chambers judge:

(a) whether a disagreement by one party about the applicability of an index could raise a "dispute" under the Keephills Power Purchase Arrangement, or whether both parties had to agree that there was an issue;

(b) whether the presumed confidentiality of private arbitrations precluded reference to some or all prior arbitral decisions.

No appeal was launched from the findings on these other issues, and these reasons should not be taken as endorsing or disagreeing with the answers given.

Conclusion

[66] The formal judgment of the chambers judge decreed in part as follows:

- Are prior arbitration decisions binding in future arbitrations?

  Answer: No

- Does *res judicata* apply to arbitrations?

  Answer: No

- Is ENMAX [the respondent] bound by the Prior Arbitration Decision or estopped from taking certain positions in the Current Arbitration as a result of the Prior Arbitration Decision?

  Answer: No

[67] The appeal is allowed. The above provisions of the judgment are varied and the questions are answered instead as follows:

- Are prior arbitration decisions binding in future arbitrations?

  Answer: Yes, provided the arbitration involves the same parties.

- Do the doctrines of *res judicata* and issue estoppel apply to arbitrations?

  Answer: Yes, provided that the requisite elements are found to exist.

- Is ENMAX bound by the Prior Arbitration Decision or estopped from taking certain positions in the Current Arbitration as a result of the Prior Arbitration Decision?

  Answer: Yes, to the extent that the issues were decided by the Discrete Finding in the Prior Arbitration Decision.

Appeal heard on September 10, 2015

Memorandum filed at Calgary, Alberta
this 9th day of December, 2015

Paperny J.A.

Slatter J.A.

McDonald J.A.

Appearances:

M.J. Donaldson
J.J.M. Taylor
for the Appellant

D.W. McGrath, Q.C.
M. O'Brien
for the Respondent

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In the Matter of EnerNorth Industries Inc.

[Indexed as: EnerNorth Industries Inc., Re]

96 O.R. (3d) 1

Court of Appeal for Ontario,
Simmons, Blair and Juriansz JJ.A.
July 3, 2009

Bankruptcy and insolvency -- Proof of claim -- Creditor not having unqualified right on application pursuant to s. 135(5) of Bankruptcy and Insolvency Act to challenge validity of judgment debt based on decision of court of competent jurisdiction if court considered merits of claim in granting judgment -- Creditors of bankrupt moving for order under s. 135(5) challenging proof of claim filed by judgment debtor based on Singapore judgment -- Issues of mitigation and set-off raised by creditors having been finally determined in Singapore proceedings -- Creditors being privies of bankrupt -- Doctrine of res judicata applying -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 135(5).

EnerNorth and Oakwell were parties to a joint venture agreement concerning the construction and operation of two power plants in India. They incorporated the Project Company to finance, construct and operate the Project. Disputes arose between EnerNorth and Oakwell which were ultimately resolved by way of a Settlement Agreement in which EnerNorth agreed to buy out Oakwell's interest in the Project Company. They agreed that any disputes would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts. EnerNorth did not make the required payments under the Settlement Agreement. It sold its interest in the Project Company to VBC. Oakwell entered into negotiations with VBC

directly, resulting in a Licence Agreement pursuant to which the Project Company was to pay Oakwell certain "technical fees". Oakwell sued EnerNorth in Singapore to recover the outstanding amounts under the Settlement Agreement. EnerNorth counterclaimed. The action was successful and the counterclaim was dismissed. The Singapore Court of Appeal dismissed EnerNorth's appeal. EnerNorth did not pay the Singapore judgment. Oakwell commenced enforcement proceedings in Ontario. Those proceedings were successful, and EnerNorth filed an assignment in bankruptcy. Oakwell made a claim in that bankruptcy which was based entirely upon the Singapore judgment. Other creditors of EnerNorth (the "appellants") moved before the Bankruptcy Court for an order pursuant to s. 135(5) of the Bankruptcy and Insolvency Act ("BIA") challenging the proof of claim filed by Oakwell. Oakwell brought a cross-motion to dismiss that motion on the ground that the issue raised by the appellants, i.e., whether the Licence Agreement payments had to be set-off against any payments made to Oakwell under the Settlement Agreement, had been finally determined in the Singapore proceedings. The cross-motion was granted. The appellants appealed.

Held, the appeal should be dismissed. [page2]

While the court's power to expunge or reduce a proof of claim on an application under s. 135(5) of the BIA is wide, there is no basis for holding that an applicant pursuant to s. 135 should have an unqualified right to challenge the validity of a judgment debt that is based on a decision of a court of competent jurisdiction on the merits of the claim or that res judicata should not apply, where appropriate, in such circumstances. In the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim.

The doctrine of res judicata applies in bankruptcy proceedings. The appellants were precluded by res judicata from advancing their contention that Oakwell's proof of claim had to

be expunged or reduced by reason of the mitigation/set-off issue. Two of the appellants were the president and chairman of EnerNorth, respectively, at the time of the Singapore proceedings. For the purposes of the bankruptcy proceedings, the trustee stood in the shoes of EnerNorth, and for the purposes of the proposed s. 135(5) hearing, the creditors in effect stood in the shoes of the trustee because they sought to have the court do what the trustee had declined to do. They were identified with EnerNorth for purposes of comparison between the Singapore proceedings and the proposed s. 135(5) hearing, and there was a community or privity of interest between them in that regard. The appellants were privies of EnerNorth for the purpose of the res judicata analysis in the s. 135(5) context. The mitigation/set-off argument was considered and rejected by the trial judge in the Singapore proceedings. The appellants were barred from re-litigating that issue in their efforts under s. 135(5) of the BIA to accomplish what EnerNorth failed to do in the Singapore courts and the Ontario courts.

Cases referred to

Fraser (Re); Ex parte Central Bank of London, [1892] 2 Q.B. 633 (C.A.); Van Laun (Re); Ex parte Chatterton, [1907] 2 K.B. 23 (C.A.), affg [1907] 1 K.B. 155 (K.B. Div.), consd

Other cases referred to

A Debtor (Re) (1915), 113 L.T. 704 (K.B.); Angle v. Canada (M.N.R.), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, 47 D.L.R. (3d) 544, 2 N.R. 397, 74 D.T.C. 6278; Arnco Business Services Ltd. (Re), [1983] O.J. No. 973, 38 C.P.C. 226, 23 A.C.W.S. (2d) 91 (H.C.J.); Bank of Montreal v. Maple City Ford Sales (1986) Ltd. (2001), 51 O.R. (3d) 523, [2000] O.J. No. 5701 (S.C.J.); Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53, 195 D.L.R. (4th) 308, 145 O.A.C. 349, 2 C.P.C. (5th) 1, 102 A.C.W.S. (3d) 302 (C.A.); Canada Asian Centre Developments Inc. (Re), [2003] B.C.J. No. 34, 2003 BCSC 41, 10 B.C.L.R. (4th) 161, 39 C.B.R. (4th) 35, 119 A.C.W.S. (3d) 8; Carl Zeiss Stiftung v. Rayner & Keeler Ltd.

(No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, [1967] R.P.C. 497 (H.L.); Chaban v. Chaban (Trustee of), [1999] S.J. No. 112, 172 D.L.R. (4th) 312, [1999] 6 W.W.R. 174, 177 Sask. R. 139, 9 C.B.R. (4th) 5, 87 A.C.W.S. (3d) 222 (C.A.); Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 2001 SCC 44, 201 D.L.R. (4th) 193, 272 N.R. 1, J.E. 2001-1439, 149 O.A.C. 1, 34 Admin. L.R. (3d) 163, 10 C.C.E.L. (3d) 1, [2001] CLLC 210-033, 7 C.P.C. (5th) 199, 106 A.C.W.S. (3d) 460; Fallis v. United Fuel Investments Ltd., [1962] S.C.R. 771, [1962] S.C.J. No. 63, 34 D.L.R. (2d) 175, 4 C.B.R. (N.S.) 209; Flatau (Re); Ex parte Scotch Whisky Distillers, Ltd. (1888), 22 Q.B.D. 83 (C.A.); Gibson Mining Co. v. Hartin, [1940] B.C.J. No. 21, [1940] 2 D.L.R. 605, [1940] 2 W.W.R. 155, 55 B.C.R. 196, 21 C.B.R. 403 (C.A.); Grossman (Re), [1998] A.J. No. 498, 1998 ABQB 381, 222 A.R. 139, 3 C.B.R. (4th) 267, [1998] 4 C.T.C. 197, 79 A.C.W.S. (3d) 449; [page3][cf2]Las Vegas Strip Ltd. v. Toronto (City) (1997), 32 O.R. (3d) 651, [1997] O.J. No. 1033, 99 O.A.C. 67, 70 A.C.W.S. (3d) 153 (C.A.), affg (1996), 30 O.R. (3d) 286, [1996] O.J. No. 3210, 13 O.T.C. 308, 38 C.R.R. (2d) 129, 34 M.P.L.R. (2d) 233, 65 A.C.W.S. (3d) 851 (Gen. Div.); Oakwell Engineering Ltd. v. Energy Power Systems Ltd. (April 27, 2004), CA129/2003/Y (Sing. C.A.), affg [2003] SGHC 241; Oakwell Engineering Ltd. v. Enernorth Industries Inc. (2006), 81 O.R. (3d) 288, [2006] O.J. No. 2289, 211 O.A.C. 262, 19 B.L.R. (4th) 11, 30 C.P.C. (6th) 253, 148 A.C.W.S. (3d) 897 (C.A.), affg (2005), 76 O.R. (3d) 528, [2005] O.J. No. 2652, [2005] O.T.C. 534, 7 B.L.R. (4th) 256, 140 A.C.W.S. (3d) 70, 141 A.C.W.S. (3d) 208 (S.C.J.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 343]; Orpen v. Roberts, [1925] S.C.R. 364 at 367, [1925] S.C.J. No. 14, [1925] 1 D.L.R. 1101

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 135 [as am.], (1), (2), (3) [as am.], (4) [as am.], (5), 193

Authorities referred to

Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra, The 2009 Annotated Bankruptcy and Insolvency Act (Toronto: Thomson Carswell, 2008)

Lange, Donald J., The Doctrine of Res Judicata in Canada, 2nd

ed. (Markham, Ont.: LexisNexis Canada Inc., 2004)
Spencer-Bower, George, and Alexander Kingcome Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths, 1969)

APPEAL from the order of C.L. Campbell J. (2009), 92 O.R. (3d) 392, [2008] O.J. No. 3137 (S.C.J.) granting a cross-motion to dismiss a motion for an order challenging a proof of claim.

Douglas G. Garbig, for appellants Fieldstone Traders Limited, Milton Klyman, Hagen Gocht, 1420041 Ontario Inc., Trigel Energy Inc., Reid Hill Enterprises Ltd., Richard Barrer, Hurricane Management Ltd. and Les's Mechanical Service Ltd.

Paul D. Guy, for appellants Sandra J. Hall and James C. Cassina.

Matthew I. Milne-Smith and Shelby Z. Austin, for respondent Oakwell Engineering Limited.

The judgment of the court was delivered by

BLAIR J.A.:--

I. Overview

[1] EnerNorth Industries Inc. is bankrupt. Its various creditors are squabbling amongst themselves over the amount owing to one of them, Oakwell Engineering Limited. To sort this out, the appellant creditors sought to obtain an order under s. 135(5) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), entitling them to challenge and determine the validity of the proof of claim filed by Oakwell. That proof of claim is [page4]founded upon a judgment rendered in Singapore prior to EnerNorth's assignment in bankruptcy.

[2] Justice Colin Campbell dismissed the creditors' motion on res judicata and issue estoppel grounds, holding that the very

issue they wished to have determined had already been decided in the proceedings before the courts in Singapore. In my view, he was correct in arriving at this conclusion, and I would dismiss the appeal for the reasons that follow.

II. Facts

The genesis of the problem

[3] EnerNorth and Oakwell were parties to a joint venture agreement concerning the construction and operation of two power plants in the State of Andhra Pradesh in India. They incorporated a company (the "Project Company") to finance, construct and operate the Project. EnerNorth held an 87.5 per cent interest, and Oakwell a 12.5 per cent interest, in the Project Company.

[4] The Project did not develop according to plan and various disputes arose between the parties. The disputes were ultimately resolved in December 1998, by way of a Settlement Agreement in which EnerNorth agreed to buy out Oakwell's interest in the Project Company. In exchange, EnerNorth was to pay Oakwell:

(1) 1.85 million EnerNorth shares, in lieu of payment of approximately US$3 million;
(2) US$2.79 million, payable within 30 days after successful financing of the Project ("Financial Closure"); and
(3) a royalty equivalent to 6.25 per cent of the actual cash flow of the Project Company for the first five years of its commercial operation, according to a formula set out in the Settlement Agreement.

[5] Under the Settlement Agreement, both parties agreed to do all things necessary to give effect to the agreement. They also agreed that any disputes would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.

[6] EnerNorth did not achieve Financial Closure. Although it transferred the 1.85 million shares to Oakwell, it never paid Oakwell either the $2.79 million or the 6.25 per cent annual royalty.

[7] EnerNorth's inability to realize Financial Closure and to make the payments under the Settlement Agreement was [page5] attributable to the fact that EnerNorth -- perhaps in recognition of its inability to complete the Project -- sold its interest in the Project Company (including the newly acquired Oakwell portion) to another group of companies, known as The VBC Group, in August 2000. I will refer to the August 2000 agreement between EnerNorth and the VBC Group as the "VBC Agreement". Although Oakwell had been aware of VBC's interest in the Project, it was initially unaware of the VBC Agreement. When it discovered what had occurred, it protested to VBC and entered into negotiations with VBC directly, arguing that EnerNorth and VBC were not entitled to exclude it completely from the Project under Indian law because of its position as original promoter of the Project.

[8] These negotiations led to a series of agreements between Oakwell and the VBC Group (including the Project Company) on July 4, 2001. Principal amongst these was a Technology Transfer, Collaboration and Licence Agreement (the "Licence Agreement") pursuant to which the Project Company was to pay Oakwell "technical fees" totalling US$6 million "in acknowledgement of the technical services and know-how provided and to be provided by [Oakwell] since 1995" and for the granting of a certain licence. Of the $6 million, $2 million was to become payable on registration of the Licence Agreement with the Reserve Bank of India. The other $4 million was payable in respect of technical services in the event they were required after signing the Licence Agreement.

[9] It is the payments made, or to be made, under this Licence Agreement, and how they were treated before the Singapore courts, that provide the grist for the dispute on this appeal.

[10] In August 2002, Oakwell sued EnerNorth in Singapore to recover the outstanding amounts under the Settlement Agreement and other damages for the breach of the Settlement Agreement. EnerNorth defended the suit, arguing, in part, that the Licence Agreement was a sham and that payments made under it were

simply camouflaged substitutions for the very payments Oakwell was alleging EnerNorth owed it under the Settlement Agreement. They submitted, for example, that the $2 million payment paralleled the $2.79 million called for on Financial Closure under the Settlement Agreement, less credit for a payment of US$790,000 made by EnerNorth to the order of Oakwell in July 1999 to discharge certain debts owing by Oakwell to various third parties in India. The remaining $4 million was to satisfy the royalty obligation under the Settlement Agreement.

[11] Before this court, Oakwell insists that any payments received, or to be received, by it under the Licence Agreement are separate and apart from its claim against EnerNorth arising [page6]out of the Settlement Agreement and that this issue has already been determined in its favour in the Singapore proceedings. The appellants -- EnerNorth's creditors -- argue here that the Singapore proceedings are not dispositive. As EnerNorth did in the Singapore proceedings, they assert that any payments received by Oakwell as a result of the Licence Agreement are, in effect, a substitute for the Settlement Agreement payments and must therefore be deducted from any amounts owing by EnerNorth to Oakwell in relation to the Settlement Agreement; in the result, there would be more money to be distributed amongst the appellant creditors.

[12] Before returning to this debate, I turn briefly to a history of the legal proceedings between EnerNorth and Oakwell, and a history of the bankruptcy proceedings involving the appellant creditors.

The Singapore action

[13] Oakwell succeeded in the Singapore proceedings. On October 16, 2003, the Singapore High Court rendered judgment in its favour and dismissed EnerNorth's counterclaim.

The trial proceedings

[14] In the Singapore proceedings, Oakwell alleged that EnerNorth had (i) breached its obligation under the Settlement Agreement to achieve Financial Closure, and (ii) repudiated the

Settlement Agreement by entering into the VBC Agreement. It claimed damages of US$2.79 million, representing the sum due on Financial Closure (less credit for two offset amounts discussed below) and damages for loss of the 6.25 per cent annual royalty fees. These issues were all determined in Oakwell's favour: Oakwell Engineering Ltd. v. Energy Power Systems Ltd., [2003] SGHC 241 (Sing. H.C.).

[15] EnerNorth's defence -- as set out in its pleadings and in its opening and closing submissions at trial -- was to argue:

(a) that the Settlement Agreement had been frustrated as a result of a reduction in tariffs imposed by the Indian government and reducing the amounts payable to the Project Company, thus rendering Financial Closure impossible and the performance of the Project economically non-viable;

(b) if the Settlement Agreement had not been frustrated, that EnerNorth had not breached or repudiated it; and that,

(c) even if EnerNorth had breached or repudiated the Settlement Agreement, Oakwell had suffered no damages because [page7]Oakwell had mitigated its losses by entering into the Licence Agreement with VBC -- any past or future payments received from VBC under the Licence Agreement would have to be set-off against any payments payable by EnerNorth under the Settlement Agreement (the "mitigation/set-off issue").

[16] In addition, EnerNorth counterclaimed that Oakwell had breached the Settlement Agreement by entering into the Licence Agreement with VBC, in effect selling the same interest in the Project to VBC that was to be relinquished to EnerNorth as part of the Settlement Agreement. Accordingly, EnerNorth sought an order requiring Oakwell to disgorge any and all "shares, monies or other benefits" received, or to be received in the future, under the Licence Agreement.

[17] With the exception of two voluntary credits offered by Oakwell, the Singapore trial judge rejected EnerNorth's defences in their entirety and dismissed its counterclaim. The first voluntary reduction consisted of the US$790,000 payment referred to above. The second -- which takes on some significance for the purposes of this appeal -- was a payment

of US$350,000 made by VBC to Oakwell under the Licence Agreement prior to the commencement of the Singapore action. Oakwell conceded that both of these amounts should be credited to EnerNorth in the proceedings.

[18] The trial judge ordered that EnerNorth pay to Oakwell:

(1) US$2.79 million (less the sums of US$790,000 and US$350,000) in relation to the failure to achieve Financial Closure; and

(2) US$2,560,210 in damages in respect of the 6.25 per cent annual royalty under the Settlement Agreement.

[19] He also ordered that EnerNorth's counterclaim be dismissed.

The Singapore appeal

[20] EnerNorth unsuccessfully argued the same issues in its appeal before the Singapore Court of Appeal, including the mitigation/set-off issue. In its written appeal case brief, it contended that "If [EnerNorth] did repudiate the Settlement Agreement on or before 10 August 2000, Oakwell mitigated its losses". The appeal case argued:

> One of [the] ways that Oakwell agreed to receive the Royalty under . . . the Settlement Agreement was by entering into an agreement directly with the Project Company [i.e., the Licence Agreement with VBC] whereby the company would pay Oakwell "as technical or consultancy fees" an amount equal to the Royalty. One of the agreements Oakwell entered into on 4 July 2001 [page8]was an agreement with the Project Company whereby Oakwell would receive a lump sum as a "Technical Fee". Accordingly, Oakwell contracted directly with the Project Company for the very thing it had agreed to accept from the Project Company under the Settlement Agreement.
>
> Therefore, even if [EnerNorth] had breached the Settlement Agreement on 10 August 2000, in respect of the Royalty, Oakwell had fully mitigated its losses by directly entering into the very contract with the Project Company that under the Settlement Agreement it had agreed to accept as payment

for the Royalty.

. . . . .

Oakwell, in other words, had a duty to mitigate its (claimed) losses arising out of [EnerNorth's] repudiation of the Settlement Agreement (if indeed that is what [EnerNorth] did) and Oakwell did in fact mitigate its losses by conveying the interests it had relinquished to [EnerNorth] under the Settlement Agreement to VBC for valuable consideration. Therefore, the Court erred by awarding damages to Oakwell in these circumstances and in effect gave Oakwell double recovery.

(Emphasis added)

[21] The appeal was dismissed, without reasons: Oakwell Engineering Ltd. v. Energy Power Systems Ltd. (April 27, 2004), CA129/2003/Y (Sing. C.A.).

The Ontario enforcement proceedings

[22] EnerNorth did not pay the Singapore judgment, and as a result, Oakwell commenced enforcement proceedings in Ontario. EnerNorth opposed enforcement principally on the basis that the Singapore proceedings were biased and unfair.

[23] One of the bases advanced in support of this argument was that the judgment permitted double recovery since Oakwell was allowed to retain the remaining US$1,650,000 of the $2 million to be paid to it by VBC under the Licence Agreement (after credit of $350,000) without having to deduct that amount from the damages awarded. As Mr. Cassina -- the then chairman of EnerNorth -- said in an affidavit, "Oakwell, in effect, got to have its cake and eat it too" at the expense of EnerNorth.

[24] Justice Day rejected EnerNorth's arguments and ordered that the Singapore judgment be enforced in full: Oakwell Engineering Ltd. v. Enernorth Industries Inc. (2005), 76 O.R. (3d) 528, [2005] O.J. No. 2652 (S.C.J.). His decision was upheld in this court: (2006), 81 O.R. (3d) 288, [2006] O.J. No. 2289 (C.A.). Leave to appeal to the Supreme Court of Canada was

sought but denied on January 18, 2007, [2006] S.C.C.A. No. 343.

[25] On March 20, 2007, EnerNorth filed an assignment in bankruptcy. RSM Richter Inc. ("Richter") was appointed trustee in bankruptcy the following day. [page9]

The bankruptcy proceedings

[26] Oakwell's claim in the bankruptcy is for CDN$6,807,130.43. It is based entirely upon the Singapore judgment, plus interest and costs.

[27] The appellants, Ms. Hall and Mr. Cassina, are minor creditors of EnerNorth. They are its former president and chairman, respectively. Ms. Hall has filed a proof of claim in the amount of $20,142.38, for outstanding salary, vacation pay and directors' fees. Mr. Cassina's claim is for $73,222.06, for outstanding consulting and directors' fees.

[28] At the first meeting of creditors, Ms. Hall raised the issue of whether Oakwell's claim should be reduced by a further US$1,650,000, allegedly received from VBC under the Licence Agreement following the date of the Singapore judgment. The other unsecured creditors -- whom I shall call the appellant group of creditors -- took up the cause along with her. While Oakwell does not specifically concede that it has received the additional funds, it accepts that these proceedings should be decided on the basis that it has.

[29] Richter made enquiries about these allegations and concluded that it had not been provided with any confirmable information that would warrant reducing Oakwell's proof of claim. Accordingly, it proposed to admit Oakwell's proof of claim in full.

[30] Ms. Hall and Mr. Cassina moved before the Bankruptcy Court for an order pursuant to s. 135(5) of the BIA challenging the proof of claim filed by Oakwell. They were supported by a companion motion filed on behalf of the appellant group of creditors. Oakwell brought a cross-motion to dismiss these motions on the ground that the issue of whether the Licence

Agreement payments had to be set-off against any payments made to Oakwell under the Settlement Agreement had already been finally determined in the Singapore proceedings.

[31] Justice Campbell granted the cross-motion and dismissed the appellants' motion. The appeal is from that order.

III. Analysis

The motion to quash

[32] Oakwell moved to quash the appeals on the ground that leave to appeal is required under s. 193 of the BIA and leave had not been sought.

[33] Section 193 states:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: [page10]
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[34] We dismissed the motion to quash after argument of the motion. Given the reach of the appellants' position that s. 135(5) applicants have an "unqualified right" to attack the validity of any judgment issued by a court of competent jurisdiction in a hearing under that section, the implications of the appeal are widespread and the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings: s. 193(b). Even if that were not the case, however, we were satisfied that the property involved in the appeal exceeds $10,000 in value. The test for the value of

property involved in the appeal is the amount of the loss or gain which the granting or refusal of the claimed right would entail: Orpen v. Roberts, [1925] S.C.R. 364, [1925] S.C.J. No. 14, at p. 367 S.C.R.; Fallis v. United Fuel Investments Ltd., [1962] S.C.R. 771, [1962] S.C.J. No. 63, at p. 774 S.C.R. Here, the loss or gain to Oakwell or to the creditors, in terms of the quantum of Oakwell's claim in the bankruptcy, is in the millions of dollars.

The issues on the appeal

[35] The appellants raise three issues on the appeal:

(1) Do the appellants, as creditors, have "an unqualified right" under s. 135(5) of the BIA to challenge Oakwell's proof of claim?

(2) Does the existence of a judgment granted against a bankrupt prior to bankruptcy displace the ability of creditors under s. 135(5) to challenge a proof of claim filed on the basis of that judgment?

(3) If a s. 135(5) hearing could be denied on the basis of the doctrine of res judicata, does res judicata or issue estoppel apply in the circumstances of this case?

Issues 1 & 2: The right to challenge a proof of claim and go behind a valid judgment under s. 135(5) of the BIA is not "unqualified"

[36] I shall deal with the first and second issues together. [page11]

[37] Section 135 of the BIA deals with a trustee's examination, acceptance or disallowance of proofs of claim filed by creditors in bankruptcy proceedings. Subsection 135(1) provides that the trustee is to examine proofs of claim or of security and the grounds therefore and "may require further evidence in support of the claim or security". Subsection 135(2) deals with the right of the trustee to disallow a claim, and subsections 135(3) and (4) provide for notice of that determination and for finality and conclusiveness of that decision subject to an appeal from the trustee's decision. Subsection 135(5) states:

Expunge or reduce a proof

135(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[38] The appellants' argument that they have "an unqualified right" to challenge Oakwell's proof of claim under s. 135(5) is based on the unsupported theory that the only precondition to a creditor being entitled to a hearing under s. 135(5) is that the trustee must have declined to interfere in the matter. I do not read the provision in such a restricted manner. Their premise that the Singapore judgment cannot "displace" their "unqualified" right is founded on quite old English authority which -- if it ever stood for the proposition advanced -- should no longer be followed, in my view.

[39] In the first of these decisions, Fraser (Re); Ex parte Central Bank of London, [1892] 2 Q.B. 633 (C.A.), at pp. 635-37 Q.B., Lord Esher M.R. said:

As a matter of law the judgment, therefore, stands as a good judgment against John Fraser, and it cannot be questioned by him in any Court, except the Court of Bankruptcy. . . . The mere fact that there is a judgment for the debt does not prevent the registrar from saying that there is no good petitioning creditor's debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the Court goes round the judgment, and inquires into the subject-matter. . . . The existence of the judgment is no doubt prima facie evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor.

[40] Lord Justice Kay concurred, at pp. 637-38 Q.B., saying:

It is old law in bankruptcy that, neither upon an attempt to

> prove a debt, nor upon a petition for an adjudication of bankruptcy or a receiving order against a debtor, is a judgment against him for the debt conclusive. . . . Can this judgment be treated as conclusive in bankruptcy because the debtor has unsuccessfully attempted to set it aside? I think not, and I cannot see how the matter is any more res judicata because there has been an unsuccessful appeal to this Court. I agree in all that the Master of the Rolls has said on this point. [page12]

[41] Later, in Van Laun (Re); Ex parte Chatterton, [1907] 2 K.B. 23 (C.A.), Cozens-Hardy M.R. adopted a similar approach. At p. 29, he said:

> [I]f a judgment had been obtained upon the covenant, it is competent and it is the duty of the Court of Bankruptcy to go behind the judgment, to open the judgment and to say, "That is the judgment, but the creditor can only prove for the amount which is justly and truly due upon it."

[42] In language adopted by the Master of the Rolls, the trial judge in Van Laun (Re) had said, at [1907] 1 K.B. 155 (K.B. Div.), at pp. 162-63:

> The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

[43] While I accept the first statement of Cozens-Hardy M.R. cited above, with respect to those eminent jurists, I disagree with the balance of their sweeping statements. They cast the net of the trustee's ability to assess a proof of claim based upon the judgment of a court of competent jurisdiction, and the court's ability to expunge or reduce such a proof, too broadly.

[44] Lord Esher M.R., himself, suggested as much in an earlier decision, Flateau (Re); Ex parte Scotch Whisky Distillers, Ltd. (1888), 22 Q.B.D. 83 (C.A.), at p. 85. In that case, the bankruptcy was based upon a judgment debt which was under appeal. The registrar in bankruptcy refused to adjourn the bankruptcy petition pending the outcome of the appeal. His decision was affirmed by the Court of Appeal. On the issue of the right to re-try the issues in Bankruptcy Court, Lord Esher M.R. said, on that occasion (at p. 85):

> It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition.

(Emphasis added)

[45] In the same decision, Lopes L.J. was equally succinct, at p. 87:

> It has been argued that the registrar was bound to hear evidence upon issues which had been already tried by a judge and jury, and that he had no discretion in the matter. In my opinion such a contention cannot be for a moment [page13]maintained. Proceedings in bankruptcy are already scandalously long; if this contention were well founded they would be almost interminable.

(Emphasis added)

[46] In other decisions, English authorities have distinguished Fraser (Re) and its progeny on the basis that it involved a default judgment where there had been no determination of the claim on the merits: see, e.g., A Debtor (Re) (1915), 113 L.T. 704 (K.B.), at p. 705. I note as well, that Van Laun (Re) involved a default judgment.

[47] In Canada Asian Centre Developments Inc. (Re), [2003]

B.C.J. No. 34, 39 C.B.R. (4th) 35 (S.C.), at para. 26, Burnyeat J. drew the same distinction, noting that the comments of Cozens-Hardy M.R. in Van Laun (Re) were obiter. Lord Justice Fry made the point in Flateau (Re), at p. 86, as well:

> It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court.

[48] I see no basis for holding that an applicant pursuant to s. 135(5) of the BIA should have "an unqualified" right to challenge the validity of a judgment debt that is based on a decision of a court of competent jurisdiction on the merits of the claim or that res judicata should not apply, where appropriate, in such circumstances. Take, for example, the case of a debtor with $10 million in assets and judgment debts spread amongst five creditors of $5 million each. Suppose that each $5 million judgment debt resulted from lengthy and costly litigation from trial, through intermediate appeal to the Supreme Court of Canada and that the debtor has failed at each stage. As EnerNorth did here, the debtor makes an assignment in bankruptcy following its last loss in the highest court. It surely contravenes every imaginable principle of judicial economy, finality and fairness to say that the Bankruptcy Court can now, indiscriminately, re-open each hotly contested dispute in order to satisfy itself, in its own mind, that "there really is a debt due to the . . . creditor" (Fraser (Re)) or that "the debt on which the proof is founded is a real debt" (Van Laun (Re)). I do not accept such a proposition.

[49] I agree that the trustee's power to allow or disallow a proof of claim, and the court's power to expunge or reduce it on an application under s. 135(5) of the BIA, is wide. However, to say that the attacking creditor or debtor has an "unqualified" right to challenge the proof of claim where the claim is based upon a valid and enforceable judgment that is no longer subject to appeal is going too far. The appellant's submission goes beyond the proposition that a judgment creditor is precluded from making a [page14]"double

recovery", that is, that the Bankruptcy Court may examine whether the amount claimed in the proof of claim is the true amount remaining to be paid under the judgment. The Bankruptcy Court may make such an enquiry. But, in the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim: see Canada Asian Centre Developments Inc. (Re), as cited in Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, The 2009 Annotated Bankruptcy and Insolvency Act (Toronto: Thomson Carswell, 2008), at G67.1.

Issue 3: The doctrine of res judicata applies in this case

[50] The central issue on this appeal is whether Ms. Hall, Mr. Cassina and the appellant group of creditors are precluded by the doctrine of res judicata from advancing their contention that Oakwell's proof of claim must be expunged or reduced by reason of the mitigation/set-off issue. Like the application judge, I have concluded that they are.

[51] As the application judge noted, the appellants' essential submission is that Oakwell's proof of claim, based on the Singapore judgment, represents an attempt by Oakwell to "double collect" to the extent of sums it has received under the Licence Agreement. Regardless of the validity of the judgment, double recovery is not permitted. However, that very issue has already been determined against the interests of EnerNorth in the Singapore proceedings, in my view.

The standard of review

[52] Whether res judicata applies is a question of law. What is determined in a legal proceeding and whether res judicata applies in the circumstances are essentially legal decisions, attracting little, if any, deference. The standard of review on this issue is, therefore, correctness.

The doctrine of res judicata and its application in

bankruptcy proceedings

[53] The doctrine of res judicata is a common-law doctrine that prevents the re-litigation of issues already decided. It is founded on two central policy concerns: finality (it is in the interest of the public that an end be put to litigation); and fairness (no one should be twice vexed by the same cause). The [page15]doctrine is part of the general law of estoppel and is said to have two central branches, namely, "cause of action estoppel" and "issue estoppel".

[54] Cause of action estoppel refers to the determination of the cause or causes of action before the court. The applicable form of res judicata in this case, however, is issue estoppel. Issue estoppel prevents a litigant from re-litigating an issue that has been clearly decided by a court of competent jurisdiction in a previous proceeding between the same parties or their privies even if the new litigation involves a different cause of action. As the Supreme Court of Canada observed in Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, at para. 18:

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[55] Canadian authorities confirm that res judicata may apply in bankruptcy proceedings, including those involving the establishment of a proof of claim. In Chaban v. Chaban (Trustee of), [1999] S.J. No. 112, 172 D.L.R. (4th) 312 (C.A.), the Saskatchewan Court of Appeal held that a trustee in bankruptcy was not permitted to resort to its power under s. 135(2) to disallow a claim (by the debtor's father/mortgagee) that had already been determined in the father's favour in previous proceedings. Speaking for the court, Chief Justice Bayda said, at para. 31:

> Section 135(2) is an empowering provision. But the power vested in the trustee is not absolute. . . . In my respectful

> view, the power cannot be invoked where to do so results in the reliance upon a procedure that conflicts with the procedure prescribed by a subsisting order of a superior court. Parliament did not intend s. 135(2) to be used by a trustee in those cases where to do so would amount to a collateral attack upon a subsisting order of a superior court or where it would amount to something akin to an abuse of process. . . .

(Emphasis added)

[56] A Bankruptcy Court, acting under s. 135(5), is in no different a position than a trustee in bankruptcy in such circumstances.

[57] Other Canadian decisions have also held that res judicata applies in bankruptcy proceedings. In Arnco Business Services Ltd. (Re), [1983] O.J. No. 973, 38 C.P.C. 226 (H.C.J.), for example, judgment creditors petitioned for a receiving order and the debtor defended on the basis that the judgment underlying the claim that he was bankrupt should be set aside. Gray J. refused, holding (amongst other things) that "the principle of res judicata can be raised as a bar to a subsequent bankruptcy proceeding" [page16](at p. 235 C.P.C.). If res judicata may be raised as a bar to the bankruptcy proceeding itself, it can be raised -- where appropriate -- in answer to a plea that a proof of claim should be disallowed, expunged or reduced: see, also, Gibson Mining Co. v. Hartin, [1940] B.C.J. No. 21, [1940] 2 D.L.R. 605 (C.A.); Grossman (Re), [1998] A.J. No. 498, 222 A.R. 139 (Q.B.).

The mitigation/set-off issue is res judicata

[58] Here, the question is whether res judicata applies to preclude the appellants from asserting in the bankruptcy proceedings that moneys received by Oakwell under the Licence Agreement, post-Singapore judgment, are to be set-off against moneys owing by EnerNorth to Oakwell on the judgment awarding damages for breach of the Settlement Agreement, thus reducing or eliminating the Oakwell proof of claim in the bankruptcy. For that to be the case, the same issue must have been decided by a court of competent jurisdiction in a prior proceeding

involving the same parties or their privies. The decision must have been final, fundamental in the sense that it was not collateral to the first proceeding, and made on the merits: see Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536 (H.L.), at p. 935 A.C.; Angle v. Canada (M.N.R.), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, at pp. 254-55 S.C.R.; Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53 (C.A.), at para. 16.

[59] Two of these requirements call for consideration. First, did the Singapore proceedings involve the same parties (or their privies) as the proposed s. 135 proceedings? Secondly, was the mitigation/set-off issue determined in those earlier proceedings? The other criteria are not at issue on this appeal.

(i) Whether the Singapore proceedings involved the same parties or their privies

[60] For res judicata or issue estoppel to apply, the previous proceedings must have involved the same parties or their privies. Although Ms. Hall and Mr. Cassina were the president and chairman of EnerNorth, respectively, at the time of the Singapore proceedings -- indeed, Mr. Cassina was a witness for EnerNorth in the proceedings -- the appellant group of creditors argues that its members were in no way involved, nor could they have been. One of the criteria for the application of res judicata has accordingly not been met, they say.

[61] I do not accept this argument. While there is little authority directly on point, I am satisfied that Ms. Hall, Mr. Cassina and the appellant group of creditors are all "privies" of EnerNorth for [page17]the purposes of the s. 135 hearing analysis. As officers of EnerNorth, Ms. Hall and Mr. Cassina were clearly aligned with its interests in the Singapore proceedings and, in the present context, continue to be so. It is clear that directors and officers may be considered the privies of their companies: see, for example, Donald J. Lange, The Doctrine of Res Judicata in Canada, 2nd ed. (Markham, Ont.: LexisNexis Canada Inc., 2004), at p. 79, citing Bank of

Montreal v. Maple City Ford Sales (1986) Ltd. (2001), 51 O.R. (3d) 523, [2000] O.J. No. 5701 (S.C.J.). In the latter case, Gillese J. (as she then was) noted that to the extent that the former directors and a creditor of the bankrupt "come to this court to advance the claims of [the bankrupt] they are a privy" (at p. 525 O.R.).

[62] Gillese J. went on to observe, at p. 526 O.R., that:

> Privies within the context of the doctrine of res judicata means a situation where there is a sufficient degree of identification between two persons to make it just to hold that the decision to which one was a party should be binding in the proceedings to which the other is a party. [See Note 1 below]

[63] The appellant creditors as a class, fall within this description. For purposes of the bankruptcy proceedings, the trustee stands in the shoes of EnerNorth, and for purposes of the proposed s. 135(5) hearing, the creditors in effect stand in the shoes of the Trustee, because they seek to have the court do what the Trustee has declined to do. They are "identified" with EnerNorth for purposes of the comparison between the Singapore proceedings and the proposed s. 135(5) hearing, and there is a "community or privity of interest" between them in this regard: see George Spencer-Bower and Alexander Kingcome Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths, 1969), at p. 209. The appellants are only entitled to argue that Oakwell's proof of claim should be expunged or reduced if EnerNorth is entitled to make the mitigation/set-off claim. As creditors, therefore, they have "a sufficient degree of identification" with EnerNorth's claim in the Singapore proceedings "to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party": Bank of Montreal v. Maple City Ford Sales (1986) Ltd. [at para. 12]

[64] I conclude, therefore, that Ms. Hall, Mr. Cassina and the appellant group of creditors are all "privies" of EnerNorth for purposes of the res judicata analysis in the s. 135(5) context. [page18]

(ii) Whether the mitigation/set-off issue was determined in the Singapore proceedings

[65] The application judge concluded, at para. 22, that the appellants "seek to litigate precisely the issue that was before the Singapore Court, namely, the entitlement of Oakwell to receive funds from VBC and at the same time pursue its entitlement under the Settlement Agreement against EnerNorth". In his view, "[t]he fact that the precise amount was not dealt with in the Singapore trial, apart from the concession in respect of $350,000, [did] not invalidate Oakwell's entitlement under the judgment against EnerNorth". To permit the s. 135 challenge to proceed would therefore violate the principles of res judicata.

[66] I agree.

[67] The appellants submit that the mitigation/set-off issue was not determined in the Singapore proceedings and, indeed, that the trial judge specifically indicated that the issue was "not a matter before [him]". Alternatively, to the extent the issue may have been determined, they say it was determined in EnerNorth's favour because the trial judge in fact deducted the $350,000 that had been received by Oakwell from VBC to that point. A review of the trial judge's reasons in their entirety does not bear out this analysis, however.

[68] There is no doubt the mitigation/set-off issue was squarely before the trial judge. It was raised in both the defence and counterclaim. It was the subject of evidence. It was argued in EnerNorth's written submissions at the opening and the close of trial. But was it decided? That question is somewhat more difficult to answer.

[69] It is true that the Singapore trial judge gave little direct consideration to the question of whether moneys received by Oakwell from VBC under the Licence Agreement had to be deducted from moneys received by Oakwell from EnerNorth under the Settlement Agreement, except simply to deduct the amount conceded by Oakwell. He made no specific finding one way or the other on that point. However, the appellants' submission that

he said the mitigation/set-off issue was not before him is not accurate. What he said was that Oakwell's claim that VBC had breached the Licence Agreement by failing to pay the remaining amount of $1,650,000 under that Agreement was "not a matter before [him]". That issue is quite different than the mitigation/set-off issue as between EnerNorth and Oakwell.

[70] Read as a whole, the trial judge's reasons -- and, more importantly, the judgment he rendered -- reveal that he rejected the mitigation/set-off argument. The judgment rendered does [page19]not make sense unless premised on the rejection of EnerNorth's arguments by way of defence and counterclaim, in their entirety.

[71] For example, at para. 69, the trial judge stated that "[Oakwell's] claim against the VBC Group was to be settled by the payment of the sum of US$2 million in respect of past technical services and any ongoing technical services and advice, if required, which [Oakwell] rendered for the benefit of the Project Company since 1995". It necessarily follows that he accepted Oakwell's position that the Licence Agreement and the Settlement Agreement dealt with different matters -- that is to say, Oakwell had not mitigated its losses by entering into the Licence Agreement with VBC. This conclusion is reinforced by the trial judge's rejection of EnerNorth's counterclaim that any moneys or benefits received by Oakwell from VBC under the Licence Agreement had to be disgorged to EnerNorth.

[72] Moreover, I cannot accept the appellants' contention, based on the $350,000 reduction in damages, that the mitigation/set-off argument was decided in their favour. If EnerNorth's mitigation/set-off argument had actually been accepted, the judgment would not have required EnerNorth to pay -- as it does -- damages "less the sums of US$790,000 and US$350,000". The judgment would have provided for payment of damages less any moneys or benefits received or to be received by Oakwell under the Licence Agreement. It did not. Viewed in this way, the judgment rendered is consistent only with the trial judge having rejected EnerNorth's submissions on the mitigation/set-off issue that were clearly put before him.

[73] I realize that the $350,000 deduction is at odds with the rejection of EnerNorth's position. However, I do not view it as either an acceptance of EnerNorth's mitigation/set-off position (for the reasons outlined above) or an indication that he was only dealing with payments already received by Oakwell from VBC and leaving the issue of what was to be done with future payments to a future determination.

[74] As I read the judgment, the trial judge simply reduced the amount of the award by the two conceded amounts because Oakwell had voluntarily agreed to those reductions. The trial judge made no finding that Oakwell was obliged to make the deduction or that any amounts received under the Licence Agreement should be set-off and, as I have explained, his judgment as a whole is incompatible with such a conclusion. His judgment is very full and thorough. In my view, it makes no sense for him to have rejected EnerNorth's defence and dismissed its counterclaim -- both of which he did -- without also rejecting the mitigation/set-off argument. I am not convinced that he left open to future proceedings the resolution of whether [page20]the bulk of the moneys that were the subject of the debate (the US$1,650,000 and US$4 million) were to be set-off against the Settlement Agreement damages and/or disgorged.

[75] In the end, I am satisfied that the mitigation/set-off issue was both fully argued and determined in the Singapore proceedings. EnerNorth's creditors are barred from re-litigating that very issue in their efforts under s. 135(5) of the BIA to accomplish what EnerNorth failed to do in the Singapore courts and the Ontario courts.

IV. Disposition

[76] For the foregoing reasons, I would dismiss the appeal.

[77] Oakwell is entitled to its costs of the appeal, payable jointly and severally by all appellants, and fixed in the amount of $13,500 inclusive of fees, disbursements and GST.

Appeal dismissed.

Notes

Note 1: This statement, as she indicated, is adopted from Las Vegas Strip Ltd. v. Toronto (City) (1996), 30 O.R. (3d) 286, [1996] O.J. No. 3210 (Gen. Div.) (Sharpe J.), affd (1997), 32 O.R. (3d) 651, [1997] O.J. No. 1033 (C.A.).

16

Universal Am-Can Ltd. v. Ontario (Municipal Board), [2001] O.J. No. 3615

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court

McRae J.

Heard: September 12, 2001.

Judgment: September 13, 2001.

Court File No. 604/00

OMB Case No. PL000627

[2001] O.J. No. 3615 | 21 M.P.L.R. (3d) 250 | 108 A.C.W.S. (3d) 385

Between Universal Am-Can Ltd. (appellant), and Tornorth Holdings Ltd., Brampton (City of), Customized Transportation Ltd. and Daimler Chrysler Canada Ltd., (respondents)

(11 paras.)

Case Summary

Real property tax — Assessment appeals — Appeals to the courts — Leave to appeal.

Motion by Universal for leave to appeal two decisions of the Municipal Board. The Board found that the issues were not res judicata.

HELD: Motion dismissed.

There was no important issue of law. Res judicata and issue estoppel applied to the Board. The Board correctly found that the second application before it was substantially different from the earlier application and so res judicata did not apply. There was no reason to doubt the correctness of either of the decisions.

Counsel

Ron Sleightholm, for the appellant. T.J. Hill and P. Foran, for the respondent, Tornorth Holdings Ltd. F. Handy, for the respondent, Brampton (City of).

McRAE J. (endorsement)

1 This is a motion for leave to appeal to the Divisional Court two decisions of the Ontario Municipal Board.

2 The same issues were raised with respect to both motions. They were argued together.

3 The case has a long and tortured history. There have been two full hearings before the Board, a short application to the Board for a ruling that the issues were res judicata, plus an earlier application to the Divisional Court and now this motion for leave to appeal the final decision of the Board, along with leave to appeal the Board's decision that the issues are not res judicata.

4 The test in a motion for leave is not in dispute.

5 The applicant must satisfy the Court that there is a question of law of sufficient importance to merit the attention of the Divisional Court. (See, Toronto v. Torgan Developments *(1990), 47 M.P.L.R. 7*, 30 O.A.C. 318 (Callaghan C.J.H.C.).

6 The applicant must also show that there is reason to doubt the correctness of the decision - not that the decision is probably wrong - but only to doubt the correctness of the decision.

7 I agree with Montgomery J. in Toronto v. Social Housing Coalition *[1993] O.J. No. 2289*, at para. 4 (Div. Ct.), where he stated:

> The planning process and the municipal legislative factors which are necessary in developments of this kind are peculiarly and expressly, by statute, within the province of the Board. In my view it is not appropriate that the court intervene, save in the clearest case.

8 The applicant has failed to meet the test for leave on either basis.

9 There is no important issue of law. It is undisputed that res judicata and issue estoppel apply to the Board. The Board recognized this, as can be seen in Mr. Makuch's decision of September 7, 2000. Simply put, he found that the second application was substantially different from the earlier application and so res judicata did not apply.

10 This, in my view, was a correct interpretation of the law and there is no basis to conclude that there is reason to doubt the correctness of either of the decisions.

11 The applications for leave are dismissed with costs to the Respondent, Tornorth Holdings Ltd., fixed at $2,500 and costs to the City of Brampton fixed at $2,000.

McRAE J.

17

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Elsner v. British Columbia (Police Complaint Commissioner),* 2018 BCCA 147

Date: 20180419
Docket: CA44393

Between:

Chief Constable Frank J. Elsner

Respondent
(Petitioner)

And

The Police Complaint Commissioner

Appellant
(Respondent)

And

Mayors Barbara Desjardins and Lisa Helps in their capacity as Internal Discipline Authority

Respondents
(Respondents)

Restriction on publication: This file is partially sealed and there is a publication ban of the names of the individuals referenced as Officer A and Officer B, pursuant to an order dated April 12, 2017, and until further order of the Court.

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2017 (*Elsner v. British Columbia (Police Complaint Commissioner)*, 2017 BCSC 605, Vancouver Registry Docket S162351).

Counsel for the Appellant:	D.K. Lovett, Q.C. B. Martland
Counsel for the Respondents, Barbara Desjardins and Lisa Helps:	J.M. Doyle
Counsel for the Attorney General of British Columbia:	S. Bevan

Place and Date of Hearing:	Vancouver, British Columbia March 16, 2018
Place and Date of Judgment:	Vancouver, British Columbia April 19, 2018

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Fitch

Summary:

CA sets aside chambers judge's order which quashed, in part, Police Complaint Commissioner's order for external investigation into conduct of Chief Constable of the Victoria Police Department pursuant to s. 93 of Division 3 of Part XI of the Police Act*. Conduct concerned Twitter communications between Chief Constable and spouse of an officer under his command. Conduct was originally addressed as "internal discipline matter" pursuant to Division 3 of Part XI of the Act. Chambers judge erred in applying standard of review of correctness. General rule that a tribunal's interpretation of its own statute is afforded deference was not displaced. The PCC's decision to order an external investigation after the matter had been addressed internally was based on a reasonable interpretation of s. 93. PCC's conclusion that the reputation of the administration of justice may require a more open investigation than under Division 6 of Part XI lay within the bounds of reasonableness. While further investigation would not further underlying principles of finality and judicial economy, order did not amount to abuse of process by re-litigation – or "re-investigation." Nevertheless, CA queried whether the time and expense of another investigation was warranted given Chief Constable had resigned; the alleged misconduct was mainly an exchange of "Twitter" messages; and important personal and privacy interests would suffer in an external investigation.*

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In this appeal, the Court is asked to address once again the dense and complicated procedures set out in Part XI of the *Police Act*, R.S.B.C. 1996, c. 367 for dealing with allegations of misconduct on the part of police. As is well known, and as this court recounted in *Florkow v. British Columbia (Police Complaint Commissioner)* 2013 BCCA 92, the question of how best to address and resolve such complaints was the subject of various reports and enquiries over the 1990s and the first decade of this century. The last of these was the *Report on the Review of the Police Complaint Process in British Columbia* by Mr. Josiah Wood, Q.C. (as he then was). It was released in February 2007, and most of its recommendations were adopted when the Legislature enacted Part XI: see S.B.C. 2009, c. 28. It came into force on March 31, 2010 and has not been changed in any substantive way since then.

[2] Under Part XI, the Police Complaints Commissioner ("PCC"), who is an officer of the Legislature, has a 'gatekeeper' role aimed at "ensuring that misconduct on the part of police is appropriately dealt with in the public interest and in accordance with

the *Act*". (*Florkow*, at para. 2.) Part XI creates three "streams" or processes: "public trust complaints", dealt with under Division 3; "internal discipline matters", dealt with under Division 6; and "policy or service complaints", dealt with under Division 5. Since this case does not involve a policy or service complaint, I need not describe Division 5 here.

[3] As will be explained in greater detail below, Divisions 3 and 6 are very different. Division 3 consists of over 75 complicated sections. It contemplates a series of steps to be taken by various "authorities" in investigating, reporting on and reviewing complaints of "misconduct" – defined generally to mean "public trust offences" – on the part of police. The PCC must make decisions within the specified time limits at various stages of the process, which may or may not bring the matter to an end. If the process continues to the final stage, a full public hearing before a retired judge may be convened. Division 6, in contrast, consists of only three sections. It contemplates that an "internal discipline authority" – in this case, the chair of the municipal police board that employs the police officer (or "member") whose conduct is at issue – will act in accordance with procedures previously established by the board for internal discipline matters. The authority must provide its final decision and any recommendations to the PCC, but the Commissioner is not given any (express) authority to reject the decision or to require that it be reviewed further.

[4] In the case at bar, the conduct at issue was *not* the subject of a complaint under the *Act*; nor did it involve conduct by a police officer in carrying out police duties or interacting with the public. Instead, it involved conduct of the kind that may occur in any workplace – a flirtation between two people, both married. In this instance, the "relationship" was found not to have gone beyond some "Twitter" messages and one awkward meeting in his office when she turned up unexpectedly. Unfortunately, one party was a chief constable; the other ("Officer A") was a police officer. She was not under his command, but was the spouse of "Officer B", who *was* under the Chief Constable's command. It is this fact that arguably takes his conduct

outside the realm of ordinary workplace relationships and that has made it a matter of concern to other members serving with Officer B.

Statutory Context

Definitions

[5] Before recounting the facts in detail, however, it may be useful to describe the statutory context as it relates to the two types of processes in Divisions 3 and 6 of Part XI. I note first the following definitions in s. 76 that are relevant to this appeal:

> **"internal discipline matter"** means a matter concerning the conduct or deportment of a member that
>
> (a) is not the subject of an admissible complaint or an investigation under Division 3, and
>
> (b) does not directly involve or affect the public;
>
> **"member"** means a municipal constable, deputy chief constable or chief constable of a municipal police department;
>
> **"misconduct"** has the same meaning as in Division 2.

Section 77(1) in Division 2 defines "misconduct" to mean:

> (a) conduct that constitutes a public trust offence described in subsection [77] (2), or
>
> (b) conduct that constitutes
>
> (i) an offence under section 86 or 106, or
>
> (ii) a disciplinary breach of public trust described in subsection [77](3).

Section 77 continues:

> (2) A public trust offence is an offence under an enactment of Canada, or of any province or territory in Canada, a conviction in respect of which does or would likely
>
> (a) render a member unfit to perform her or his duties as a member, or
>
> (b) discredit the reputation of the municipal police department with which the member is employed.
>
> (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

> (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,
>
> (i) intentionally or recklessly making an arrest without good and sufficient cause,
>
> (ii) in the performance, or purported performance, of duties, intentionally or recklessly
>
> (A) using unnecessary force on any person, or
>
> (B) detaining or searching any person without good and sufficient cause, or
>
> (iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;
>
> . . .
>
> (h) "discreditable conduct", which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:
>
> (i) acting in a disorderly manner that is prejudicial to the maintenance of a discipline in the municipal police department;
>
> (ii) contravening a provision of this *Act* or a regulation, rule or guideline made under this *Act*;
>
> (iii) without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada.
>
> [Emphasis added.]

I note that there is no allegation in this case of any "offence under an enactment of Canada" or the Province.

Public Trust Complaints Under Division 3

[6] Division 3 of Part XI, headed "Process Respecting Alleged Misconduct", deals with complaints concerning "any conduct of a member that is alleged to constitute misconduct". (My emphasis.) Such a complaint may be made directly to the PCC or to any of the persons described in s. 78(2)(b). On receipt of a complaint, the PCC

must determine whether it is admissible or inadmissible under s. 82, subsection 2 of which states:

> (2) A complaint or part of a complaint is admissible under this Division if
>
> (a) the conduct alleged would, if substantiated, constitute misconduct by the member,
>
> (b) the complaint is made within the time allowed under section 79(1) or (2), and
>
> (c) the complaint is not frivolous or vexatious. [Emphasis added.]

[7] Conversely, a complaint is inadmissible insofar as it relates to the matters set out forth in s. 82(3):

> (3) A complaint or a part of a complaint is inadmissible under this Division insofar as it relates to any of the following:
>
> (a) the general direction and management or operation of a municipal police department;
>
> (b) the inadequacy or inappropriateness of any of the following in respect of a municipal police department:
>
> (i) its staffing or resource allocation;
>
> (ii) its training programs or resources;
>
> (iii) its standing orders or policies;
>
> (iv) its ability to respond to requests for assistance;
>
> (v) its internal procedures.

Inadmissible complaints are required to be processed by the board of the relevant police department under Division 5 of Part XI.

[8] Division 3 goes on to make detailed provision for the investigation of admissible complaints that are not resolved by mediation or other informal means under Division 4. Where the complaint concerns the conduct of a chief constable or former chief constable, the PCC must direct that the investigation be carried out by a constable of an external force appointed by a chief constable or by a special provincial constable: s. 91(1).

[9] Since no complaint was formally made in this case, s. 93 is also relevant and indeed is relied on heavily by the PCC. It provides in part:

> (1) Regardless of whether a complaint is made or registered under section 78, if at any time information comes to the attention of the police complaint commissioner concerning the conduct of a person who, at the time of the conduct, was a member of a municipal police department and that conduct would, if substantiated, constitute misconduct, the police complaint commissioner may
>
> (a) order an investigation into the conduct of the member or former member, and
>
> (b) direct that the investigation into the matter be conducted under this Division by any of the following as investigating officer:
>
> (i) a constable of the municipal police department who has no connection with the matter and whose rank is equivalent to or higher than the rank of the member or former member whose conduct is the subject of the investigation;
>
> (ii) a constable of an external police force who is appointed for the purpose of this section by a chief constable, a chief officer or the commissioner, as the case may be, of the external police force;
>
> (iii) a special provincial constable appointed for the purpose of this section by the minister.
>
> (2) In making an appointment under subsection (1)(b)(iii), the minister must consider the recommendations, if any, of the police complaint commissioner.
>
> . . .
>
> (9) The police complaint commissioner may provide information respecting an investigation under this section to any persons who, in the police complaint commissioner's opinion, have a direct interest in the matter.
>
> (10) In providing information under subsection (9), the police complaint commissioner may sever any information that must or may be excepted from disclosure by the head of a public body under Division 2 of Part 2 of the *Freedom of Information and Protection of Privacy Act*.

[10] The balance of Division 3 goes on to provide for the multi-stage process I have mentioned. In *Florkow*, we set out those stages at paras. 8–11, to which the reader is referred. We also summarized the process as follows:

> The process established by Part XI for dealing with complaints of police misconduct encompasses several stages – the investigation of a complaint by an investigating officer ("IO"); the review of the IO's final investigative report by a "discipline authority" ("DA") and, where the DA considers that the conduct of the police officer ("member") constitutes misconduct, the convening of a discipline proceeding; the review of a DA's 'no misconduct' determination by a retired judge (who becomes the DA) where the PCC considers the first DA's determination to be "incorrect"; the preparation of a disposition report by the DA following a discipline proceeding, and his or her determination of appropriate disciplinary measures; and in certain circumstances, the arranging of a "review on the record" or a public hearing

> by an "adjudicator" (who is also a retired judge). Where at the end of the investigative stage or at the end of a disciplinary proceeding, the decision-maker finds that the conduct complained of does not constitute misconduct, the Act generally brings the process to an end by stating that the decision is "final and conclusive" and "not open to question or review by a court of law". An exception is made at the end of the investigative stage, however, if the PCC takes certain measures within the time specified in the *Act*: see s. 112(5). [At para. 3.]

[11] At whatever stage the process ends, the "discipline authority" may determine and apply any of the disciplinary or corrective measures set out in s. 126(1), which range from dismissal to giving advice to the member (or former member: see s. 127). The PCC receives a copy of the authority's conclusion and reasons, and unless the PCC arranges a public hearing or review on the record, the authority's decision is "final and conclusive." (s. 133(6).)

[12] This court held in *Florkow* that the PCC did not have a 'stand-alone' or inherent discretion to order a public hearing, as the PCC had had under the previous legislation. The fact that the 20-day time limitation specified in s. 117(3) had passed without the PCC's having acted to appoint a retired judge to determine whether the conduct in question 'appeared to' constitute misconduct, meant that the PCC lacked the authority to convene a public hearing: see para. 61. The Court declined to infer the existence of an inherent jurisdiction that would permit the PCC to bypass the "very detailed provisions" of Part XI. (See also *Bentley v. Police Complaints Commissioner* 2014 BCCA 181.)

Internal Discipline Matters Under Division 6

[13] Division 6 of Part XI deals with "internal discipline matters", which s. 76 defines as follows:

> "internal discipline matter" means a matter concerning the conduct or deportment of a member that
>
> (a) is not the subject of an admissible complaint or an investigation under Division 3, and
>
> (b) does not directly involve or affect the public. [Emphasis added.]

[14] As mentioned earlier, Division 6 is consists of only three sections. Section 174 sets out the meaning of "internal discipline authority". Where the conduct of a chief constable is at issue, the authority is "the chair of the board of the municipal police department with which the member is employed." The remaining two sections of Division 6 state:

> 175 (1) A chief constable of a municipal police department and the chair of the board of the municipal police department must establish procedures, not inconsistent with this Act, for dealing with internal discipline matters and taking disciplinary or corrective measures in respect of them.
>
> (2) The procedures established under subsection (1) take effect after
>
> (a) a copy of the procedures is filed with the police complaint commissioner, and
>
> (b) the board of the municipal police department concerned approves the procedures.
>
> (3) An internal discipline authority, the board and any arbitrator that may be appointed under the grievance procedure of the collective agreement may use, but are not restricted by,
>
> (a) Division 2 to determine standards against which the conduct or deportment of a member may be judged, and
>
> (b) section 126 to determine appropriate discipline in respect of the matter.
>
> (4) The internal discipline authority must provide the police complaint commissioner with a copy of
>
> (a) any recommendation on disciplinary or corrective measures arising from an internal discipline matter, and
>
> (b) the final decision reached by the internal discipline authority, the board or the arbitrator.
>
> (5) On request of the police complaint commissioner, an internal discipline authority must provide any additional information or records respecting an internal discipline matter that are in the possession or control of the municipal police department concerned.
>
> (6) The internal discipline authority may determine any issue respecting a member's competence or suitability to perform police duties that arises in an internal discipline matter.
>
> 176 (1) A chief constable of a municipal police department may delegate to a deputy chief constable or senior officer of the municipal police department any of her or his powers or duties as internal discipline authority in a member's case under this Division.
>
> (2) A delegation under this section must be in writing, and the chief constable making the delegation must, as soon as practicable after the delegation is

> made, notify the police complaint commissioner and the member concerned of that delegation.
>
> [Emphasis added.]

[15] The Internal Discipline Rules of the Victoria Police Department ("VPD") contemplate that the "discipline authority" in relation to conduct of a chief constable – the chair of the employer police board – may order an investigation if he or she becomes aware there may be "grounds to discipline or dismiss" a member. The investigation must be carried out by a person of equal or higher rank than the member.

[16] The Rules include a directive that members may use Internet access at the VPD only for business purposes, and may access social media on a computer owned by the Department, only for investigational purposes. Members are also warned that they have no reasonable expectation of privacy and that "All uses of social media must meet the ethical standards consistent with the expectations of [VPD] employees."

Factual Background

[17] Turning next to the facts of this case, I note that this court has had access to certain material that is subject to a sealing order made by the court below on October 21, 2016. The Supreme Court also imposed an interim publication ban with respect to the names of Officers A and B, which ban is still in force. (See 2016 BCSC 1914 at paras. 39–45.) In the final judgment that is the subject of this appeal, the chambers judge continued the ban with respect to the identity of Officers A and B, but left it to the PCC to decide whether information obtained from a search of the Chief Constable's Twitter account should be publicly disclosed. In the Court's words, "the Commissioner is permitted to conduct the External Investigation to the extent allowed in these reasons and make what use he needs of those messages in the course of that investigation, consistent with the *Act* and the publication ban ordered herein." (At para. 120.)

[18] The respondents Helps and Desjardins are the mayors of Victoria and Esquimalt respectively, and are co-chairs of the combined Victoria and Esquimalt Police Board. (The board of each police department is the employer of police officers, including chief constables: see s. 26(3) of the *Act*.) In August 2015, the Mayors received information (from a source that has not been disclosed) that the Chief Constable had, in the words of the chambers judge, "exchanged Twitter messages with a police officer ('Officer A') who was employed by another police department, but who was the spouse of a member of the VPD ('Officer B') serving under the petitioner." (At para. 6.) Mayor Desjardins deposed that she contacted legal counsel, Ms. McNeil, and instructed her to contact the PCC for "direction and advice". Neither of the Mayors had been involved in a matter of this kind and thus, Mayor Desjardins deposed, they were "very reliant" upon the Office of the Police Complaint Commissioner. The Mayors arranged for the delivery of copies of the Twitter messages in question to the PCC's office for review on or about August 31, 2015 in preparation for a meeting with him and his staff. Again as deposed by Mayor Desjardins, the contents, time, date and Twitter "handle" were all apparent on the face of the messages.

[19] Due to the illness of one participant, the meeting took place by telephone on the same day with the PCC and his deputy, Mr. Woods. According to Mayor Desjardins, the PCC had already read the messages; according to the deputy PCC the messages were read over the phone to him. The focus of the meeting was whether the matter should proceed as an internal discipline matter or one of breach of public trust. Evidently, the Mayors believed the former course should be taken. The PCC agreed to this alternative, subject to two conditions. Major Desjardins recalls these conditions as follows:

> 14. The PCC told us that the matter could proceed as an internal discipline matter if:
>
> > a. we first spoke to John Doe [Officer B] and determined whether he wanted to proceed with the matter as one of internal discipline or public trust. The PCC advised that if John Doe wanted to proceed with the matter as a public trust matter, it would proceed as such; otherwise, I understood the PCC agreed that the matter would proceed as an internal discipline matter;

> b. we informed the Board in general terms of the allegations and updated the Board during the course of the matter.

The PCC's recollection is somewhat more elaborate:

> I acceded to the request of counsel for the Co-Chairs to allow this matter, initially, to proceed in the internal discipline process. My decision was based on the course of action proposed by counsel for the Co-Chairs, the privacy interests involved, and the requirement that two preconditions be met by the Co-Chairs. These conditions could have an impact on the information available in determining whether the matter should be dealt with through the internal process or by way of disciplinary breach of public trust. They were as follows:
>
> | | |
> |---|---|
> | Precondition 1 | There had to be a full and continuing disclosure of the allegations and progress of the investigation to the other Victoria Police Board members. |
> | Precondition 2 | There had to be disclosure of the allegations to the Member [Officer B] serving under the command of Chief Constable Elsner, and the Co-Chairs should obtain the Member's [Officer B's] informed views as to whether he wished to initiate a complaint or request a public trust investigation under the *Police Act*. |

[20] Although the Mayors were "extremely uncomfortable" with the idea of meeting with Officer B to solicit his views on how the matter should proceed, they did so immediately. They informed him that there was evidence the Chief Constable "could be having 'a relationship' with [Officer A]". They did not reveal the contents of the Twitter messages. Officer B was upset and said he wanted to talk to his wife. Later the same day, the Mayors met again with him. He said he had spoken with the Chief Constable about the matter and that he, Officer B, "did not want a public trust investigation. To the contrary, [Officer B] did not want any investigation at all, citing the well-being of his family." The Mayors explained that notwithstanding this reaction, an investigation had to be held and that they would advise the PCC that he, Officer B, "did not want the matter to be one of public trust. [Officer B] expressed his agreement. [Officer B] told us he wanted this matter to remain confidential so that his family's privacy was not compromised."

[21] Counsel for the Mayors passed along the information concerning Officer B's wishes and, since they believed the PCC's second pre-condition had been met, the

Mayors embarked on an internal investigation under Division 6. They appointed an independent investigator who was a lawyer experienced in police matters. As noted by the chambers judge, the investigator later confirmed in her preliminary report that her mandate had been to investigate two issues:

> a) whether the petitioner engaged in an inappropriate relationship with Officer A; and
>
> b) whether the petitioner improperly used the Victoria Police Department's social media account or accounts. [At para. 11.]

The Mayors also held an emergency telephone meeting of the Police Board and informed them of the allegations against the Chief Constable and the convening of the internal investigation.

[22] Some weeks later, on October 27, 2015, Mr. Ryan, the chair of the governance committee of the Board, wrote a somewhat intemperate letter to the Mayors, with a copy to the PCC. Among other things, he expressed the view that any investigative report in respect of a discipline matter involving the Chief Constable must be "promptly provided" to the Board, that the Board should meet *in camera* to "comprehensively discuss" the results of any such report, and that the final decision should be made by the Mayors "only after full consultation with the Board." (No particular section of the *Act* was cited for these propositions, which would appear to be contrary to s. 174.) The chair sent copies of his letter to the Police Board members.

[23] Although the PCC was away on vacation, the deputy PCC wrote to counsel for the Mayors the next day, expressing the PCC's "concern" that the Police Board had not been fully informed of the matter. (It may be that he was unaware of the telephone meeting the Mayors had held with the Board when the investigation was commenced.) The letter continued:

> If the chairs maintain that there is no need to inform the full board, the PCC is going to revisit his decision. If there is no oversight provided by the board as contemplated in the legislation, then the PCC feels the public trust investigation may be required to ensure proper oversight of this very serious matter. The PCC will be back in the office on Monday next if you wished to discuss with him personally. [Emphasis added.]

After further emails between Mr. Woods and counsel for the Mayors, however, Mr. Woods advised counsel for the Mayors on October 29, 2015 that he had received word from Mr. Ryan that the issue had been "resolved".

[24] The chambers judge below inferred from the PCC's later order of December 18, 2015 that:

> ….. the Commissioner was satisfied that the two preconditions were met … [A]fter referring to the two preconditions as set out above, he wrote:
>
> > The following day our office was advised by counsel for the Co-Chairs that the remaining Police Board members had been briefed, and that the affected Member did not wish an investigation. On the understanding that my two conditions had been satisfied, I supported the decision to proceed with this matter as an internal discipline matter. It was my expectation that if the investigation revealed evidence of conduct that could constitute a disciplinary breach of public trust, the Co-Chairs would raise the matter with our office.
>
> [At para. 14; emphasis added.]

[25] The independent investigator proceeded to interview relevant witnesses and on November 16, 2015, provided her "preliminary report" to the Mayors. The chambers judge below summarized her findings as follows:

> In her report, the independent investigator found that the petitioner did not have a sexual relationship with Officer A, but that he did exchange "tweets" with her that were sexually charged and that the exchange constituted an inappropriate relationship.
>
> The independent investigator concluded that it was inappropriate for the petitioner to have engaged in the Twitter activity during working hours using a departmental device. She also found that the petitioner's Twitter account was not a personal account and was subject to the Victoria Police Department's Social Media Policy requiring its use to meet ethical standards consistent with the expectation of departmental employees. She found that the Twitter messages sent between the petitioner and Officer A were clearly inappropriate and did not meet the required ethical standards.
>
> The independent investigator also found that the petitioner's conduct fell below the standard expected of a chief constable and was potentially damaging to the reputation of the Victoria Police Department, the petitioner's reputation and to his credibility as a leader of the force, as well as damaging to a long-term employee of the force under his command. She concluded that the petitioner's conduct constituted misconduct within the meaning of the *Act* and amounted to discreditable conduct within the meaning of Part 11, Division 2 (Misconduct) of the *Act*, in that it would be likely to bring discredit on the department. [At paras. 15–17; emphasis added.]

[26] The investigator also found in her report that the Chief Constable had finally realized there could be "serious consequences" to the "activity" and had broken off communications with Officer A and "defriended" her in late June (the month in which the direct Twitter communications had become of a personal nature.) As well, the investigator confirmed that Officer A had refused to be interviewed, but that Officer B had been interviewed. He had told the investigator he understood from both his wife and the Chief Constable that "*no inappropriate communication or contact of any sort*" had taken place between them. The investigator found that the Chief Constable had not fully informed Officer B about what had occurred.

[27] The Mayors provided the Chief Constable with a copy of the report. Subsequently they received the written submissions of counsel on his behalf. After considering same, the Mayors made their final decision. Mayor Desjardins deposed:

> 29. … As the Discipline Authority we (not the Board) decided that we would accept the findings of the independent investigator. We determined that the conduct of Chief Elsner was discreditable conduct which fell below the ethical standard expected of a police chief, was potentially damaging to John Doe and, more generally, was potentially damaging to the reputation of the VicPD and to the reputation and credibility of Chief Elsner himself as a leader of the VicPD and its disciplinary authority. We were of the view that the impugned conduct, while worthy of discipline, was at the low end of the scale and we decided, with the benefit of information from our counsel who had reviewed similar disciplinary issues, that an appropriate censure for the conduct in issue was a written letter of reprimand to be placed on the Petitioner's personnel file. [Emphasis added.]

[28] The Mayors met with the Chief Constable on the morning of December 4, 2015 to inform him of their proposed letter of discipline. He accepted the proposed discipline, although expressing "dissatisfaction" with the investigator's report. He told the Mayors he had been in touch with Officer B "with a view to repairing their relationship going forward", as a result of which advice the Mayors amended their letter of reprimand slightly to reflect that fact[1]. As far as the Mayors were concerned, this was the "final determination" of the matter.

[1] I do not regard this change to make the letter more accurate as meaning that the Mayors and Chief Constable reached a "negotiated settlement", or that the contents of the (final) letter were "uncertain", as counsel for the PCC asserted in this court.

[29] According to affidavit evidence filed on behalf of the Chief Constable, he disagreed with many of the findings and conclusions contained in the investigator's report, which he described as "fundamentally flawed," and he asserted that the Twitter exchange had been accessed illegally by persons unknown. But, since he was assured the report would not be released to the public and he wanted to "get on with my work", he says he decided to accept the Mayors' decision. He instructed his lawyer not to apply for judicial review or otherwise appeal the decision.

The PCC's Order

[30] The matter, however, was not over. On December 4, as a result of media inquiries, the PCC asked the Mayors about the status of the investigation. They told him it had been completed and that they had decided a letter of reprimand was to be placed on the Chief Constable's record. The PCC asked for all records relating to the investigation (relying on s. 175(5) of the *Act*) and a copy of the letter of reprimand.

[31] Two days later, the Chief Constable received a call from the *Vancouver Sun* asking for his comments on the report that he was "having an affair with a member of another police department". He later met with media personnel and gave his version of the circumstances surrounding his exchange of Twitter messages with Officer A and of the results of the disciplinary investigation. He said he had spoken to Officer B, who "had wanted to know if there was an inappropriate relationship and I had assured him there had not been".

[32] On December 9, 2015, the Victoria City Police Union issued a public statement to the effect that based on the Chief Constable's conduct, which had been found to be improper, the Union had "no confidence" in his ability to lead the Department. The Union wrote to the PCC requesting "an independent Public Trust investigation into these matters."

[33] On December 18, 2015, the PCC ordered two external investigations into Chief Constable Elsner's conduct under s. 93 of the *Act* (reproduced above at para.

9). One of the investigations is irrelevant to this appeal. With respect to *this* matter, his order, which he chose to make public under s. 95(2), provides a lengthy explanation for, *inter alia*, the change from his position in October that an internal disciplinary process would be appropriate, to the position that an external inquiry was now necessary. In the text of the order, the PCC recalled, for example, the telephone meeting with the Mayors and their counsel on August 31, 2015:

> … our meeting took place by teleconference, in which some additional information was provided. At this point, the available information was limited; there is no information available at that time as to the ownership, operations and privacy related to the social media account. There was no information with respect to whether the [Twitter] communications took place while [the Chief Constable was] on duty or off duty, and whether any municipal police equipment was used to facilitate the communications. These considerations were relevant to determining whether this matter involved a disciplinary breach of public trust and whether it should be dealt with under the public trust process under the *Act*. [Emphasis added.]

The PCC described his role with respect to internal disciplinary proceedings as follows:

> It is an after-the- fact role, and in this respect, it may be distinguished from the way public-trust matters are handled. In the public-trust process, our office has the jurisdiction to provide active oversight of the investigation and to request any and all information as it becomes available. In contrast, in the internal discipline process, the request for the investigation report, and all additional information or records, can only be made by our office at the *conclusion* of the internal discipline process, unless voluntarily provided or disclosed by the co-chairs at an earlier time. [Emphasis added.]

[34] The PCC also suggested that “best practices” had not been followed in the investigation:

> In my view, based on the information and course of action provided by counsel for the Co-Chairs at the outset, this matter involved serious allegations. It involved an obvious potential for conflicting and controversial evidence amongst the witnesses and parties. It was my expectation that, at a minimum, all interviews would be audio recorded. Instead, I learned afterward, all the witness interviews were documented by handwritten notes made by the interviewer, and constituted summaries of the evidence. Furthermore, there was no opportunity provided to the witnesses to review the summaries of their interviews and raise any issues, nor a requirement for them to sign a document attesting to the accuracy of their evidence.

> My review also revealed that a number of obvious investigative avenues were not explored, some of which could have provided important corroborating and/or contradictory evidence. One material witness refused to cooperate with the investigation or participate in an interview. In my view, there were procedural options available that could have been explored to obtain the cooperation of this witness. The effect of the non-participation of an important witness was to leave an evidentiary gap on one side of the ledger, with the result that the accounts of other witnesses may have achieved a greater influence than had this evidence been available in the investigative process. [Emphasis added.]

[35] As well, the PCC said it appeared the Chief Constable had not been fully compliant *during the internal investigation* with the directions of the investigator (a) not to "speak to witnesses related to the investigation" (he had apologized to some witnesses for putting them in a difficult positon); and (b) to tell Officer B *all* that had happened between the Chief Constable and Officer A (the PCC suggested the Chief Constable had provided "false information" to Officer B). Further, the PCC asserted the Chief Constable had not been completely honest in answering the investigator's questions about what he had told Officer B. (Counsel before us likened these three allegations to charges of obstruction of justice.)

[36] Addressing his change of mind directly, the PCC stated:

> … while I appreciate that I was previously inclined to the view that the matter might be properly addressed through the internal disciplinary process, as this outline makes plain, the conditions sought for that approach were not met. Moreover, the facts of the case have changed significantly, and the information available now is different both in quantity and in character. Because section 93(1) of the *Police Act* speaks to the information that comes to my attention "at any time", I see it as not only appropriate, but necessary that I act based on my present understanding and view of the matter. [Emphasis added.]

Elsewhere in the order, the PCC emphasized his "oversight role" and the "processes in place… intended to maintain public confidence in the investigation of misconduct and the administration of the police disciplinary process. More broadly, this office is charged with an overarching public duty of ensuring the integrity of the police disciplinary process and fostering public confidence in this process."

[37] The order advanced *five* allegations of conduct that, the PCC stated, would constitute misconduct (as defined in the *Act*) if substantiated. They were the original 'charges' that had been investigated by the Mayors and the three new 'obstruction' charges:

> *1. Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did engage in conduct with the spouse of a member under his command which constituted a conflict of interest and/or a breach of trust, in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> 2. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did provide misleading information to a member under his command, in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> *3. Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did provide misleading information to an investigator in circumstances in which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> 4. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department: That Chief Constable Elsner did contact witnesses during the course of an internal investigation, which he was the subject of, contrary to the direction of the independent investigator and in circumstances which he knew, or ought to have known, would likely bring discredit to the Victoria Police Department.
>
> 5. *Inappropriate Use of Department Equipment and/or Facilities* pursuant to section 77(3)(c)(iv) of the *Police Act*: That Chief Constable Elsner did use police equipment and/or facilities of the Victoria Police Department for purposes unrelated to his duties as a member.

[38] The PCC appointed a retired judge as the discipline authority in respect of the proposed external investigation. His order was silent as to whether the internal investigation was to be considered somehow nullified or whether Mayors' letter of reprimand was to be suspended pending the further investigation.

Judicial Review

[39] On March 14, 2016, the Chief Constable petitioned the Supreme Court of British Columbia for an order quashing the PCC's order. The petition was heard in November 2016, by which time the Chief Constable had resigned from the police force.

The Chambers Judge's Decision on Review

[40] In his reasons (indexed as 2017 BCSC 605), the chambers judge below briefly summarized the facts before him and generally outlined the three "streams" in the *Act* for the processing of complaints. After noting the definition of "internal discipline matter", he observed:

> Public trust complaints involve conduct which directly involves or affects members of the public and are dealt with under s. 77 of the *Act.* Arguably, Officer A could be considered as a member of the public, but the Mayors and the Commissioner all appear to have initially accepted that the matter should be dealt with as a matter of internal discipline. [At para. 27.]

[41] The judge noted that Mr. Elsner had sought various forms of relief in his amended petition, but had advanced a narrower list of issues through counsel at the hearing. In a footnote, he had also said he would not advance issues raised in the pleading relating to the search of his electronic records and devices or issues relating to the appointment of the external investigator. (At para. 33.) In the result, counsel for Mr. Elsner confined himself in the court below to the following assertions:

> a) the Commissioner has no authority to initiate an external investigation in relation to matters that have been resolved through an internal discipline process; and
>
> b) the Commissioner is estopped from commencing his external investigation, based on promissory or issue estoppel, or abuse of process.

[42] The chambers judge began his discussion of the issues by listing the information that had been available to the PCC and which formed the "record" for purposes of this judicial review. These records are listed at para. 40 of his reasons. In addition there was "the planned course of action by the Mayors to proceed by way

of internal investigation on or about September 8, 2015" and the fact that Officer B preferred this course. The judge also noted that the PCC had not been provided with the independent investigator's *preliminary* report until about December 4, 2015. (As far as I can determine, his office did not request it until then.)

[43] With respect to the PCC's jurisdiction to order an external investigation, the chambers judge observed that since the PCC's order had been made under the authority of s. 93, it was necessary to interpret that section. He noted the definitions of "misconduct" in s. 77 and "internal discipline matter" in s. 76, observing that there was no "mutual exclusivity" between the two kinds of conduct. (At para. 47.)

[44] On the topic of standard of review, the judge reviewed *Dunsmuir v. New Brunswick* 2008 SCC 9. Mr. Elsner argued that according to para. 62 of *Dunsmuir*, courts should first decide whether the jurisprudence has already settled the applicable standard of review for a particular category of question "in a satisfactory manner". In his submission, this court had in *Florkow* and *Bentley* identified the standard of correctness as applicable to the PCC's decision to order a hearing.

[45] The Attorney General responded that this court's decision in *Florkow* had been "overtaken by subsequent developments in the law", in particular by the Supreme Court of Canada's decisions in *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)* 2015 SCC 45 at para. 27; *Canadian Broadcasting Corp. v. Sodrac 2003 Inc.* 2015 SCC 57 at para. 39; and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.* 2016 SCC 47 at para. 26. In each of these cases, the Court had concluded that the matters raised were not 'true' questions of jurisdiction. The chambers judge acknowledged that this court had referred in *Florkow* to *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* 2011 SCC 61, where Mr. Justice Cromwell had observed:

> Recast to side-step the language of "jurisdiction" or "*vires*", these two cases demonstrate that there are provisions in home statutes that tribunals must interpret correctly.
>
> The point is this. The proposition that provisions of a "home statute" are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is

> advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in "home" statutes are "exceptional" is not an answer to a plausible argument that a particular provision falls outside the "presumption" of reasonableness review and into the "exceptional" category of correctness review. Nor does it assist in determining by what means the "presumption" may be rebutted. [At paras. 98–9.]

[46] The chambers judge considered himself bound by *Florkow* and *Bentley*, both of which had in his analysis concluded that the PCC's jurisdiction to order investigations after the completion of earlier investigations under the *Act*, was to be reviewed on the correctness standard. (At para. 63.) Nevertheless, he also considered whether the question before him was a "true question of jurisdiction", in which case the presumption of reasonableness imposed by the Supreme Court of Canada in cases such as *Edmonton (City)* would be rebutted. On this point, the PCC asserted that he was entitled to deference in interpreting the scope of his authority under Part XI and that his decision should therefore be reviewed on the standard of reasonableness. Mr. Elsner on the other hand characterized the question before the Court as whether the PCC had had the "authority" (a less charged word than "jurisdiction") to institute the external investigation. In his submission, this question *was* one of true jurisdiction to be reviewed on a correctness standard.

[47] Having stated the parties' positions, the chambers judge concluded, without further discussion, that:

> Here, the question before me is whether under the *Act*, in particular given the wording of s. 93, it was within the scope of the Commissioner's authority to issue the Order for External Investigation following the completed internal discipline process. As in *Florkow*, this question does not relate to the way in which the Commissioner should undertake his investigation; rather, this is a matter of whether he had the authority in the first place to issue the Order for External Investigation.
>
> For these reasons, I am satisfied that the issue in this case is a true question of jurisdiction and should be reviewed applying a correctness lens. [At paras. 70–1; emphasis added.]

[48] Under the heading "Application of the Correctness Standard" the chambers judge noted Mr. Elsner's contention that because the key allegations to be considered in the external review had already proceeded through the internal

discipline process, the PCC had "no remaining jurisdiction" to order an external investigation of those allegations. As for s. 93(1) of the *Act*, the petitioner submitted that the phrase "at any time" referred to the time at which the relevant information came to the attention of the PCC. It did not, as the PCC argued, confer an "express and broad authority to independently order an investigation whenever he receives information that an officer has potentially misconducted himself or herself in a matter that would constitute a disciplinary breach of trust." (At para. 74.) Counsel for the Mayors also argued that if the PCC could undertake an external investigation into matters already determined in an internal discipline review, matters that had been investigated would never be finalized and could be open to external investigation indefinitely. This would not be consistent with two of the goals of Part XI, namely finality and efficiency.

[49] For his part, the PCC contended that:

> … given the scheme and object of Part II of the *Act*, the broad wording of s. 93, and the exercise of discretion by the [PCC] that may be involved in determining what constitutes an "internal discipline matter", it is a reasonable interpretation of s. 93 that the [PCC] may use the power to order an external investigation *further to* a completed Division 6 process – for example, to address new information that has come to light about alleged misconduct or to remedy deficiencies in the prior Division 6 process.
>
> [The PCC] contends that his oversight responsibilities would be rendered meaningless if he was unable to commence a public trust investigation where he is of the view that an internal investigation was somehow deficient. [At paras. 75–6; emphasis added.]

[50] Citing the "modern approach" to statutory interpretation (see *Bell ExpressVu Limited Partnership v. Rex* 2002 SCC 42 at para. 26), the chambers judge noted that in addition to allowing the investigation under Division 3 to proceed in the absence of a complaint, s. 93 "may arguably serve" as a way in which the Commissioner may exercise *ex post facto* oversight and remedial power in relation to an internal discipline process under Division 6. The judge said he was prepared to assume for purposes of argument that the PCC was "not powerless" to take further steps when "information, obtained by him via his internal discipline production powers, reviews

conduct which, if substantiated, could constitute a disciplinary breach of trust." (At para. 81.)

[51] In this case, new information allegedly obtained by the PCC under s. 175(5) had legitimately raised conduct concerns that *had not been directly investigated or dealt with by the Mayors*. In particular, although the investigator under Division 6 had commented on the allegations that Mr. Elsner had provided misleading information to her and to Officer B and had misconducted himself by contacting potential witnesses in the investigation, those allegations had not been a part of the internal discipline proceeding and therefore did not form the basis for disciplinary action under Division 6. The judge concluded that the PCC had been "entitled" to order an external investigation into Mr. Elsner's activities, "but only to the extent that the internal investigation and decision by the Mayors did not address the issues that the [PCC] has set out for the External Investigation." (At para. 84; my emphasis.)

Abuse of Process

[52] The chambers judge next turned to the petitioner's submission that even if the *Act* conferred the authority on the PCC to commence a public trust investigation in connection with a matter that had already been determined through the internal discipline process, he was estopped from doing so by promissory estoppel, issue estoppel or abuse of process. Promissory estoppel and issue estoppel were found not to be applicable; that conclusion is not challenged. Abuse of process is of course a wider doctrine and not subject to the technical constraints of finality and mutuality that apply to *res judicata* and other forms of estoppel.

[53] Counsel argued that it was in the interests of justice to apply abuse of process, given the "comprehensive nature" of the internal investigation and the Chief Constable's claim that he had been persuaded to "accept" the findings made by the Mayors on the understanding that the matter would then be concluded. (I note here that the Mayors did not, in law, require his 'consent' to the investigator's report or his 'acceptance' of their recommendation. Nevertheless, it had been open to him to

seek judicial review of the Mayors' decision – a right that was not subject to any time limitation: see s. 11 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.)

[54] The chambers judge cited *Toronto (City) v. CUPE Local 79*, 2003 SCC 63 for the proposition that abuse of process may apply in the administrative law context where re-litigation (or in this case, re-investigation) is "unfair to the point [of being] contrary to the interests of justice", "oppressive or vexatious" or "violates the fundamental principles of justice underlying the community's sense of fair play and decency". (See paras. 35–58 of *Toronto (City)*.) He also quoted para. 37 of *Toronto (City)*, where the majority approved the comments of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000) 51 O.R. (3d) 481 (C.A.) that:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.* See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.* [At para. 55–6 of *Canam*; emphasis by underlining added.]

The majority in *Toronto (City)* went on to observe that abuse of process has been applied where allowing the re-litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice. (At para. 37.)

[55] The chambers judge then concluded that the doctrine applied to the *first and fifth* allegations of misconduct set out in the PCC's order. In his analysis:

> In my view as the first and fifth allegations that are the subject of the impugned External Investigation were disposed of by the Mayors in a process that was acceded to by the Commissioner, the doctrine of abuse of process discussed in *Toronto (City)*, estops the Commissioner from ordering an external investigation into those allegations. I therefore quash that part of the Order for External Investigation issued December 18, 2015 by the Commissioner.

> I find, however, that the Commissioner is not estopped from ordering an external investigation into the remaining three allegations that are the subject of the impugned External Investigation. [At paras. 110–1; emphasis added.]

[56] In the result, the Court quashed the PCC's order dated December 18, 2015 for an external investigation, insofar as it related to the following allegations of misconduct:

> a) whether the petitioner committed discreditable conduct by exchanging messages with the spouse of a member under his command; and
>
> b) whether the petitioner used Victoria Police Department property or devices to exchange the messages set out in para. 1(a) and if so, whether he did so while on duty.

On Appeal

[57] The PCC appeals the chambers judge's order on the following two grounds:

> 1. The Court identified and applied the wrong standard of review to the PCC's section 93 decision; and
>
> 2. The Court incorrectly applied administrative law abuse of process principles and in any event further erred in principle by failing to address the factors for and against the exercise of the Court's discretion.

[58] In the PCC's submission, the standard of review applicable to the interpretation and application of s. 93 of the *Act* is one of reasonableness rather than correctness, and s. 93 may be reasonably interpreted to "permit the PCC to independently order an external investigation whenever he receives information about conduct which, if substantiated, would constitute a disciplinary breach of trust. A disciplinary breach of trust is not, by definition, an internal discipline matter." Ms. Lovett on behalf of the PCC acknowledged that the chambers judge's application of abuse of process was entirely separate from this first ground. Thus in order to succeed in this court, the PCC must show that both basic conclusions of the chambers judge were erroneous.

[59] Mr. Elsner was not represented and did not appear at the hearing of this appeal, and neither of the respondents addressed the question of abuse of process in their factums. However, it was not suggested that the argument has been

abandoned or that we should not address the PCC's second ground of appeal in the usual way.

Analysis

Preliminary Matters

[60] It is obvious that the role of the PCC under Part XI is different from that of most administrative tribunals. As we have seen, the PCC acts as a 'gatekeeper' in ensuring civilian oversight of police complaints. The PCC does not *adjudicate* complaints on their merits, although his or her view of the results of investigations undertaken under Division 3 dictates in some instances whether further investigation or review will be required. (See *Florkow* at para. 8.) The PCC's role is more executive or prosecutorial in nature – deciding whether complaints are admissible, whether investigations should be ordered, to what stage the processes should be pursued, and who should be appointed as "authorities" and "adjudicators" under the Act. It is for those appointees to address the merits of the complaints and to give their reasons therefor, which are protected by "final and binding" privative clauses in Division 3. Nevertheless, in his December order, the PCC did provide a lengthy explanation of why he had invoked s. 93 in this case.

[61] In *Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44, the Court said this about a similar tribunal:

> The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42. [At para. 56.]

From this the PCC submits that where, as here, the tribunal has an investigative role, impartiality and fairness concerns are "muted" – an argument supported by the cases discussed at paras. 72–89 of *Kyle v. Stewart* 2017 BCSC 522. Nevertheless,

a "general duty to be fair" still exists in situations such as this: *Nicholson v. Haldimand Norfold (Regional) Police Commissioners* [1979] 1 S.C.R. 311 at 324.

[62] The issue of the PCC's standing was not discussed by the court below, and was touched upon only briefly by counsel in their written arguments in this court. The PCC again cited *Ontario (Energy Board*), in which the Court confirmed that judges have a discretion to permit administrative tribunals to appear in court in connection with the judicial review of their decisions. In the Court's analysis:

> Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.
>
> Some cases might arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. [At paras. 53–4.]

[63] In support of his participation, the PCC emphasizes that unless he had opposed the petition, aspects of the application for judicial review would have gone unopposed. In this case, however, the Attorney General of the Province *also* appeared and made arguments very similar to those of the PCC on standard of review and the interpretation of s. 93. It is not clear why this was thought necessary.

[64] For their part, the Mayors adverted briefly to *Lowe v. Diebolt* 2014 BCCA 280. That case was decided against the PCC on the basis of delay, making it unnecessary for this court to reach a decision on the question of standing. The Court did note, however, that the arguments raised by the PCC had been directed at the substantive correctness of the conclusions of a retired judge under Part XI, had taken an adversarial approach to the member, and had thus raised concerns regarding the PCC's neutrality in complaint proceedings. (At para. 74.)

[65] In my view, some similar concerns regarding neutrality arise in this case. However, the Mayors did not contend that the appeal should be quashed due to lack of standing, and given the nature of the case, it is likely preferable to decide the appeal on its merits.

Standard of Review

[66] I turn, then, to the ever-present question of standard of review. The chambers judge below took the view that he was bound by this court's decisions in *Florkow* and *Bentley* to apply the standard of correctness to the question of whether the PCC had the "jurisdiction to commence a public trust investigation." (At para. 42.) On this point, the judge followed the direction given in *Dunsmuir* that:

> … the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [At para. 62.]

The judge also considered, at paras. 64–71, whether the question before him was a "true question of jurisdiction in its own right" and concluded that it was, with the result that the question should be reviewed "applying a correctness lens." (At para. 71.)

[67] It will be recalled that in *Florkow*, this court acknowledged that in *Alberta Teachers*, a majority of the Supreme Court of Canada had suggested that "the time may have come" to reconsider whether the "category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review". The majority went on to suggest that in 'unexceptional' situations, the interpretation by a tribunal of its own statute should be presumed to be a question of statutory interpretation subject to deference on judicial review. (At para. 34, quoted in *Florkow* at para. 34.) Accordingly, this court in *Florkow* applied *both* the correctness and reasonableness standards in ruling that the PCC could not 'leapfrog' or "override" various statutory conditions in Division 3 (including a time limitation) to order a public hearing at the time and in the circumstances he had. (See paras. 54–5.)

[68] This case is somewhat different from *Florkow*, however. The PCC was there asserting an *"inherent" authority* to direct a public hearing, rather than relying on a statutory provision. In the case at bar, the PCC relies on s. 93 (quoted above at para. 9), which on its face permits him to order an investigation "at any time information comes to his attention that would, if substantiated, constitute misconduct", and "regardless of whether a complaint is made". While I remain of the view that the question of whether an *inherent discretion or jurisdiction* exists is clearly (if not axiomatically) one of jurisdiction, it seems just as clear that the central issue in the case at bar is one of statutory interpretation. (See *Edmonton (City)* at para. 33; *Quebec (Attorney General) v. Guerin* 2017 SCC 42 at para. 34; *Atco Gas and Pipelines Ltd.* at para. 28.) I see no reason why what is now the general rule, or presumption, that a tribunal's interpretation of its home statute is to be reviewed on a standard of reasonableness, should not apply in this case. On this point, then, I disagree respectfully with the chambers judge's conclusion to the contrary.

Reasonableness and Reasons

[69] The next question is whether s. 93, reasonably interpreted, could be invoked in respect of alleged misconduct *after* an internal investigation *into the same conduct* has been concluded. The chambers judge below, applying a standard of correctness, did not answer this question directly, but stated:

> In addition to allowing the Division 3 process to be set in motion in the absence of a complaint, in appropriate circumstances s. 93 may arguably serve as a mechanism for the Commissioner to exercise *ex post facto* oversight and remedial power in relation to an investigation and discipline process that has proceeded at first instance under Part 11, Division 6 of the *Act.*
>
> I am prepared to assume for the purposes of this argument that the Commissioner is not powerless to take any further steps when information, obtained by him via his internal discipline production powers, reveals conduct which, if substantiated, could constitute a disciplinary breach of trust.
> [At paras. 80–1; emphasis added.]

It may be that his finding of abuse of process implies that he viewed the PCC's position as unreasonable. In any event, having found that the chambers judge

applied the incorrect standard, this court must determine whether the PCC's interpretation of s. 93 meets the deferential standard.

[70] I begin with the much-quoted passage from *Dunsmuir* concerning the standard of reasonableness and what underlies it:

> Tribunals have a margin of appreciation with the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> … deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. [At paras. 47–8; emphasis added.]

[71] In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, Abella J. for the Court cited with approval an article by Professor Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997) 279. Professor Dyzenhaus had explained how reasonableness applies to the reasons of administrative tribunals as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Quoted at para. 12 of *N.L.N.U.*; emphasis added.]

Abella J. then continued:

> This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized

> administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).
>
> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- 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. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> 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.
>
> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [At paras. 13–16; emphasis added.]

See also *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* 2013 SCC 36 at paras. 52–3; and *Construction Labour Relations Association (Alberta) v. Driver Iron Inc.* 2012 SCC 65 at para. 3.

[72] More recent decisions of the Supreme Court of Canada have debated the role of reasons in articulating the decision-maker's "outcome". In *Canada (Attorney General) v. Igloo Vikski Inc.* 2016 SCC 38, Brown J. stated that the tribunal's reasoning must exhibit "justification, transparency and intelligibility within the decision-making process" and that the "substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls

within a range of possible outcomes." (At para. 18; my emphasis.) Côté J. in dissent cautioned that an "indefensible process of reasoning cannot be saved by the mere fact that the outcome itself may be, in the end, an available one." (At para. 56.)

[73] In *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)* 2018 SCC 4, Wagner J. (as he then was) observed:

> These components of the Tribunal's reasoning formed one part of its justification for validating the band's claim under s. 14(1)(b). In my view, its decision as a whole is the appropriate frame of reference for considering "the existence of justification, transparency and intelligibility within the decision-making process": *Dunsmuir*, at para. 47. Meeting those criteria did not require the Tribunal to make an explicit finding on each constituent element or to provide all of the detail that a reviewing court would have preferred. In light of the nature of the process and the materials and submissions before it, the Tribunal's reasons adequately explain the bases of its decision that the band had made out valid grounds for a specific claim based on events in the Colony prior to Confederation. Though sparse on the issue of s. 14(2), the reasons taken as a whole, provide a reviewing court with an adequate account of why that decision was made that serves the purpose of showing whether the result falls within a range of possible outcomes. [At para. 107; emphasis added.]

[74] In *Delta Air Lines v. Lukács* 2018 SCC 2, Chief Justice McLachlin for the majority found that a decision of the Canadian Transportation Agency did not meet the standard of reasonableness. In response to the argument that the Court should "supplement" the Agency's reasons to uphold the decision as reasonable, the Chief Justice observed:

> … while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body. [At para. 24; emphasis added.]

Application to this Case

[75] The Mayors' main argument in this court was not so much a challenge of the PCC's interpretation of his statutory authority as it was an attack on the reasons given by him in the December order, described at paras. 33 to 35 above. Mr. Doyle on behalf of the Mayors focussed first on the PCC's statement that, on August 31, 2015 when he spoke with the Mayors, there was "no information available … as to

the ownership, operations and privacy related to the social media account", as to whether the Twitter communications took place when the Chief Constable was on or off duty, or as to whether any VPD equipment had been used to facilitate such communications. In fact, the Mayors submit, this information *was* "available". In any event, the subjects of ownership of the Twitter account and on/off duty communications were investigated and reported on by the Mayors and indeed constituted one of their two mandates. (See para. 21 above.) The investigator made the following findings on this topic in her preliminary report:

> It is the Chief's position that the direct messages are personal communications between two individuals and therefore cannot be considered work related.
>
> As previously stated, this is not a personal Twitter account but rather a Twitter account set up for him as Chief of the VPD. All communications on that Twitter account identify him as Chief of the VPD. When using the public function he is speaking on behalf of the VPD as the Chief. The Chief uses the direct messaging function for work related purposes such as communicating with the media as well as personal messaging. In either case he is identified as the Chief.
>
> As stated above, Section 8.4 of the policy clearly states that "All uses of social media must meet the ethical standards consistent with the expectations of Department employees." This would include both the public and the direct messaging function.
>
> This is not dissimilar from the department's policy with respect to email which is also a direct message between two individuals. Nevertheless, pursuant to the Computer Network and Electronic Information Policy AC100 Section 3.32, "Sending harassing, threatening, obscene, inappropriate, or objectionable messages via email is prohibited".
>
> I therefore conclude that the Chief improperly used the department's social media account(s). The Twitter messages in issue are clearly inappropriate, do not meet ethical standards, and are potentially damaging to the reputation of both the Chief and the department. I also find that it was inappropriate for the Chief to be engaging in the Twitter activity in question during working hours and/or from departmental devices.

[76] With respect to the PCC's statement that his office had not been entitled to require information or records from the internal discipline authority until the process was complete, the Mayors point out that s. 175(5) of Division 6 does not, on its face at least, restrict the PCC to requesting information only after the internal discipline authority has reached its final decision. (See also s. 177(5).) In any event, the PCC did not request any such information or records and was content to proceed on the

basis that the Mayors would inform *the employer/police board* of the "allegations and progress of the investigation". Further, if the PCC had wanted a transcript of the interviews of witnesses to be kept or be recorded, he could also have made that a condition of his "approval" of the internal discipline process. As for the suggestion that the internal investigation was "flawed" by virtue of a failure to record all interviews, there was no evidence that this is normally done in internal investigations under Division 6.

[77] The Mayors go on to note the PCC's statement in the December order that:

> One material witness refused to cooperate with the investigation or participate in an interview. In my view, there were procedural options available that could have been explored to obtain the cooperation of this witness.

Presumably, this is a reference to Officer A, who refused to be questioned or to participate in the internal investigation. Ms. Lovett on behalf of the PCC suggested in this court that if the external investigation proceeds, the PCC expects that Officer A's commanding officer would be able to exert pressure on her to change her mind and provide information concerning the events in question. With respect, the suggestion that Officer A's supervisor should pressure an officer in this manner would seem highly objectionable, given the personal and privacy interests at stake. On the other hand, s. 101 of the *Act* might apply to her as a "member" so that an investigating officer could require her to answer questions or provide a written statement.

[78] Finally, with respect to the PCC's statement that the conditions he had imposed for the internal disciplinary process to take place were not met, and that the "facts of the case have changed significantly, and the information available now is different both in quantity and in character", Mr. Doyle on behalf of the Mayors argued again that this is simply not the case. In his submission, the only "new facts" do *not* relate to the two 'charges' that were investigated in that process; rather, the allegations relate to the Chief Constable's conduct during the investigation itself – his speaking to some other witnesses when he had been told not to, his failure to be forthcoming in what he told Officer B and his misleading the internal investigator on

that point. These allegations are the subjects of the three 'new' charges described in the PCC's December order.

[79] I share some of Mr. Doyle's skepticism concerning the rationales given by the PCC in his order for his change of position. In particular, the 'revelation' that the Twitter exchange had occurred while the Chief Constable (and presumably Officer A) were on duty and that the Chief Constable had used the social media accounts provided to him by the VPD could hardly have been unexpected. The suggestion that his use of the VPD's Twitter account 'changed the nature' of his conduct is, with respect, dubious. These issues were in any event purely secondary to the real substance of the Chief Constable's alleged misconduct (as defined.) If the only misbehaviour alleged had been that he had used the VPD's Twitter account for some personal purpose, the convening of an external investigation would be an extreme over-reaction.

[80] Bearing in mind, however, the direction given in *N.L.N.U.* that the review of reasons is an "organic exercise" and 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", one can infer from the December order that the PCC was of the view from the beginning that even if he 'permitted' the matter of the Chief Constable's conduct to proceed through an internal investigation, it would still be open to the PCC to order an external investigation under s. 93. As counsel for the PCC suggested in this court, the external investigation was seen as just "the next step" in the process of civilian oversight for which the PCC is responsible.

[81] I agree that it might reasonably be expected that on occasion, what had originally seemed an internal discipline matter might turn out to be, or become, a matter that does "affect the public" (see the definition of "internal discipline matter" in s. 76) or that taken together with new allegations may be likely to bring discredit on the police department and therefore constitute "discreditable conduct" (see the definition of "public trust offence" in s. 77.) The idea of 'overlap' between matters of internal discipline and public trust complaints (a term used in the *Act* prior to the

2007 amendments) was contemplated by Mr. Wood in his *2007 Report*. He discussed a possibility that is the opposite of the case at bar – that a public trust complaint might be appropriately processed as an internal matter. At para. 323 of the report, he stated that in preparing his recommendations, he had received:

> … strong submissions … by police management whose viewpoint is that the maintenance of good discipline and efficient police services requires that chief constables have the ability, through an internal discipline process, based upon "normal labour law principles", to deal with conduct matters in which the public is not involved. The debate between these two points of view has tended to focus, at least from the union perspective, on ambiguities surrounding the definitions of both an internal discipline complaint and a public trust default found in s. 46(1). …. However, in addition to problems stemming from the actual definitions in s. 46(1), there is the underlying policy decision, reflected in paragraph (b) of the current definition of an internal discipline complaint, that in certain circumstances what is properly defined as a public trust complaint may be processed under Division 6. Those who hold the union's viewpoint see this as undermining the integrity of the "three stream model" reflected by Divisions 4 [Public Trust Complaints], 5 and 6 of the present *Act*.
>
> 324 I am not persuaded that the provision of s. 64(5), under which a public trust default may be processed as an internal complaint, undermine anything more than an overly-rigid and simplistic theoretical model of the three types of complaints described in Part IX and the different "streams" under which they are processed. …. there is nothing earth shattering about the notion of a public trust default being processed under Division 6. If in fact a complaint about the conduct in question is never formally lodged … neither is there anything untoward about a public trust complaint, which has been properly withdrawn by the complainant, being processed under Division 6 [Internal Discipline Complaints] …
>
> 325 Assuming that the recommended increased oversight powers of the police complaint commissioner are implemented, and the police complaint commissioner has no reason either to order an investigation or, if an investigation has already been completed, to order a public review or a public hearing, in either case there may still be a legitimate basis upon which management will want to review the conduct of the officer(s) in question. I see no reason why management should be deprived of the ability to do so, nor any reasons why the consent of the police complaint commissioner should be a prerequisite to such an internal review. [Emphasis added.]

[82] I also note that under the *Act* prior to the 2010 amendments, Division 4 (dealing with public trust complaints) contained s. 55(3), which stated:

> Despite any other provision of this Act, the Police Complaint Commissioner may order an investigation into the conduct of a Municipal Constable, Chief Constable or Deputy Chief Constable, whether or not a record of complaint has been lodged.

Division 6 at the time, dealing with internal discipline complaints, stated in s. 64 that:

> (5) If a municipal constable, chief constable or deputy chief constable is alleged to have committed an act or to have omitted to do an act and the act or omission would, if proved, constitute a disciplinary default, the discipline authority may deal with the allegation as a matter of internal discipline under this Division if
>
> (a) the police complaint commissioner has not, under section 54(6)(a) or (8) or 55(3), ordered an investigation into the act or omission and has not arranged a public hearing in respect of that act or omission, and
>
> (b) one or more of the following applies to the allegation:
>
> (i) the act or omissions does not constitute a public trust default;
>
> (ii) a record of complaint was not lodged under section 52 in respect of the act or omission;
>
> (iii) a record of complaint was lodged under section 52 in respect of the act or omission but the complainant has filed a notice of withdrawal under section 52.2 and the discipline authority has ceased to process the complaint under Division 4.
>
> (6) On request of the police complaint commissioner, a discipline authority must provide any additional information about an internal discipline complaint that is in the possession or control of the municipal police department to which the complaint relates.
>
> (7) If the police complaint commissioner concludes on the basis of information received that an internal discipline complaint should be dealt with as a public trust complaint, the police complaint commissioner may order a further investigation, a public hearing or both. [Emphasis added.]

At para. 327 of his *Report*, Mr. Wood suggested that given the Commissioner's authority under s. 55(3), s. 64(7) was "redundant" and could be eliminated in the legislation he was recommending. Had that recommendation not been made, this appeal might have been avoided.

[83] In my view, these circumstances, together with the plain wording of s. 93, support the PCC's interpretation of s. 93 as permitting him to order an external investigation into matters that have already been the subject of an internal discipline proceeding under Division 6. Thus I conclude this interpretation did fall within a "range of possible acceptable outcomes which are defensible" *in respect of the law*. (*Dunsmuir*, at para. 47; my emphasis.) This conclusion is buttressed in this instance by the fact that it would be difficult for the PCC to try to keep the three 'new' charges in a compartment separate from the other two in any investigation. The five matters

are interrelated and it was not unreasonable for the PCC to want to have the flexibility to have them all investigated without breaching legal boundaries.

Abuse of Process

[84] Whether the decision to order the external investigation was reasonably defensible "*in respect of the facts*" is more difficult. Since this issue overlaps to a considerable degree with the issue of whether the doctrine of abuse of process was correctly applied in this case, I propose to deal with them together.

[85] As mentioned earlier, neither of the respondents addressed abuse of process in their written or oral submissions in this court. For his part, the PCC submitted that the doctrine applies only to prevent the "re-litigation by a losing party in one adjudicative forum, of issues previously determined by a court or a quasi-judicial tribunal in an entirely different forum." (My emphasis.) His factum continued:

> Such re-litigation may result in the misuse of either the court's or the tribunal's processes *by a litigant*. In contrast, the PCC is not a "litigant" or a losing party in a court or a tribunal proceeding, the Respondent was not a litigant or a winning party in such a proceeding, and the PCC was not a party to the Mayors' decision-making. The Mayors' decision did not involve litigation or any *lis inter partes*. It was a product of an investigative, not adjudicative, process. That process was procedurally flawed and resulted in a negotiated "disciplinary" outcome based on a misguided belief that it would remain confidential and that the investigation report and letter of reprimand would be immune from any scrutiny. Finality doctrines simply have no application in this context.

[86] I cannot agree that abuse of process and its related doctrines are restricted to a purely "litigation" context involving a *lis inter partes*. In *Danyluk v. Aynsworth Technologies* 2001 SCC 44, the Court recounted that the common law rules developed to prevent abuses of the decision-making process had been extended in Canada to administrative agencies as early as the mid-1800s. (At para. 22, citing D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at p. 94 *et seq*.) More recently, in *Toronto (City)*, Arbour J. for the Court adopted a wide view of the term "adjudicative process" that had been explained by Mr. Justice Doherty at (2001) 55 O.R. (3d) 541 (C.A.) In his words:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate. [At para. 74; original emphasis added.]

[87] Arbour J. went on in *Toronto (City)* to note that a common justification for the application of *res judicata* is that a party should not be "twice vexed in the same cause." (At para. 50.) She suggested, however, that courts should focus on the "process" rather than on the interests of a party, and that the doctrine of abuse of process "concentrates on the integrity of the adjudicative process." (At para. 51.) In her analysis:

> It is … apparent that from the system's point of view, re-litigation carries serious detrimental effects and should be avoided unless the circumstances dictate that re-litigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where re-litigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original results should not be binding in the new context. This was stated unequivocally by this court in [*Danyluk v. Aynsworth Technologies Inc.* 2001 SCC 44] at para. 80. [At para. 52; emphasis added.]

[88] In 2011, in *British Columbia (Workers Compensation Board) v. Figliola* 2011 SCC 52, a majority of the Court, *per* Abella J., stated that abuse of process has as its goal "the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings", as had been explained in *Toronto (City)*. Abella J. continued:

> At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).

> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).
>
> These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.
>
> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [At paras. 34–6; emphasis added.]

(See also *Intact Insurance Co. v. Federation Insurance Co. of Canada* 2017 ONCA 73 at paras. 28–30; and *Bajwa v. Veterinary Medical Association (British Columbia)* 2011 BCCA 265 at paras. 32–40.)

[89] Last, I note *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19, in which the majority confirmed, citing *Danyluk*, that issue estoppel applies to decisions of administrative tribunals. Cromwell and Karakatsanis JJ. for the majority observed that the "residual discretion" of the doctrine:

> … requires the courts to take account the range and diversity of structures, mandates and procedures of administrative decision; however, the discretion

> must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir* …, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." [At para. 31; emphasis added.]

After noting the complexity of police oversight, the Court concluded that it was neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. (At para. 35.)

[90] Applying the foregoing to the facts in *Penner*, the majority ruled that the court of appeal below had "failed to focus on fairness" and in particular, had "failed to fully analyze the fairness of using the results of the [disciplinary] process to preclude the [plaintiff's] civil claims, having regard to the nature and scope of the earlier proceedings and the parties' reasonable expectations in relation to them." (At para. 49.) There was nothing in the *Police Act* that could have given rise to an expectation that the disciplinary hearing would be conclusive of the plaintiff's legal rights against the officers; nor did the different onuses of proof give rise to a reasonable expectation on the part of the officers that the result of the hearing under the *Police Act* would be determinative of the outcome of a civil action. In the result, the majority ruled that the Court of Appeal's application of issue estoppel in the case had been "fundamentally unfair".

[91] Unfortunately, we do not have the benefit of a full explanation from the chambers judge of his reasons for applying abuse of process in the case at bar. He did quote, however, the passage from *Toronto (City)*, in which it was said that abuse of process is applied "where allowing the litigation to proceed would … violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice." These principles are of course relevant to this case, although we are here dealing with a 're-investigation' rather than re-litigation, where abuse of process has more resonance. Judicial economy does resonate here, in that an investigation has already been held and the internal authority found that the Chief

Constable had engaged in “discreditable” conduct. The objective of finality would obviously be served by leaving these findings intact, although here the time and expense of another investigation would not be saved given the existence of the new charges.

[92] There are also personal and privacy interests involved. One can only imagine the effects on Officers A and B and their family of an external investigation which will take place in the public eye, at least in part. On the other hand, an investigation will proceed in any event in respect of the three ‘new’ charges, and as already noted, it would be difficult to restrict the process to those three. Given that the matter – with emphasis on the fact that Officer B was under the Chief Constable’s command – has been publicized, the reputation of the administration of justice may require that all five charges by dealt with as part and parcel of an entire course of conduct and in a more ‘transparent’ manner.

[93] At the end of the day, this was a policy decision for the PCC. Obviously, it required the balancing of several nuanced and complex considerations. When the matter first came to his attention, he was willing to treat it as an internal discipline matter and to follow Officer B’s preference. He now sees the five issues as engaging the public trust and warranting an external investigation. Not without some hesitation, I conclude that the Commissioner’s decision lay within the range of “possible, acceptable outcomes which are defensible in respect of the facts and law.” Further, although finality and economy are obviously not served by the convening of another investigation, the circumstances do not in my opinion descend to the level of abuse of process. On this point, I again respectfully disagree with the chambers judge.

[94] I would allow the appeal. I add one thing, however. The Chief Constable resigned his post in May of 2017. I suggest with respect that the PCC might reconsider whether it is still necessary or in the public interest to spend public funds at this late date on investigating what appears to have been an entirely consensual and short-lived flirtation via Twitter involving a chief constable who is no longer employed by the VPD.

Disposition

[95] In the result, I would allow the appeal and set aside the chambers judge's order. If counsel wish to speak to the matters of the sealing order or publication bans, they may do so by written submissions. Unless counsel wish to speak to costs, I would order that the parties bear their own costs.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Fitch"

18

Federal Court Cour fédérale

Date: 20161219

Docket: IMM-968-16

Citation: 2016 FC 1391

Ottawa, Ontario, December 19, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMMAD UMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a matter of sponsorship in respect of marriage. The issue is one of sufficiency of evidence to ensure, not only that the marriage is genuine, but, that it is monogamous.

II. Nature of the Matter

[2] This is an application for judicial review by the Applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration Appeal Division [IAD] dated February 19, 2016, which dismissed the Applicant's appeal relating to the refusal of the application for permanent residence as a member of the family class on the basis of application of the *res judicata* doctrine.

III. Facts

[3] The Applicant, born in Ghana in 1962, is a citizen of Canada. He is the sponsor in the application for permanent residence as a member of the family class made by his spouse, a citizen of Ghana born in 1981.

[4] The Applicant alleges following. He was married to a first spouse on February 4, 1990. They separated in 2000 and divorced in Ghana on June 17, 2003. The notice of divorce was registered on August 17, 2007.

[5] The Applicant met his second spouse over the phone on November 30, 2003. They were engaged on February 14 or April 14, 2004. They first met on January 24, 2005. They were married in Ghana on February 27, 2005.

[6] The Applicant first tried to sponsor his spouse for permanent residence in 2008. A Visa Officer refused the sponsorship application on April 28, 2009, on the following grounds:

> Based on your interview at our office and a review of the documentation submitted, I am not satisfied that your relationship with your sponsor is genuine. In addition, I am not satisfied that your marriage is valid. You provided a divorce certificate between your sponsor and his previous spouse which was issued after the current marriage certificate. You have also provided statutory declarations in support of your sponsor's divorce and your current marriage which was declared and signed by deceased persons. I am not satisfied that these statutory declarations are valid. You were advised of the concerns during your interviews, but you were unable to convince me that they were unfounded. I am therefore not satisfied that your relationship was not entered into for the purpose of gaining entry to Canada. As a result, for the purpose of the regulations, you are not considered to be a member of the family class.

[7] The Applicant appealed the refusal before the IAD pursuant to subsection 63(1) of the IRPA and was heard on May 31, 2011. The appeal was dismissed by the IAD and the Visa Officer's decision was upheld on July 14, 2011. The Applicant did not seek judicial review of this decision before the Federal Court.

[8] The Applicant filed a second sponsorship for his spouse's permanent residence application. A second Visa Officer refused the sponsorship on February 24, 2014, on the following grounds:

> Based on a review of the documentation submitted, I am not satisfied that your relationship was not entered into for the purpose of gaining entry to Canada and I am not satisfied your relationship with your sponsor is genuine… As a result, for the purpose of the Regulations, you are not considered to be a member of the family class.

[9] The Applicant again appealed the refusal of his spouse's application for permanent residence as a member of the family class before the IAD on March 20, 2014.

IV. Decision

[10] On July 21, 2014, the IAD sent an early review letter to the parties and asked for submissions regarding the application for *res judicata* to the second appeal by the Applicant.

[11] On February 11, 2016, the IAD dismissed the appeal.

[12] The IAD found that *res judicata* did apply to the appeal, as the three preconditions were met. The Applicant had simply filed another sponsorship application, rather than asking for judicial review of the first IAD decision in 2011 or seeking a valid divorce from his first spouse and remarrying his second spouse. His second application for sponsorship did not overcome the earlier findings of the 2011 IAD decision and was again refused by a second Visa Officer in 2014.

[13] The IAD found that the Applicant did not produce new evidence that could be considered as constituting special circumstances capable of overriding *res judicata*; the Applicant did not address the *res judicata* issue, rather producing new evidence to show that his relationship was genuine. Consequently, the IAD decided there were no circumstances warranting the panel's discretion not to give effect to the *res judicata* principle.

V. Submissions of the Parties

[14] The Applicant claims that the IAD rejected the validity of his marriage without regard to the new evidence produced. He argues that the IAD decision was profoundly discriminatory, that

it violates the right to family life and the right to equality, and that it is based on erroneous conclusions of fact without any regard to the evidence before the immigration agent. Finally, the Applicant argues that the IAD erred in applying the *res judicata* principle. Its application took place at the expense of justice and was applied mechanically, since the IAD did not take into account the entirety of the circumstances.

[15] The Defendant argues that the IAD decision was reasonable, since no decisive new evidence was produced that could not have been adduced during the first proceedings with reasonable diligence. The Applicant has produced new versions of documents previously submitted to the IAD and a legal opinion although they could have been presented to the first panel with reasonable diligence.

VI. Issues

[16] This matter raises the following issue: Did the IAD err in its finding that the *res judicata* ought to be applied?

[17] This issue should be reviewed on a standard of reasonableness (*Chotai v Canada (Citizenship and Immigration)*, 2015 FC 1335 at para 16).

VII. Analysis

[18] The IAD determined that the three preconditions of *res judicata*, as established by the Supreme Court of Canada, were met in the Applicant's case:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> (*Danyluk v Ainsworth Techonologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44 at para 25)

[19] In his memorandum the Applicant does not argue that these criteria were not met. Rather, he claims that the doctrine of *res judicata* should not have been applied, considering the circumstances of the case.

[20] It is of constant jurisprudence that the doctrine of *res judicata* must not be applied automatically:

> … The decision-maker must then apply the doctrine of *res judicata* unless some special or particular circumstances warrant hearing the matter on the merits. In determining whether such circumstances exist, it is necessary to ask whether, taking into account all of the circumstances, application of the principle of *res judicata* would work an injustice (*Apotex Inc. v. Merck & Co.* (C.A.), *Danyluk*). [The Court's emphasis]
>
> (*Mohammed v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1442 at para 12)

[21] In the case before this Court, no special or particular circumstances warranted that the IAD would hear the matter on the merits.

[22] In the Applicant's first sponsorship application, the Visa Officer and the IAD referred to the following irregularities as understood on the officer's examination: a divorce certificate between the Applicant and his previous spouse was issued after his current marriage certificate and statutory declarations in support of the Applicant's divorce and his current marriage were declared and signed by deceased persons.

[23] In his second sponsorship application, the Applicant submitted a new version of the same documents, but removed the discrepancies that had been remarked upon by the first Visa Officer in 2009 and by the first IAD panel in 2011.

[24] The Court finds it was reasonable for the IAD to determine that *res judicata* ought to apply in this case, since the Applicant produced new evidence mostly showing that his relationship to his spouse was genuine, but not that it is monogamous, and that no special or particular circumstances warranted that the IAD would hear the matter on the merits.

VIII. Conclusion

[25] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-968-16
STYLE OF CAUSE:	MOHAMMAD UMAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 15, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	DECEMBER 19, 2016

APPEARANCES:

Stewart Istvanffy	FOR THE APPLICANT
Jocelyne Murphy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Stewart Istvanffy Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT

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Kaloti v. Canada (Minister of Citizenship and Immigration), [1998] F.C.J. No. 1281

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

Dubé J.

Heard: July 13, 1998

Judgment: September 8, 1998

Court File No. IMM-4932-97

[1998] F.C.J. No. 1281 | *[1998] A.C.F. no 1281* | *153 F.T.R. 289* | *49 Imm. L.R. (2d) 187* | *82 A.C.W.S. (3d) 759*

Between Yaspal Singh Kaloti, applicant, and The Minister of Citizenship and Immigration, respondent

(6 pp.)

Case Summary

Aliens and immigration — Admission, immigrants — Sponsorship — Members of the family class — Estoppel — Estoppel by record (res judicata) — Res judicata as a bar to subsequent proceedings — Public law cases.

This was an application by Kaloti for judicial review of the dismissal of his appeal from the denial of his application to sponsor his wife as a permanent resident. In 1990, Kaloti applied to sponsor his fiancee for permanent residence. In 1993, Kaloti and the fiancee got married in India. The visa officer refused his application on the ground that his wife was not a member of the family class pursuant to section 4(3) of the Immigration Regulations. The officer found that the marriage was not bona fide. The Appeal Division dismissed Kaloti's appeal from this decision. In 1996, Kaloti brought a new application. He claimed that there was a change in circumstances between the first and second application. The application was again dismissed. The Appeal Division dismissed his appeal on the ground that the issue was res judicata.

HELD: Application dismissed.

Res judicata was applicable to public law decisions to preclude applications from being brought over and over again. In determining whether a spouse entered into marriage primarily for the purpose of gaining admission to Canada rather than to reside permanently with his or her spouse, the issue was the intentions of the spouse at the time the marriage was entered into. Thus the change in circumstances claimed by Kaloti was irrelevant and the issue was res judicata.

Statutes, Regulations and Rules Cited:

Immigration Regulations, s. 4(3).

Counsel

Carole Simone Dahan, for the applicant. Kevin Lunney, for the respondent.

DUBÉ J. (Reasons for Order)

1 The applicant seeks to set aside the decision of the Appeal Division of the Immigration and Refugee Board ("Appeal Division") dated October 17, 1997, dismissing his appeal on the ground that it was res judicata.

2 On August 26, 1990, the applicant filed an undertaking of assistance to sponsor the application for permanent residence of his fiancée whom he subsequently married in India in February 1993. On May 28, 1993, the visa officer refused his application pursuant to subsection 4(3) of the Immigration Regulations on the ground that the marriage was not bona fide but was entered into primarily for the purpose of gaining admission to Canada. The applicant appealed to the Appeal Division which confirmed the decision of the visa officer and dismissed the appeal for lack of jurisdiction because the applicant's spouse was not a member of the family class under subsection 4(3) of the Regulations[1].

3 In 1996, the applicant re-sponsored a new application for permanent residence for his wife which was denied by a visa officer. That decision led to the Appeal Division's second decision under attack.

4 The central issue to be resolved is whether the Appeal Division was without jurisdiction on the basis of res judicata as the second appeal involved the same parties and the same issues which were already before the Appeal Division.

5 In the Horbas[2] decision, Strayer J., as he then was, stated the following:

> In subsection 4(3) of the Immigration Regulations, 1978 the visa officer is directed to have regard to two criteria: first, whether the marriage was entered into primarily for the purpose of gaining admission to Canada, and secondly whether the sponsored spouse has the intention of residing permanently with the other spouse...Admittedly the application of these criteria raise difficult questions of fact, the more so because they involve the assessment of the intention of the sponsored spouse...

6 The learned judge further added:

> It must be kept in mind that in order to reject such an application on the basis of this subsection, it must be found that there is both a marriage entered into by the sponsored spouse primarily for the purposes of immigration and lack of intention on his or her part to live permanently with the other spouse.

7 It follows that the two criteria are to be applied to the intention of a spouse at the time he or she entered into the marriage. The applicant submits that the same issues were not involved in the second appeal as a change of circumstances occurred and the question became whether or not she was a member of the family class at the time of the second application. He claims that the Appeal Division ought to have considered whether the intention of the applicant's spouse had changed since the first appeal.

8 In my view, the plain meaning of paragraph 4(3) of the Regulations cannot be a "forward looking test", as submitted by the applicant. The test is whether or not the spouse in question "entered into the marriage primarily for the purpose of gaining admission to Canada...and not with the intention of residing permanently with the other spouse". Clearly, both criteria apply to the intention of the spouse at the time of the marriage. Thus, the matter became res judicata and the Appeal Division could not hear it a second time.

9 At the hearing, I asked both parties to file submissions and research on whether or not res judicata has an application in public law.

10 Counsel for the applicant submitted that the application of res judicata is not an absolute rule but is dependent on the nature of the tribunal that is making the decision and the context of the statute under which the body operates. He refers to the Canadian Encyclopedic Digests which states that the "extent to which res judicata and issue estoppel pertain in the administrative process is uncertain"[3]. The Digests goes on to state that "where a tribunal or agency has the authority to entertain a new application, it is not bound by its initial decision". He refers to Professor Ganz's article, Estoppel and Res Judicata in Administrative Law to the effect that "there is very little authority on whether the doctrine of res judicata, which applies to the decisions of the ordinary courts, is applicable to administrative authorities". He also refers to a Supreme Court of Canada decision in Grillas v. MMI[4] which stated that the Immigration Appeal Board, the precursor of the present day Immigration Appeal Division, has the authority to re-open a previous decision on the basis that the Immigration Appeal Board retains a continuing equitable jurisdiction, and thus may hear additional evidence, notwithstanding the fact that the Board's decisions are considered final.

11 On the other hand, counsel for the respondent referred to a Federal Court of Appeal decision, O'Brien v. Canada (A.G.) (1993)[5] which confirmed that res judicata operates in the sphere of public law. The question arose whether a Public Service Commission Appeal Board would be estopped from reconsidering issues determined on an earlier appeal by the same Board, by virtue of res judicata. Décary J.A. wrote (at p. 316) that "This court has implicitly extended the applicability of the doctrine to issue estoppel, developed in the context of judicial proceedings, to proceedings before statutorily established administrative tribunals". The learned judge came to the conclusion that:

> The underlying rationale of these decisions, it seems to me, is that an appeal board is not competent, on a second appeal from a selection process, to rehear allegations which were explicitly or implicitly rejected in its decision on the first appeal. That is, the doctrine of issue estoppel applies to appeal board decisions.
>
> (my emphasis)

12 Consequently, I must find that, generally, res judicata has an application in public law. Otherwise, applicants could re-apply ad infinitum and ad nauseam with the same application, an abuse of the process of administrative tribunals. However, that would not prevent an applicant from launching a second application based on change of circumstances provided, of course, that the change of circumstances was relevant to the matter to be decided.

13 Again, in the instant matter, the plain meaning of subsection 4(3) of the Immigration Regulations is clearly centered on the intention of a spouse at the time of the marriage, a situation that cannot be affected by a subsequent change of intentions on her part. Therefore, the applicant's spouse was properly adjudged not to be a member of the family class and the matter became res judicata. It does not follow that she may not seek admission to Canada under some other provisions of the Immigration Act.

14 In my view, a question of general importance ought to be certified and I would put it as follows:

> May an applicant re-apply for admission to Canada of his spouse as a member of the family class under paragraph 4(3) of the Immigration Regulations on the ground of a change of circumstances where a previous application by him has been denied on the ground that she entered into the marriage primarily for

the purpose of gaining admission to Canada and not with the intention of residing permanently with her spouse?

15 The application for judicial review is dismissed.

DUBÉ J.

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1 4.(3) The family class does not include a spouse who entered into the marraige primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permenently with the other spouse.

2 Horbas v. M.E.I. *[1985] 2 F.C. 359*.

3 vol. 1, 3d ed., at 274, para. 171.

4 *[1972] S.C.R. 577*.

5 *153 N.R. 313*.

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SUPREME COURT OF NOVA SCOTIA

Citation: Baron v. Nova Scotia (Community Services), 2009 NSSC 122

Date: 20090417
Docket: Hfx No. 293850
Registry: Halifax

Between:

Judith Baron

Applicant

and

Minister of Community Services (N.S.)

Respondent

LIBRARY HEADING

Judge: The Honourable Justice John D. Murphy

Heard: October 1, 2008, in Halifax, Nova Scotia
Special Chambers

Final Written Submissions: October 17, 2008

Subject: Judicial review of a decision of the Assistance Appeal Board. The applicant sought orders in the nature of certiorari and mandamus.

Summary: The Applicant, who received assistance from the Department of Community Services, applied to the Department in 2006 to cover the cost of dentures as a special needs request. The request was denied by the Department on the basis that it was not covered by the Dental Assistance Plan, a decision that was affirmed on an internal appeal and by the Assistance Appeal

Board. The Applicant did not seek judicial review of the February 2006 decision of the Assistance Appeal Board. About 16 months later, having obtained legal advice, she submitted another request. Her counsel wrote to the Department in July 2007, requesting a reconsideration of the original decision. Counsel for the Department responded that the matter had been decided and there was no basis for another decision, amounting to an assertion of *res judicata*. The Department denied a request for an appeal hearing respecting the letter from counsel. The Applicant asked the Court for a *certiorari* order quashing the Minister's refusal to process the special needs request advanced in 2007, and for *mandamus*. She submitted that the Appeal Board was denied the opportunity to decide on the issue of *res judicata* as a result of the refusal of agents of the Department to consider her 2007 request or her appeal.

Issue: Were the components of *issue estoppel* met, so that the Applicant's 2007 request was *res judicata*?

Result: The application was dismissed. There was no legislative basis in the *Employment Support and Income Assistance Act* or the Regulations for the Department to "reconsider" a decision. The 2007 request offered no new information or documentation that was not before the Department and the Appeal board in 2006. The Applicant submitted that *res judicata* should not apply to requests for assistance under the Act where there was a potential for a wrong decision to result in "homelessness and starvation." The Court rejected the argument that a person seeking a special needs benefit under the Act could make repeated applications with no change in circumstances, and pursue Appeal Board proceedings if those applications were rejected. In the circumstances, the elements of issue estoppel were present and the 2007 request was *res judicata*, having been decided in 2006 on identical facts and law. The discretionary factors applicable to issue estoppel did not justify setting this result aside.

SUPREME COURT OF NOVA SCOTIA

Citation: Baron v. Nova Scotia (Community Services), 2009 NSSC 122

Date: 20090417
Docket: Hfx No. 293850
Registry: Halifax

Between:

Judith Baron

Applicant

and

Minister of Community Services (N.S.)

Respondent

Judge:	The Honourable Justice John D. Murphy
Heard:	October 1, 2008, in Halifax, Nova Scotia *Special Chambers*
Final Written Submissions:	October 17, 2008
Counsel:	Claire McNeil, for the applicant Terry D. Potter, for the respondent

By the Court:

INTRODUCTION

[1] Ms. Baron applied to the Department of Community Services to cover the cost of dentures, which she required for medical reasons, as a special needs request. The request was denied, and this denial was affirmed on an internal ministerial appeal. The Applicant appealed to the Assistance Appeal Board. According to the Appeal Board's decision, dated February 23, 2006, the Applicant submitted that her problems had been present for at least two years; that she needed $4,500.00 "up front" for the dentures; that she could not afford to pay this amount; that she had pain and mental problems in relation to the jaw problem, and was on "a lot of medications, which is very costly." The Department's position was that the need for assistance was established, but that the request was not covered by the Dental Assistance Plan. The Board concluded:

> **Finding of Facts**
>
> Caseworker has followed through extensively with the procedure and client is most grateful for her assistance. Unfortunately, according to the Act, I am denying the appeal. Judith has asked for assistance from MSI Letter included, which was sent.
>
> **Reasons** (Quote relevant sections of Employment Support and Income Assistance Act, regulations or Policy and indicate how they relate to the issues and the facts.)
>
> Regulation cpt 10, Policy – section 11
>
> Policy Dental Coverage Provision is very clear and does not cover the request.

[2] Ms. Baron did not seek judicial review of the Appeal Board's 2006 decision. About 16 months later, having obtained legal advice, she submitted another request to the Department. Cole Webber of Dalhousie Legal Aid wrote to the Department on the Applicant's behalf on July 18, 2007, asking that the Department "reconsider its decision not to grant this item of special need." In response, in a letter dated August 13, 2007, Terry D. Potter, counsel for the Department advised that:

> [t]his request has already been fully dealt with.... [M]y client made a decision on this request. The decision was subjected to the appeals process and there was no judicial review of the appeal decision. The matter has been decided and another decision is not warranted.

The Department's position amounts to invocation of the doctrine of *res judicata*.

[3] The Department denied a request for an appeal hearing with respect to Mr. Potter's letter. In an undated letter to Mr. Webber, Carmen L. LeBlanc, Co-ordinator of Appeals for the Department, wrote that:

> [t]he Board made a decision on February 23, 2006, this decision is binding and I do not believe that the Department has made a new decision that warrants an appeal process.

[4] Ms. Baron asks this Court for a *certiorari* order, quashing the Minister's decision to refuse to process the special needs request advanced in 2007, and for a *mandamus* order requiring the Minister or the Minister's agents to provide a decision on that request, and, if the request is refused, to observe statutory appeal requirements. The Applicant submits that the Appeal Board was denied the opportunity to render a decision on the issue of *res judicata* by the refusal of agents of the Department to consider her 2007 request or her appeal.

RES JUDICATA

[5] The Supreme Court of Canada has held that *res judicata*, including the aspect known as issue estoppel, which is relevant in this proceeding, applies in administrative proceedings. In **Danyluk v. Ainsworth Technologies Inc.**, [2001] 2 S.C.R. 460, the Court said, at paras. 20-21 (some citations omitted):

> The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation.... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel)....
>
> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions

> classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

The Court went on to discuss issue estoppel at paras. 22 and 24-25:

> The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* .... Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (S.C.C.), [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

***

> ... Dickson J. (later C.J.), speaking for the majority in *[Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248] at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> The preconditions to the operation of issue estoppel were set out by Dickson J. in **Angle**, *supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[6] The factors set out by Dickson J. are preconditions. Their presence does not mean that issue estoppel automatically applies. The court retains a discretion as to whether issue estoppel applies. In **Danyluk** the Court said, at para. 33 (citations omitted):

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied....

[7] This discretion is wider in the case of decisions by administrative tribunals, as the Court in **Danyluk** discussed at para.62:

> The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, 1983 CanLII 19 (S.C.C.), [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

[8] In **Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Wright**, [2006] N.S.J. No. 336 (C.A.), ("**Wright**") the Court of Appeal addressed the exercise of discretion. Cromwell J.A. said, at para.68:

> The Supreme Court of Canada has provided seven factors as part of an open ended range of considerations: *Danyluk* at para. 67. They are:
>
> (i) the wording of the statute from which the power to issue the administrative order derives
>
> (ii) the purpose of the legislation
>
> (iii) the availability of an appeal

(iv) the safeguards available to the parties in the administrative procedure, including issues concerning natural justice

(v) the expertise of the administrative decision maker

(vi) the circumstances giving rise to the prior administrative proceedings

(vii) the potential injustice

THE LEGISLATIVE SCHEME

[9] The purpose of the *Employment Support and Income Assistance Act* ("E.S.I.A.A." or "the Act") is to "provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency" (s.2). The basic principles of assistance are set out at section 7:

7 (1) Subject to this Act and the regulations, the Minister shall furnish assistance to all persons in need.

(2) Persons assisting the Minister in the administration of this Act shall

(a) receive applications for assistance; and

(b) in accordance with this Act and the regulations,

(i) determine whether the applicant is eligible to receive assistance,

(ii) determine the amount of financial assistance the applicant is eligible to receive,

(iii) determine the other forms of assistance available that would benefit the applicant,

(iv) advise the applicant of the amount of financial assistance that will be provided, the other forms of assistance that will be available for the applicant and the conditions to be met to ensure the continuation of the assistance provided,

> (v) advise the applicant that the applicant has the right to appeal determinations made pursuant to this Act, and
>
> (vi) from time to time review the assistance provided to a recipient, and in particular whether any conditions imposed have been met, and promptly advise the recipient of any changes in eligibility and of the right to appeal the change.

The Applicant submits that the use of the word "shall" in s.7 indicates that the Minister and the Minister's agents have no discretion in those areas identified in that section.

[10] Section 12 of the Act deals with appeals to the Minister and the setting down of appeals before assistance appeal boards. It provides, in part:

> 12 (1) Any person who has applied for or who has received assistance pursuant to this Act may appeal any decision related to the person's application or assistance received.
>
> ***
>
> (3) An appeal may be filed with the Minister at any time within thirty days after the decision complained of is communicated to the applicant or person who received assistance.
>
> (4) The Minister shall review the appeal and, within ten days after the receipt of an appeal, advise the person appealing whether the decision complained of is upheld, varied or reversed, and the reasons for upholding or changing the decision.
>
> (5) Within ten days after receipt of the notice pursuant to subsection (4), the person appealing shall advise the Minister whether the person will continue the appeal and, where the appeal is not continued, the decision set out in the notice is deemed to be satisfactory.
>
> (6) Where the appeal is continued, the appeal shall be set down for hearing before an appeal board.

[11] The powers and duties of assistance appeal boards are described at s.13:

> 13 (1) An appeal board shall hear an appeal in camera, permitting access only to a representative of the Minister, the appellant, the appellant's counsel or agent and such other persons as the board may determine.
>
> (2) The board shall determine the facts and whether the decision made, on the basis of the facts found by the board, is in compliance with this Act and the regulations.
>
> (3) Where the board determines that the decision is contrary to this Act and the regulations, the board shall vary or reverse the decision in accordance with this Act and the regulations.
>
> (4) A decision of the board shall contain the facts found by the board, a statement of the issue in the appeal, the applicable provisions of this Act and the regulations and a statement of the reasons for the board's decision.

[12] Ms. Baron says the use of the word “shall” in describing the obligations of the Minister and the Board in responding to a Notice of Appeal indicates that they have no discretion in determining whether an appeal will proceed. The Applicant says there is no indication in the legislation of any limitation on an appeal board’s power to rehear or to reconsider issues or appeals, or to rehear subsequent appeals of the same matter.

ANALYSIS

[13] The Respondent’s position is that Ms. Baron requested a “reconsideration” of the original decision, while offering no new information or documentation in support of the request. There is, as the Respondent points out, no legislative basis for the Department to reconsider a decision. The Respondent adds that the legislative requirements for a “special need” application were not met, and maintains that there was no new information upon which the Department could make a decision. The proper course for the Applicant, the Respondent says, was to obtain new medical documentation and reapply. If the Court determines that the Department was required to make a decision based on the reconsideration request, the Respondent says *res judicata* applies and the Appeal Board had no jurisdiction to rehear the matter.

[14] Ms. Baron submits that *res judicata* is not appropriate in the context of requests for assistance under the E.S.I.A.A. which arise in circumstances “where the

potential outcomes of a wrong decision may result in homelessness and starvation." The interests at stake, it is submitted, require "a high level of judicial scrutiny and a high standard of procedural and substantive fairness by the board," given that the issues involved affect the necessities of life. The Applicant describes the scheme of the Act as a continuing and dynamic relationship, with ongoing responsibilities and obligations, between the person in need and the Department. The Applicant submits that changes in circumstances, or (as allegedly in this case) a lack of change or improvement, indicate the need for review and adjustment in order to respond to the person's need over time. The dynamic nature of the relationship, it is submitted, is demonstrated by the eligibility review process, which permits the Department to conduct reviews "from time to time" and requires it to advise of eligibility changes, with a right of appeal of such changes. The Applicant contrasts the "ongoing and dynamic" situation as between the assistance recipient and the Department with the discrete transactions and finality of litigation that is allegedly epitomized by *res judicata*.

[15] It is difficult to accept Ms. Baron's argument that a person seeking special needs benefits under the Act has the right to make new applications (which her counsel maintained, in response to a question posed during the hearing, should be unrestricted) with no change in circumstances, and to pursue appeal board proceedings if those applications are rejected. The legislation does not provide any entitlement to a "reconsideration" of a decision by the Department. In this case, it does not appear to be disputed that there had been no change in the Applicant's circumstances when Mr. Webber requested that the Department "reconsider" the original decision.

[16] The phrases "*res judicata*" and "issue estoppel" were not raised in the correspondence among Mr. Webber, Mr. Potter and Ms. LeBlanc, previously quoted in paras.2 and 3, although Mr. Potter's words made it clear that the Department's position was that the request had been "fully dealt with..." and Ms. LeBlanc maintained that the Department had made no new decision to warrant an appeal process. These comments amount to an assertion of *res judicata*. I will review the elements of issue estoppel as they relate to Ms. Baron's situation.

Issue Estoppel - Elements

(Preconditions identified in Angle (*supra*) and recognized in Danyluk (*supra*))

[17] ***Same parties*** According to the Applicant, agents of the Minister refused to deal with her second application or to refer it to the Appeal Board. Had the matter proceeded, the same parties would have been involved.

[18] ***Same question*** The Applicant submits that the Appeal Board failed to decide the issue before it, which was whether the Applicant was entitled to assistance for obtaining dentures as a special needs expense. According to the Applicant, the board's reasons were "utterly indecipherable and provide no insight on what issue they thought they were deciding, or their reasons for decision." Nevertheless, Ms. Baron has not provided any information to suggest that the request she made in 2007 differed from what she had sought in 2006.

[19] ***Finality*** The February 2006 Appeal Board decision was subject to judicial review, but the Applicant did not seek this remedy. As such, the decision would stand as final between the parties.

[20] I conclude that the three criteria or the preconditions to operation of issue estoppel have been met, and that I must determine whether the principle should be applied based on discretionary factors.

Issue Estoppel

Discretionary factors (as enumerated in Wright (*supra*))

[21] Ms. Baron's position, which the Respondent refutes in each instance, may be summarized as follows with respect to discretionary considerations relevant to this case.

[22] ***Potential Injustice*** The Applicant takes the position that *res judicata* bars access to justice, and argues that the result of applying the doctrine might be to put more pressure on judicial resources by causing increased numbers of judicial review applications of Appeal Board decisions in which *res judicata* was relied upon. Further, the Applicant submits that the nature of proceedings before the Board (for instance, the lack of a record and the holding of hearings *in camera*) suggests that less importance should be attributed to considerations of consistency or of avoiding inconsistent decisions than would be the case with court proceedings. Also, as noted above, the Applicant contends that the "dynamic and ongoing relationship"

between the Department and an assistance recipient distinguishes the situation from traditional court litigation. Rather, the Applicant submits, preventing injustice is a strong reason to reject the operation of issue estoppel.

[23] ***Wording of the statute; availability of appeal*** The Act provides for an appeal of "any decision related to the person's application or assistance received" (s. 12(1)). The Minister is required to review the appeal and advise the appellant whether the decision is upheld; if so, the appellant has the option of continuing the appeal. If it is continued, "the appeal shall be set down for hearing before an appeal board" (ss. 12(4)-(6)). The Applicant says the right of appeal and the non-discretionary duties imposed upon the Minister "implicitly authorizes the board to hear and rehear matters."

[24] ***Purpose of the legislation*** Section 2 provides that "[t]he purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency." According to the Applicant, the potentially serious consequences of an error "in relation to needs necessary to human survival" support an emphasis on "the pursuit of justice" over the concern with wasting resources.

[25] ***Safeguards to the parties; natural justice*** The Applicant points out that the procedural safeguards before the Board are minimal; there is little or no provision for disclosure, legal advice for assistance recipients, recording of hearings or other such matters. As such, the Applicant submits, concerns about wasting resources have diminished significance in this context.

[26] ***Expertise of the decision makers*** The legislation does not impose any requirement for special expertise for Board members, including legal expertise. The Applicant submits that decisions on legal issues such as *res judicata* would therefore be vulnerable to judicial review, and that application of *res judicata* in this context might lead to increased requests for judicial review.

[27] ***The circumstances giving rise to the administrative proceeding*** Ms. Baron says there are significant concerns about the reliability of the appeal decision. She submits that the interests at stake and the "damage to human dignity caused by a wrong decision in the context of access to food, housing and health care" indicate that further Board review should be available. The Applicant submits that her

illness has not abated and that she has no other means of having these needs met. As such, she says, two appeals in two years is not excessive.

[28] The discretionary factors do not, in my view, justify interfering with the conclusion that Ms. Baron's request was *res judicata*, when the essential elements or preconditions of issue estoppel were met. An order in the nature of *mandamus* is not warranted.

Note on form of 2007 Request

During oral submissions, Respondent's counsel requested that *res judicata* in this case not be determined on the narrow basis that Ms. Baron's 2007 request was for "reconsideration" and not a new application for special needs assistance. The disposition of this application would not be different if the second request had taken the form of a new application without a change in circumstances, instead of a request to reconsider the 2006 decision. Application of *res judicata* principles depends upon whether the requisite elements or preconditions are present as a matter of substance, not form, and the discretionary factors which must be applied in the circumstances of each case are unlikely to be resolved based only on technicality or application format.

CONCLUSION

[29] I am satisfied that the elements of issue estoppel are met in this case, and that Ms. Baron's 2007 request was *res judicata*, having been previously decided on identical facts and law. Discretionary factors do not justify setting this result aside. The Application for *certiorari* and *mandamus* orders is therefore dismissed.

[30] Given the relationship between the parties, and the Applicant's circumstances, I make no order as to costs.

J.

21

Heer v. Canada (Minister of Citizenship and Immigration), [2013] I.A.D.D. No. 274

Canada Immigration and Refugee Board, Immigration Appeal Division Decisions

Immigration and Refugee Board of Canada

Immigration Appeal Division

Panel: Maryanne Kingma In Chambers

Decision: February 26, 2013.

IAD File No. VB2-01064

Client ID No. 3407-0163

[2013] I.A.D.D. No. 274 | *[2013] D.S.A.I. no 274*

Between Harjinder Singh Heer, Appellant(s), and The Minister of Citizenship and Immigration, Respondent

(13 paras.)

Appearances

Counsel for the Appellant(s): Narinder Ghag.

Designated Representative(s): N/A.

Counsel for the Minister: Nadine Wu.

Reasons for Decision

SPONSORSHIP

INTRODUCTION

1 These are my reasons and decision in respect of the appeal of Harjinder Singh HEER (the "appellant"). The appeal arises from a second sponsorship application for the appellant's spouse Navdeep HEER (the "applicant").[1] This decision addresses whether the doctrines of *res judicata* or abuse of process apply to prevent hearing this appeal on the merits.

2 The first sponsorship application was refused and an appeal dismissed by the Immigration Appeal Division (the "IAD") on February 25, 2010[2] following an in-person hearing. The IAD Member upheld the decision of the visa officer that the marriage fell within section 4 of the Regulations as one that was not genuine and was entered into primarily for the purpose of immigration.

3 This second application was refused by the visa post on February 24, 2012.[3] The officer found that the marriage fell within subsection 4(1) of the Regulations as one that was primarily for the purpose of immigration and that was not genuine. A Notice of Appeal was received at the IAD on April 4, 2012. By letter of September 26, 2012, the IAD invited submissions on the application of *res judicata* and abuse of process to this appeal.

ISSUE

4 The issue to be decided is whether the doctrines of *res judicata* or abuse of process apply to prevent the hearing of this appeal on its merits.

ANALYSIS

5 The doctrine of *res judicata* and its purpose,[4] as well as its application to proceedings at the IAD, are well-established law.[5] The associated concept of issue *estoppel* is a doctrine of public policy that is designed to advance the interests of justice by promoting finality in judicial decision-making, as explained by the Supreme Court of Canada in the case of *Danyluk*.[6] This form of *res judicata* applies when the following three conditions are satisfied:

1. the parties in the previous proceeding are the same;
2. the previous decision was final, and
3. the issue is the same.

6 In this case, all three of those questions are answered in the affirmative: the previous IAD decision is a final adjudication on the issue of whether the marriage is caught by the "bad faith" provision of the Regulations and the parties to this appeal are the same as in the previous appeal. An amendment to the bad faith provision of the Regulations came into effect on September 30, 2010. That amendment changed the test for bad faith from a conjunctive to a disjunctive test but using the same two components: whether the marriage was entered into primarily for the purpose of immigration and whether it is genuine. The issue is the same notwithstanding the ammendment.

7 Generally, *res judicata* applies in public law to prevent applicants from re-applying *ad infinitum* and *ad nauseam* with the same application, which would constitute an abuse of the process of administrative tribunals. Jurisprudence, such as the Federal Court case of *Kaloti*,[7] confirms that a tribunal has jurisdiction to control its process and to prevent abuse and may therefore consider whether to summarily dispose of an appeal that is an abusive attempt to re-litigate what was already decided. However, the court confirmed that the doctrine should not prevent an applicant from launching a second application based on change of circumstances provided, of course, that the change of circumstances is relevant to the matter to be decided.

8 Numerous cases confirm the principles of finality set out in *Danyluk* but also identify special circumstances where the integrity of the justice system may be enhanced by re-litigation and where injustice would result if *res judicata* is applied. For example, *res judicata* may be overcome where fresh, new evidence, previously unavailable, conclusively impeaches the original results.[8]

9 The appellant's reference to the case of *Donkor* v. *Canada (MCI)*[9] was not clarified with further submissions. I find the reference does not assist in this case. The IAD found that the appeal failed on both test prongs and the evidence offered in support of a re-hearing is not sufficient to overcome the application of *res judicata*.

10 The appellant pointed out the following evidence in support of genuineness of the marriage in this case:

* Since the visa officer refusal, the appellant has returned to India for three separate visits;
* There was insufficient emphasis placed on the fact of their child born on July 4, 2009; and
* The couple has continued to communicate by telephone.

11 I find that the appellant has failed to show that there are grounds to overcome the application of *res judicata* in this case. The Member in the previous appeal provided opportunity for both the appellant and applicant to give

testimony and undertook a detailed examination of relevant considerations to assess genuineness. The IAD member considered the fact of visits and the birth of a child, but found that the relationship was not genuine because of the willingness of the families to agree to the match so quickly and in the manner they did despite incompatibilities in age and marital background. In addition, the Member found a lack of communication and knowledge and inferred from the available evidence that it was more likely that the marriage was arranged primarily for the applicant to acquire permanent resident status in Canada.

12 The appellant has not provided evidence or argument sufficient to overcome the application of *res judicata* in the circumstances of this case.

CONCLUSION

13 In the circumstances I find that the arguments against the application of *res judicata* are not sufficient to overcome its application in this case. The appeal is, therefore, dismissed.

DECISION

The appeal is dismissed.

Maryanne Kingma

February 26, 2013

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1 *Immigration and Refugee Protection Act* (the "Act"), S.C. 2001, c. 27, subsection 13(1), which provides as follows:

> **13 (1) Right to sponsor family member** - A Canadian citizen or permanent resident may, subject to the Regulations, sponsor a foreign national who is a member of the family class.

2 Record, p.173.

3 Record pp. 168-169.

4 *Angle v. Minister of National Revenue* -- *M.N.R* [1975] 2 S.C.R. 248, at page 254; and *Danyluk* v. *Ainsworth Technologies Inc* [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46 (QL) at para. 25. The purpose of the doctrine of *res judicata* was described by the Supreme Court of Canada (SCC) in *Danyluk* as follows:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

5 *Danyluk* v. *Ainsworth Technologies Inc* [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46 (QL) at paragraph 21:

> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

6 Ibid.

7 *Kaloti* v. *Canada (Minister of Citizenship and Immigration)*, (2000), 8 Imm. L.R. (3d) 287 (F.C.T.D.).

8 *Toronto (City)* v. *C.U.P.E.,* Local 79, *2003 SCC 63*, *[2003] 3 S.C.R. 77*.

9 *Donkor* v. *Canada (Minister of Citizenship and Immigration),* (2006), No. 1375, *2006 FC 1089*.

End of Document

22

CITATION: Anishinabek Police Service v. Public Service Alliance of Canada, 2012 ONSC 4583
DIVISIONAL COURT FILE NO.: 191/11 and 454/11
DATE: 20120815

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LAX, SWINTON AND NORDHEIMER JJ.

Court File No.: 191/11	
B E T W E E N:	
ANISHINABEK POLICE SERVICE	*Brian Daly*, for the Applicant
Applicant	
- and -	
PUBLIC SERVICE ALLIANCE OF CANADA, GORDON SIMMONS, SHERRILL MURRAY AND IRV KLEINER	*Andrew Raven*, for the Respondent Public Service Alliance of Canada
	David Feliciant, for the Attorney General of Ontario
Respondents	
Court File No: 454/11	
AND BETWEEN:	
ANISHINABEK POLICE SERVICE	*Brian Daly*, for the Applicant
Applicant	
- and -	
PUBLIC SERVICE ALLIANCE OF CANADA, OWEN SHIME, SHERRILL MURRAY AND IRV KLEINER	*Andrew Raven*, for the Respondent Public Service Alliance of Canada
	David Feliciant, for the Attorney General of Ontario
Respondents	
	HEARD at TORONTO: July 10, 2012

Swinton J.:

Overview

[1] The applicant, Anishinabek Police Service (the "Employer" or the "APS"), seeks judicial review of two arbitration awards arising from grievances about an unpaid suspension imposed on First Nations Constable Craig McCue (the "grievor") and the subsequent termination of his employment. At issue in these applications is the authority of the arbitrators to proceed to hear the grievances on the merits. The applicant argues that the doctrines of abuse of process and issue estoppel bar arbitration due to an earlier adjudication under the APS *Code of Conduct and Professionalism* (the "Code of Conduct").

[2] For the reasons that follow, I would dismiss the applications for judicial review.

Background

The Process under the Code of Conduct

[3] According to the Agreed Statement of Facts (found at p. 46 of the Application Record in Court File 454/11), the APS, since it was formed in 1994, has operated under a series of tripartite Police Service Agreements involving the governments of Canada and Ontario and a number of Anishinabek First Nations. The APS is a stand-alone First Nations police service that polices 16 First Nation communities. As the tripartite agreement requires the adoption of a code of conduct to address employee discipline, the APS has had a *Code of Conduct and Professionalism* in place since 1994.

[4] The tripartite agreement leaves the content of the code of conduct to the discretion of the employer. In the present case, the Code of Conduct mirrors the code of conduct found in provincial legislation that applies to other police forces. However, First Nations constables are expressly excluded from the disciplinary provisions of the Ontario *Police Services Act*, R.S.O. 1990, c. P.15.

[5] The grievor was suspended with pay on May 3, 2005 after he became the subject of criminal charges. In September 2007, he pleaded guilty to a criminal charge of assault against his wife. He was convicted and was given a conditional discharge. In September, 2008, the APS changed his suspension to one without pay.

[6] In July 2009, the chief of the APS appointed a retired superintendent of the Ontario Provincial Police, R.J. Fitches, as an adjudicator to conduct a discipline hearing pursuant to the Code of Conduct. The adjudicator held a hearing over the course of several days and on January 26, 2010, determined that the grievor had engaged in discreditable conduct in respect of the assault on his wife. Subsequently, on April 12, 2010, the adjudicator concluded that the grievor should be dismissed from the APS. The dismissal occurred July 28, 2010.

The Arbitration Proceedings

[7] The Public Service Alliance of Canada ("the Union") has been the certified bargaining agent for the First Nations constables employed by the APS since May 16, 2008. Labour relations between the APS and the Union are governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "CLC").

[8] The Union is bound by a collective agreement that was entered into by the APS and a predecessor police officers' association in 2006. The collective agreement recognizes the Union as the exclusive bargaining agent for the uniformed officers of the APS (Article 1.01). The agreement also contains a management rights clause in Article 2.02 providing that the APS will not exercise discipline, up to and including termination, without reasonable cause. The article continues,

> A claim by an employee that he/she has been disciplined without reasonable cause may be the subject of a grievance in accordance with the grievance procedure outlined in this Agreement.

[9] Pursuant to s. 57(1) of the CLC, parties to a collective agreement are required to resolve disputes concerning the application, interpretation, administration or alleged contravention of the agreement by referral to arbitration or otherwise, without stoppage of work. An arbitrator is either selected by the parties or appointed by the federal Minister of Labour (s. 57(2)).

[10] The powers of arbitrators are set out in s. 60 of the CLC and include the power to determine whether a matter is arbitrable (s. 60(1)(b)) and the power to substitute a penalty for the discipline imposed or a dismissal, if there is no specific penalty in the collective agreement (s. 60(2)).

[11] The Union filed grievances concerning both the unpaid suspension and the grievor's dismissal under the collective agreement. The Union was not a party to the adjudication under the Code of Conduct, although a Union representative appeared as a witness. Indeed, the Union had written a letter to the APS in early January 2010 objecting to the process under the Code of Conduct.

[12] An arbitration board chaired by Gordon Simmons was appointed to hear the grievor's suspension grievance. APS raised a preliminary objection to the arbitration board's jurisdiction to hear the grievance, which was rejected. Subsequently, APS argued that the grievance should be dismissed because of issue estoppel or the doctrine of abuse of process.

[13] The majority of the board rejected APS's submissions, holding that the arbitration board had jurisdiction to hear the grievance under the collective agreement (Simmons Award, March 8, 2010). As well, they rejected the arguments of issue estoppel and abuse of process, because the proceeding under the Code of Conduct did not result in a judicial decision and was not

"litigation" in the legal sense of that word. Moreover, the issue before the arbitration board, the appropriateness of a disciplinary suspension, had not been dealt with by the adjudicator (Simmons Award, February 8, 2011).

[14] Subsequently, a second arbitration board, chaired by Owen Shime, was appointed to deal with the dismissal grievance, in which the Union claimed that APS contravened the collective agreement and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 by dismissing the grievor without accommodating his disability, alcoholism.

[15] In an award dated September 8, 2011, the majority rejected APS's argument that the arbitration proceeding should be dismissed, because it would be an abuse of process to continue. Arbitrator Shime adopted the reasons of Arbitrator Simmons and concluded that the adjudicator's findings "lacked the necessary statutory or legal foundation to constitute a judicial or quasi-judicial proceeding to which the doctrine of abuse of process or issue estoppel may be applied in the event of a subsequently appropriate legal proceeding" (Shime Award, p. 8). As well, he relied on the provisions of the *Canada Labour Code*, concluding that they gave the grievor a right to proceed to arbitration respecting his discipline and dismissal before an independent arbitrator selected by the parties. The unilateral selection of the adjudicator by the Employer was not in accordance with the requirements of s. 57 of the CLC (Award, p. 12).

The Standard of Review

[16] The applicant argues that the arbitration awards must be reviewed on a standard of correctness, because the arbitrators were applying doctrines of abuse of process and issue estoppel. These are said to be general questions of law, outside the special expertise of a labour arbitrator. Moreover, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 60 cited *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 as an example of a case where the standard of review was correctness, because the question at issue was one of general law both of central importance to the legal system and outside the adjudicator's special expertise. At issue in the *City of Toronto* case was the application of the doctrines of issue estoppel and abuse of process by a labour arbitrator where the grievor had been convicted in a criminal trial and then sought to relitigate the underlying issues before the arbitrator.

[17] The Union argues that the standard of review is reasonableness, given the more recent decision of the Supreme Court of Canada in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59. In *Nor-Man*, the Court dealt with the standard applicable to the decision of a labour arbitrator applying the doctrine of equitable estoppel.

[18] I note that the Supreme Court in *Nor-Man* did not overrule the *City of Toronto* case. Indeed, the Court referred to that case when it described the situations in which the standard of correctness applies (see paras. 35 and 55). Fish J., speaking for the Court, explained that the standard of reasonableness applied because the arbitrator was imposing estoppel as a remedy (at

para. 38), and arbitrators require flexibility to provide appropriate remedies in the resolution of workplace disputes (at para. 49). As well, he noted that arbitrators have the authority to apply general legal principles in a manner reasonably responsive to the distinctive nature of labour relations (at para. 52).

[19] This Court has recently held that the standard of reasonableness applied where a labour arbitrator had to apply the doctrines of abuse of process and issue estoppel to the award of another arbitrator dealing with the same parties (*Canadian Union of Public Employees, Local 79 v. Toronto (City)*, 2012 ONSC 1158 (Div. Ct.) at para. 28).

[20] For purposes of this application for judicial review, I need not determine whether *Nor-Man* has changed the standard of review from that applied in *City of Toronto*. Assuming that the standard of review here is correctness, I am satisfied that the decisions of the arbitrators were correct.

Analysis

[21] The issue in the present case is whether the arbitrators were required to respect the determination of the adjudicator under the Code of Conduct that the grievor should be dismissed because of discreditable conduct. APS argues that the arbitrators erred in holding that the adjudication under the Code of Conduct was not a judicial proceeding and in concluding that the grievances were not bound to fail as a result of the adjudication.

[22] Finality doctrines such as issue estoppel and abuse of process are aimed at protecting the fairness and integrity of the adjudicative process *(City of Toronto*, above, at para. 51and *British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52 at para. 28). They aim at preventing a litigant who is dissatisfied with the result of an adjudication from attempting to relitigate. As Binnie J. stated in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, "A litigant, to use the vernacular, is only entitled to one bite at the cherry" (at para. 18).

[23] The requirements for issue estoppel were set out by the Supreme Court of Canada in *Danyluk* at para. 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[24] Issue estoppel, as well as abuse of process, fundamentally requires that the decision in the prior process be a judicial decision, reached through an adjudicative process. In determining whether the prior decision is a judicial decision, three elements are to be considered:

> Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? (*Danyluk* at para. 35)

[25] In the present case, both arbitrators set out the correct legal principles respecting abuse of process and issue estoppel and then applied them. They correctly concluded that the decision of the adjudicator was not a judicial decision as understood in the jurisprudence.

[26] There is no enabling legislation which provides the adjudicator under the Code of Conduct with authority to make a decision. Rather, the adjudicator's authority derives from the Code of Conduct, which was adopted by the APS in order to meet its contractual commitments to the federal and provincial governments. Therefore, the adjudicator did not have any statutory authority to make a judicial decision, in contrast to the adjudicators in cases like *Danyluk* and *Figliola*, above.

[27] APS argues that the adjudicator acted judicially, as he conducted the hearing in a manner consistent with the procedures under the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, in accordance with the requirements of the Code of Conduct. For example, evidence was taken under oath or affirmation and the procedures used were similar to those used under the *Police Services Act*.

[28] It is true that the adjudicator conducted the hearing in accordance with principles of procedural fairness. In that sense, it can be said that he acted in a judicial manner. However, that does not change the fact that he was not exercising a statutory function, nor was he making a judicial decision. Rather, he was acting as a delegate of the chief of the APS in making a decision whether to discipline the grievor.

[29] Both the APS and the Union rely on the decision of the Divisional Court in *Macdonald v. Anishinabek Police Service*, 2006 CanLII 37598. In that case, the APS had dismissed a probationary constable. When he sought judicial review, the APS argued that the Court had no jurisdiction, as the relationship of the constable and the APS should be determined under the *Canada Labour Code*. However, the Canada Industrial Relations Board had dismissed a complaint from the constable that his union violated the duty of fair representation under the CLC because there was, as yet, no collective agreement in place at the time of his termination.

[30] In *Macdonald*, this Court rejected the argument that it had no jurisdiction to determine the application for judicial review. It concluded that the APS had a duty to act fairly prior to dismissing a constable, and the Code of Conduct granted the constable the right to a hearing. However, the APS had failed to provide such a hearing or procedural fairness.

[31] With respect to the interaction between the Code of Conduct and the procedures available under a collective agreement, the Court stated that "[i]t would only be at the conclusion of that hearing process that a discharge grievance could arise" (at para. 36). "That hearing process" is the one contemplated by the Code of Conduct. The Court also stated,

> Given the dual nature of the APS, which is both an employer under the federal labour regime and the operator of a professional police force, the two systems must live together. We therefore reject the respondent's submission that the *Canada Labour Code* has supplanted the APS *Code of Conduct*.

[32] Again at para. 41, the Court stated,

> Unlike other police services which are subject to statutory discipline procedures under the *Police Services Act*, it would appear that the APS does not have available to it a statutory discipline procedure that it can invoke, unless it can be found in section 54. Instead, as noted, it has the *Code of Conduct* followed by resort to the grievance procedure under the collective bargaining agreement and the *Canada Labour Code*.

[33] Despite the APS's argument that *Macdonald* is determinative of its argument for finality, I see nothing in the reasons of the Divisional Court that addresses the specific issue arising in the present applications. The Court in *Macdonald* determined that the APS could not unilaterally impose discipline without first following the Code of Conduct. If anything, the quotations above suggest that the Divisional Court recognized that resort to the grievance procedure and arbitration is available following a determination under the Code of Conduct.

[34] APS also relied on *Penner v. Niagara (Regional Municipality) Police Services Board*, 2010 ONCA 616 and *Figliola*, above. Both are distinguishable.

[35] In *Penner*, the Ontario Court of Appeal struck a Statement of Claim in a civil action brought by Mr. Penner against a police service. The issues raised were the same as those canvassed in a decision in an earlier disciplinary proceeding under the *Police Services Act* that had been upheld on appeal. Mr. Penner was a full party at the disciplinary hearing, as his complaint against the officers had led to the disciplinary process. In the circumstances, the Court held that the doctrine of issue estoppel applied. In the course of its reasons, the Court stated that "the hearing officer was carrying out a judicial function and the hearing was conducted with basic standards of procedural fairness" (at para. 25).

[36] In *Penner*, unlike the present case, the hearing officer was exercising his power in accordance with the statutory regime for police discipline found in the *Police Services Act*. In addition, Mr. Penner was the one who initiated the proceedings with his complaint, and he brought the civil action because of his discontent with the findings in the disciplinary process.

[37] *Figliola* is also a case where a litigant, unhappy with the result in one proceeding, turned to another forum. Several workers had first sought benefits from the Workers' Compensation Board of British Columbia and, when dissatisfied with the outcome of those proceedings, had turned to the Human Rights Tribunal. The Supreme Court of Canada held that the Tribunal was precluded from proceeding because of a legislative provision stating that the Tribunal could dismiss a complaint if the substance of the complaint had been appropriately dealt with in another proceeding. In reaching this conclusion, Abella J. for the majority spoke of the

importance of finality to litigation in the context where a litigant was seeking to relitigate in a different forum (at para. 47).

[38] The present case is not an example of a litigant invoking different tribunals to relitigate the same issue. The grievor did not invoke one adjudicative process and, when unhappy with the result, turn to arbitration. Rather, he was required to participate in a disciplinary process before the adjudicator that was set in motion by his Employer. Moreover, that process was created because of the Employer's independent decision to adopt the Code of Conduct, albeit as required by the tripartite agreement.

[39] APS also argues that the issues before the adjudicator and Arbitrator Shime are the same, since each had to deal with the termination of the grievor's employment. Counsel also argued that the suspension grievance before Arbitrator Simmons was bound to fail, given the decision to terminate by the adjudicator.

[40] However, even if the adjudicator's decision could be said to be a judicial decision, the doctrine of issue estoppel does not apply here. The issues before the arbitrators and the adjudicator are not the same, despite the APS assertion to the contrary. The adjudicator stated clearly during the hearing before him that he was not dealing with violations of the collective agreement (Transcript, February 22, 2010, p. 172). Moreover, the dismissal grievance claims relief for unjust dismissal because of the non-discrimination clause in the collective agreement, the *Canadian Human Rights Act* and the duty to accommodate, none of which were considered by the adjudicator. In addition, the disciplinary nature of the suspension without pay was also not considered by the adjudicator.

[41] APS also argues that the Union was a party to the adjudication, since a Union representative was present and an individual from the Union testified on behalf of the grievor. However, the Union was not an active party to the adjudication. According to the Agreed Statement of Facts, the grievor was represented by an agent, and not counsel provided by the Union.

[42] APS also points to certain articles of the collective agreement as evidence of the Union's acknowledgement and acceptance of the Code of Conduct proceedings. Article 1.07 defines an "Employee Representative" to mean a person either appointed by the Union or the employee in grievances or Code of Conduct complaints. Article 2.01 recognizes management rights, including in paragraph (d) the right to manage the APS, including the right to make rules, regulations and policies. Finally, Article 19.05 provides that an employee is not entitled to indemnification for legal costs arising from disciplinary charges or conduct complaints. In my view, none of these provisions indicates an agreement by the Union that discipline matters will be determined only through the adjudication process under the Code of Conduct.

[43] Finally, APS argues that the conclusion of the arbitrators calls into question the efficacy of the Code of Conduct and risks undermining public confidence in the public complaints system incorporated in the Code of Conduct. The Attorney General of Ontario also made submissions

about the importance of an effective system of public complaints respecting First Nations police services.

[44] There is no doubt that an effective police complaints system is important to the administration of justice in the province. However, it is also important to acknowledge the policy in the *Canada Labour Code* that preserves and protects the right of employees to engage in free collective bargaining. In the present case, APS entered into a collective agreement with the Union which expressly recognized the employee's right to grieve unreasonable discipline and dismissal decisions and ultimately contemplated arbitration before an independent arbitrator.

[45] APS adopted a Code of Conduct as it was required to do by the tripartite agreement. APS also entered into a collective agreement with the Union that provides the right to arbitrate discipline and dismissal decisions. These separate provisions have to co-exist. APS cannot avoid its contractual obligations under the collective agreement by reliance on the tripartite agreement. The Union is not a party to the tripartite agreement, and unilateral action by the APS in entering into that agreement cannot oust the right of the Union to pursue a grievance under the collective agreement.

[46] In sum, the arbitrators correctly concluded that the doctrines of abuse of process and issue estoppel did not preclude them from proceeding to hear the grievances on the merits.

Conclusion

[47] For these reasons, the applications for judicial review are dismissed. Costs to the Union are fixed at $6,000.00 all inclusive payable by the applicant.

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Swinton J.

_____

Lax J.

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Nordheimer J.

DATE: August 15, 2012

23

British Columbia (Workers' Compensation Board) v. Figliola, [2011] 3 S.C.R. 422

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: March 16, 2011;

Judgment: October 27, 2011.

File No.: 33648.

[2011] 3 S.C.R. 422 | *[2011] 3 R.C.S. 422* | *[2011] S.C.J. No. 52* | *[2011] A.C.S. no 52* | *2011 SCC 52*

Workers' Compensation Board of British Columbia, Appellant; v. Guiseppe Figliola, Kimberley Sallis, Barry Dearden and British Columbia Human Rights Tribunal, Respondents, and Attorney General of British Columbia, Coalition of BC Businesses, Canadian Human Rights Commission, Alberta Human Rights Commission and Vancouver Area Human Rights Coalition Society, Interveners.

(99 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Administrative law — Judicial review — Standard of review — Patent unreasonableness — Injured workers receiving compensation pursuant to British Columbia's Workers' Compensation Board chronic pain policy — Workers filing appeal with Board's Review Division claiming policy breached s. 8 of British Columbia Human Rights Code — Board rejecting that policy breached Human Rights Code — Workers subsequently filing complaints with Human Rights Tribunal repeating same arguments — Human Rights Tribunal deciding that this was appropriate question for Tribunal to determine — What is the scope of Tribunal's discretion to determine whether the substance of a complaint has been "appropriately dealt with" when two bodies share jurisdiction over human rights — Whether exercise of discretion by Tribunal was patently unreasonable — Human Rights [page423] Code, R.S.B.C. 1996, c. 210, ss. 8, 27(1) — Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59.

Summary:

The complainant workers suffered from chronic pain and sought compensation from British Columbia's Workers' Compensation Board. Pursuant to the Board's chronic pain policy, they received a fixed compensation award. They appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under s. 8 of the British Columbia *Human Rights Code* ("*Code*"). The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint and concluded that the Board's chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

The complainants appealed this decision to the Workers' Compensation Appeal Tribunal ("WCAT"). Before the appeal was heard, the legislation was amended removing WCAT's authority to apply the *Code*. Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by WCAT, but judicial review remained available. Instead of applying for judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division.

The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*, the Tribunal had no jurisdiction, and that under s. 27(1)(f) of the *Code*, the complaints had already been "appropriately dealt with" by the Review Division. The Tribunal rejected both arguments and found that the issue raised was an appropriate question for the Tribunal to consider and that the parties to the complaints should receive the benefit of a full Tribunal hearing. On judicial review, the Tribunal's decision was set aside. The Court of Appeal, however, concluded that the Tribunal's decision was not patently unreasonable and restored its decision.

[page424]

Held: The appeal should be allowed, the Tribunal's decision set aside and the complaints dismissed.

Per LeBel, Deschamps, Abella, Charron and Rothstein JJ.: Section 27(1)(f) of the *Code* is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack and abuse of process -- doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness.

Read as a whole, s. 27(1)(f) does not codify these actual doctrines or their technical explications, it embraces their underlying principles. As a result, the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Relying on these principles will lead the Tribunal to ask itself whether there was concurrent jurisdiction to decide the issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with" under s. 27(1)(f). The Tribunal's strict adherence to the application of issue estoppel was an overly formalistic interpretation of s. 27(1)(f), particularly of the phrase "appropriately dealt with", and had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation.

Section 27(1)(f) does not represent a statutory invitation either to judicially review another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies.

[page425]

The discretion in s. 27(1)(f) was intended to be limited. This is based not only on the language of s. 27(1)(f) and the legislative history, but also on the character of the other six categories of complaints in s. 27(1), all of which refer to circumstances that make hearing the complaint presumptively unwarranted, such as complaints that are not within the Tribunal's jurisdiction, allege acts or omissions that do not contravene the *Code*, have no reasonable prospect of success, would not be of any benefit to the complainant or further the purposes of the *Code*, or are made for improper motives or bad faith.

What the complainants in this case were trying to do is relitigate in a different forum. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings

before a different tribunal in search of a more favourable result. This strategy represented a "collateral appeal" to the Tribunal, the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent. The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision: it questioned whether the Review Division's process met the necessary procedural requirements; it criticized the Review Officer for the way he interpreted his human rights mandate; it held that the decision of the Review Officer was not final; it concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal; and it suggested that Review Officers lacked expertise in interpreting or applying the *Code*.

The standard of review designated under s. 59 of the *Administrative Tribunals Act* is patent unreasonableness. Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision is patently unreasonable.

Per McLachlin C.J. and Binnie, Fish and Cromwell JJ.: Both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both [page426] the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). A narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision. Rather, s. 27(1)(f) confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law.

The grammatical and ordinary meaning of the words of s. 27(1)(f) support an expansive view of the discretion, not a narrow one. Nor can it be suggested that s. 27(1)(f) be read narrowly because of the character of the other six categories of discretion conferred by s. 27(1). The provision's legislative history also confirms that it was the Legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider.

The Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are not the only, or even the most important considerations. The need for this necessarily broader discretion in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainants found themselves in this case and underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The most important consideration is whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

[page427]

In this case, the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable. While the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to be exactly the sort of approach called for by s. 27(1)(f). The Tribunal also failed to have regard to the fundamental fairness or otherwise of the earlier

proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

The appeal should be allowed and the application of the Workers' Compensation Board under s. 27(1)(f) should be remitted to the Tribunal for reconsideration.

Cases Cited

By Abella J.

Referred to: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4) 308; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4) 372; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Garland v. Consumers' [page428] Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4) 683; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

By Cromwell J.

Referred to: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4) 266; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL); *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 44, 59.

Attorney General Statutes Amendment Act, 2007, S.B.C. 2007, c. 14, s. 3.

Canadian Charter of Rights and Freedoms, s. 15.

Civil Code of Québec, S.Q. 1991, c. 64, art. 2848.

Human Rights Amendment Act, 1995, S.B.C. 1995, c. 42.

Human Rights Code, R.S.B.C. 1996, c. 210, ss. 8, 25(2) [rep. & sub. 2002, c. 62, s. 11], (3) [rep. *idem*], 27(1), (2) [rep. & sub. *idem*, s. 12].

Human Rights Code Amendment Act, 2002, S.B.C. 2002, c. 62.

Workers Compensation Act, R.S.B.C. 1996, c. 492, ss. 96.4(2), 99, 245 to 250, 251.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Huddart, Frankel and Tysoe JJ.A.), 2010 BCCA 77, 2 B.C.L.R. (5) 274, 316 D.L.R. (4) 648, 284 B.C.A.C. 50, 481 W.A.C. 50, 3 Admin. L.R. (5) 49, [2010] B.C.J. No. 259 (QL), 2010 CarswellBC 330, setting aside a decision of Stromberg-Stein J., 2009 BCSC 377, 93 B.C.L.R. (4) 384, 96 Admin. L.R. (4) 250, [2009] B.C.J. No. 554 (QL), 2009 CarswellBC 737. Appeal allowed.

Counsel

Scott A. Nielsen and *Laurel Courtenay*, for the appellant.

Lindsay Waddell, *James Sayre* and *Kevin Love*, for the respondents Guiseppe Figliola, Kimberley Sallis and Barry Dearden.

Jessica M. Connell and *Katherine Hardie*, for the respondent the British Columbia Human Rights Tribunal.

Jonathan G. Penner, for the intervener the Attorney General of British Columbia.

Peter A. Gall, *Q.C.*, and *Nitya Iyer*, for the intervener the Coalition of BC Businesses.

Sheila Osborne-Brown and *Philippe Dufresne*, for the intervener the Canadian Human Rights Commission.

[page430]

Janice R. Ashcroft, for the intervener the Alberta Human Rights Commission.

Ryan D. W. Dalziel, for the intervener the Vancouver Area Human Rights Coalition Society.

The judgment of LeBel, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

ABELLA J.

1 Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

2 In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

Background

3 Guiseppe Figliola, Kimberley Sallis, and Barry Dearden suffered from chronic pain. Mr. Figliola suffered a lower back injury while trying to place a sixty-pound, steel airshaft in the centre of a roll of paper. Ms. Sallis fell down a set of slippery stairs while delivering letters for Canada Post. Mr. Dearden, who also worked for Canada Post, developed back pain while delivering mail.

4 Each of them sought compensation from the British Columbia's Workers' Compensation Board [page431] for, among other things, their chronic pain. The employers were notified in each case.

5 The Board's chronic pain policy, set by its board of directors, provided for a fixed award for such pain:

> Where a Board officer determines that a worker is entitled to [an] award for chronic pain ... an award equal to 2.5% of total disability will be granted to the worker.

(*Rehabilitation Services and Claims Manual*, vol. I, Policy No. 39.01, Chronic Pain, at para. 4(b); later replaced by vol. II, Policy No. 39.02, Chronic Pain (online).)

6 Pursuant to this policy, the complainants received a fixed compensation award amounting to 2.5% of total disability for their chronic pain. The Workers' Compensation Board expresses partial disability as a percentage of the disability suffered by a completely disabled worker. This is intended to reflect "the extent to which a particular

injury is likely to impair a worker's ability to earn in the future" (*Rehabilitation Services and Claims Manual*, vol. II, Policy No. 39.00).

7 Each complainant appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional under s. 15 of the *Canadian Charter of Rights and Freedoms*, and discriminatory on the grounds of disability under s. 8 of the *Human Rights Code*, *R.S.B.C. 1996, c. 210*.

8 At the Review Division, the Review Officer, Nick Attewell, found that only the Workers' Compensation Appeal Tribunal ("WCAT") had the authority to scrutinize policies for patent [page432] unreasonableness. He also concluded that, since the combination of s. 44 of the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45* ("*ATA*"), and s. 245.1 of the *Workers Compensation Act*, *R.S.B.C. 1996, c. 492*, expressly deprived the WCAT of jurisdiction over constitutional questions, this meant that he too had no such jurisdiction.

9 The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint. This authority flowed from this Court's decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, *2006 SCC 14*, *[2006] 1 S.C.R. 513*, where the majority concluded that human rights tribunals did not have exclusive jurisdiction over human rights cases and that unless there was statutory language to the contrary, other tribunals had concurrent jurisdiction to apply human rights legislation.

10 In careful and thorough reasons, the Review Officer concluded that the Board's chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

11 The complainants appealed Mr. Attewell's decision to the WCAT. Before the appeal was heard, the B.C. legislature amended the *Administrative Tribunals Act* and the *Workers Compensation Act*, removing the WCAT's authority to apply the *Code* (*Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14). The effect of this amendment on a Review Officer's authority to address the *Code* is not before us and was not argued by any of the parties.

12 Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by the WCAT, but judicial review remained available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division. They did not proceed [page433] with their appeal to the WCAT from the conclusions of the Review Officer dealing with whether he had jurisdiction to find the chronic pain policy to be patently unreasonable.

13 The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*, the Tribunal had no jurisdiction, and that under s. 27(1)(f), the complaints had already been appropriately dealt with by the Review Division. Those provisions state:

> **27(1)** A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> ...
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

14 The Tribunal rejected both arguments (*2008 BCHRT 374* (CanLII)). Of particular relevance, it did not agree that the complaints should be dismissed under s. 27(1)(f). Citing *British Columbia (Ministry of Competition, Science &*

Enterprise) v. Matuszewski, 2008 BCSC 915, 82 Admin. L.R. (4th) 308, and relying on this Court's decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, the Tribunal concluded that "the substance of the Complaints was not appropriately dealt with in the review process... . [T]he issue raised is an appropriate question for the Tribunal to consider and the parties to the Complaints should receive the benefit of a full Tribunal hearing" (para. 50).

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15 On judicial review, the Tribunal's decision was set aside by Justice Stromberg-Stein (2009 BCSC 377, 93 B.C.L.R. (4th) 384). She concluded that the same issues had already been "conclusively decided" by the Review Officer and that the Tribunal had failed to take into proper account the principles of *res judicata*, collateral attack, and abuse of process (paras. 40 and 54). She found that for the Tribunal to proceed would be a violation of the principles of consistency, finality and the integrity of the administration of justice. In her view, the complaints to the Tribunal were merely a veiled attempt to circumvent judicial review:

> The Tribunal would be ruling on the correctness of the Review Division decision. That is not the role of the Tribunal and to do so constitutes an abuse of process. [para. 56]

16 As for which standard of review applied, her view was that the Tribunal's decision ought to be set aside whether the standard was correctness or patent unreasonableness.

17 The Court of Appeal restored the Tribunal's decision (2010 BCCA 77, 2 B.C.L.R. (5th) 274). It interpreted s. 27(1)(f) as reflecting the legislature's intention to confer jurisdiction on the Tribunal to adjudicate human rights complaints even when the same issue had previously been dealt with by another tribunal. This did not represent the Tribunal exercising appellate review over the other proceeding, it flowed from the Tribunal's role in determining whether the previous proceeding had substantively addressed the human rights issues.

18 On the question of the standard of review, the Court of Appeal concluded that the issue revolved around s. 27(1)(f). Since a decision under s. 27(1)(f) is discretionary, the appropriate standard according to the jurisprudence is patent unreasonableness: see *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; [page435] *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; and *Matuszewski*. This was based on s. 59(3) of the *ATA*, which sets out the relevant standard, and on s. 59(4), which sets out a number of indicia:

> **59 (1)** In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> ...
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

19 The Court of Appeal concluded that the Tribunal's decision was not patently unreasonable.

20 I agree with the conclusion that, based on the directions found in s. 59(3) of the *ATA*, the Tribunal's decision is to be reviewed on a standard of patent unreasonableness. In my respectful view, however, I see the Tribunal's decision not to dismiss the complaints in these circumstances as reaching that threshold.

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Analysis

21 The question of jurisdiction is not seriously at issue in this appeal. Since *Tranchemontagne*, tribunals other than human rights commissions have rightly assumed that, absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation. That means that at the time these complaints were brought, namely, before the amendments to the *ATA* removed the WCAT's human rights jurisdiction, both the Workers' Compensation Board *and* the Human Rights Tribunal had ostensible authority to hear human rights complaints. Since the complainants brought their complaints to the Board, and since either the Board or the Tribunal was entitled to hear the issue, the Board had jurisdiction when it decided the complainants' human rights issues. But based on their concurrent jurisdiction when this complaint was brought to the Board, there is no serious question that the Tribunal, in theory, also had authority over these human rights complaints. This means that s. 27(1)(a) of the *Code* is not in play.

22 The question then arises: when two bodies share jurisdiction over human rights, what ought to guide the Tribunal under s. 27(1)(f) in deciding when to dismiss all or part of a complaint that has already been decided by the other tribunal?

23 In *Matuszewski*, Pitfield J. explored the contours and concepts of this provision. In that case, the collective agreement had banned the accrual of seniority while an employee was on long-term disability. The union grieved, alleging that the provision was discriminatory. The arbitrator concluded that it was not. The union did not seek judicial review from the arbitrator's decision. One of the employees in the bargaining unit filed a complaint with the Human Rights Tribunal alleging that the same collective agreement provision was discriminatory. [page437] The Human Rights Tribunal refused to dismiss this fresh complaint.

24 On judicial review of the Tribunal's decision, Pitfield J. concluded that the Tribunal's refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, the principles underlying all three of these doctrines are "factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint" (para. 31).

25 I agree with Pitfield J.'s conclusion that s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness. They are vibrant principles in the civil law as well (*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848; *Boucher v. Stelco Inc.*, *2005 SCC 64*, *[2005] 3 S.C.R. 279*; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, *[1990] 2 S.C.R. 440*, at p. 448).

26 As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.

[page438]

27 The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue*, *[1975] 2 S.C.R. 248*, at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant ... is only entitled to one bite at the cherry... . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

28 The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc.*, *2010 SCC 62*, *[2010] 3 S.C.R. 585*, and *Garland v. Consumers' Gas Co.*, *2004 SCC 25*, *[2004] 1 S.C.R. 629*.

29 Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' [page439] claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision":

> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions ... . [para. 35]

30 In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E., Local 79*, *2003 SCC 63*, *[2003] 3 S.C.R. 77*, at para. 46).

31 And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

32 Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to relitigate [page440] the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process" (para. 56).

33 Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency

and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

(See also *R. v. Mahalingan*, *2008 SCC 63*, *[2008] 3 S.C.R. 316*, at para. 106, *per* Charron J.)

34 At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

* It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
* Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness [page441] and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
* The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
* Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
* Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

35 These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

36 Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

[page442]

37 Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of

whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

38 What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

39 I see the discretion in s. 27(1)(f), in fact, as being limited, based not only on the language of s. 27(1)(f), but also on the character of the other six categories of complaints in s. 27(1) in whose company it finds itself. Section 27(1) states:

> **27 (1)** A member or panel may, at any time after a complaint is filed and with or without a [page443] hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> (i) benefit the person, group or class alleged to have been discriminated against, or
>
> (ii) further the purposes of this Code;
>
> (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

40 Each subsection in s. 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal's jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s. 27(1)(f). The fact that the word "may" is used in the preamble to s. 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to [page444] decide, for example, whether or not to dismiss complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.

41 This is the context in which the words "appropriately dealt with" in s. 27(1)(f) should be understood. All of the other provisions with which s. 27(1)(f) is surrounded lean towards encouraging dismissal. On its face, there is no principled basis for interpreting s. 27(1)(f) idiosyncratically from the rest of s. 27(1). I concede that the word "appropriately" is, by itself, easily stretched into many linguistic directions. But our task is not to define the word, it is

to define it in its statutory context so that, to the extent reasonably possible, the legislature's intentions can be respected.

42 Nor does the legislative history of s. 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the *Code* required the Tribunal to consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing. These factors were interpreted by the Human Rights Commission to include the administrative fairness of the earlier proceeding, the expertise of the decision-maker, which forum was more appropriate for discussing the issues, and whether the earlier proceeding could deliver an adequate remedy, factors which provided hurdles to the dismissal of complaints: see D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at pp. 100-101.

43 The legislature removed these limiting factors in 2002 in the *Human Rights Code Amendment [page445] Act, 2002*, S.B.C. 2002, c. 62. By removing factors which argued *against* dismissing a complaint, the legislature may well be taken to have intended that a different approach be taken by the Tribunal, namely, one that made it easier to dismiss complaints. This is consistent with the statement of the then Minister of Government Services, the Hon. U. Dosanjh, on second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, which included s. 22(1), the almost identically worded predecessor to s. 27(1). While he did not specifically refer to each of the subsections of s. 22(1) or their discrete purposes, it is clear that his overriding objective in introducing this legislative package, which included these provisions, was to reduce a substantial backlog and ensure "a system ... which will be efficient and streamlined":

> In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings.
>
> ...
>
> You have the power to dismiss the complaints, as I indicated, and that has been expanded. [Emphasis added.]
>
> (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

44 This then brings us to the Tribunal's use of the *Danyluk* factors. Not only do I resist re-introducing by judicial fiat the types of factors that the legislature has expressly removed, it is not clear to me that the *Danyluk* factors even apply. They were developed to assist courts in applying the doctrine of issue estoppel. Section 27(1)(f), on the other hand, is not limited to issue estoppel. As Pitfield J. explained in *Matuszewski*, s. 27(1)(f) does not call for the technical application of any of the common law doctrines - issue estoppel, collateral attack or [page446] abuse of process - it calls instead for an approach that applies their combined principles. Notably, neither Stromberg-Stein J. nor the Court of Appeal referred to the *Danyluk* factors in their respective analyses.

45 Moreover, importing the *Danyluk* factors into s. 27(1)(f) would undermine what this Court mandated in *Tranchemontagne* when it directed that, absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation. That means that *Danyluk* factors such as the prior decision-maker's mandate and expertise, are presumed to be satisfied. Encouraging the Tribunal to nonetheless apply a comparative mandate and expertise approach would erode Bastarache J.'s conclusion that human rights tribunals are not the exclusive "guardian or the gatekeeper for human rights law" (*Tranchemontagne*, at para. 39).

46 This brings us to how the Tribunal exercised its discretion in this case. Because I see s. 27(1)(f) as reflecting the principles of the common law doctrines rather than the codification of their technical tenets, I find the Tribunal's strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with". With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant's request for relitigation

of the same s. 8 issue, the Tribunal was disregarding Arbour J.'s admonition in *Toronto (City)* that parties should not try to [page447] impeach findings by the "impermissible route of relitigation in a different forum" (para. 46).

47 "Relitigation in a different forum" is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a "collateral appeal" to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent:

> ... this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]

48 The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision.

49 To begin, it questioned whether the Review Division's process met the necessary procedural requirements. This is a classic judicial review question and not one within the mandate of a concurrent decision-maker. While the Tribunal may inquire into whether the parties had notice of the case to be met and were given an opportunity to respond, that does not mean that it can require that the prior process be a procedural mimic of the Tribunal's own, more elaborate one. But in any event, I agree with Stromberg-Stein J. that there were no complaints [page448] about the complainants' ability to know the case to be met or the Board's jurisdiction to hear it:

> Each of the complainants participated fully in the proceedings; each knew the case to be met and had the chance to meet it. Each of the complainants had the benefit of competent and experienced counsel who raised the human rights issues within the workers' compensation context. The issues were analyzed and addressed fully by the Review Division. It was implicit in their submissions to the Review Division that they accepted the Review Division had full authority to decide the human rights issue. [para. 52]

(See also *Rasanen v. Rosemount Instruments Ltd.* *(1994), 112 D.L.R. (4th) 683* (Ont. C.A.), at p. 705.)

As long as the complainants had a chance to air their grievances before an authorized decision-maker, the extent to which they received traditional "judicial" procedural trappings should not be the Tribunal's concern.

50 The Tribunal also criticized the Review Officer for the way he interpreted his human rights mandate:

> ... the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a [*bona fide* justification] for the Policy. There was no analysis regarding where the onus lay in establishing a [*bona fide* justification] or what the applicable interpretive principles with respect to human rights legislation are... . Further, any discriminatory rule must not discriminate more than is necessary; hence, there must be consideration given to possible alternatives to the impugned rule which would be less discriminatory while still achieving the objective ... . [para. 46]

These too are precisely the kinds of questions about the merits that are properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s. 27(1)(f).

[page449]

51 In addition, the Tribunal held that the decision of the Review Officer was not final. It is not clear to me what the Tribunal was getting at. "Final" means that all available means of review or appeal have been exhausted. Where a

party chooses not to avail itself of those steps, the decision is final. Even under the strict application of issue estoppel, which in my view is not in any event what s. 27(1)(f) was intended to incorporate, the Review Officer's decision was a final one in these circumstances. Having chosen not to judicially review the decision as they were entitled to do, the complainants cannot then claim that because the decision lacks "finality" they are entitled to start all over again before a different decision-maker dealing with the same subject matter (*Danyluk*, at para. 57).

52 The Tribunal concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal. This, the Tribunal held, precluded the application of the doctrine of issue estoppel. This too represents the strict application of issue estoppel rather than of the principles underlying all three common law doctrines. Moreover, it is worth noting, as Arbour J. observed in *Toronto (City)*, that the absence of "mutuality" does not preclude the application of abuse of process to avoid undue multiplicity (para. 37).

53 Finally, the Tribunal suggested that Review Officers lacked expertise in interpreting or applying the *Code*. As previously mentioned, since both adjudicative bodies had concurrent jurisdiction at the time the complaint was heard and decided, this is irrelevant. Bastarache J., in *Tranchemontagne*, expressly rejected the argument that the quasi-constitutional status of human rights legislation required that there be an expert human rights body exercising a supervisory role over human rights jurisprudence. As he explained, human rights legislation must be offered accessible application to further the purposes of the *Code* by fostering "a general culture of respect for human rights in the [page450] administrative system" (paras. 33 and 39; *Nova Scotia (Workers' Compensation Board) v. Martin*, *2003 SCC 54*, *[2003] 2 S.C.R. 504*; and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, *2007 SCC 15*, *[2007] 1 S.C.R. 650*).

54 Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision, in my respectful view, is patently unreasonable. Since it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority, I see no point in wasting the parties' time and resources by sending the matter back for an inevitable result.

55 I would therefore allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In accordance with the Board's request, there will be no order for costs.

The reasons of McLachlin C.J. and Binnie, Fish and Cromwell JJ. were delivered by

CROMWELL J.

I. Introduction

56 I agree with my colleague Abella J. that the decision of the Human Rights Tribunal was patently unreasonable (*2008 BCHRT 374* (CanLII)). However, I do not, with respect, share Abella J.'s interpretation of the discretion conferred by s. 27(1)(f) of the *Human Rights Code*, *R.S.B.C. 1996, c. 210*, nor do I agree with her decision not to remit the complaints to the Tribunal.

[page451]

57 I do not subscribe to my colleague's understanding of what lies at the heart of the common law finality doctrines or of the principles underlying s. 27(1)(f) of the *Human Rights Code*. Abella J. writes that what is at the heart of these finality doctrines is preventing abuse of the decision-making process and that the discretion conferred by s.

27(1)(f) is a limited one, concerned only with finality, avoiding unnecessary relitigation and pursuing the appropriate review mechanisms. I respectfully disagree.

58 The common law has consistently seen these finality doctrines as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered. Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations. As for s. 27(1)(f), it confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law. In my view, both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). In my respectful view, a narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision.

59 I would allow the appeal and remit the Workers' Compensation Board's motion to dismiss the complaints under s. 27(1)(f) to the Tribunal for reconsideration in light of the principles I set out.

[page452]

II. Analysis

A. *Common Law Finality Doctrines*

60 The leading authorities from this Court on the application of finality doctrines in the administrative law context are *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. Both emphasized the importance of balance and discretion in applying these finality doctrines.

61 In *Danyluk*, the question was whether Ms. Danyluk's court action for damages for wrongful dismissal was barred by issue estoppel arising from an adverse decision of an employment standards officer. Writing for a unanimous Court, Binnie J. noted that while finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice (para. 19). He noted that the common law finality doctrines of cause of action estoppel, issue estoppel, and collateral attack have been extended to the decisions of administrative officers. Importantly, however, he added that in the administrative law context, "the more specific objective [of applying these doctrines] is to balance fairness to the parties with the protection of the administrative decision-making process" (para. 21). Thus, even when the traditional elements of the finality doctrines are present, the court must go on to exercise a discretion as to whether or not to allow the claim to proceed. He noted that this discretion existed even when the estoppel was alleged to arise from a court decision, but added that such discretion "is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers": para. 62 (emphasis added); see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 227-29. Binnie J. quoted Finch J.A. (as he then was) to the effect that "[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably [page453] calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case": *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32, cited in *Danyluk*, at para. 63. Binnie J. then held that it is "an error of principle not to address the factors for and against the exercise of the discretion ... . The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice" (paras. 66-67).

62 To assist decision-makers in achieving the appropriate balance, the Court set out a detailed (although non-exhaustive) list of factors for a court to consider when exercising its discretion: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice (*Danyluk*, at

paras. 68-80). I note in passing that this list reflects a much broader conception of the discretion at common law than my colleague Abella J. envisions under s. 27(1)(f). The three factors to be considered set out at para. 37 of her reasons are limited to whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether in the earlier proceeding the parties (or their privies) had an [page454] opportunity to know the case and have a chance to meet it.

63 Nothing would be served by my reviewing the *Danyluk* factors in detail. It is particularly noteworthy, however, that in that case, the Court refused to apply issue estoppel even though Ms. Danyluk, represented by counsel, had not pursued an administrative review of the employment standards officer's decision and that her claim of substantial injustice turned largely on the facts that she had received neither notice of the employer's allegation nor an opportunity to respond (para. 80). Also of importance was that the legislation did not view the employment standards proceedings as an exclusive forum for complaints of this nature (para. 69). To characterize *Danyluk* as simply emphasizing the importance of finality in litigation is an incomplete account of the Court's approach in that case.

64 I turn next to *Toronto (City) v. C.U.P.E., Local 79*. It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee's dismissal decided to make his own assessment of the facts relating to the conduct giving rise to a criminal conviction and on which the dismissal was based. Front and centre in Arbour J.'s analysis (on behalf of a unanimous Court on this point) was the importance of maintaining a "judicial balance between finality, fairness, efficiency and authority of judicial decisions" (para. 15). Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that "[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result" (para. 53). She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.

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65 I conclude that the Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are *not* the *only*, or even the most important considerations.

66 The need for this "necessarily broader" discretion (to use Binnie J.'s words at para. 62 of *Danyluk*) in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainant workers found themselves in this case. I will use the facts of Mr. Figliola's case as an example.

67 As a result of a workplace injury, Mr. Figliola received a 3.5% functional disability award from the Workers' Compensation Board, consisting of 1% for lumbar spine and 2.5% for chronic pain, determined under the Board's Policy No. 39.01. He appealed the Board's decision to the Review Division which is an internal appeal body. He raised four issues. He complained that his injury had not been properly assessed under the policy and in addition that the policy was patently unreasonable, violated s. 15 of the *Canadian Charter of Rights and Freedoms* and was contrary to the *Human Rights Code*.

68 Subject to Board practices and procedures, the Review Officer may conduct a review as the officer considers appropriate: *Workers Compensation Act*, *R.S.B.C. 1996, c. 492* ("Act"), s. 96.4(2). As I understand the record, the review in this case was a paper review on the basis of written submissions on behalf of Mr. Figliola. His employer [page456] did not participate and there was no oral hearing. Although the Review Officer was undoubtedly the only appropriate forum in which to review the application of the Board's policy to the facts of Mr. Figliola's case, the role of the Review Officer with respect to his other complaints is much less clear.

69 With respect to Mr. Figliola's claims that the policy was patently unreasonable, the Review Officer found that he had no authority at all. He noted that he was bound by s. 99 of the Act to apply a Board policy that applied to the case. While the appeals tribunal to which appeals lie from the Review Division had authority to consider the validity of a policy (s. 251 of the Act), even it had no authority "to make binding determinations as to the validity of policy. Rather, it is required to refer to the Board of Directors its determinations and is bound by the decision of the Board of Directors as to whether the policy should be maintained or changed" (A.R., vol. I, at p. 6). The Review Officer reasoned that "[i]t would be odd if [the appeals tribunal] was required to go through such a process but the Review Division had even greater authority of considering and deciding whether a policy was valid" (*ibid.*). He therefore concluded that the Review Division had no general jurisdiction to find a policy of the Board invalid on the basis that it was patently unreasonable.

70 As for Mr. Figliola's *Charter* claims, the Review Officer similarly found that he had no jurisdiction to consider them at all. As he put it,

> [a]mendments to the *Act* resulting from the *Administrative Tribunals Act* (the "*ATA*") took effect on December 3, 2004. Those amendments stated that [the appeals tribunal] has no jurisdiction over constitutional questions ... . Although this change did not specifically refer to the Review Division, the Review Division considers that the change indicates a statutory intent that it does not have jurisdiction over constitutional questions, including *Charter* questions. [A.R., vol. I, at p. 7]

[page457]

71 Turning finally to Mr. Figliola's claims under the *Human Rights Code*, the Review Officer relied on *Tranchemontagne v. Ontario (Director, Disability Support Program)*, *2006 SCC 14*, *[2006] 1 S.C.R. 513*, for his conclusion that he had authority to decline to apply the policy if it conflicted with the *Code*, given the provision in s. 4 of the *Code* that it prevails in the event of conflict with any other enactment. If I am reading the Review Officer's decision correctly, I understand him to reason that his statutory obligation to apply Board policies (s. 99 of the Act) conflicts with the *Code*'s prohibitions against discrimination. However, because the *Code* prevails in the event of conflict, the Review Officer can determine whether the policy is consistent with the *Code*. Assuming, without deciding, that this is the correct view and therefore that the Review Officer can assess the policy's compliance with the *Code*, there remains the question of what remedy the Review Officer can fashion if he or she concludes that the policy is not compliant. According to the Board's submissions, the process that was followed at the relevant time (although it was not formalized until later) was this: if the Review Officer found the *Code* challenge had merit, he or she would not apply the policy to the particular case. The policy itself would be referred to the Board "for inclusion in the Policy and Research Division's work plan as a high priority project" (A.F., at para. 59).

72 As noted earlier, the Review Officer's decisions are appealable to the Workers' Compensation Appeal Tribunal ("WCAT"), with certain exclusions not relevant here. Mr. Figliola pursued such an appeal and it was set down for an oral hearing. The WCAT, it should be noted, has extensive authority to review the matter, including hearing evidence; it is not simply an appeal in the usual sense (ss. 245 to 250 of the Act). However, the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45* ("*ATA*"), was amended effective October 18, 2007, removing the WCAT's jurisdiction to apply the *Code*: *Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3. Thus in midstream, Mr. Figliola lost the right to a thorough, evidence-based review [page458] of the merits of the Review Officer's decision on the human rights issue.

73 The question of what this amendment did to the Review Officer's authority to address the *Code* issues is not before us. However, the amendment taking away the WCAT's jurisdiction would appear to engage the same reasoning that led the Review Officer to conclude that he had no jurisdiction with respect to the attacks on the Board's policy as being patently unreasonable and contrary to the *Charter*. As noted earlier, the Review Officer reasoned that as the WCAT did not have this jurisdiction, it followed that the Review Division did not have that jurisdiction either. Thus it seems (although I need not decide the point) that the *ATA* amendments taking away the WCAT's *Code* jurisdiction not only took away a right of review on the merits, but also had the effect of taking away

the Review Officer's authority to test Board policies against the *Code* which he exercised in this case. I recognize that the Board takes the opposite view, maintaining that even though *Code* jurisdiction was removed from the WCAT, a review officer may still review Board policies for consistency with the *Code*. It is not my task to resolve this issue here. One thing is certain, however. The amendments were intended to reverse the effects of the Court's decision in *Tranchemontagne* in relation to the human rights jurisdiction of the WCAT (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, at pp. 8088-93).

74 I simply wish to note the rather complex, changing and at times uncertain process available in the workers' compensation system to address the human rights issue in this case. To my mind, this underlines the wisdom of applying finality doctrines [page459] with considerable flexibility in the administrative law setting. The decision that is relied on by the Board in this case as being a final determination is in fact an internal review decision given after a paper review in which the employer did not participate. Whether the Review Officer had authority to consider the question is at least debatable. (Of course, Mr. Figliola's position before the Review Officer was that he did have authority.) The remedy available in the proceedings was a decision not to apply the policy and refer it to the Board for study. At the time Mr. Figliola raised the point before the Review Officer, there was a right of appeal to the WCAT which included the opportunity to call evidence. In the midst of the proceedings, that right was removed and indeed the whole authority of the WCAT to even consider *Code* issues was removed. It surely cannot be said that there was any legislative intent that the Review Officer was to have exclusive jurisdiction over the human rights questions.

75 It seems to me that whether a Review Officer's decision in these circumstances should bar any future consideration by the Human Rights Tribunal of the underlying human rights complaint cannot properly be addressed by simply looking at the three factors identified by my colleague, viz., whether the Review Officer had concurrent jurisdiction to decide a point that was essentially the same as the one before the Human Rights Tribunal and whether there had been an opportunity to know the case to meet and a chance to meet it. There is, as *Danyluk* shows, a great deal more to it than that. The kinds of complications we see in this case are not uncommon in administrative law, although this case may present an unusually cluttered jurisdictional and procedural landscape. The point, to my way of thinking, is that these are the types of factors that call for a highly flexible approach to applying the finality doctrines, a flexibility that in my view exists both at the common law and, as I will discuss next, under s. 27(1)(f) of the *Code*.

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B. *Statutory Interpretation*

76 My colleague is of the view that s. 27(1)(f) confers a "limited" discretion, the exercise of which is to be guided uniquely "by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues" (para. 36). Putting aside for the moment whether the discretion is "limited" or "broad", I have difficulty with my colleague's treatment of the relevant factors which she identifies.

77 I repeat the three factors identified as those to be considered: whether the previous adjudicator had concurrent authority to decide the matter, whether the issue decided was essentially the same, and whether the previous process provided an opportunity to the parties or their privies to know the case to be met and have a chance to meet it (Abella J.'s reasons, at para. 37). However, at para. 49 of my colleague's reasons, the question of whether the Review Division's process met the "necessary procedural requirements" is dismissed as "a classic judicial review question and not one within the mandate of a concurrent decision-maker". Thus if I understand correctly, the Tribunal is to consider whether the earlier process was fair but cannot consider at all whether the earlier process met the "necessary procedural requirements". I would have thought that the "necessary procedural requirements" would include the obligation to act fairly. But if that is so, I do not understand how procedural fairness can be at the same time a question beyond the concurrent decision-maker's mandate (para. 49) and a proper factor for the Tribunal to consider in exercising its discretion under s. 27(1)(f) (para. 37).

78 It would also seem to me that whether the adjudicator had authority to decide the matter is generally the sort of issue that is raised on judicial review, but it figures here as a factor to be considered in exercising the Tribunal's discretion (para. 37). In my respectful view, relevant factors cannot [page461] simply be dismissed as "classic judicial review question[s]" and therefore "not one within the mandate of a concurrent decision-maker" (para. 49). This was not the approach in *Danyluk*. Rather, all relevant factors need to be considered and weighed in exercising the discretion.

79 Be that as may be, it remains that my colleague's conception of s. 27(1)(f) is that it confers a more limited discretion to apply the finality doctrines than has been recognized at common law with respect to decisions of administrative decision-makers. With respect, and for the following reasons, I cannot accept this interpretation of the provision.

80 We must interpret the words of the provision "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": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

81 I turn first to the grammatical and ordinary sense of the words. It is difficult for me to imagine broader language to describe a discretionary power than to say the Tribunal may dismiss a complaint if the substance of it has been appropriately dealt with elsewhere. To my way of thinking, the grammatical and ordinary meaning of the words support an expansive view of the discretion, not a narrow one. I agree with my colleague that this provision reflects the principles of the finality doctrines rather than codifies their technical tenets (para. 46). However, as I discussed earlier, the "principles" of those doctrines, especially as they have developed in administrative law, include a search for balance between finality and fairness and a large measure of discretion to allow that balance to be struck in the wide variety of decision-making contexts in which they may have to be applied. The provision's focus on the "substance" of the complaint and the use of the broad words "appropriately dealt [page462] with" seem to me clear indications that the breadth of the common law discretion is expanded, not restricted.

82 I turn next to look at the provision in the context of the rest of the section in which it is found. It is suggested that s. 27(1)(f) should be read narrowly because the character of the other six categories of discretion conferred by s. 27(1) relates to clear circumstances in which dismissal would be appropriate. The premise of this view is that all of the other parts of s. 27(1) clearly call for a narrow discretion. Respectfully, I do not accept this premise. It is the case, of course, that some of the other grounds of discretionary dismissal set out in s. 27(1) do indeed arise in circumstances in which it would be demonstrably undesirable to proceed with the complaint: Abella J.'s reasons, at paras. 39-41. For example, it is hard to see how the Tribunal has discretion, in any meaningful sense of the word, to refuse to dismiss a complaint not within its jurisdiction (s. 27(1)(a)), or which discloses no contravention of the *Code* (s. 27(1)(b)). However, not all of the categories set out in s. 27(1) are of this character: see, e.g., *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266, at paras. 38-42. In my view, the nature of the discretion in the various paragraphs of s. 27(1) is influenced by the content of each paragraph rather than the use of "may" in the section's opening words.

83 Section 27(1)(d) confers discretion to dismiss where the proceeding would not benefit the person, group or class alleged to have been discriminated against or would not further the purposes of the *Code*. Exercising this discretion requires the Tribunal to consider fundamental questions about the role of human rights legislation and human rights adjudication. The discretion with respect to these matters is thus wide-ranging, grounded in policy and in the Tribunal's specialized human [page463] rights mandate (*Becker*, at para. 42). It does not share the character of some of the other more straightforward provisions in s. 27(1), but is similar in breadth to the discretion set out in s. 27(1)(f). In s. 27(1)(f), the breadth of the discretion is apparent from the very general language relating to the "substance" of the complaint and whether it has been dealt with "appropriately". I see nothing in the structure of or the context provided by s. 27(1) read as a whole that suggests a narrow interpretation of the discretion to dismiss where the "substance" of a complaint has been "appropriately" dealt with.

84 A further element of the statutory context is the provision's legislative history. That history confirms that it was the legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. It is significant that the *Human Rights Code* previously set out in s. 25(3) mandatory factors to take into account in the exercise of this discretion in *deferring* a complaint. The now repealed s. 27(2) provided that those same factors had to be considered when *dismissing* a complaint. These factors included the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other proceeding in the circumstances. However, the legislature removed these specified factors (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62, ss. 11 and 12). This is consistent with an intention to confer a more open-ended discretion. That intention is explicit in the *Official Report of Debates of the Legislative Assembly (Hansard)*. Indeed, in response to the question as to why the mandatory factors were removed, the Honourable Geoff Plant, then-Attorney General of British Columbia and responsible minister for this legislation, said the following:

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> The fundamental issue in any attempt to seek the exercise of this power is whether there is another proceeding capable of appropriately dealing with the substance of the complaint. Our view is that that test is sufficient to ensure that the power is exercised in a case-by-case way in accordance with the principles and purposes of the code. It may well be that the panel members will consider the facts and factors that are now referred to in subsection (3), but we did not think it was necessary to tie the hands of a panel or a tribunal member with those specific criteria.
>
> ...
>
> ... [What the amendment] does is express the principle or the test pretty broadly and pretty generally. [Emphasis added.]

(*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, at p. 4094)

85 The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider. I would also add, with respect, that the comments of the Minister of Government Services at second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, cited by Abella J., at para. 43, have nothing to do with the scope of discretion under s. 27(1)(f) or its predecessor provisions.

86 A further aspect of the legislative context is the legal framework in which the legislation is to operate. I have developed earlier my understanding of the common law approach to the discretionary application of finality doctrines in the administrative law context. Read against that background, my view is that the provision may most realistically be viewed as further loosening the strictures of the common law doctrines.

87 It is also part of the pre-existing legal framework that under earlier legislation (*Human Rights Code*, *R.S.B.C. 1996, c. 210, s. 27*), the Commissioner of Investigation and Mediation had developed a policy about how to decide whether to proceed with a complaint that had been the subject [page465] of other proceedings. That policy called for consideration of factors such as these:

> (1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes.

(D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at p. 100, fn. 128)

88 The use of the broad language employed in s. 27(1)(f), introduced into the pre-existing practice, does not support the view that the discretion was narrowly conceived; it supports the opposite inference.

89 A final contextual element relates to the similarly worded power to defer a complaint pending its resolution in another forum under s. 25(2) of the *Code*. That provision reads as follows:

> **25...** .
>
> (2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

90 The power to defer a complaint is not based on the finality doctrines because when deferral is being considered there has been no other final decision. Nonetheless, the legislature chose to use essentially the same language to confer discretion to defer as it did to confer the discretion to dismiss. The repetition of this language in s. 27(1)(f) [page466] suggests to me that a broad and flexible discretion was intended.

91 Looking at the text, context and purpose of the provision, I conclude that the discretion conferred under s. 27(1)(f) was conceived of as a broad discretion.

C. *Exercising the Discretion*

92 As I see it, s. 27(1)(f) broadens the common law approach to the finality doctrines in two main ways. By asking whether the substance of the complaint has been addressed elsewhere, the focus must be on the substance of the complaint - its "essential character" to borrow a phrase from *Weber v. Ontario Hydro*, *[1995] 2 S.C.R. 929*, at para. 52; and *Villella v. Vancouver (City)*, *2005 BCHRT 405*, *[2005] B.C.H.R.T.D. No. 405* (QL), at para. 21. The focus is not on the technical requirements of the common law finality doctrines, such as identity of parties, mutuality, identity of claims and so forth. The section compels attention to the substance of the matter, not to technical details of pleading or form. If the Tribunal concludes that the substance of the complaint has not in fact been dealt with previously, then its inquiry under s. 27(1)(f) is completed and there is no basis to dismiss the complaint. Where the substance of the matter has been addressed previously, the important interests in finality and adherence to proper review mechanisms are in play. It then becomes necessary for the Tribunal to exercise its discretion, recognizing that those interests must be given significant weight.

93 Faced with a complaint, the substance of which has been addressed elsewhere, the Tribunal must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. Other than by providing that the previous dealing with the substance of the complaint has been appropriate, the statute is silent on the factors that may properly be considered by the Tribunal in exercising its [page467] discretion to dismiss or not to dismiss. This exercise of discretion is "necessarily case specific and depends on the entirety of the circumstances": *Schweneke v. Ontario (2000), 47 O.R. (3d) 97* (C.A.), at paras. 38 and 43, cited with approval in *Danyluk*, at para. 63. *Danyluk*, however, provides a useful starting point for assembling a non-exhaustive group of relevant considerations.

94 The mandate of the previous decision-maker and of the Tribunal should generally be considered. Is there a discernable legislative intent that the other decision-maker was intended to be an exclusive forum or, on the contrary, that the opposite appears to have been contemplated? The purposes of the legislative schemes should also generally be taken into account. For example, if the focus and purpose of the earlier administrative proceeding was entirely different from proceedings before the Human Rights Tribunal, there may be reason to question the appropriateness of giving conclusive weight to the outcome of those earlier proceedings. The existence of review

mechanisms for the earlier decision is also a relevant consideration. Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum. However, as *Danyluk* shows, this is not always a decisive consideration (paras. 74 and 80). The Tribunal may also consider the safeguards available to the parties in the earlier administrative proceedings. Such factors as the availability of evidence and the opportunity of the party to fully present his or her case should be taken into account. A further relevant consideration is the expertise of the earlier administrative decision-maker. As Binnie J. noted in *Danyluk*, the rule against collateral attack has long taken this factor into account. While not conclusive, the fact that the earlier decision is "based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*" may suggest that it did not appropriately deal with the matter: para. 77, citing *R. v. Consolidated Maybrun Mines Ltd.*, [*[1998] 1 S.C.R. 706*], at para. 50. The circumstances giving rise to the prior administrative proceedings may also be a relevant consideration. In *Danyluk*, for example, the fact that the employee had undertaken the earlier administrative proceedings at a [page468] time of "personal vulnerability" was taken into account (para. 78).

95 The most important consideration, however, is the last one noted by Binnie J. in *Danyluk*, at para. 80: whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

96 The Tribunal's approach to the s. 27(1)(f) discretion is in line with the *Danyluk* factors. For example, in *Villella*, the Tribunal discussed a number of the factors which it should consider. It emphasized that the question was not whether, in its view, the earlier proceeding was correctly decided or whether the process was the same as the Tribunal's process. The Tribunal recognized that it is the clear legislative intent of s. 25 that proceedings before the Tribunal are not the sole means through which human rights issues can be appropriately addressed. However, the Tribunal also noted that s. 27(1)(f) obliged it to examine the substance of the matter and not to simply "rubber stamp" the previous decision (para. 19). This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available; and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to me to be exactly the sort of approach called for by s. 27(1)(f).

D. *Application*

97 At the end of the day, I agree with Abella J.'s conclusion that the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable within the meaning of s. 59 of the [page469] *ATA*. For the purposes of that section, a discretionary decision is patently unreasonable if, among other things, it "is based entirely or predominantly on irrelevant factors" (s. 59(4)(c)), or "fails to take statutory requirements into account" (s. 59(4)(d)). While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the "substance" of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

98 However, I do not agree with my colleague's proposed disposition of the appeal. In her reasons, Abella J. would allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In my opinion, the appeal should be allowed and, in accordance with what I understand to be the general rule in British Columbia, the Workers' Compensation Board's application to dismiss the complaints under s. 27(1)(f) should be remitted to the Tribunal for reconsideration. As the Court of Appeal held in *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, [*2011 BCCA 49*], [*299 B.C.A.C. 129*], at para. 51, "the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless

exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body" (see also *Allman v. Amacon Property Management Services [page470] Inc.*, *2007 BCCA 302*, *243 B.C.A.C. 52*). This case does not present exceptional circumstances justifying diverging from this general rule.

99 I would therefore allow the appeal without costs and remit the Workers' Compensation Board's application under s. 27(1)(f) to the Tribunal for reconsideration.

Appeal allowed.

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Solicitor for the appellant: Workers' Compensation Board, Richmond.

Solicitor for the respondents Guiseppe Figliola, Kimberley Sallis and Barry Dearden: Community Legal Assistance Society, Vancouver.

Solicitor for the respondent the British Columbia Human Rights Tribunal: British Columbia Human Rights Tribunal, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Coalition of BC Businesses: Heenan Blaikie, Vancouver.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Alberta Human Rights Commission: Alberta Human Rights Commission, Calgary.

Solicitors for the intervener the Vancouver Area Human Rights Coalition Society: Bull, Housser & Tupper, Vancouver.

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Canam Enterprises Inc. v. Coles; CB Commercial Real Estate Group Canada Inc., Leon and Senst, Third Parties; National Trust Company of Canada, Duncan and James Duncan Estate and Business Broker, Fourth Parties*

CB Commercial Real Estate Group Canada Inc. et al. v. Coles

[Indexed as: Canam Enterprises Inc. v. Coles]

51 O.R. (3d) 481
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Docket No. C33982

Court of Appeal for Ontario
Finlayson, Weiler and Goudge JJ.A.
December 8, 2000

* An appeal from the following judgment to the Supreme Court of Canada (McLachlin C.J., Gonthier, Major, Binnie, Arbour, LeBel and Deschamps JJ.) was allowed on October 8, 2002. The full text of the appeal is available at [2002] S.C.J. No. 64 in the S.C.J. database.

Actions -- Bars -- Abuse of process -- Purchaser bringing action against vendor alleging that mortgage back void because of misrepresentation made by vendor's real estate agent about zoning of property -- Purchaser's action dismissed based on doctrine of merger -- Purchaser then bringing action against own solicitor for negligence in failing to investigate zoning -- Solicitor denying negligence and bringing third party proceedings against real estate agent -- Solicitor relying on Negligence Act and claiming contribution from real estate agent -- Lawyer alleging that agent having liability to purchaser -- Real estate agent moving to dismiss third party claim based on issue estoppel -- Issue estoppel not established but third

party claim dismissed based on doctrine of abuse of process -- Negligence Act, R.S.O. 1990, c. N.1.

In 1993, National Trust retained CB Inc. and L and S ("the Realtors") as its real estate agent to sell a property in Toronto. In marketing the property, the Realtors represented that the property was zoned C-1 Commercial. This representation was false because the property was subject to a site-specific zoning by-law that restricted its uses. Unaware that the representation about zoning was false, Canam Enterprises Inc. ("Canam") entered into an agreement to purchase it for a price of $1,420,000, to be paid, in part, by a mortgage back to National Trust for $1,130,000. Canam retained C as its lawyer, and the transaction closed without Canam being aware that the property was not zoned C-1 Commercial as represented. After the closing, Canam sued National Trust for a declaration that the mortgage was void because of the Realtors' misrepresentation about the zoning. National Trust counterclaimed to enforce its mortgage. In 1998, Day J. granted National Trust's motion for summary judgment dismissing Canam's claim and granting it judgment on the counterclaim. Although Day J. concluded that there had been a false representation, he held that the misrepresentation did not provide grounds to set aside the mortgage because of the doctrine of merger. Canam then sued C for professional negligence, which he denied, pleading that under his retainer Canam was responsible for investigating zoning matters. In addition to defending, C commenced third party proceedings against the Realtors. In the third party proceedings, C did not assert any claim of his own against the Realtors but relied on the provisions of the Negligence Act to plead that the Realtors were liable to Canam. The Realtors defended and also brought fourth party proceedings against National Trust alleging that if they provided false information, it had been obtained from National Trust. The Realtors then moved for a summary judgment dismissing C's third party claim based on the defences of res judicata, issue estoppel and abuse of process because of the judgment of Day J. National Trust also moved for a summary judgment dismissing both the third party claim against the Realtors and the fourth party claim against it on the same grounds. For the purpose of the motion, the parties agreed that the facts pleaded were true

and that they gave rise to a cause of action. Nordheimer J. granted both motions and dismissed the third and fourth party claims on the basis that they were barred by issue estoppel or, alternatively, that they constituted an abuse of process. C appealed and sought an order setting aside the dismissal of his third party claim against the Realtors.

Held, the appeal should be dismissed with costs.

Per Finlayson J.A. (Weiler J.A. concurring): The result below was correct, and the appeal should be dismissed based on the doctrine of abuse of process but not based upon the principle of res judicata, of which issue estoppel is one aspect. The requirements of issue estoppel are: (1) that the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. On this appeal, the key question about issue estoppel was whether the appropriate parties were privies to the proceedings between Canam and National Trust. Someone who is privy in interest to a party in an action is equally bound by the final judgment in those proceedings. Here C claimed contribution under the Negligence Act and sought to add the Realtors as joint tortfeasors for the misrepresentations they made to Canam. In the prior proceeding the parties were Canam and National Trust. The Realtors were privies of National Trust, but an issue estoppel did not arise in the immediate case because it was not necessary in the mortgage action for Day J. to deal with the present assertion that had the Realtors been parties then damages could have been awarded against them. The misrepresentation issue was not disposed of in a manner that was dispositive of a claim now being asserted against the Realtors. It could hardly be said that the parties to the mortgage action had an opportunity to raise the issue of the potential liability of an entity that was not a party to the action at all. However, the court could still utilize the broader doctrine of abuse of process, which is a discretionary principle not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public

policy. The Realtors could have been properly included in the mortgage proceedings. It did not lie in the mouth of a stranger to those proceedings to insist that there now be a trial as to the liability of the Realtors to Canam. To allow the defendant to retry the issue of misrepresentation would be a classic example of abuse of process and a waste of the time and resources of the litigants and the court.

Per Goudge J.A. (dissenting): The third party proceeding ought not to have been dismissed on the basis of either issue estoppel or the doctrine of abuse of process. The same issue requirement of issue estoppel was not met. The issue in the third party proceeding was whether the Realtors owed a duty of care to Canam which was breached by the misrepresentation concerning zoning. That duty was not a part of the proceedings before Day J., which dealt with whether the contractual rights of National Trust were voided by the misrepresentation made on its behalf. Given this finding, it was unnecessary to deal with the same parties requirement of issue estoppel, but if one were to address this requirement, having due regard to the subject matter of the dispute before Day J., it would not appear that one could find the privity of interest between C or Canam or between the Realtors and National Trust. As for the doctrine of abuse of process, it engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or that would in some other way bring the administration of justice into disrepute. One circumstance where the doctrine is applied is where the litigation before the court is found in essence to be an attempt to relitigate a claim that the court has already determined. There was, however, no relitigation in the immediate case. The third party proceeding was the first time that the Realtors would have to respond to the assertion that they breached their duty to Canam. The third party claim raised an issue not previously litigated. It was not manifestly unfair to allow C to bring the claim or to require the Realtors to defend it. There was no abuse of process.

Cases referred to

Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397; Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, 110 Sol. Jo. 425, [1967] R.P.C. 497 (H.L.); Fenerty v. Halifax (City) (1920), 53 N.S.R. 457, 50 D.L.R. 435 (S.C.); Gleeson v. J. Wippell & Co. Ltd., [1977] All E.R. 54, [1977] 1 W.L.R. 510, 121 Sol. Jo. 157 (Ch. D.); Heynen v. Frito Lay Canada Ltd. (1999), 45 O.R. (3d) 776, 46 C.C.E.L. (2d) 1, 179 D.L.R. (4th) 317, [2000] C.L.L.C. 210-003 (C.A.); House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347, [1990] 2 All E.R. 990 (C.A.); M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe), [1998] 4 All E.R. 675 (C.A.); Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024, 112 D.L.R. (4th) 683 (C.A.) [Leave to appeal to S.C.C. refused (1994), 19 O.R. (3d) xvi, 7 C.C.E.L. (2d) 40n, 178 N.R. 80n]; Solomon v. Smith (1987), [1988] 1 W.W.R. 410, 45 D.L.R. (4th) 266, 49 Man. R. (2d) 252, 22 C.P.C. (2d) 12 (C.A.)

Statutes referred to

Negligence Act, R.S.O. 1990, c. N.1

APPEAL from an order of Nordheimer J. (2000), 47 O.R. (3d) 446 (S.C.J.) dismissing a third party and a fourth party claim.

Christine Innes, for respondent.
V.A. Edwards and J. Sebastian Winny, for appellant.
Jeffrey S. Klein, for third parties respondents.
Mark Hartman, for fourth party respondent, National Trust Company of Canada.

[1] FINLAYSON J.A. (WEILER J. concurring): -- The defendant in the main action, Alan H. Coles ("Coles"), appeals from the summary judgment of The Honourable Mr. Justice Nordheimer dated March 2, 2000. The motions judge granted motions by the third parties, CB Commercial Real Estate Group Canada Inc., Kevin W. Leon and Peter D. Senst (the "Realtors") and the fourth party,

National Trust Company of Canada ("National Trust"), and dismissed both the third and fourth party claims on the basis that they were barred by issue estoppel or, alternatively, that they constituted an abuse of process. Coles seeks an order setting aside the dismissal of his third party claim against the Realtors. There is no appeal from the dismissal of the fourth party claim by either Coles or the plaintiff Canam.

Facts

The original real estate transaction

[2] Pursuant to an agreement of purchase and sale dated March 5, 1993, Canam Enterprises Inc. ("Canam") agreed to purchase 200 Finch Avenue West in Toronto ("the property") from National Trust pursuant to a power of sale. The purchase price of the property was $1,420,000. Canam provided a down payment of $290,000, and National Trust agreed to take back a mortgage of $1,130,000 to secure the balance of the purchase price.

[3] The Realtors acted as listing agents for National Trust. They prepared and circulated advertising material which represented the zoning of the property as C-1 Commercial. The advertisement specifically detailed potential retail uses of the property.

[4] The agreement of purchase and sale also stipulated that the zoning of the property was C-1 Commercial. It contained a requisition period that gave Canam the right to make requisitions as to title and other matters. Canam's solicitor on the transaction, Coles, requisitioned evidence that C-1 Commercial use could be lawfully continued. National Trust's solicitors responded with what has been described as "the usual satisfy yourself reply".

[5] When the transaction closed on June 29, 1993, the property was subject to a site-specific zoning by-law which restricted it to "professional office" use. Canam alleges that as a result of these use restrictions, it has suffered significant financial losses, including losses arising from defaulting on the vendor take-back mortgage to National Trust.

The prior proceeding (the "Mortgage Action")

[6] Following Canam's default under the mortgage, National Trust issued a Notice of Sale dated January 14, 1997. On August 22, 1997, Canam commenced a separate action against National Trust seeking a declaration that the mortgage was void and unenforceable because of the false representations made by the Realtors about the zoning. National Trust counter-claimed for the balance owing on its mortgage and for payment on a guarantee. In its defence to Canam's claim, National Trust took the position that the representation concerning zoning merged with the conveyance.

[7] National Trust successfully moved for summary judgment on its counterclaim and for dismissal of Canam's claim before Day J. on April 20, 1998. Summary judgment was granted on that date, with oral reasons released December 23, 1998 [reported 22 R.P.R. (3d) 129]. In his reasons for judgment, Day J. concluded that false representations were made concerning zoning on behalf of National Trust. He then examined the doctrine of merger in the context of the requisition period contained in the agreement of purchase and sale. He concluded [at p. 135]: "From the broad considerations it appears that the defence of Canam as to misrepresentation will not apply so as to set aside the contract."

Nature of the present action

[8] Following receipt of the Notice of Sale, Canam commenced this action against its former solicitor, Coles, by statement of claim issued June 17, 1997. Canam claimed damages for alleged negligence in relation to the zoning restrictions on the property that it purchased. Canam pleaded that Coles failed to warn it of the site-specific by-law restricting the use of the property.

[9] Coles denied any negligence or breach of contract. He pleaded that his retainer with Canam was expressly limited to exclude zoning inquiries, and that Canam was responsible for investigating zoning matters.

[10] Coles commenced a third party claim for contribution or indemnity against the Realtors who listed the property and represented it as being zoned C-1 Commercial. Coles alleged that the Realtors knew or ought to have known of the true zoning of the property, failed to take steps to verify the correct zoning, and breached their professional duty to Canam, including a fiduciary duty to Canam, in failing to ascertain and disclose the restricted zoning by-law. Coles pleads and relies on the provisions of the Negligence Act, R.S.O. 1990, c. N.1.

[11] The Realtors have defended both the main action and the third party claim, in part with a defence of res judicata based on the disposition of the Mortgage Action. The Realtors also commenced a fourth party claim for contribution or indemnity against National Trust, for whom they acted as a selling agent and broker. The fourth party claim against National Trust pleads that if the Realtors provided false information to Canam, they obtained it from National Trust, who should accordingly be liable to the Realtors in negligence. The Realtors' allegations against National Trust are not framed as a joint tortfeasor claim.

[12] National Trust has defended the main action, the third party claim and the fourth party claim, and has raised the plea of res judicata and abuse of process based on the disposition of the Mortgage Action. The remaining fourth parties have not defended the proceeding.

Motions before Nordheimer J.

[13] National Trust moved for summary judgment dismissing both the third party claim against the Realtors and the fourth party claim against National Trust based on the defences of issue estoppel and abuse of process. The Realtors also brought a motion for summary judgment dismissing the third party claim based on the defences of issue estoppel and abuse of process.

[14] On the motions for summary judgment before Nordheimer J., the parties agreed that for the purpose of the motions, the

facts set out in both the third party and fourth party claims were true and gave rise to a cause of action. The only issue to be determined on the motions was whether, by virtue of the judgment of Day J., the third and fourth party claims should be dismissed on the basis of issue estoppel, res judicata, or abuse of process.

Reasons of the motions judge

[15] Nordheimer J. granted the motions of the third and fourth parties in his reasons reported at 47 O.R. (3d) 446. He dismissed the third and fourth party claims, with costs of both claims payable by Coles.

[16] The motions judge referred to the relevant authorities on the issues of cause of action estoppel, issue estoppel and abuse of process. He found primarily that issue estoppel applied to the third party proceedings and in the alternative that they were an abuse of process.

[17] With respect to the false representations made about the zoning possibilities, the motions judge clarified that Coles was not asserting any independent liability claims. All of the liability alleged in the third and fourth party claims arising from the false representations involved liability to Canam alone. The motions judge went on to find that issue estoppel applied. He found that Day J.'s decision on the matter was final. He also found that the issue regarding the legal consequences of the false representations made to Canam was a fundamental part of Day J.'s decision. The motions judge then concluded at paras. 19 and 20 [p. 453 O.R.]:

> The fundamental issue determined by Mr. Justice Day is whether, in all of the circumstances, the transaction could be rescinded, or liability on the mortgage avoided, by Canam based on the false representations. The source of those representations was not the issue. The fact of the representations being false, and the fact that they were made by others on behalf of National Trust, was accepted by Mr. Justice Day. He concluded, regardless of those facts, that the transaction could not be avoided by Canam. In my view,

> that is a complete answer to whether Canam could now claim any relief surrounding these representations -- it could not. Put another way, the decision of Mr. Justice Day clearly determined that there was no liability of National Trust to Canam arising from the false representations.
>
> It follows from that conclusion that it is not open to Coles to indirectly advance such a claim on behalf of Canam because, in the end result, it would still involve a re-litigation of the same question -- a situation which the principle of res judicata is designed to prevent. . . .

[18] The motions judge proceeded to the privity of interest requirement for the application of issue estoppel. Here, the motions judge concluded that Coles, as a solicitor, was a privy of his client, Canam.

Analysis

Issue estoppel

[19] The principle of res judicata applies where a judgment rendered by a court of competent jurisdiction provides a conclusive disposition of the merits of the case and acts as an absolute bar to any subsequent proceedings involving the same claim, demand or cause of action. Issue estoppel is one aspect of res judicata. The oft-cited requirements of issue estoppel are attributed to Lord Guest in Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at p. 935, [1966] 2 All E.R. 536 (H.L.): (1) that the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[20] The key issue raised in this court is whether the appropriate parties were privy to the proceedings between Canam and National Trust so that the doctrine of issue estoppel applies to prevent the third party claim by Coles against the Realtors. I agree with the result arrived at by the motions

judge, but for different reasons.

[21] The issues of identity of subject matter and identity of parties had to be resolved by the motions judge. The latter issue, also referred to as privity, is treated identically under the doctrine of res judicata whether the claim is cause of action estoppel or issue estoppel. Someone who is privy in interest to a party in an action is equally bound by the final judgment in those proceedings. Thus, where a party to the prior proceeding is clearly and sufficiently identified with a non-party to the litigation, the doctrine of res judicata may be applied: Gleeson v. J. Wippell & Co. Ltd., [1977] 3 All E.R. 54 at p. 60, [1977] 1 W.L.R. 510 (Ch. D.).

Privity of interest

[22] Privity between an agent and a principal will be based on privity of interest. This matter was considered by Megarry V.-C. in Gleeson at p. 60: "it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. . . . It is in that sense that I would regard the phrase 'privity of interest'."

[23] In Carl-Zeiss-Stiftung at p. 566, Lord Guest had this to say of privies: "There is a dearth of authority in England on the question of privies. . . . 'Privies' have been described as those who are 'privy to the party in estate or interest'. . . . Before a person can be privy to a party there must be community or privity of interest between them." Lord Reid made a similar comment in that decision at p. 550: "It has always been said that there must be privity of blood, title or interest: here it would have to be privity of interest. That can arise in many ways, but it seems to me to be essential that [there be] some kind of interest in the previous litigation or its subject-matter." Thus, in the case of an agent and principal, their mutual interest in the outcome of the lawsuit will make the agent a privy to the principal -- a necessary element for the application of issue estoppel.

[24] The motions judge found that Cole was a privy of Canam in the prior proceeding between Canam and National Trust because he was Canam's solicitor. This finding seems to me to illustrate a misconception of the interaction between the various proceedings. Canam responded to the Notice of Sale of National Trust by instituting an action against National Trust for a declaration that the mortgage that authorized the Notice was void and unenforceable by virtue of false representations as to the nature of the zoning emanating from National Trust and conveyed to Canam by the Realtors. Canam did not sue the Realtors, who had acted as the agents of National Trust in conveying these alleged misrepresentations to it, and does not propose to sue them now.

[25] In the present action, Canam is suing Coles for negligence for not advising it of the true nature of the zoning. Coles, for his part, does not say he relied on the representations of National Trust (or the Realtors) in not advising Canam of the state of the zoning. Rather, he states that his retainer did not require him to give such advice. He is not attempting to excuse his tort of negligence by stating that he relied upon the representations of the Realtors. He seeks to add the Realtors as joint tortfeasors for their misrepresentations to Canam and claims contribution under the Negligence Act.

[26] The issue before the motions judge and this court became whether Coles was estopped, or barred by the doctrine of abuse of process, from raising as between Canam and the Realtors the issue of whether Canam was relieved of liability under the mortgage to National Trust because Canam relied on the zoning representations conveyed to it through National Trust's agents, the Realtors. If my assessment of the situation is correct, the issue is not whether Coles was a privy of Canam, but whether the Realtors were privies of National Trust. Instead of looking at the relationship between the solicitor Cole and his client, the plaintiff, Canam, we should look to the relationship between the third party Realtors and the defendant in the Mortgage Action, National Trust. The Realtors should take the position that Canam could have sued them in the Mortgage Action

as agents of National Trust for the same misrepresentations that it alleged against National Trust and did not do so. Since the Mortgage Action involving th ese allegations of misrepresentation was resolved adversely to Canam, it follows that the issue of the validity of the real estate transaction is res judicata between Canam and National Trust, and issue estoppel applies as between Canam and the Realtors as privies to National Trust.

[27] I am satisfied that the Realtors are privies of National Trust, but I am having some difficulty in applying issue estoppel in this case. The summary judgment judge in the Mortgage Action found that false representations had been made that were attributable to National Trust but that no remedy was available to Canam because the representations complained of had merged in the closing of the original real estate transaction. Because it was not required of him, he did not deal with the present assertion that had the Realtors been parties to the Mortgage Action, he could have awarded damages against them in favour of National Trust. Accordingly, I am concerned that the misrepresentation issue was disposed of in a manner that may not be dispositive if the action was against the Realtors as well as National Trust.

[28] In deciding the application of issue estoppel, it is necessary to consider the context and rationale behind the doctrine of res judicata. As was stated by Ritchie J. in Fenerty v. Halifax (City) (1920), 53 N.S.R. 457 at p. 463, 50 D.L.R. 435 (S.C.):

> The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. . . .

[29] Additional clarification for the application of "issue estoppel" was provided by Dickson J. in Angle v. Minister of

National Revenue (1974), [1975] 2 S.C.R. 248 at p. 255, 47 D.L.R. (3d) 544 at pp. 555-56: "It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. . . . The question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings." (Emphasis added)

[30] It can hardly be said in this case that the parties to the Mortgage Action had an opportunity to raise the issue of the potential liability of an entity that was not a party to the action at all. Additionally, while the decision that the misrepresentation merged in the conveyance was fundamental to the decision that it could not affect the validity of the mortgage that was being enforced, I am not altogether sure that merger would be a defence to the agents of the National Trust in an action against them in damages. Certainly, the point was never raised because it was irrelevant to the proceedings as framed.

Abuse of process

[31] However, we are not limited in this case to the application of issue estoppel. The court can still utilize the broader doctrine of abuse of process. Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. The doctrine can be relied upon by persons who were not parties to the previous litigation but who claim that if they were going to be sued they should have been sued in the previous litigation. This was the case in M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe), [1998] 4 All E.R. 675 (C.A.), where the second claim was against a wholly owned subsidiary of the defendant in the first claim. Similarly, in Solomon v. Smith (1987), [1988] 1 W.W.R. 410 at pp. 419-20, 45 D.L.R. (4th) 266 (Man. C.A.), the purchaser unsuccessfully sued the vendor and was seeking to sue the vendor's agent. The court found that a llowing the second action to proceed would amount to an abuse of process.

[32] Although there are no cases directly on point in this jurisdiction, the general principles of abuse of process dictate that the agent in this case should not be required to defend a cause of action previously litigated. The safest question to ask is whether the same evidence is needed to support the issues in both cases. It would seem that the evidence would be the same: the same evidence will be presented to show that a negligent representation was made and the same evidence will be used to show that the plaintiff relied upon the representations to his detriment.

[33] Unless there is new evidence, special circumstances or equitable reasons, then Coles should not be entitled to raise a second cause of action, identical in merit, against an agent who was a privy to the initial proceeding. The Realtors could have been properly included in the initial proceeding. There could be any number of reasons why Canam did not do so, but it hardly lies in the mouth of a stranger to those proceedings to insist constructively that there now be a trial as to the liability of the Realtors to Canam.

[34] Maintaining open and ready access to the courts by all legitimate suitors is fundamental to our system of justice. However, to achieve this worthy purpose, the courts must be vigilant to ensure that our system does not become clogged with unnecessary, repetitious litigation. To allow the defendant to retry the issue of misrepresentation would be a classic example of abuse of process and a waste of the time and resources of the litigants and the court. The retrying of the issues in this case would also erode the principle of finality that is crucial to the proper administration of justice. Thus, where agents as third parties must raise a defence to issues that are identical to those in a prior proceeding against their principal, the court is entitled to exercise its discretion and terminate the third party proceedings (and in this case the fourth party) as an abuse of process.

Disposition

[35] Accordingly, for the reasons set out above, I would dismiss the appeal with costs payable by the appellant to the

respondents on a party and party basis.

[36] GOUDGE J.A. (dissenting): -- I have had the benefit of reading the reasons for judgment of my colleague Finlayson J.A. I agree with him that Nordheimer J. ought not to have dismissed the third party claim on the basis of issue estoppel. However, I disagree that this conclusion was properly reached on the basis of the doctrine of abuse of process. For the reasons that follow I would allow the appeal and dismiss the motion for summary judgment seeking to dismiss the third party claim.

[37] The facts are well described in my colleague's reasons for judgment. For my purposes I need only highlight a few of them.

[38] The third party claim is brought by the defendant in the main action, Alan H. Coles ("Coles"). It seeks relief against CB Commercial Real Estate Group Canada Inc., Kevin W. Leon and Peter D. Senst (the "Realtors").

[39] Coles acted as the solicitor for the plaintiff Canam Enterprises Inc. ("Canam") when it purchased 200 Finch Avenue West in Toronto from National Trust Company of Canada ("National Trust"). The Realtors acted as real estate agents for National Trust on the transaction.

[40] In the main action, Canam sues Coles for professional negligence, pleading that Coles failed to warn it of the zoning restriction on the use of the property. Those restrictions, which prevented the property from being put to retail use, caused Canam significant harm.

[41] In the third party claim, Coles seeks contribution from the Realtors pursuant to the provisions of the Negligence Act, R.S.O. 1990, c. N.1. Coles pleads that the Realtors had a duty of care or even a fiduciary duty to Canam. The Realtors breached this duty by representing to Canam that the property could lawfully be put to retail use when they knew or ought to have known that this representation was false. Coles pleads that Canam relied on this representation in agreeing to purchase the property and that the Realtors are liable in

damages to Canam for the harm caused by this misrepresentation.

[42] On the motion for summary judgment to dismiss the third party claim, the parties agreed that for the purposes of the motion the facts pleaded were true and gave rise to a cause of action.

Issue Estoppel

[43] The doctrine of issue estoppel prevents a party from relitigating an issue already decided in an earlier proceeding. The three requirements of the doctrine are well settled. They are (a) that the prior proceeding must have decided the same question as is in issue in the subsequent proceeding; (b) that the decision said to create the estoppel be judicial and final; and (c) that the parties to the earlier decision be either the same as, or the privies of, the parties in the subsequent proceeding.

[44] The question is whether the prior decision of Day J. triggers the application of this doctrine to the third party claim. In the prior proceeding Canam sought a declaration that the mortgage taken back by National Trust when it sold the property to Canam was void because the purchaser was induced to enter the contract by the misrepresentation of the vendor as to the use of the property allowed by its zoning. National Trust counterclaimed for the balance owing on the mortgage.

[45] In his reasons for judgment, Day J. dismissed Canam's claim and allowed National Trust's counterclaim. He found that the representation about zoning was made on behalf of National Trust by the Realtors and that the representation was false. However, he concluded that the misrepresentation did not entitle Canam to set aside the mortgage contract because of the doctrine of merger.

[46] In these circumstances, there is no doubt that the decision of Day J. was judicial and final.

[47] However, like Finlayson J.A., I do not think that the "same issue" requirement of issue estoppel is met. As this

court said in Heynen & Frito Lay Canada Ltd. (1999), 45 O.R. (3d) 776, 179 D.L.R. (4th) 317, this determination depends on a careful analysis of both the factual context and the legal question addressed in the earlier proceeding. This allows the specific issue determined in the earlier proceeding to be identified and compared to the issue to be resolved in the subsequent proceeding. This reflects "the fastidious approach" that the courts have taken to the "same question" test that was described by Morden A.C.J.O. in Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 at p. 294, 112 D.L.R. (4th) 683 (C.A.).

[48] The issue in the third party claim is whether the Realtors owed a duty of care to Canam which was breached by the misrepresentation concerning zoning. This duty is separate from and not derived from the contractual relationship between Canam and National Trust. It depends on the nature of the direct relationship between Canam and the Realtors. This duty was not part of the proceedings before Day J., which dealt with whether the contractual rights of National Trust were voided by the misrepresentation made on its behalf.

[49] As Finlayson J.A. writes, it can hardly be said that the parties before Day J. had the opportunity to raise the issue of the potential liability of the Realtors, who were not a party to that action at all. While the legal consequence for National Trust of the false representation made to Canam was fundamental to the decision of Day J., the legal consequence for the Realtors of making that false representation was not before him. In the language of Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, quoted by my colleague, the question of whether the Realtors had an independent duty of care to Canam was not "fundamental to the decision arrived at" by Day J. The "same issue" requirement of issue estoppel is therefore not met.

[50] Given this finding, it is unnecessary to deal with "the same parties" requirement of issue estoppel. Indeed where, as here, the question is whether they are "privies", this inquiry may be impossible to answer if the two proceedings do not raise the same question. The measure of whether the parties are the

privies of those in the earlier proceeding would seem to require that the same question be involved in both proceedings, that is, that the subject matter of both disputes be the same. This is implicit in Gleeson v. J. Wippell & Co. Ltd., [1977] 3 All E.R. 54 at p. 60, [1977] 1 W.L.R. 510 (Ch. D.), where Vice-Chancellor Megarry said:

> I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.'

(Emphasis added)

[51] Even if one were to address the "same parties" requirement having due regard only to the subject matter of the dispute before Day J., I do not think one could find the privity of interest between Coles and Canam or between the Realtors and National Trust.

[52] The subject matter of the dispute before Day J. was the contractual right of National Trust and the corresponding contractual obligation of Canam under the mortgage. Coles has no identification of interest with Canam having regard to this subject matter. He was simply its lawyer. Canam's contract with National Trust does not reach him.

[53] In the same way, having regard to this subject matter, the Realtors have no identification of interest with National Trust. The contract between Canam and National Trust does not affect them at all. In Solomon v. Smith (1987), 45 D.L.R. (4th) 266, [1988] 1 W.W.R. 410, the Manitoba Court of Appeal reached just such a conclusion. It found that where a purchaser had unsuccessfully sued a vendor seeking to avoid the transaction because of a misrepresentation, the purchaser's subsequent action in tort against the vendor's agent based on the same misrepresentation was not against the same party or its privy.

[54] In summary, therefore, it is my view that the first requirement of issue estoppel is not met in this case, and the third requirement is probably not met as well. I agree with my colleague that the third party claim ought not to have been dismissed on the basis of issue estoppel.

Abuse of Process

[55] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

[56] One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See Solomon v. Smith, supra. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.

[57] I would disagree. As I have attempted to indicate, the issue in the third party claim is different from the issue already determined by Day J. The duty of care owed by the Realtors to Canam was simply not before Day J. This is not the relitigation of an issue already decided by the court. Hence, in my view, Nordheimer J. built his conclusion of an abuse of process on an erroneous foundation.

[58] This issue can be addressed by looking not just at the claim but also at the party bringing it. Here it cannot be said that the third party claim is an attempt by Coles to relitigate a claim which he has previously raised but lost. Coles has not raised this issue before in any legal proceeding. Nor could Coles have forced Canam to raise this issue and sue the Realtors in the action in contrast against National Trust before Day J. Coles has not had his day in court on this issue.

[59] Equally this issue can be examined from the perspective of the party required to defend the claim. Here, it cannot be said that the third party claim forces the Realtors to relitigate a claim which [they have] already successfully resisted. The Realtors have not previously been required to defend this or any other claim by either Canam or Coles.

[60] Although this is the first time that the Realtors have had to respond to the assertion that they breached their duty to Canam by making the negligent misrepresentation, they say it is manifestly unfair to require them to do so because of a prior proceeding in which it was found that on behalf of National Trust they knowingly made this false representation. I do not find this persuasive. The prior proceeding did not vindicate their conduct in the slightest, but rather found that the Realtors had made the false representation. This prior finding hardly makes it unfair that they now must defend the third party claim.

[61] In summary, the third party claim raises an issue not previously litigated. It is not manifestly unfair to allow Coles to bring the claim or to require the Realtors to defend it. In my view, it is not an abuse of process.

[62] I would therefore allow the appeal with costs payable by the third party. I would set aside the order below and order that the motion for summary judgment in the third party claim be dismissed with costs payable by the third party.

Appeal dismissed with costs.

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Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77

Supreme Court Reports

Supreme Court of Canada

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

Heard: February 13, 2003;

Judgment: November 6, 2003.

File No.: 28840.

[2003] 3 S.C.R. 77 | *[2003] 3 R.C.S. 77* | *[2003] S.C.J. No. 64* | *[2003] A.C.S. no 64* | *2003 SCC 63*

Canadian Union of Public Employees, Local 79 , appellant; v. City of Toronto and Douglas C. Stanley, respondents, and Attorney General of Ontario , intervener.

(135 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Catchwords:

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Summary:

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. [page78] The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was

admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy [page79] result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute, [page80] an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the

pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions -- for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between [page81] patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

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By LeBel J.

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Counsel

Douglas J. Wray and Harold F. Caley, for the appellant.

Jason Hanson, Mahmud Jamal and Kari M. Abrams, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

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Sean Kearney, Mary Gersht and Meredith Brown, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J.

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to [page87] testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* *(2000), 187 D.L.R. (4th) 323*

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, *[2003] 3 S.C.R. 149*, *2003 SCC 64*, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, *R.S.O. 1990, c. E.23*, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally,

O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each [page88] case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario (2001), 55 O.R. (3d) 541*

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the [page89] resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, *R.S.O. 1990, c. E.23*

> **22.1** (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
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> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
>
> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

[page90]

> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

> **48.** (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also [page91] *Dr. Q, supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard.. . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she [page92] must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction -- the finding of another court -- admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

[page93]

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound, supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* *(1983), 150 D.L.R. (3d) 249* (Ont. H.C.), at p. 264, aff'd *(1984), 48 O.R. (2d) 266* (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* *(1985), 51 O.R. (2d) 1* (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law [page94] doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the

Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided [page95] in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement, [page96] as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants ... .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p.

631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc*., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due [page97] process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category -- what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".
>
> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that [page98] is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free [page99] rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, *[2002] 1 S.C.R. 297*, *2002 SCC 12*; *Lemay v. The King*, *[1952] 1 S.C.R. 232*, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the [page100] arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, *[1983] 2 S.C.R. 594*, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, *[1996] 2 S.C.R. 223*, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, *[1998] 1 S.C.R. 706*, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in [page101] subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal

force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of [page102] oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> [page103]
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation

is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.) . The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in [page105] previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of

process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less [page106] on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to [page107] secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter, supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues [page108] determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so.. . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined ... . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter, supra*; see also *Q. v. Minto Management Ltd.* *(1984), 46 O.R. (2d) 756* (H.C.), *Franco, supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* *(1977), 18 O.R. (2d) 215* (H.C.), at p. 218, aff'd without reference to this point *(1978), 18 O.R. (2d) 714* (C.A.); *Bomac, supra*, at pp. 26-27; *Bjarnarson, supra*, at p. 39; *Germscheid v. Valois* *(1989), 68 O.R. (2d) 670* (H.C.); *Simpson v. Geswein* *(1995), 25 C.C.L.T. (2d) 49* (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* *(1991), 85 D.L.R. (4th) 540* (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* *(1988), 47 D.L.R. (4th) 431* (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* *(1995), 23 O.R. (3d) 106* (Gen. Div.), at p. 115; see also [page109] P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that [page110] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would

dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended [page111] or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of [page112] sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court -- or the jury --, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

[page113]

The reasons of LeBel and Deschamps JJ. were delivered by

LeBEL J.

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, *R.S.O. 1990, c. E.23*, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, [page114] 2002 SCC 86 , I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64 , released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise , it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149 ; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain, supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the [page115] pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have

raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular [page116] representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less [page117] deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions -- for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

[page118]

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate [page119] question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp., supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *[1998] 1 S.C.R. 982*, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, *[1997] 1 S.C.R. 748* , at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan, supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" [page120] (para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan, supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, *[1994] 2 S.C.R. 557*, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, *[1990] 2 S.C.R. 1324*. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education, supra*, at para. 39; *Canadian Broadcasting Corp., supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe, supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, *[1993] 1 S.C.R. 554*, at pp. 599-600, endorsed in *Pushpanathan, supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop [page121] a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe, supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, *[1997] 2 S.C.R. 890*). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49 ; *Macdonell v. Quebec (Commission d'accès à l'information)*, *[2002] 3 S.C.R. 661*, *2002 SCC 71*, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can [page122] be separated into two distinct issues, one of which is reviewable on a correctness standard, should not

be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC, supra*, of patent unreasonableness as a "very strict test", [page123] which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "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 unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, 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 patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[page124]

82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam, supra*, at para. 57),

and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q, supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

[page125]

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE, supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE, supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*") , at p. 389, and in *CUPE, supra*, at p. 237:

> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147. [page126] *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers, supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70) .

89 If Dickson J.'s reference to *Anisminic* in *CUPE, supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [*[1989] 2 S.C.R. 983*] ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as [page127] one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE, supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but ... then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" *(1991), 45 Admin. L.R. 264*, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. [page128] concurring) took to patent unreasonableness in *Paccar, supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> ...
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [*[1997] 1 S.C.R. 793*] ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local*

301, supra, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been... . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> [page129]
>
> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness -- whether the employees' criminal convictions could be relitigated -- and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness -- whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision -- indeed, what that decision is wholly premised on -- is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable -- a conclusion that flows from the applicability of two separate standards of review -- is very different from suggesting [page130] that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 -- "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" -- the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, [page131] there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.
>
> (L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 S.C.L.R. (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, *[1990] 3 S.C.R. 644*:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she ... reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*
>
> (I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" *(1993), 22 Man. L.J. 28*, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review [page132] under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario, supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam, supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient

for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear", [page133] the reviewing court should not intervene (*Nipawin, supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.
>
> (*Ryan, supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin, supra*, and *CUPE, supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe, supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to [page134] find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC, supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational... . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> ... admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest ... that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense [page135] of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.
>
> (Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* *(2000), 184 F.T.R. 246*, at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar, supra*, at p. 1004, *per* La Forest J.; *Ryan, supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin, supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead [page136] that tribunal to reach the decision it did" (*Ryan, supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar, supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain, supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal ... is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, *[1993] 2 S.C.R. 316*, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the ... standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan, supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser -- *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness [page137] are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the

adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> 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 unreasonable but not patently unreasonable .

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" [page138] of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above -- i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education, supra*, [page139] and *Ivanhoe, supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers, supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law, supra*, at pp.

72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE, supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed . An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f 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" (para. 57).

116 This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is [page140] flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident -- i.e., clear, obvious, or immediate -- is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law, supra*, at p. 72; see also *Ivanhoe, supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> 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 patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

[page141]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

(*Ryan, supra*, at para. 53)

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record ... Or can one go beyond the record to demonstrate -- "identify" -- why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?
>
> (D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

[page142]

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch -- i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language -- and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators [page143] in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817* , at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be [page144] overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible -- whether its illegibility is evident on a cursory glance or only after a close examination -- the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the [page145] decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q, supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the*

Constitution, *[1981] 1 S.C.R. 753*, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217*, at para. 71:

> In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"... . A third aspect of the rule of law is ... that "the exercise of all public [page146] power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance .

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> ... societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*
>
> (See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original) ; see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers, supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a [page147] way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable

decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts [page148] should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68) . As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Solicitors

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

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COURT OF APPEAL FOR ONTARIO

CITATION: Winter v. Sherman Estate, 2018 ONCA 703
DATE: 20180829
DOCKET: C64434

Sharpe, Juriansz and Roberts JJ.A.

BETWEEN

Kerry J.D. Winter, Jeffrey Barkin, Paul T. Barkin
and Julia Winter, personal representative of Dana C. Winter, deceased

Plaintiffs
(Appellants)

and

The Estate of Bernard C. Sherman, deceased, Meyer F. Florence,
Apotex Inc. and Joel D. Ulster

Defendants
(Respondents)

Brad Teplitsky, for the appellants

Katherine Kay and Mark Walli, for the respondents

Heard: August 15, 2018

On appeal from the judgment of Justice Kenneth G. Hood of the Superior Court of Justice, dated September 15, 2017, with reasons reported at 2017 ONSC 5492.

REASONS FOR DECISION

[1] The appellants appeal from the dismissal of their action.[1] The motion judge found there was no genuine issue requiring a trial that the late Dr. Sherman owed the appellants an *ad hoc* fiduciary duty to look after their financial interests. He also dismissed the action on the ground that the action was an abuse of process in that it was an attempt to re-litigate issues determined by the appellants' unsuccessful action against the Royal Trust Company and Royal Trust Corporation of Canada ("Royal Trust"), the trustee of their parents' estates.

[2] These proceedings arise out of a bitter family dispute between the appellants and their first cousin, the late Dr. Sherman. The appellants allege Dr. Sherman made a commitment to look after their financial interests when the appellants were very young children and recently orphaned. Specifically, they contend this *ad hoc* fiduciary duty arose during the purchase by Dr. Sherman and Joel Ulster of the assets of the family businesses owned by the estates of the appellants' parents ("the Empire Companies"). They plead the respondents breached that duty by dishonouring an option agreement given as part of the consideration for the purchase that would have allowed the appellants to be employed by and acquire 5% of the shares of the Empire Companies. Because

[1] By notice dated August 8, 2018, the respondents abandoned their costs appeal.

of the breach, the appellants claim a 20% interest in Apotex Inc. or the equivalent in damages.

[3] The appellants submit that the motion judge erred by failing to recognize that the crux of the present action against the respondents was whether Dr. Sherman owed them an *ad hoc* fiduciary duty and to identify the clear indicia of the fiduciary relationship between them. They say he further erred by concluding that the identical issues had been determined by Perell J. in the proceedings against Royal Trust and were dispositive of the issues in the present action.

[4] We do not accept these submissions.

[5] The motion judge properly considered the criteria for the creation of an *ad hoc* fiduciary duty as articulated by the Supreme Court in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261. Applying those criteria, he carefully analyzed the evidence of the parties' relationship and the communications between Dr. Sherman and Royal Trust in relation to Dr. Sherman's acquisition and subsequent sale of his interest in the Empire Companies. He did not accept the appellants' interpretation of that evidence as giving rise to a fiduciary relationship or duty. Rather, he concluded that Dr. Sherman did not undertake to look after the appellants' interests or ever abandon his own self-interest. As the motion judge succinctly put it:

> It was up to Royal Trust to look after the plaintiffs' interests, not Sherman. It is clear from the

> correspondence, Sherman's evidence, the purchase agreement itself, and the findings made by Justice Perell that there was only so much that Sherman was prepared to do for the plaintiffs if he was to become the buyer of the Empire Companies. Royal Trust knew that. At the end of the day, Sherman was looking after his own interests – not those of the plaintiffs. His obligations to the plaintiffs were clearly set out in the purchase agreement and eventual option agreement. The obligations, such as they were in the contracts, cannot create a fiduciary duty. There was never a point where Sherman relinquished his own self-interest and agreed to act solely on behalf of the plaintiffs: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 33. To the contrary, Sherman's self-interest was always clear. That self-interest was made known to Royal Trust and found its way into the contracts for the purchase of the Empire Companies.

[6] There is no error in the motion judge's meticulous analysis or findings.

[7] Further, the appellants too narrowly construe the doctrine of abuse of process. This doctrine is flexible and unencumbered by the specific requirements of *res judicata* or issue estoppel: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para 40; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2002] 3 S.C.R. 77, at para. 42. Where a precondition for issue estoppel has not been met, such as mutuality of parties, courts have turned to the doctrine of abuse of process to preclude re-litigation of the same issue: *C.U.P.E.*, at para. 37. While the doctrine is similar to issue estoppel in that it can bar litigation of legal and factual issues "that are necessarily bound up with the determination of" an issue in the prior proceeding, abuse of process also applies where issues

> "could have been determined": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 54; *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633, 363 D.L.R. (4th) 470, at para. 13; *McQuillan v. Native Inter-Tribal Housing Co-Operative Inc.* (1998), 42 O.R. (3d) 46 (C.A.), at pp. 50 - 51. As such, the doctrine of abuse of process is broader than *res judicata* and issue estoppel and applies to bar litigation that, if it proceeded, would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *C.U.P.E.*, at para. 37.

[8] We agree with the motion judge that the whole evidentiary underpinning of this action is the same as that of the Royal Trust action and that it would be unfair and an abuse of process to allow the appellants to "in effect, re-litigate their case, with a new theory, to see if this one will succeed where previous theories have failed". Moreover, the doctrine of abuse of process applies to prevent re-litigation of previously decided facts: *Intact Insurance Company v. Federated Insurance Company of Canada*, 2017 ONCA 73, 134 O.R. (3d) 241, at para. 28, leave to appeal refused, [2017] S.C.C.A. No. 98; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 46; *C.U.P.E.*, at para 37. As the motion judge determined, the relief and issues put forward by the appellants in these proceedings "arise from the same relationships and subject matter that have already been dealt with by Perell J. and the Court of Appeal" in the Royal Trust action.

[9] We do not accept the appellants' argument that their present action encompasses more than the interpretation of the option agreement and that the existence of a fiduciary duty overlays any obligations that Dr. Sherman had under that agreement. As the motion judge observed, Perell J. determined that the "limited, qualified, contingent and conditional" option agreement expressed precisely what had been agreed upon by the parties and that Dr. Sherman was not prepared to offer anything further.

[10] As a result, we find no error in the motion judge's determination that the appellants' present action is an abuse of process.

Disposition

[11] Accordingly, the appeal is dismissed.

[12] The respondents are entitled to their costs of $60,000, the amount the parties agreed to be reasonable, including disbursements and all applicable taxes.

"Robert J. Sharpe J.A."
"R.G. Juriansz J.A."
"L.B. Roberts J.A."

27

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 (Excerpt)

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

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

Exclusion of representatives
(3) A tribunal may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser. 2006, c. 21, Sched. C, s. 134 (7).

28

McIntosh v. Ontario (Ministry of the Environment), [2010] O.E.R.T.D. No. 11

Ontario Environmental Review Tribunal Decisions

Ontario Environmental Review Tribunal

Panel: Marcia Valiante, Member

Heard: By written submissions.

Decision: March 10, 2010.

Case Nos. 09-165 and 09-166

[2010] O.E.R.T.D. No. 11 | 50 C.E.L.R. (3d) 161 | 2010 CarswellOnt 1785

IN THE MATTER OF applications for Leave to Appeal by Jodi McIntosh and by the Trent-Talbot River Property Owners Association, pursuant to section 38 of the Environmental Bill of Rights, 1993 S.O. 1993, c. 28, as amended, with respect to a decision of the Director, Ministry of the Environment, under section 34 of the Ontario Water Resources Act, R.S.O. 1990, c. O.40, as amended, to issue Permit to Take Water No. 5716-7L6KBF, dated December 3, 2009, to M.A.Q. Aggregates Inc. and Barbara Ann McCarthy for water taking at Lot 1, Concession 1, Mara, Ramara, County of Simcoe; and IN THE MATTER OF a written Hearing

(130 paras.)

Case Summary

For a list of parties in this matter, please see the Appendix.

Appearances

Joan M. Brennan - Counsel for the Applicant, Jodi McIntosh.

Rodney V. Northey - Counsel for the Applicant, the Trent-Talbot River Property Owners Association.

Danielle Meuleman and Jerry Herlihy - Counsel for the Director, Ministry of the Environment.

David S. White - Counsel for the Instrument Holders, M.A.Q. Aggregates Inc. and Barbara McCarthy.

Reasons for Decision

Background:

1 On December 18, 2009, Jodi McIntosh (the "Applicant McIntosh") and the Trent-Talbot River Property Owners Association (the "Applicant Association") (together, the "Applicants") brought applications under section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), for Leave to Appeal the issuance of Permit to Take Water Number 5716-7L6KBF (the "PTTW") to M.A.Q. Aggregates Inc. and Barbara McCarthy (the "Instrument Holders"). The

PTTW was issued on December 3, 2009 by Ellen Schmarje, Director, Ministry of the Environment ("MOE"), under section 34 of the *Ontario Water Resources Act* ("*OWRA*"). The PTTW authorizes the Instrument Holders to take water from a quarry sump for the purpose of dewatering a proposed limestone quarry on land owned by Barbara McCarthy (the "McCarthy Quarry"). The PTTW expires on December 31, 2014.

2 This is the second attempt by the Instrument Holders to obtain a water-taking permit for this purpose at this location. In October 2002, the MOE issued Permit to Take Water No. 01-P-1132 (the "2002 PTTW") to Thomas S. McCarthy and Barbara McCarthy to permit dewatering of the proposed quarry. The Applicant Association and Marchand Lamarre and the Applicant McIntosh were granted Leave to Appeal the issuance of that permit. Following a Hearing before the Environmental Review Tribunal (the "Tribunal"), the permit was amended by the addition of further Terms and Conditions. The Applicants then filed a motion to review the Tribunal's decision. The Tribunal dismissed the motion to review, but amended several minor errors in the decision. The Applicants then appealed the Tribunal's decision to the Minister of the Environment, under section 102.3(2) of the *OWRA*. On July 23, 2007, the Minister, Laurel Broten, allowed the appeal by Mr. Lamarre and Ms. McIntosh, revoking the permit, and dismissed the appeal by the Association.

3 On September 10, 2007, the MOE received a new application for a permit from the Instrument Holders. The proposal was posted on the *EBR* Registry on September 14, 2007 and re-posted on September 27, 2007 for 30 days. Christopher Munro, MOE Hydrogeologist, with the Water Resources Unit, MOE Central Region, was assigned the responsibility for the technical review of the application. MOE staff met with representatives of M.A.Q. Aggregates and informed them that the application as submitted did not contain sufficient data to conduct a review and that additional information was required for the review to proceed. The Instrument Holders contracted with Azimuth Environmental Consulting Inc. ("Azimuth") and Earthfx Incorporated ("Earthfx") to carry out this work. Their reports were submitted by the Instrument Holders in April and November 2008 and the proposal was re-posted on the Registry on June 23, 2008 for 30 days. On December 9, 2008, a draft PTTW was posted on the Registry for comments until January 30, 2009. On January 23, 2009 and July 23, 2009, the MOE met with the Applicants and was provided with further comments. As a result of the meetings and comments, the Director required a scoped peer review by a second MOE Hydrogeologist, Kyle Stephenson, MOE Eastern Region, because of his experience with similar applications in the area and his expertise in fractured rock hydrogeology. After a preliminary review, Mr. Stephenson recommended further testing, which was carried out in November 2009. Mr. Stephenson submitted his final Technical Review Memorandum on December 2, 2009. Mr. Munro submitted his Technical Review to the Director on December 3, 2009, and the Director issued the PTTW and posted the Instrument Decision Notice on the Registry on that date. Following the filing of the applications for Leave to Appeal, both the Applicants and the Director requested and were granted extensions of time for filing materials.

Relevant Legislation:

Environmental Bill of Rights, *1993*

4

> 38. (1) Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:
>
> 1. The person seeking leave to appeal has an interest in the decision.
> 2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal.
>
> 41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and

(b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

Issues:

5

1. Whether the Applicants have standing to seek Leave to Appeal under section 38 of the EBR.
2. Whether the Applicants have met the two-part test for granting Leave to Appeal under section 41 of the EBR.

Discussion and Analysis:

Issue #1: Whether the Applicants have standing to seek Leave to Appeal under section 38 of the *EBR*.

6 The test for standing to seek Leave to Appeal has four elements: (1) the applicant must be a resident of Ontario; (2) the decision appealed from must be a Class I or II instrument; (3) the applicant must have an "interest" in the decision, and (4) another person must have a right to appeal the instrument decision under another statute (*Safety-Kleen Canada Inc. v. Ontario (Director, Ministry of the Environment)*, *(2006), 21 C.E.L.R. (3d) 88* (Ont. Env. Rev. Trib.)).

7 In this case, the PTTW is a Class I instrument and the Instrument Holders have a right to appeal the Director's decision respecting the PTTW under the *OWRA*. The Applicant McIntosh is a resident of Ontario and has a direct interest in the Director's decision. She resides with her family on the property adjacent to the proposed McCarthy Quarry site. The Applicant Association does not identify its membership but it appears to be a group representative of local community members, all of whom who reside in Ontario. Both Applicants have been actively involved in the matters at issue in this Hearing since the time of the 2002 application. No objection was raised regarding standing of the Applicants. The Tribunal finds that the Applicants have standing to seek Leave to Appeal.

Issue #2: Whether the Applicants have met the two-part test for granting Leave to Appeal under section 41 of the *EBR*.

(a) The Test for Granting Leave

8 The test for granting Leave to Appeal involves two elements: (1) there must appear to be good reason to believe that no reasonable person could have made the decision to issue the instrument, having regard to relevant law and policy; and (2) it must appear that the decision could result in significant harm to the environment. The Applicants have the onus of establishing that this test has been met. The standard of proof is less than a balance of probabilities, but the Applicants must lead "sufficient evidence to establish a *prima facie* case" (*Lafarge v. Ontario (Environmental Review Tribunal)* *(2008), 36 C.E.L.R. (3d) 191* (Ont. Div. Ct.), at para. 45).

9 The role of the Tribunal when deciding an application for Leave is not to determine the merits of the appeal. Furthermore, the Tribunal at this stage does not determine whether in fact the Director's decision is unreasonable or that significant harm to the environment will occur as a result. Under Part (a) of section 41, the Applicants must establish that there is "good reason to believe" that no reasonable person could have made the decision. This provision requires that decisions be made with regard to relevant law and policies. If the Applicants are able to establish that it appears that the Director failed to have regard to relevant law or policies, or that the decision does not incorporate or reflect them, the Tribunal can find that this part of the test has been established. Under Part (b) of section 41, the Applicants must establish that it "appears" that the decision could result in significant harm to the environment.

(b) The First Part of the Leave Test

Grounds for Leave to Appeal

10 The Applicant McIntosh raises the following grounds that she argues satisfy the first part of the section 41 test:

1. The Director, in issuing the PTTW, failed to take into account adequately the doctrine of *res judicata*, or in the alternative the doctrine of abuse of process, or in the alternative she issued a PTTW that offends these principles and thereby offends the common law;
2. The Director failed to take into account adequately the Minister's Decision Letter, or in the alternative issued a PTTW that is inconsistent with that Decision Letter;
3. The Director failed to take into account adequately Ontario Regulation 387/04, as amended, or in the alternative issued a PTTW that is inconsistent with that Regulation;
4. The Director failed to take into account adequately all of the guidelines or policies in the Permit to Take Water Manual, dated April 2005, or in the alternative issued a PTTW that is inconsistent with that Manual;
5. The Director failed to take into account adequately all of the principles in the MOE's Statement of Environmental Values ("SEV"), or in the alternative issued a PTTW that is inconsistent with the SEV;
6. The Director issued the PTTW based in part on unsubstantiated, inaccurate or misinterpreted information; and 7. The Director failed to give effect to Guideline F-15, Financial Assurance Guideline, dated November 2005.

11 The Applicant Association raises the following grounds that it argues satisfy the first part of the section 41 test:

1. Abuse of process;
2. Inadequate study of the site-specific fractured rock setting;
3. Failure to address cumulative impacts;
4. Failure to consider the MOE's SEV; and 5. Failure to consider the *Lake Simcoe Protection Act, 2008*, *S.O. 2008, c. 23*, and the Lake Simcoe Protection Plan, June 2009.

12 Many of these grounds overlap. They will be addressed below under the following groupings:

1. *Res judicata* and abuse of process
2. Impact on the McIntosh well and viability of a replacement water supply
3. Adequacy of the site-specific hydrogeological studies
4. Cumulative effects
5. The *Lake Simcoe Protection Act, 2008* and the Lake Simcoe Protection Plan
6. Financial Conditions

Ground #1: *Res Judicata* and Abuse of Process

13 The Applicant McIntosh submits that the doctrine of *res judicata* applies because the PTTW is virtually identical to the 2002 PTTW that was revoked by the Minister in her Decision Letter of July 23, 2007. In the alternative, the Applicant McIntosh submits that issuance of the PTTW in such circumstances and, where there is no relevant change of circumstances, is an abuse of process. The Applicant McIntosh submits that issuing the new PTTW is

inconsistent with public policy that encourages participation and is an abuse of process if "residents can successfully appeal ... only to be faced immediately thereafter with commencing the time consuming, emotionally draining and financially demanding process all over again."

14 The Applicant Association submits that the common law doctrine of abuse of process is relevant law that should have been considered by the Director. The Association argues that the Minister revoked the 2002 PTTW on the grounds that the impacts of the water taking would be "unacceptable", yet this PTTW would permit the same applicant to take the same amount of water in the same location.

15 In response, the Director agrees that the doctrines of *res judicata* and abuse of process apply generally in administrative law matters, but submits that they do not bar the PTTW application in this case. The Director submits that applicants are not prevented from reapplying for a permit where there is a change in circumstances that is relevant and warrants fresh consideration. The Director submits that the new application is based on further studies, research and analysis that meet the concerns of Minister Broten expressed in her Decision Letter and that meet current MOE standards. The Director further submits that she specifically considered this issue and concluded that the new PTTW satisfied the Minister's concerns and MOE standards.

16 The Instrument Holders in response make a similar argument to the Director's, that is, that there is no law that prevents a re-application for a permit that has been refused if there is a change of circumstances relevant to the matter decided, or if the second application addresses a concern raised in the first decision. The Instrument Holders submit that the PTTW is based on new scientific evidence and a new model that respond directly to the concerns raised by Minister Broten in her 2007 Decision Letter.

17 In Reply, the Applicant Association submits that the doctrine of abuse of process is applicable on the basis of other factors beyond a change in circumstances, namely, where its application would serve the objective of achieving a "finality to litigation" and ensuring a litigant has only "one bite at the cherry", or where there would be "damage to the public interest" in allowing a proceeding to continue. The Applicant Association further submits that the Director failed to identify a relevant change in circumstances. This is because the new application is for an identical water taking and the new analysis and evidence are not relevant. The Association submits that in order to be a relevant change in circumstances, there must be a change that is beyond the control of the losing party. The Association further submits that a decision relied on by the Instrument Holders, *Re Brampton (City) Official Plan Amendment No. OP93-136* *(2000), 41 O.M.B.R. 132*, *[2000] O.M.B.D. No. 1082*, does not support a finding of change of circumstances here, because it involved a change in the project being proposed, not just the introduction of new studies.

Findings on Ground #1:

18 The essence of the argument on this ground is that Minister Broten's Decision Letter regarding the 2002 PTTW, released after full consideration of the evidence, represents a final determination of this matter that cannot, in fairness, be re-litigated. Thus, it is argued, the common law doctrines of *res judicata* and abuse of process are relevant law, and that no reasonable person would have failed to consider them when faced with an application for an identical water taking that had been determined not to be acceptable.

19 In the *Lafarge* case, *supra*, the Divisional Court held that the Tribunal's determination, that in appropriate cases the common law can be "relevant law" for which the Director must have regard, was a reasonable interpretation of section 41 of the *EBR*. *Res judicata* and abuse of process are important common law doctrines designed to ensure the integrity of judicial decision-making processes. They are different but related doctrines.

20 The concept of abuse of process applies to a broad power to control judicial process. The one aspect invoked here, referred to as "abuse of process by relitigation", overlaps with the concept of *res judicata* (Donald Lange, *The Doctrine of Res Judicata in Canada*, 2d Ed., 2004, pp 371- 375). According to Lange,

> The policy supporting abuse of process by relitigation is the same as the essential policy grounds of issue estoppel and cause of action estoppel. The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
>
> As stated previously, courts have maintained that abuse of process by relitigation is an extraordinary remedy to be applied sparingly and only in the clearest and most obvious cases (pages 378-9).

21 The case of *Canam Enterprises Inc. v. Coles*, *(2000), 51 O.R. (3d) 481* (C.A.), relied on by the Applicant McIntosh identifies the three requirements for the application of the aspect of *res judicata* known as "issue estoppel":

> (1) that the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (para. 19).

22 The Court of Appeal in *Canam* goes on to address the "broader doctrine of abuse of process":

> Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. ... [T]he general principles of abuse of process dictate that the agent in this case should not be required to defend a cause of action previously litigated. The safest question to ask is whether the same evidence is needed to support the issues in both cases. ... Unless there is new evidence, special circumstance or equitable reasons, then Coles should not be entitled to raise a second cause of action, identical in merit, against an agent who was a privy to the initial proceeding (paras. 31-33).

23 The Applicants contend, and the Director and the Instrument Holders concede, that the doctrines of *res judicata* and abuse of process apply in the administrative law context. The Applicant McIntosh cites the case of *Kaloti v. Canada (Minister of Citizenship and Immigration)*, *(1998), 153 F.T.R. 289*, in which the Federal Court held:

> Consequently, I must find that, generally, *res judicata* has an application in public law. Otherwise, applicants could re-apply *ad infinitum* and *ad nauseam* with the same application, an abuse of the process of administrative tribunals. However, that would not prevent an applicant from launching a second application based on change of circumstances provided, of course, that the change of circumstances was relevant to the matter to be decided (para. 12).

24 In the case of *Danyluk v. Ainsworth Technologies*, *[2001] 2 S.C.R. 460*, relied on by the Applicant Association, the Supreme Court of Canada held:

> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided (pages 474-5).

25 According to Sara Blake, the author of *Administrative Law in Canada*, at pages 131 and 133, filed by the Director,

> Though refusal to grant an application does not generally preclude a new application, an applicant who does not raise any new circumstance that would warrant fresh consideration, may be precluded from filing repetitive applications that simply re-litigate an application previously filed and decided. ...

26 Blake makes a distinction between legal and policy questions and factual questions:

> When parties appear before a tribunal with a new case raising legal or policy issues similar to those decided in a previous case between the same parties, the tribunal is not bound by the concept of *res judicata*. This flexibility enables a tribunal to continue its pursuit of the public interest, to consider and apply changes in policy and to effectively regulate dynamic and ongoing relationships between parties. A tribunal may permit re-litigation and may come to a different conclusion without risk of court interference. However, the importance of stability in an industry requires that a tribunal have good reason for reversing its decisions.
>
> A tribunal may refuse to permit parties to re-litigate factual questions. A tribunal may rely on findings of fact made by it in previous proceedings between the same parties, if these findings are relevant to the present proceeding and there is no new evidence that would support a different finding.

27 Based on these principles, all the Parties agree that a proponent simply re-submitting the same application after a final, judicial determination on the merits rejecting the project would constitute an abuse of process and possibly give rise to a claim of *res judicata*. The Parties also agree that these doctrines would not apply where there has been a material "change of circumstances".

28 The key point of disagreement between the Parties is whether the Instrument Holders' new application for the PTTW is sufficiently different in some way from the 2002 PTTW so as to constitute a change of circumstances and therefore not amount to an abuse of process.

29 The final determination on the previous PTTW application was made by the Minister in her Decision Letter of July 23, 2007. This was as a result of appeals to the Minister from the decision of the Tribunal pursuant to section 102.3(2) of the *OWRA*. At the time, such appeals were limited to "any matter other than a question of law" and the Minister on such an appeal had authority to "confirm, alter or revoke the decision of the Tribunal as to the matter in appeal as the Minister considers in the public interest."

30 In her Decision Letter, the Minister stated as follows regarding the appeal of Mr. Lamarre and Ms. McIntosh:

> I recognize that the Regulations and the associated guidance manuals depict a fair sharing approach. I also recognize the need for balancing among all users of our essential water resources for the long-term environmental, social and economic well-being of Ontario. The PTTW attempts to satisfy these principles through conditions that require that any interference be rectified. However, I am concerned with the uncertainties involved in putting these conditions into practice.
>
> The Tribunal found that it was not in dispute that the Lamarre/McIntosh wells would be impacted by the quarrying activities ... It has been proposed that the drilling of a deeper well will provide Lamarre/McIntosh with an adequate water supply. However, no such well has been drilled, and there is no guarantee that the lower geological formations will indeed produce an adequate supply. Further, it is recognized that water from a lower formation will likely be of diminished quality and, as a result, will require treatment to make it potable. Lamarre/McIntosh are understandably concerned about the uncertainties raised by this situation.
>
> I share these concerns. As a result, I am not prepared to uphold the issuing of the PTTW and I, therefore, allow the appeal of Lamarre/McIntosh.

31 With respect to the appeal by the Association, the Minister stated:

> The Association is particularly concerned about the fact that the proposed quarry is in a fractured rock setting. I am mindful that there is a difference of opinion among experts as to whether the analysis of the

> impact of the quarry performed to date is adequate. I also recognize that fracture flow is more difficult to predict than flow in a porous medium. The Tribunal considered all of the evidence relating to the geology at this site and concluded that the testing performed to date, in conjunction with the monitoring conditions of the PTTW, was sufficient.
>
> I am not prepared to interfere with the Tribunal's general conclusion on the adequacy of testing or modelling and I, therefore, dismiss the appeal of the Association. However, it should be noted that if I had not allowed the appeal of Lamarre/McIntosh, then I would have added a condition to further strengthen the PTTW's ability to deal with any unanticipated consequences of the quarry, and to further acknowledge the difficulties inherent with a fractured rock setting. This condition would have required that the site's hydrogeological model be recalibrated in specified circumstances, and that additional testing be considered if the model could not be recalibrated.

32 From the record, it appears that the application for a PTTW filed by the Instrument Holders in September 2007, a mere two months after the Minister's Decision Letter, was not different from the previous application in any material respect. The location, the purpose and the amount of the water taking are the same. The proponents are the same or a privy to the previous applicants. If there had been no other changes, this would constitute an abuse of process. However, the MOE, from the start, took the position that the new application was inadequate and would not be processed without additional information to support it, in particular information responding to the Minister's decision. According to Mr. Munro, the MOE's Hydrogeologist, "MOE Southwest Region Technical Support staff stated that the supporting documentation for the September 13, 2007 PTTW application did not satisfy the concerns of the Minister's July 23, 2007 decision letter. The proponent requested and received additional time to conduct further hydrogeological investigations." Mr. Munro repeatedly stated in his reports that the "Proponent must satisfy Minister Broten's concerns or a new PTTW will not be issued."

33 Throughout its consideration of the application, MOE staff had two issues in mind that they required the Instrument Holders to satisfy. One was the uncertainty regarding an appropriate replacement for the McIntosh family's water supply should their drilled well be adversely impacted by the quarry dewatering. The second was the predicted impacts on the groundwater, necessitating adjustments to the model used to predict impacts and further geological and hydrogoelogical monitoring on the site. Over the two years following the initial application, studies were done and actions taken that ultimately satisfied the MOE that these issues and the Minister's concerns had been adequately addressed.

34 Do these new studies demonstrate that the application as approved in December 2009 reflects a "change of circumstances" sufficient to conclude that the Instrument Holders are not abusing the approval process by re-submitting the very same application that was rejected?

35 The case cited by the Parties that is most relevant to this situation is *Re City of Brampton Official Plan Amendment No. 93-136*, *supra*. In that case, the Ontario Municipal Board held that it was not an abuse of process for the applicant to re-apply for approval after its original application had been turned down by the Board. The key factors for the Board in reaching this conclusion were that in its earlier decision the Board had made findings that could be said to be "an invitation to the proponent to file an amended proposal which would address the issues raised by the Board" and that the new application was "sufficiently different and distinguishable from the previous application when examined in the context of the conclusions drawn by the Board." In the earlier decision, the panel had stated that some form of residential development might be appropriate for the site, but that the proposal in the form sought was not appropriate. The proponent revised the form of its proposal and re-applied. The Board went on to say that its conclusion would have been different if the earlier panel had concluded that residential development was not appropriate for the lands. The Divisional Court later quashed the Board's finding that it would be appropriate for the original panel members to sit on the hearing of the new application (see *Universal Am-Can Ltd. v. City of Brampton*, *[2000] O.J. No. 4286*, *41 OMBR 129* (Ont. Div. Ct.)).

36 The Applicant Association argues that the Instrument Holders' PTTW application is not "sufficiently different and distinguishable" from the earlier PTTW to take it outside the doctrine of abuse of process because a relevant

change of circumstances cannot be a change carried out by the losing party. The Director and the Instrument Holders emphasize that the Minister did not interfere with findings of the Tribunal regarding the adequacy of testing or modeling, or other aspects of the PTTW, but raised limited concerns that constituted an "invitation" to the proponents, to which they eventually responded in their new application. They cite the new hydrogeologic investigation, new model, new data, and the bored well construction, all of which were carried out in direct response to the Minister's concerns.

37 The Tribunal has not been asked directly to find that these proceedings are an abuse of process. Rather, the Tribunal has been asked to grant Leave to Appeal. In deciding whether Leave to Appeal should be granted, the Tribunal must determine whether the Applicants have established that there is good reason to believe that no reasonable person, having regard to the doctrines of *res judicata* and abuse of process, could have issued the PTTW.

38 The Tribunal finds that the evidence demonstrates that the Director did have regard to the potential for abuse of process, although not expressed in those terms, when faced with an application that was identical to the earlier one and that did not respond to the Minister's specific concerns that formed the basis for her allowing the appeal of Mr. Lamarre and Ms. McIntosh. It is clear from the record that the Director and MOE staff refused to consider the application until they were satisfied that the Minister's concerns had been addressed and resolved.

39 The legal authorities refer to the need for a change of circumstances and to new evidence that could support a different finding from the earlier proceeding. The Applicant Association identified no precedent to support its view that a relevant change of circumstances must be outside the control of the losing party, and the logic of why that should be so is not self-evident. In the *Brampton* case, the change of circumstances was a revised residential proposal that responded to the concerns of the Board in rejecting the earlier proposal. This does not necessarily mean that a change to the proposed project itself is the only possible change of circumstances that would meet the test, although that would often be necessary. In this case, the Director and MOE staff proceeded on the basis that the Minister's decision did not reflect a rejection of the quarry dewatering project *per se*, but instead reflected an unwillingness to accept the uncertainty around the practical availability of an alternative water supply for Mr. Lamarre and Ms. McIntosh and a concern with the level of understanding of on-site hydrogeology. Given the narrow focus of the Minister's decision, the Tribunal finds that this approach was not unreasonable.

40 Therefore, the Tribunal finds that the Applicants have not led sufficient evidence to demonstrate that there is good reason to believe that no reasonable person, having regard to the doctrines of *res judicata* and abuse of process, could have issued the PTTW.

Ground #2: Impact on the McIntosh Well and the Viability of a Replacement Water Supply

41 The Applicant McIntosh submits that the Director either failed to take into account, or the PTTW is inconsistent with, a number of relevant laws, policies and decisions, including Minister Broten's Decision Letter revoking the 2002 PTTW, *O.Reg. 387/04*, the 2005 PTTW Manual, and the MOE's SEV. In addition, the Applicant McIntosh submits that the decision is based on unsubstantiated or erroneous information. The Applicant McIntosh also argues that the proposed replacement of the family's water supply with a bored well is not made a condition in the PTTW, and that a bored well is not reliable in terms of water quantity or quality, so cannot be an acceptable replacement for the existing supply from the drilled well. The Applicant McIntosh further argues that the obligation on the Instrument Holders is to "restore" the supply or reduce the taking, and that "restore" has a different meaning from "replace", which was the approach accepted by the Director in this case.

42 The Applicant Association submits that the Director's conclusions regarding the viability of the proposed mitigation measure for the expected McIntosh well interference are not supported by the hydrogeological studies on the site. The Association's expert, Dr. Walter Illman, Associate Professor at the Department of Earth and Environmental Sciences, University of Waterloo, raises a number of criticisms of the tests on which the Director relies.

43 The Director agrees that the de-watering authorized by the PTTW is likely to interfere with the McIntosh drilled well and submits that relevant law and policy require consideration of the interests of existing users and require a permit holder to restore a supply if unacceptable interference occurs. The Director acknowledges that Minister Broten "revoked the previous PTTW based on uncertainty surrounding the reliability of a practical solution to restore the McIntosh water supply," and submits that further investigations were carried out "which attempted to address this concern," including the construction and testing of the large diameter bored well in the overburden aquifer and the November 2009 pumping test. The Director submits that the results of these investigations demonstrate that a bored well in the overburden is a viable option for restoration of the McIntosh water supply. The Director disagrees with McIntosh's submission that "restoration" cannot include "replacement". The Director further submits that it is not necessary to include a condition specifically requiring that a bored well be constructed in the event of unacceptable interference with the McIntosh well, but it is sufficient that the Instrument Holders be required to provide any user with an alternative supply if there is any negative impact on his or her water supply and restore the supply if that impact is permanent.

44 The Instrument Holders submit that Minister Broten's concern about the viability of an alternative water supply for the McIntosh family has been resolved. The Instrument Holders argue that the construction of a large diameter bored well on the McCarthy property adjacent to the McIntosh property demonstrates that a viable source of water of sufficient quality and quantity is available if necessary. In addition, the Instrument Holders argue that the recent 72-hour pump test on the McCarthy Quarry site demonstrates that there is limited vertical connection between the bedrock and the overburden, so development of the quarry will not affect the water supply in a replacement well bored in the overburden. The Instrument Holders submit that the relevant law guarantees a fair sharing of groundwater and recognizes that replacement water supply is an acceptable solution to the problem of interference with existing users.

Findings on Ground #2:

45 The MOE's policy guidance anticipates that interference with existing water supplies can occur when new water taking permits are issued but that the interests of existing water users will be protected from either temporary or permanent "unacceptable" levels of interference. For example, the PTTW Manual provides that where a new permit interferes with an existing water supply, the new permit holder "will be required to restore the supply or reduce the taking so as to alleviate the interference" (page 22). The Manual goes on to say that special permit conditions may be included to address interference and that "contingency plans should be worked out beforehand with the applicant to ensure their understanding of obligations under the PTTW program and continued co-operation with Ministry objectives." The MOE "Technical Guidance Document for Hydrogeological Studies in Support of Category 3 Applications for Permit to Take Water," April 2008, provides that where "an unacceptable impact" with an "established pattern of water use" is predicted or occurs, the MOE will only issue the permit "if the applicant first takes reasonable actions to restore or modify the existing user's water supply system so that they may continue with their established pattern of water use" (page 3). In addition, the Director must consider the principles in the MOE SEV, including the direction to exercise a precautionary approach in its decision-making.

46 No Party disagrees about the likelihood of eventual interference to some degree with the McIntosh well. This well is drilled into the Upper Bobcaygeon Formation, the same bedrock layer as the proposed quarry floor (although the base elevation in the well is approximately 4 m below the quarry floor), and it is within the predicted zone of influence of dewatering activity. The evidence suggests that this will not occur immediately, as quarrying will begin in the northern part of the site and proceed toward the McIntosh land. The maximum extraction will not occur for at least ten years. There is uncertainty regarding the likely extent of interference. The so-called "worst case" impact predicted by Azimuth, the Instrument Holders' consultant in its April 2008 report, is a 0.8 m drawdown resulting from the McCarthy Quarry alone. Azimuth also calculated a 2.4 m drawdown in the McIntosh well resulting from unmitigated cumulative dewatering at all area quarries, including the McCarthy Quarry, but these figures are based on modeling that has been shown by the pumping test to underestimate the potential for drawdown in the McIntosh well, according to Mr. Stephenson in his Affidavit. According to Azimuth, the McIntosh well has an available well yield of 14 m. It is noted that the Tribunal found in 2006 that "the evidence confirms that there will eventually be

negative impacts" on the domestic water supply in the McIntosh well. At the Tribunal hearing in 2006, witnesses on behalf of the Instrument Holders testified that the McIntosh well could suffer up to a 2 m drawdown which, one witness stated, represents an additional 5% decline in drawdown, or 20% to 30% drawdown in the well when combined with domestic water demands. The Applicants did not provide evidence on this application that disagreed with these estimates of the degree of interference expected. If and when interference is experienced that prevents the McIntosh family from continuing their established pattern of water use, then it would constitute an "unacceptable impact" or "unacceptable interference" under MOE policy and must be redressed by the Instrument Holders.

47 No Party disagrees about the need for a contingency plan to address the potential for unacceptable interference with the McIntosh well. Minister Broten's concern in 2007 was with the practical uncertainty regarding the contingency then proposed, that is, a well drilled into a deeper aquifer. This uncertainty led her to revoke the PTTW. The issue on this Application is whether her concern has been addressed with sufficient confidence to allow the PTTW to be issued. The Applicants say it has not; the Instrument Holders and the Director say it has.

48 The Applicant McIntosh argues as a preliminary matter that a "replacement" supply cannot meet the obligation to "restore" the existing supply in the event of interference. The MOE's policies require a permit holder to restore the supply or reduce the taking. The Applicant McIntosh argues that this requires the Instrument Holders to "bring the yield of the drilled well back to what it was before the interference," not to allow replacement of the family's domestic supply from a different source of water. The Director argues that development of an alternative supply is an acceptable action within MOE policies and was acceptable to Minister Broten when she revoked the previous permit on the basis only that there was an unacceptable level of uncertainty regarding the quantity and quality of the supply in the proposed alternative well. The Instrument Holders submit a similar argument and there is evidence that turning to an alternative supply in the face of permanent interference is common practice in Ontario.

49 The purpose of the policy of restoration is to accommodate new water users to the extent possible so long as existing users' supplies are protected and ecosystem functions are maintained. The PTTW Manual expressly allows either restoration of a supply *or* reduction of a new taking. The Technical Guidance document requires actions to "restore or modify the existing user's water supply system so that they may continue with their established pattern of water use." A fair reading of MOE policy suggests that reduction is required if restoration is not possible. However, if the original flow in a specific well cannot be restored, unless a replacement well could be provided, the only alternative would be to reduce or forgo a new taking. If a replacement well is of equivalent quantity and quality to the old well, allowing use of the replacement well would not do violence to the desired purpose of MOE policy, that is, of ensuring an existing user can continue with an established pattern of water use. The Tribunal finds that, in this context, "restoration of a supply" may include the use of a "replacement" or alternative supply.

50 The core issue here is whether the replacement proposed by the Instrument Holders, and accepted by the MOE, is adequate in the circumstances. The Instrument Holders propose that, if unacceptable interference with the McIntosh well occurs, a new well would be bored in the overburden. The Instrument Holders claim that their studies demonstrate that this well could supply water of equivalent quantity and quality - and in fact, better quality - as the existing drilled well, which has experienced both quality and quantity problems. In addition, the Instrument Holders claim that the overburden aquifer is not hydraulically connected with the bedrock layer from which de-watering will occur, so that the water supply in the overburden will not be diminished by quarry de-watering.

51 The Instrument Holders' consultant, Azimuth, did an investigation in October 2008 to determine whether the overburden could produce an adequate supply of potable water. A large-diameter well was bored in the overburden aquifer on the McCarthy land near the McIntosh property line. The water in this well was then tested for quantity and quality, and showed sufficient quantity for domestic household use and satisfactory quality. Mr. Munro in his Affidavit accepts, and it is not disputed, that the overburden geology on the McIntosh property is similar to that on the McCarthy land where the well was bored and that the November 2009 pumping test confirms continuing water level and water chemistry data indicating no vertical connection between the bedrock and the overburden. As a result, the Director accepted that a bored well in the overburden on the McIntosh property would provide an adequate replacement supply to the existing drilled well. This satisfied the Director that Minister Broten's concerns about the McIntosh well had been addressed.

52 The Applicants have not produced scientific evidence demonstrating that a bored well in overburden in this location could not provide an adequate supply of potable water to replace that from the existing drilled well, but have raised a number of important questions about the studies relied on by the Director. As has been recognized in other Tribunal decisions, although the onus is on the Applicants to establish a "real foundation" to meet the section 41 test for Leave to Appeal, it is not always necessary for the Applicant to generate its own scientific evidence. In *Marshall v. Director, Ministry of the Environment*, *[2008] O.E.R.T.D. No. 39*, September 10, 2008, the Tribunal stated:

> Thus, in some cases, it may be sufficient for an applicant to simply bring to the surface any apparent errors from the available documents, and if the respondents do not adequately refute them, then Leave to Appeal may be granted. In other cases, where possible errors or concerns are not so obvious, more may be needed from an applicant in order to satisfy the section 41 test. At one end of the spectrum, an applicant may uncover errors in the Director's decision based on documents that are already available or reveal that a Director failed to consider an applicable law or policy. At the other, an applicant may commission an expert to raise questions about the reasonableness of the scientific and technical basis of the decision. While the arguments and facts that may be needed to address the section 41 test will depend on the decision at issue, the one constant is that an applicant must satisfy the statutory test (page 11).

53 The Applicant McIntosh questions the reliability of the water supply from bored wells compared with drilled wells and notes that Mr. Stephenson of the MOE acknowledges this in his December 2, 2009 memorandum to the Director. She argues that there is a perception of unreliability that might make it difficult for her to sell her property in future. Both the MOE and the Instrument Holders suggest that there may be options other than the bored well that could be investigated in the future. The Applicant McIntosh submits that this uncertainty with respect to the nature, location and reliability of the alternative supply cannot satisfy Minister Broten's concerns.

54 In his Affidavit, which echoes his December 2, 2009 Technical Review Memorandum comments, Mr. Stephenson of the MOE states:

> It is noted that a bored well can have less reliable yield (seasonal fluctuations) and can be susceptible to quality problems which may require treatment (e.g. ultraviolet disinfection). This type of treatment is also commonly required / recommended in drilled wells situated in a rural setting. The overburden aquifer is widely used for domestic supply in the area of the Quarry. The PTTW requires frequent and ongoing monitoring and interpretation of (on-site and off-site) monitoring data to ensure that the overburden aquifer is not significantly impacted by quarry dewatering over time. If monitoring data indicates impact to the overburden aquifer, alternate contingency action would be required including reduction or suspension of water taking at the quarry site.
>
> Based on my experience with assessments completed at other sites in the area, there may also be an opportunity to further explore potential (contingency) aquifer units deeper in bedrock ...

55 Mr. Munro of the MOE in his Affidavit agrees that bored wells can be subject to water level declines in dry summer months, but notes that the groundwater levels recorded by Azimuth in dug wells near the McCarthy property since early 2006 show a maximum seasonal decline of 4m in August of 2006, "an abnormally dry year. As the bored well completed on the McCarthy property has an available water column of 6.5 m, the bored well would be reliable even during the driest of summer months." In addition, he notes that the majority (39 out of 51) of domestic wells in use within 1.5 km of the proposed quarry are bored into the overburden.

56 Another question raised about the bored well as a suitable replacement is whether there is vertical connectivity between the bedrock and the overburden which would mean that the overburden aquifer would be negatively affected by the de-watering of the bedrock for quarry operations, and thus not be able to provide a reliable replacement supply. The Instrument Holders and the Director rely on numerous tests and data, including water level and water chemistry data and the November 2009 pumping test, as the basis for concluding that the overburden

aquifer is not hydraulically connected with the bedrock layers. Dr. Illman, on behalf of the Applicant Association, reviewed the results of the pumping test and identified a concern with changes in water levels in overburden wells experienced following the November 2009 pumping test. Azimuth did recognize these changes, referring to them as an "oscillation" experienced consistently, that is, the same magnitude of response, in all the overburden wells regardless of the distance from the pumping well, as well as in bedrock wells at a distance. Because the levels at first rose after the pumping test started and because there was no difference in influence with distance from the pumping well, Azimuth concluded that the oscillation was due to "an external influence on a regional scale," likely barometric pressure and a rainfall event, rather than due to the pumping test. However, Dr. Illman remains "uncertain on the cause of this decline in water levels. Importantly, I do not see any basis to rule out the pumping test as the reason for this decline." In addition, he points out different changes in the levels in the overburden wells during the test period that are not consistent with Azimuth's conclusion that all of the wells were influenced equally by a regional event. Finally, Dr. Illman raises a concern about the relationship between the Bobcaygeon Formation and the higher bedrock Verulam Formation identified at one well during the pumping test, saying it is "not certain at this time how dewatering of the Verulam formation will affect the still-higher overburden areas..."

57 Dr. Illman did not read the Azimuth report on the pumping test prior to submission of the application for Leave to Appeal but made further comments regarding connectivity between bedrock and overburden by way of Reply. As a result, the Instrument Holders and the Director did not have an opportunity to respond directly to Dr. Illman's final comments. However, in their Responses, both the Instrument Holders and the Director expressed confidence in the data showing negligible vertical connectivity. Mr. Stephenson had raised a concern in a meeting in October 2009 about the need for further work to "assess the degree of hydraulic connection between bedrock and overburden units and ensure this contingency plan is viable." He recommended the pumping test to determine this issue. In its application, the Applicant Association quotes from Mr. Stephenson's December Technical Review Memorandum, written following the pumping test, in an attempt to imply that he disagrees with the conclusion of Azimuth and Mr. Munro that there is "no discernible vertical connectivity between the overburden and the bedrock." Mr. Stephenson responds to this claim, in his Affidavit, saying

> The submissions by the Applicant, Trent-Talbot, at paragraph 91 state that my interpretations of the pumping test conducted in November 2009 disagree with interpretations presented by Mr. Munro. Specifically, it was indicated that I have suggested the presence of a hydraulic connection between the overburden aquifer and shallow bedrock. I did not indicate that there was such a connection. Further review of the report entitled "McCarthy Quarry OW4 Pump Test" (page 8) will clarify the nature of the response in overburden wells observed during the pumping test. In short, the observed oscillations in water levels in overburden wells can be related to climatic conditions and not pumping at well OW4.

58 In other words, it is Mr. Stephenson's opinion that the pumping test satisfied the concern he raised in October about the degree of vertical connectivity. As a result, the MOE's two hydrogeologists agree with Azimuth that there is no discernible vertical connectivity between the bedrock and overburden. It should be noted that Mr. Stephenson was brought in to review the documentation as a result of a request by the Applicant Association. He was specifically identified by the Applicant Association because of his expertise in fractured rock hydrogeology. His involvement led directly to further tests and an improved scientific foundation for the conclusions reached by the Director.

59 The present situation is dramatically different from the 2002 PTTW where the proposal for a replacement supply was based on little more than speculation, leading Minister Broten to revoke the 2002 PTTW on that basis. Here, as a result of tests required by the MOE and Mr. Stephenson's involvement, there is a strong scientific foundation for the conclusion that a bored well could provide a reliable supply of potable water in the event of interference. Despite this, some uncertainty remains about the timing and degree of the likely impacts. The question for the Tribunal is not whether there is uncertainty remaining, but whether the Applicants have established that there is good reason to believe that no reasonable person could have issued the PTTW on the basis of this information.

60 The MOE SEV requires use of a "precautionary, science-based approach in its decision-making to protect human health and the environment". In addition, the MOE is to rely on the "best science" available and "planning

and management for environmental protection should strive for continuous improvement and effectiveness through adaptive management." Section 11 of the *EBR* requires that "every reasonable step be taken" to ensure that the SEV is "considered whenever decisions that might significantly affect the environment are made within the ministry." The Divisional Court in *Lafarge* held that it was "reasonable for the Tribunal to have regarded the SEV as relevant policy which should guide the decisions of Directors" (*supra*, para. 56). The Tribunal in numerous previous cases has treated the MOE SEV as "relevant policy" that the Director is expected to follow in making decisions under section 34 of the *OWRA* and recently confirmed that this interpretation continues to apply with respect to the MOE's current, modified SEV (*Protect Our Water and Environmental Resources v. Ontario* (Director, Ministry of the *Environment)* *(2009), 43 C.E.L.R. (3d) 180* (Ont. Env. Rev. Trib.))

61 The Director in her Affidavit states that she considered the SEV when making her decision, although she does not specifically identify how the decision reflects a "precautionary, science based approach". MOE staff were not satisfied at the time of the permit application that Minister Broten's concerns had been addressed. The MOE's approach to the permit application between September 2007 and December 2009 was to require significant further study by the Instrument Holders, to consult with the Applicants, and to bring in Mr. Stephenson for further review. The Applicants have not brought forward evidence to demonstrate that there were serious inadequacies with the scientific foundation for the PTTW at the time it was issued. The Tribunal finds that the Director's approach is consistent with the SEV requirement for a "science-based approach" and for reliance on the "best science" available.

62 A precautionary approach applies when there is scientific uncertainty about the risk of environmental harm from an activity. In essence, the approach provides that scientific uncertainty about environmental harm from an existing activity should not prevent the adoption of measures to protect the environment. In a situation where there is significant uncertainty about the risk of a future activity, the Tribunal has held that a precautionary approach "presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of the risk." (*Davidson v. Ontario (Director, Ministry of the Environment*) *(2006), 24 C.E.L.R. (3d) 165* (Ont. Env. Rev. Trib.), para. 44). The Tribunal has also held that when "there is credible evidence that shows that harm is unlikely, the degree of uncertainty is significantly reduced and it is consistent with the precautionary approach for the Director to approve the activity and include measures to prevent harm or to confirm the predictions." (*Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of the Environment)* *(2009), 44 C.E.L.R. (3d) 216* (Ont. Env. Rev. Trib.), para. 139) In this case, evidence has been generated in order to reduce significantly the uncertainty regarding the viability of a replacement supply for the Applicant McIntosh's domestic needs. Some uncertainty remains, as identified in Dr. Illman's report. However, the Tribunal finds that, on balance, the evidence largely supports the Director's conclusions.

63 In addition, the PTTW conditions address the areas of uncertainty, and require detailed and ongoing study throughout the life of the quarry. For example, conditions in the PTTW require the Instrument Holders to monitor water levels and water quality in a set of wells, including "sentry wells", in the bedrock and overburden and to report periodically to the MOE. This will help ensure early detection of groundwater interference. In addition, conditions require immediate action. If a complaint is made to the Instrument Holders regarding groundwater interference, the Instrument Holders are required to implement the "McCarthy Quarry Complaint Process". The Instrument Holders shall immediately notify the local MOE office of "any complaint arising from the taking of water authorized under this Permit and shall report any action which has been taken or is proposed with regard to such complaint." If the water taking is "observed to cause any negative impact to other water supplies obtained from any adequate sources that were in use prior to initial issuance" of the PTTW, the Instrument Holders are required to make a water supply "equivalent in quantity and quality to their normal takings, or shall compensate such persons for their reasonable costs of so doing, or shall reduce the rate and amount of taking to prevent or alleviate the observed negative impact." Finally, if "permanent interference is caused by the water taking," the Instrument Holders "shall restore the water supplies of those permanently affected."

64 The Applicant McIntosh raises a concern with the Director's failure to require the provision of the bored well as a condition in the PTTW. The Director takes the position in her Affidavit that the MOE is "not prescriptive when writing conditions in a PTTW - the conditions require a Instrument Holder to do something, but do not tell them how to do

it." The Director points out that the conditions apply generally to interference with any person's water supply, not just the McIntosh family. In addition, the Director states that other viable alternatives may be available in the future, so a prescriptive condition would limit the development of those options. The Director has satisfied herself that a viable contingency, the bored well, exists, that there is a clear requirement for the Instrument Holders to respond immediately in the case of groundwater interference, and that the MOE retains broad power to revoke or amend the PTTW. The Applicant has not demonstrated that this is an unreasonable approach in the circumstances.

65 Therefore, the Tribunal finds that the Applicants have not established that there is good reason to believe that no reasonable person, having regard to MOE policies and the evidence with respect to the impact on the McIntosh well, could have issued the PTTW.

Ground #3: Adequacy of the Site-Specific Hydrogeological Assessment

66 The Applicant Association raises a number of questions challenging the adequacy of the Instrument Holders' studies of the hydrogeology of the McCarthy Quarry site. It argues that the gaps, inaccuracies and improper assumptions in these studies establish that there is good reason to believe no reasonable person could have issued the PTTW. The concerns fall into two broad categories: new evidence and a new model.

67 The Applicant Association submits that the November 2009 pumping test was carried out because earlier studies provided an insufficient characterization of the site to enable the MOE to assess the potential impacts of the McCarthy Quarry on groundwater flow and that the data generated from the pumping test contradict earlier conclusions and fail to support the Director's conclusion that a PTTW should be issued. In addition, the Applicant Association submits that there is no reasonable basis for the Director to rely on the new model developed in response to the concerns of Minister Broten. The basis for these submissions is primarily the technical review by Dr. Illman. The key issues he raises are the expected zone of influence, the degree of vertical connectivity and the likelihood of offsite impacts. The Applicant Association also criticizes the MOE's reliance on data from the nearby James Dick Quarry to help characterize the expected zone of influence.

68 The Director submits that the pumping test was used, along with other data and studies, to characterize the hydrogeology of the site and that most of Dr. Illman's concerns with the test are answered in the full report, which he did not read prior to formulating his comments. The MOE hydrogeologists disagree with Dr. Illman's interpretation of the test results and conclude that the test confirms the expected zone of influence and the lack of vertical connectivity. With respect to the new model, the Director submits that it is a significant improvement over the model used for the 2002 PTTW and has been used only to simulate the impact of the McCarthy Quarry at the regional, not the local, scale, which Dr. Illman accepts is appropriate. The Director submits that the assumptions used in the model represent the industry standard. The Director submits that the MOE's consideration of recent studies and monitoring data from other local quarries for comparison was appropriate and that the Applicant Association's data from these quarries is outdated and its criticism is, consequently, misplaced.

69 The Instrument Holders submit that the new model is scientifically defensible for use in a fractured rock setting and is the industry standard, even if it does not meet the expectations of academic level research as advocated by Dr. Illman. The Instrument Holders submit that Minister Broten did not criticize the general adequacy of the scientific work in support of the previous PTTW, but would only have added conditions to improve the model.

70 In Reply, the Applicant Association objects to the inclusion, in the Director's and Instrument Holders' Responses, of data not included in the Azimuth report on the November 2009 pumping test and asks the Tribunal to exclude it from consideration. In addition, the Applicant Association submits that, although Dr. Illman finally did read the full report of the pumping test, all of his concerns have not been addressed. He continues to assert that there is uncertainty with respect to several issues on the site.

Findings on Ground #3:

71 It is open to the Tribunal to find that a seriously inadequate scientific foundation can form the basis for

concluding that there is good reason to believe that no reasonable person could have issued the PTTW, without specific reference to relevant law and policy. As the Tribunal stated in *Quinte West (City) v. Ontario (Director, Ministry of the Environment)* *(2009), 46 C.E.L.R. (3d) 237* (Ont. Env. Rev. Trib.), at para. 23:

> Relying upon technical studies with serious shortcomings could well be something that no reasonable Director could do, and in an appropriate case could result in a finding that it appears there is good reason to believe that no reasonable person could have made the decision being challenged. ... The issue is not whether the Director or the Applicant is correct in their relative assessments, but whether the Director's assessment is so unreasonable that no reasonable person could have made the same judgments or come to the same conclusions.

Sub-issue #1: New evidence

72 As a preliminary matter, the Applicant Association requests that the Tribunal exclude information referred to in the Response materials filed by the Director and the Instrument Holders. The Association argues that because this information was not made available to it earlier, it would be unfair to include it at this stage.

73 The specific objectionable information relates to a key plank in the Applicant Association's argument about the predicted extent of the zone of influence. In particular, it refers to datalogger records of two wells that were included in the November 2009 pumping test, but for the period after the completion of the pumping test, and as a result, were not included in the December 2009 Azimuth report. Mr. Munro refers to these records in his Affidavit and includes the data in Exhibit H to that Affidavit. Graphs are also included in the report from Azimuth dated January 19, 2010 and included in the Instrument Holders' Response materials.

74 The inclusion of these records at this time appears to be for the purpose of responding to a concern raised by Dr. Illman in his Preliminary Report. Dr. Illman stated that because wells OW8-I, 8-II and 8-III showed declining water levels to the end of the 72-hour test, it suggested to him "that there is no obvious end point to impacts based on the 72-hour pumping test: to assess an end point, there must be evidence that the declining water levels reach some equilibrium." He goes on to say that this is significant because it could show a connection between the pumped well and the OW8 wells 1,400 m away, undermining the conclusion, accepted by the MOE, of a 600 m zone of influence. The records collected subsequent to the end of the test show that the levels in wells at OW8 continued to fall for ten days even though the level in the pumping well recovered quickly after pumping stopped. In addition, records over the two years prior to the pumping test show that variations in well OW8 water levels are unrelated to variations in levels in the pumping well. Mr. Munro concludes that these records answer Dr. Illman's concern and demonstrate that these wells are not hydraulically connected, thereby undermining Dr. Illman's estimate of a 1,400 m zone of influence. After reviewing this information, Dr. Illman agreed that it provided "an explanation for the responses in OW8 that is not due to the pumping test," however he went on to recommend that a second, longer pumping test be done to rule out a connection between the wells.

75 It is not clear to the Tribunal how including this material in Responses to its Application and Dr. Illman's Preliminary Report could be unfair to the Applicant Association, and this argument is not fully explained. The material responds directly to an important concern raised in the application and provides an explanation sought by Dr. Illman, satisfying him on some aspects, even though he continues to express some uncertainty. The Tribunal finds that the Applicant has provided no reasonable justification for excluding this information from consideration.

Sub-issue #2: Evidence supporting site characterization

76 The starting point for this discussion is Minister Broten's Decision Letter of July 23, 2007. In dismissing the Applicant Association's Appeal, which was based on its concern with the inadequacy of the assessment of the site, the Minister stated:

> The Association is particularly concerned about the fact that the proposed quarry is in a fractured rock setting. I am mindful that there is a difference of opinion among experts as to whether the analysis of the

> impact of the quarry performed to date is adequate. I also recognize that fracture flow is more difficult to predict than flow in a porous medium. The Tribunal considered all of the evidence relating to the geology at this site and concluded that the testing performed to date, in conjunction with the monitoring conditions of the PTTW, was sufficient.
>
> I am not prepared to interfere with the Tribunal's general conclusion on the adequacy of testing or modeling, and I, therefore, dismiss the appeal of the Association. However, it should be noted that if I had not allowed the appeal of Lamarre/McIntosh, then I would have added a condition to further strengthen the PTTW's ability to deal with any unanticipated consequences of the quarry, and to further acknowledge the difficulties inherent with a fractured rock setting. This condition would have required that the site's hydrogeological model be recalibrated in specified circumstances, and that additional testing be considered if the model could not be recalibrated.

77 Even though the Minister did not allow the appeal on these grounds, the MOE treated her comments as a clear direction that further effort at site assessment was required before the Instrument Holder's 2007 application would be processed. At the MOE's request, Azimuth, on behalf of the Instrument Holders, created a new numerical groundwater model, conducted further testing and monitoring at the site, and carried out the November 2009 pumping test.

78 The conclusions regarding the characterization of site geology and hydrogeology are based on what Azimuth refers to as "multiple lines of evidence". These include most importantly regional information (other quarry sites, domestic wells), a drilling program on site, hydraulic testing using packer tests and pumping tests, and monitoring of water levels and hydrogeochemistry on and off site. The major findings of this work are outlined in the report entitled "McCarthy Quarry Hydrogeological Assessment", prepared by Azimuth and Earthfx, and dated April 2008. Further work was done in October 2008 with respect to construction and testing of the bored well. Based on this work, Mr. Munro drafted a PTTW in December 2008, which was subsequently discussed with the Applicants at meetings in January and July of 2009. In response to these discussions and subsequent comments, the Director requested that Mr. Stephenson review the application and supporting documents. In his preliminary review in October 2009, Mr. Stephenson concluded that the model used for simulating groundwater flow was appropriate on a regional scale, but was "less certain" on a local scale. As a result of this uncertainty, he recommended that additional work "should be completed to further assess potential impacts to groundwater on a more site-specific / local scale. This work should include the completion of a pumping test program." The purpose of this test was to provide information on horizontal and vertical interconnectivity in the fractured bedrock and assess the degree of hydraulic connection between the bedrock and overburden.

79 In his Affidavit, Mr. Stephenson states that the "overall results of the test were consistent with the impact assessment presented by the proponent and the results also indicated that the proposed contingency plan is viable." He also addresses the specific concerns raised by Dr. Illman in his Preliminary Report regarding the pumping test. There was confusion about Dr. Illman's comments because he had not read the full report prior to submitting his Preliminary Report. Thus, Mr. Stephenson provides an explanation for many of Dr. Illman's concerns about the conduct of the pumping test and about certain of the results. He also points out that the pumping test identified several "sentry wells" that could be used to provide an early warning of potential impacts on the local scale and the PTTW contains conditions requiring frequent monitoring and reporting to the MOE that will allow for further assessment.

80 Following the filing of the response materials, Dr. Illman reviewed the full Azimuth report, the new data and considered Mr. Stephenson's interpretations. Dr. Illman's final comments identify remaining uncertainty with respect to the cause of the "oscillation" in the overburden wells (discussed above), the relationship between wells OW4 and OW6 that may show a strong hydraulic connection between the Upper Bobcaygeon and Verulam bedrock formations, and the potential for longer-term effects at well OW8 which could not be identified with only a 72-hour test. He recommends further pumping tests to address these uncertainties.

81 The evidence clearly shows that the MOE was not satisfied with the initial level of study in support of the

application. The MOE pushed the Instrument Holders to do further studies and expand their monitoring program. The Instrument Holders responded, requiring this work be carried out by their consultants. The Applicants reviewed this work and recommended that Mr. Stephenson be appointed to provide a peer review. He did so and recommended the 72-hour pumping test as a way of confirming the other lines of evidence regarding site characterization. The final conclusion of both Mr. Stephenson and Mr. Munro is that the hydrogeology of the site and the potential local groundwater impacts to be expected from dewatering are well-understood. The recent pumping test appears to confirm the previous work. There remain some uncertainties about the characterization of site hydrogeology and some possible alternative explanations for the test results, however, these do not point to serious inadequacies in the scientific studies characterizing the hydrogeology of the site.

82 The Applicant Association criticizes the MOE for relying on monitoring data from the James Dick Quarry to help in characterizing the zone of influence. This is a nearby quarry that has been operating since 1915, extracting to a depth well below the level to which the McCarthy Quarry will go. The MOE considered the monitoring data from this quarry because of its proximity, its extraction into the same bedrock units and its measured zone of influence. The Applicant is particularly critical of the use of a report from 2004, however, the Director appears to be directly influenced, not by the 2004 report, but by a report from March of 2009, which appears from the evidence to be a significant improvement over the earlier report, correcting mistakes apparently made in that report. The approach of the MOE to this information is to use it as one source of evidence, in conjunction with other evidence, leading to its conclusion regarding a predicted zone of influence. The Applicant Association has not demonstrated that this is an unreasonable approach for the Director to take to determine this issue.

83 The Applicant Association also raises a concern that dewatering will reverse groundwater flows, which are now away from the quarry, so that they will in future flow into the excavation, affecting residential wells at higher elevations than the quarry floor. The Director submits that this concern is merely speculative, not supported by any evidence and not even raised by Dr. Illman. The Tribunal agrees with the Director. The Applicant Association has provided no evidence in support of this claim, and the other evidence in the record contradicts this claim.

84 As a result, the Tribunal finds that the Applicant Association has not established that there is good reason to believe that no reasonable person, based on this scientific assessment, could have issued the PTTW.

85 One of Minister Broten's concerns was with the adequacy of the model being used to predict groundwater impacts from the McCarthy Quarry. As noted above, if she had not allowed the McIntosh appeal, she would have added a condition to the 2002 PTTW requiring that "the site's hydrogeological model be recalibrated in specified circumstances, and that additional testing be considered if the model could not be recalibrated." Following the Instrument Holder's new application, the MOE responded to Minister Broten's concerns by asking the Instrument Holders to develop a new model. Thus, the old model was not recalibrated, but Azimuth and Earthfx developed a new numerical model and submitted it to the MOE in 2008. Most of Dr. Illman's comments on the background studies relate to this model.

86 Dr. Illman raises a number of issues with the new model. First, he asserts that Azimuth applies a numerical model that is not consistent with its conceptual model. His most important criticism is with the use of the Equivalent Porous Media ("EPM") approach in a fractured rock setting. Second, he argues that the conceptual model should evolve, and be updated with new data, but that this has not been done. Third, he argues that it is not appropriate to use a regional model to assess local impacts. Fourth, he argues that some of the values used in the model are not representative of the site. Finally, he argues that model validation is necessary but was not carried out by Azimuth. For all of these reasons, the Applicant Association submits that there is no reasonable basis for the Director to rely on the Azimuth model as addressing Minister Broten's concerns and therefore it is not a reasonable basis for issuing the PTTW.

87 The conceptual model for the site is outlined in the Azimuth report of April 2008. In their view, the area is characterized by three regionally significant lateral bedding plane fracture zones, with groundwater flow occurring principally through pathways provided by fractures and jointing networks rather than though matrix materials. This leads to a great deal of local variability. Dr. Illman submits that the use of the EPM model in this setting is not

appropriate. He argues that such a model can be used is a highly fractured setting, but the evidence for this site suggests that the underlying rock is only sparsely fractured. He recommends that a separate local model be developed for the site.

88 The Director and Instrument Holders submit that the EPM approach is appropriate in a fractured rock system for a *regional* scale, rather than local scale, model, and Dr. Illman agrees subject to some conditions. They also assert that use of the EPM approach is the industry standard for fractured rock settings in Ontario because it is the most practical option available. Comments by Earthfx point out the importance of scale in considering the use of a model. At a "far-field" to "very far-field" scale, that is a site to regional scale, the presence or absence of an individual fracture does not appreciably affect the water balance and "bulk hydraulic properties" can be used to characterize a regional setting with accuracy. Azimuth cites a paper of Dr. Illman's in which he acknowledges that the inability to characterize certain parameters in detail and the "consideration of practicality" have led to the development of the EPM concept in this type of application. Mr. Stephenson asserts that the use of an alternate model proposed by Dr. Illman

> would not likely have significantly reduced uncertainty regarding potential impact at the nearest domestic well owing to difficulties with determining accurate model input parameters that would provide an accurate (and unique) prediction of impact. As with any model, certain assumptions would be applied to this additional model, resulting in the need for detailed ongoing monitoring to verify the actual effect of quarry dewatering as included in the PTTW.

89 This view is echoed in comments by Azimuth.

90 It appears that all those involved recognized the limitations in a using this numerical model as a tool to predict the likely impacts of the McCarthy Quarry. In this case, the numerical model was used to simulate the impacts under two scenarios: (1) impact of the McCarthy Quarry alone, at a regional scale, and (2) cumulative impacts of all area quarries, including the McCarthy Quarry, at a regional scale. The MOE did not rely on the results from the second scenario at all, because Azimuth and Earthfx did not have accurate data from other area quarries to enter in the model, but the MOE did refer to the first scenario simulations to help calculate the zone of influence. This calculation turned out to be consistent with other data, reinforcing the MOE's view. The November 2009 pumping test was also used to confirm some of the inputs to the model. Thus, it is not accurate to say that the Director relied on the model alone to delineate the impacts of the quarry. The model was not relied on for local characterization and was considered applicable only at the regional level. Other tests and multiple "lines of evidence" were relied on to identify the site-specific conditions and test the findings of the model. The evidence suggests that Dr. Illman's alternate model would not have yielded any better information in the circumstances.

91 In his Affidavit, Mr. Stephenson agrees with Dr. Illman that development of the conceptual model should be an iterative process. However, he attributes Dr. Illman's concern to a misunderstanding of a statement in the Azimuth report and points out that this has in fact been done with the conceptual model for this site. Both Azimuth and the MOE assert that the results derived from on-site test results, including the pumping test, were used to re-evaluate both the conceptual approach to the site and the specific input parameters in the model.

92 Dr. Illman also questions the particular values for transmissivity and anisotropy that were used in the model and criticizes the failure of Azimuth to refer to model validation in its report. In choosing the values to include in the model, Earthfx explains that it used an approach similar to other quarries in the Carden Plain but used a slightly lower anisotropy value in order to increase the conservativeness of the model predictions on a local scale. Earthfx also explains the sensitivity analysis conducted and the process of model validation. In his December Technical Review Memorandum, Mr. Stephenson addressed the simulations conducted by Azimuth, stating that

> Azimuth recognized that available information for input to their cumulative impact assessment may not have been complete or up to date. Given the variability of hydraulic parameters measured in the fractured bedrock in the study area, a sensitivity analysis would have been a useful component of the modeling completed by Azimuth.

> Given that current information from area quarry operations was not available to Azimuth, I am not prepared to accept the Azimuth model as a comprehensive assessment of cumulative impacts.

93 Mr. Stephenson submits in his Affidavit that the model was calibrated using both regional and site-specific data and simulations were done that "reasonably agree with monitoring results from similar operating quarries in the area." Mr. Stephenson acknowledges that while "additional effort could have been put to confirming model simulations completed by Azimuth," the MOE did not require it because of the regional cumulative effects study underway in the area. It was "considered reasonable to conduct additional model simulations using the improved regional model currently under development." (The cumulative effects issue is addressed in the next section.) Dr. Illman remains of the opinion that the issues of model sensitivity analysis and validation have not been adequately addressed in the Response.

94 Dr. Illman raises important questions about the usefulness of the model developed by Earthfx and Azimuth. They parallel the questions and concerns recognized by the MOE, which led it to place limited reliance on the model in evaluating potential impacts of dewatering, to require other studies, to impose enhanced monitoring conditions in the PTTW, and to pursue an in-depth regional cumulative impact assessment.

95 As a result, the Applicant Association has not established that there is good reason to believe that the Director's decision is based on a seriously inadequate scientific foundation. The Tribunal finds that the Applicant Association has not established that there is good reason to believe that no reasonable person, having regard for the scientific evidence characterizing the local impacts of the McCarthy Quarry, could have issued the PTTW.

Ground #4: Cumulative Effects

96 The Applicant Association submits that the PTTW Manual and the MOE's SEV are relevant policy for decisions regarding water taking permits. The Applicant Association submits that the Director failed to have regard for the requirement in these policies to consider the cumulative effects of the McCarthy Quarry. The Applicant Association submits that the MOE acknowledges there has been no assessment of cumulative effects, but relies on a study that is now underway and not yet complete. That, the Applicant argues, amounts to good reason to believe the Director's decision was unreasonable. In the words of the Applicant McIntosh, "there is a significant and critical difference between participating in the future in a study and having a cumulative study of the current water takings completed prior to the Director making a decision on the merits of this PTTW."

97 The Director submits that the PTTW Manual requires only that the MOE take into account relevant information that exists and that the Director did consider all available information regarding cumulative impacts of the quarry dewatering. In order to better assess the cumulative impacts of this and other quarries, the Director initiated a regional cumulative impacts assessment study. The results of that study are expected to be available within eighteen months from the onset of quarrying at the McCarthy Quarry. On the basis of the available information, the Director is satisfied that the McCarthy Quarry will have no significant off-site impacts in the period before the assessment results are available.

Findings on Ground #4:

98 The PTTW Manual adopts several principles to guide decision-making on water taking permits, including Principle #4, which provides as follows:

> The Ministry will consider the cumulative impacts of water takings. Where relevant information about watershed/aquifer conditions exists, (e.g., water availability and potential impacts to the environment and other uses) the Ministry will take this into account when reviewing individual permit applications. Where the Ministry believes that cumulative impacts need to be considered, the Ministry may initiate a watershed scale or aquifer scale assessment beyond a local-scale impact assessment, and may engage water takers to collectively reduce the burden on the watershed and to better manage the demand for water.

99 The MOE's SEV also requires consideration of cumulative effects on the environment, as well as use of a precautionary approach.

100 Mr. Stephenson, in his December Memorandum, reviewed the cumulative impact assessment work done for the McCarthy Quarry and for another nearby quarry. It is his view that "[a]lthough these assessments suggest significant cumulative impact to groundwater, the assessments are not based on all available and recent monitoring / site design information for all sites in the study area." In addition, Mr. Stephenson's comments on the modeling done, discussed above, are relevant. Thus, even if the Director were to consider only the available information, there is effectively no reliable information available showing that the cumulative impact of the dewatering authorized by this PTTW is acceptable. Because of this, the MOE has initiated a cumulative impact assessment for the area, known as the Carden Plain, because of the number of adjacent active and proposed aggregate operations, including the McCarthy Quarry, in the area. As explained in the study's Terms of Reference, written by Mr. Stephenson:

> The impact assessment for a groundwater taking at an individual, isolated site should generally follow the requirements of a Category 3 hydrogeologic study under the PTTW program. The Cumulative Impact Assessment being requested by the Ministry will require additional information (beyond what is included in a typical study for a taking at an individual site) mainly as a result of the expected interaction between the dewatering zones of influence from multiple quarries when they are operated simultaneously. Different extraction plans (e.g. final quarry depths); the timing of aggregate extraction and dewatering at the quarries; and the locations of separate quarry operations in relation to receptors must also be considered.

101 This assessment will include a hydrogeological study and additional monitoring and modeling. It is expected that results of the assessment will be available within two years. Information collected as part of the assessment may be relevant to and integrated into work under other provincial initiatives, including the *Lake Simcoe Protection Act, 2008* and the Source Water Protection program under the *Clean Water Act, 2006.*

102 In the meantime, the MOE's approach to applications for individual water taking permits for quarry dewatering in the Carden Plain is to continue to consider them prior to the completion of the cumulative impact assessment, but only if the following conditions are met:

- the individual site is adequately characterized and there is an acceptable monitoring program in place to observe the effect of quarry dewatering; and
- impacts associated with each individual site are acceptable and do not extend significantly away from the site such that significant cumulative impacts should not be occurring at this time.

103 For the McCarthy Quarry site, it is the view of the MOE that there is sufficient information about the short-term impacts of dewatering on which to base the issuance of the PTTW. While that may be true regarding the impacts of the McCarthy Quarry alone, given the inadequacies of the model identified by Dr. Illman and acknowledged by Mr. Stephenson, there is in fact very limited evidence on which to base that opinion regarding the impacts of the McCarthy Quarry as added to those of other quarry operations, even over the next few years.

104 Read together, the MOE's policies indicate that cumulative effects should be taken into account *prior to* a decision being made. As noted above, where there is a great deal of uncertainty, the precautionary approach dictates that the risk be presumed to exist. The MOE acknowledges that this is not a typical application for a water taking because it is not an isolated site but one of "multiple adjacent aggregate operations" with a high potential for cumulative impacts on surface and groundwater. The Director clearly understood the importance of cumulative effects and the need for an expanded assessment in this particular context. The outcome of that understanding is the cumulative impact assessment study now underway.

105 The issue here comes down to whether the Director's approach of issuing the PTTW without a full

understanding of those impacts, relying on the power to make modifications to the PTTW later, is one no reasonable person could have made in the circumstances. One can understand that the MOE would not interrupt activity at operating quarries pending the outcome of the assessment without at least some evidence of unacceptable cumulative impact, but it is different to continue to approve new operations when the cumulative impact of all proposed quarries on surface and groundwater is such a serious concern and remains essentially unknown today. It is true that the Director retains the authority to modify permits and change terms and conditions later, and that enhanced monitoring may pick up problems before they have fully developed, but there is no certainty that those problems will be reversible. Where there is a high degree of uncertainty, the precautionary approach indicates that the Director should presume there will be harm. Developing the data to reduce that uncertainty is the appropriate response, however, continuing to approve water takings in light of that degree of uncertainty is inconsistent with the direction of MOE policy.

106 The Tribunal finds that the Applicant has established that there is good reason to believe that no reasonable person could have issued the PTTW without having the benefit of the results of the cumulative impact assessment study so as to have an adequate understanding of cumulative effects of this and other adjacent operations.

Ground #5: The *Lake Simcoe Protection Act, 2008* and Protection Plan

107 The Applicant Association submits that the Director should have considered the Lake Simcoe Protection Plan (the "Protection Plan"), adopted under the *Lake Simcoe Protection Act, 2008* ("*LSPA*"), but failed to do so. The Applicant Association submits that the *LSPA* considers decisions to issue water taking permits under section 34 of the *OWRA* to be "prescribed instruments" that must "have regard to" policies in the Protection Plan, including the need to maintain water quantity, and if they do not, as here, the PTTW conflicts with the *LSPA*.

108 The Director submits that she did consider the *LSPA* and the Protection Plan in reaching her decision and is satisfied that the decision has regard for the principles in the *LSPA*, including maintenance of water quantity in the local watershed. The Director further submits that the purpose of the cumulative impacts assessment is to provide a more reliable tool to protect groundwater resources in the area.

109 The Instrument Holders submit that the discharge from the McCarthy Quarry was approved by the MOE pursuant to a valid Certificate of Approval that was then approved by the Tribunal in its 2006 Decision. The Instrument Holders submit that the Tribunal then found that there was no evidence to suggest that the McCarthy Quarry would contribute to deterioration in water quality in Lake Simcoe, and that remains the case. The Instrument Holders further submit that the water taking, along with other quarries in the area, will not lower groundwater levels so as to have an adverse impact on Lake Simcoe, because the water that is pumped out will remain in the watershed. Finally, the Instrument Holders note that the McCarthy Quarry site is 8 km from Lake Simcoe and the zone of influence will be approximately 600 m.

110 In Reply, the Applicant Association submits that the proposed Quarry will affect the policies in the Protection Plan regarding water quantity by converting groundwater into surface water and exporting a significant amount of precipitation away from a recharge area.

Findings on Ground #5:

111 The Director acknowledges that the *LSPA* is relevant to the decision to issue the PTTW. Under the *LSPA* and its regulation, a decision under section 34 of the *OWRA* is defined as a "prescribed instrument" that shall conform with designated policies, and shall "have regard to" other policies, in the Protection Plan (*LSPA*, s. 6(9), *O.Reg. 219/09, s. 3*(5)). The Protection Plan applies to the Lake Simcoe watershed, and thereby applies to the McCarthy Quarry. One near-term focus of the Protection Plan is to be on "maintaining water quantity". The Plan also identifies "designated policies" and "have regard to" policies. With respect to water quantity, the Plan identifies general policies regarding the maintenance of adequate flows in watershed rivers and streams and the conservation and efficient use of water. There are no "have regard to" policies identified in Chapter 5 regarding Water Quantity, and only one "designated policy" but that is not applicable here. Thus, at this stage in the development of protection for

the watershed, there are only very general policies, indicating the need to protect the ecological health of the watershed, in part by maintaining the water supply, to which the Director must have regard. Many of the approaches promoted in the Protection Plan are similar to those in the MOE's SEV, including the precautionary approach, the ecosystem approach and adaptive management.

112 The Tribunal finds that the *LSPA* and the Protection Plan are relevant law and policy for the decision to issue the PTTW in this case. However, the Applicant Association has provided no evidence showing that the Director failed to consider the *LSPA* or the Protection Plan, or failed to "have regard to" relevant policies. Nor is it clear, other than by way of very general allegations, how the PTTW might be in conflict with these principles. As the Director noted, there is a study underway to assess the cumulative impact of all of the quarries in the area on water resources. As a result, the Tribunal finds that the Applicant Association has not demonstrated that there is good reason to believe that no reasonable person, having regard to the *LSPA* and the Protection Plan, could have made the decision to issue the PTTW.

Ground #6: Financial Conditions

113 The Applicant McIntosh submits that the Director should have made the provision of financial assurance a condition of the PTTW. It is submitted that the MOE's Financial Assurance Guideline, Guideline F-15, dated November 2005, gives the Director discretion to require financial assurance in water taking permits, where there is an expectation of adverse effects on other users of the same water source or on the environment, both of which apply here. The Applicant McIntosh also submits that the Director should have seriously considered imposing a condition in the PTTW requiring the Instrument Holders to purchase her property for a fair and reasonable replacement price if her water supply is adversely affected. It is submitted that the Director has the statutory authority to require that as a condition.

114 The Director submits that financial assurance is not necessary here because of the "minor cost of the proven restorative action" and the ability to revoke the PTTW if adverse impacts are not addressed "to the Ministry's satisfaction". In her Affidavit, the Director states that financial assurance was considered as an option, but she decided it was not warranted in this case. She also stated that she had never required financial assurance for a water taking permit in six years as a signing Director.

115 The Instrument Holders submit that the legislation and regulation do not provide for financial security or the purchase of the McIntosh property and that they have already invested a significant amount of money to develop the McCarthy Quarry. It is submitted that an effort was made by Mr. Quinn Moyer, the principal of M.A.Q. Aggregates, to purchase the McIntosh property, but that this effort was not successful.

Findings on Ground #6:

116 The MOE Financial Assurance Guideline, F-15, provides that financial assurance can be required as a condition of an approval, and is intended to ensure that funds are available for, among other things, the performance of environmental measures specified in the approval. Section 4.4.4 of the Guideline provides that financial assurance may be required for water taking permits where there is the expectation of adverse effects and where "potential rededication measures are likely required." Chart F1 of the Guideline indicates that financial assurance is not normally required for permits under section 34 of the OWRA, but may be required where the criteria in Section 4.4.4 apply. This indication and the Director's evidence make clear that financial assurance is not a common condition in water taking permits.

117 The Director did consider the matter here and decided not to exercise her discretion to require financial assurance to cover the cost of a replacement water supply for the McIntosh family or any other water user adversely affected by the dewatering of the Quarry. In the Director's view, it is sufficient that replacement is mandated as a condition and that should the Instrument Holders fail to provide that replacement, there is clear authority for the MOE to reduce the dewatering activity by the Instrument Holders. The Instrument Holders seem to be saying that there is little risk of them abandoning their investment. Thus, it seems from the evidence that there is

little risk that funding for a replacement water supply will not be available if and when unacceptable interference with the McIntosh well occurs, and thus the Director's decision not to require financial assurance does not appear to be unreasonable in the circumstances.

118 The Applicant McIntosh also submits that the Director should have considered imposing a condition requiring the Instrument Holders to purchase the McIntosh property outright. The Director makes no submissions on this point, but the Tribunal notes that the responsibility under relevant law and policy when there is unacceptable interference is limited to requiring the Instrument Holders to restore a supply or cut back a taking. The Applicant McIntosh argues only that requiring the Instrument Holders to purchase the property is not precluded by the statutory language, however, it is not clear why compulsory purchase would be an appropriate response where a replacement water supply is available.

119 Therefore, the Tribunal finds that the Applicant has not established that there is good reason to believe that no reasonable person, having regard to the MOE Financial Assurance Guideline and other relevant policies, could have made the decision to issue the PTTW without these conditions.

Summary of Findings regarding the First Part of the section 41 Test

120 The Tribunal finds that the Applicants have met the first part of the section 41 test with respect to one ground, that is, the failure of the Director to adequately take into account the cumulative effects of the McCarthy Quarry. The Tribunal finds that the Applicants have not met the first part of the section 41 test with respect to any other ground of appeal.

(c) The Second Part of the section 41 Test

121 The Applicants submit that the PTTW could result in significant harm to the environment. The nature of that harm is said to be immediately off-site, on the McIntosh property, and further afield. Understandably, the Applicant McIntosh is primarily concerned with impacts on her well, and thus her family's well-being. The Applicant Association submits that there is uncontradicted evidence that the PTTW will have an unacceptable level of impact on the McIntosh well. This, in its submission, is the reason Minister Broten revoked the 2002 PTTW. In addition, it is submitted that the Tribunal in 2003 granted Leave to Appeal on the basis of evidence that other wells in the vicinity could be vulnerable, and because the same quantity of taking has been applied for and new evidence suggests an even larger zone of influence, the same conclusion should be reached on this application. The Applicant Association also points to an informal survey of nearby residents whose wells are affected by the James Dick Quarry.

122 The Director submits that in order to meet the second part of the section 41 test, the Applicants must provide a substantial information base that establishes the potential for significant harm as a result of this PTTW, and cannot simply infer harm because of the classification of all permits as Class I under the *EBR*. The Director submits that where restoration of a supply predicted to suffer interference has been demonstrated, as here, there is no longer an unacceptable impact and therefore no significant harm likely to be caused to Ms. McIntosh. In addition, the Director rejects the logic of granting Leave to Appeal here based on the decision to grant Leave to Appeal in 2003. The Director submits that the Tribunal ultimately upheld the 2002 PTTW, adding terms and conditions, and Minister Broten revoked the 2002 PTTW because of uncertainties with the restoration plan for the McIntosh well which have now been addressed. The Director submits further that the informal well survey conducted by the Applicant Association provides no evidence of a link between the McCarthy Quarry and domestic wells other than the McIntosh well.

123 The Instrument Holders submit that Minister Broten did not conclude that the impact on the McIntosh well was unacceptable but that the uncertainty regarding an alternative supply was unacceptable. The Instrument Holders argue that the issue of an alternative supply has now been resolved and Dr. Illman's concerns with the pumping test are without foundation. Finally, the Instrument Holders take issue with the implication from the well survey that the

wells near the James Dick Quarry were replaced by a municipal system because of quarry operations. They submit evidence showing that the wells near the James Dick Quarry were replaced because they were affected by bacteria due to poor well-head protection and neighbouring livestock operations.

124 In Reply, the Applicant Association submits that meeting this part of the test does not require a showing of "irreversible harm" as suggested by the Director. In addition the Applicant Association submits that well surveys conducted by the Association were accepted as evidence in previous hearings before the Tribunal and the Ontario Municipal Board. Finally, the Applicant Association submits that the proposed water taking is "major" and is within a groundwater recharge area with the potential to affect many residential wells already experiencing water shortages, and within the provincially significant Lake Simcoe watershed.

Findings on the Second Part of the Section 41 test:

125 It is not necessary at this stage for the Tribunal to determine the environmental impacts of the Director's decision with certainty. The *EBR* requires only that it must "appear" to the Tribunal that issuance of the PTTW "could result in significant harm to the environment." This means that the onus is on the Applicants to establish that the potential for environmental harm exists.

126 The PTTW is classified as a Class I instrument under the EBR. Under the 2005 PTTW Manual, the taking of groundwater in these circumstances falls within Category 3, the category with the highest potential for risk to the environment. There is substantial evidence that indicates a high risk to the McIntosh family's water supply from the dewatering of the McCarthy Quarry, but there is a proven contingency plan that is available to mitigate that impact. There is limited reliable information about potential harm to other water users. The assertion by the Applicant Association that other wells are vulnerable and that those reliant on wells near the James Dick Quarry were adversely affected is not backed up with sufficient evidence to meet the onus.

127 There is a high degree of uncertainty about the long-term potential for harm to water resources in the area surrounding the McCarthy Quarry, but there is evidence on the record of the potential for that harm to be significant. The MOE has recognized the significance of this issue and the potential for regional scale impacts on water resources. The purpose of the cumulative impact assessment is to reduce this uncertainty and determine the most likely impacts resulting from the increasing number of quarries in the area.

128 Given the degree of uncertainty about the extent of harm and the potential seriousness of the harm, the Tribunal finds that it appears that the issuance of the PTTW could result in significant harm to the environment.

Decision

129 The Tribunal grants the applications for Leave to Appeal on the ground of the Director's failure to adequately take into account the cumulative effects of the McCarthy Quarry when issuing the PTTW. No other grounds may be raised in the appeal unless the Tribunal orders otherwise.

130 *Applications for Leave to Appeal Granted in Part*.

* * * * *

Appendix A

List of Parties

Applicants:	Jodi McIntosh Trent-Talbot River Property Owners Association
Counsel for Jodi McIntosh:	Joan M. Brennan Brennan and Brennan Barristers and Solicitors 337-4195 Dundas Street West Toronto, ON M8X 1Y4
Counsel for the Trent-Talbot River Property Owners Association	Rodney V. Northey Fogler Rubinoff LLP 1200-95 Wellington Street West Toronto, ON M5J 2Z9
Director:	Ellen Schmarje Director, Section 34 *Ontario Water Resources Act*
Counsel for the Director:	Danielle Meuleman and Jerry Herlihy Ministry of the Attorney General Legal Services Branch, Environment 135 St. Clair Avenue West, 10th Floor Toronto, ON M4V 1P5
Instrument Holders:	M.A.Q. Aggregates Inc. Barbara McCarthy
Counsel for the Instrument Holders:	David S. White 4 - 229 Mapleview Drive East Barrie, ON L4N 0W5

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

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

38. Media Coverage

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

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

PART VI - COSTS

39. Cost Eligibility and Awards

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

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

PART VII - REVIEW

40. Request

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

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

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

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

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

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

41. Board Powers

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

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

42. Motion to Review

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

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

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

43. Determinations

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

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Federal Court of Appeal  Cour d'appel fédérale

Date: 20120413

Docket: A-383-11

Citation: 2012 FCA 113

CORAM: **EVANS J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

MOHAMMAD ASLAM CHAUDHRY

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on March 26, 2012.

Judgment delivered at Ottawa, Ontario, on April 13, 2012.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

Federal Court of Appeal Cour d'appel fédérale

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Respondent

REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by Mohammad Aslam Chaudhry from a decision of the Federal Court, dated September 19, 2011, in which Justice Hughes (Motions Judge) granted a motion by the Crown, the Respondent, to strike out Mr Chaudhry's statement of claim and to dismiss his action in its entirety without leave to amend.

[2] The Motions Judge provided two bases for his decision. First, the statement of claim is an "abuse of powers" – by which I assume he meant "abuse of process"– because it seeks to re-litigate

matters already determined in other proceedings brought by Mr Chaudhry in the Federal Court and in this Court. Second, it requests the Court to advise Mr Chaudhry of the venues where he can litigate what he says is now his principal concern: whether the official who terminated his employment in the federal public service had the delegated authority to make this decision.

[3] The short reasons in the Motions Judge's speaking order may not be entirely accurate in the description of Mr Chaudhry's claim. Nonetheless, I am satisfied that he reached the correct conclusion when he granted the Crown's motion, struck Mr Chaudhry's statement of claim, and dismissed his action. It is clear that the action cannot possibly succeed.

[4] The statutory provisions relating to this appeal that were in force at the relevant time are set out in the Appendix to these reasons.

Background

[5] Mr Chaudhry has been litigating the termination of his employment in the federal public service for the last seven years. The issues raised in this appeal have a substantial history, some of which forms the immediate background to the present proceeding.

[6] Mr Chaudhry started his federal public service employment with the Correctional Service of Canada on February 17, 2003 as an Administrative Services Assistant at the Bath Institution. Like all employees from outside the public service, he was appointed for a probationary period of twelve months, which, in Mr Chaudhry's case, ended on February 16, 2004.

[7] On June 16, 2003, he was appointed to an indeterminate position in the central registry at Millhaven Institution, conditional on the completion of his probationary period. At Millhaven he worked first as a transfer clerk and, from October 2003, as an input and releases clerk.

[8] However, on February 6, 2004, the Warden of Millhaven issued a memorandum to Mr Chaudhry informing him that, pursuant to subsection 28(2) of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as rep. by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 284 (PSEA), he would be rejected on probation effective February 6, 2004 for unacceptable job performance and poor relations with office colleagues. He was also told that, following one month's paid leave, he would cease to be an employee of the Correctional Service of Canada after March 7, 2004.

(i) ***Adjudicator's decision***

[9] Mr Chaudhry unsuccessfully grieved his termination to the final level of the employer's internal grievance process under section 91 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, as rep. by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 285 (PSSRA). The PSSRA is the predecessor of the current *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2; there are no material differences between these statutes for the purpose of the issues to be decided in this appeal.

[10] He then pursued his grievance to an Adjudicator under section 92 of the PSSRA. Mr Chaudhry also made an unfair labour practice complaint to the Public Service Labour Relations

Board (Board) under section 23 of the PSSRA, alleging, among other things, that the employer had breached subparagraph 8(2)*(c)*(ii) of the PSSRA by threatening him with reprisals for filing a grievance concerning his workload.

[11] Both matters were decided by Ian R. Mackenzie: the grievance, in his capacity as an Adjudicator, and the complaint as a member and Vice-Chairperson of the Board. The complaint is not relevant to this appeal. Suffice it to say that the Board dismissed it on the merits.

[12] In response to Mr Chaudhry's grievance under section 92(1) of the PSSRA, the Respondent argued that the Adjudicator had no jurisdiction to determine it. Subsection 92(3) provides that the right to grieve under subsection 92(1) does not apply to terminations under the PSEA, and Mr Chaudhry's employment was terminated following a rejection on probation under subsection 28(2) of the PSEA.

[13] On the basis of Board jurisprudence, Mr Chaudhry submitted that subsection 92(3) did not apply to his grievance because his rejection on probation was a nullity. It had been in bad faith, was procedurally unfair, and constituted disguised discipline. Accordingly, he was entitled to bring a grievance under subsection 92(1).

[14] The Adjudicator found that the Respondent had demonstrated employment-related reasons for terminating Mr Chaudhry's employment. While describing the rejection memorandum that the

Warden sent to Mr Chaudhry, the Adjudicator stated at paragraph 5 of his reasons that the Warden had the delegated authority to reject him on probation.

[15] Having concluded that Mr Chaudhry's probationary employment had been terminated under subsection 28(2) of the PSEA, the Adjudicator held that he had jurisdiction over the grievance only if Mr Chaudhry established that his termination was in bad faith or was disciplinary in nature.

[16] As evidence of the employer's bad faith, Mr Chaudhry stated that he had not been given sufficient notice before he was terminated to enable him to respond, and to correct deficiencies in his work performance. He argued that the employer had failed to follow the pre-termination procedural provisions prescribed in Treasury Board of Canada Secretariat, *Treasury Board Guidelines for Non-Disciplinary Demotion or Termination of Employment* (Ottawa: Labour Relations and Compensation Operations Division, July 2002) (Guidelines).

[17] The Adjudicator rejected this particular submission because a Note in the Guidelines states that they do not apply to rejections on probation, which continue to be governed by the PSEA. After reviewing the evidence as a whole, he concluded that Mr Chaudhry had not discharged his burden of proving that the rejection on probation was in bad faith or was disguised discipline. Hence, Mr Chaudhry had been given a notice of rejection under subsection 28(2) of the PSEA, and the Adjudicator therefore had no jurisdiction to determine the grievance because of subsection 92(3) of the PSSRA.

[18] An official of his bargaining agent, the Public Service Alliance of Canada, represented Mr Chaudhry throughout these proceedings. The decisions of the Adjudicator and the Board are reported as *Chaudhry v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 72.

(ii) ***Federal Court's decision***

[19] Mr Chaudhry applied to the Federal Court for judicial review of the dismissal of both his grievance and his complaint. The hearing was held before Justice Simpson on February 26, 2007. The Court denied the application for judicial review with respect to both the grievance and the complaint in a reasoned judgment dated April 13, 2007, and reported at 2007 FC 389.

[20] The Court held that the Adjudicator had committed no reviewable error in dismissing Mr Chaudhry's termination grievance as outside his jurisdiction under subsection 92(1) of the PSSRA. The Court rejected his argument that the employer's failure to give him adequate notice before terminating his employment violated his rights under the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Court agreed with the Board that the Guidelines did not apply to Mr Chaudhry's termination because he had been rejected on probation.

[21] The Court also held that it had no jurisdiction over the dismissal of Mr Chaudhry's section 23 complaint because this was a decision of the Board. As such, it was reviewable only in the Federal Court of Appeal by virtue of paragraph 28(1)(*i*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. He did not make an application for judicial review to this Court of the Board's dismissal of his complaint under section 23 of the PSSRA.

(iii) ***Federal Court of Appeal's decision***

[22] Mr Chaudhry appealed to this Court from the Federal Court's decision on his termination grievance, not the complaint. In his appeal, he argued that the termination of his employment was invalid because subsection 28(2) of the PSEA confers this power on the deputy head, as defined in section 2 of the PSEA, and there was no evidence that the Warden of Millhaven Institution had authority to issue the notice of an intention to reject on probation.

[23] The Court declined to decide this issue. Mr Chaudhry had not included it in his notice of application for judicial review or in his memorandum of fact and law filed with the Federal Court. Opposing Mr Chaudhry's request that this Court consider the issue of the Warden's authority to terminate his employment, counsel for the Respondent said that he would have led evidence if he had been made aware of the issue earlier.

[24] The Court dismissed the appeal for essentially the reasons given by the Federal Court. The decision is reported at 2008 FCA 61. The Supreme Court of Canada refused Mr Chaudhry's application for leave to appeal: [2008] SCCA No. 349.

[25] I would only add that Mr Chaudhry was self-represented in the judicial review proceedings in the Federal Court and, on appeal, in this Court. As a lay litigant, he no doubt found it frustrating to be met with jurisdictional barriers that prevented both the Adjudicator from determining his grievance, and the Federal Court from reviewing the Board's dismissal of his complaint. He must also have been disappointed to be told by the Federal Court and this Court that they would not

decide whether the deputy head's power to reject an employee on probation had been subdelegated to the Warden, because he had not raised the issue in either his notice of application or his memorandum of fact and law in the Federal Court.

(iv) *re-consideration by the Adjudicator*

[26] In January 2009, Mr Chaudhry made an application to the Board under section 43 of the PSSRA to reconsider its dismissal of his complaint. The Board dismissed the application for both delay and lack of merit; the decision is reported at 2009 PSLRB 39. Mr Chaudhry based his application in part at least on the absence of any evidence that the Warden had the power to reject employees on probation.

[27] Vice-Chairperson Mackenzie noted that Mr Chaudhry seems to have started focussing on the delegation issue in January 2007, just before the hearing of his application for judicial review in the Federal Court. However, he held, it was not relevant to Mr Chaudhry's unfair labour practice complaint under section 23 of the PSSRA. The re-consideration application applies only to the complaint. Adjudicators' decisions on grievances are not subject to statutory reconsideration.

Issues and analysis

[28] **Re-litigation:** Mr Chaudhry says that the Motions Judge erred in dismissing his action on the ground that he was seeking to re-litigate matters that had already been decided by the Federal Court and the Federal Court of Appeal. He submits that neither the Board nor the Federal Courts have adjudicated the issue that he now believes to be of fundamental importance to the legality of

his termination, namely the authority of the Warden to reject him on probation. Accordingly, he argues, the present action cannot be characterized as an attempt to re-litigate an issue when that issue has never been decided.

[29] I do not agree. The general prohibition on re-litigation applies both to issues that have been determined by a tribunal and those that the litigant could have raised in the proceeding before the tribunal, but did not. Mr Chaudhry could have raised the authority of the Warden when he grieved the termination of his employment under section 91 of the PSSRA through the internal grievance process.

[30] If the decision-makers did not accept this argument and dismissed the grievance, Mr Chaudhry could have made an application for judicial review to the Federal Court for a determination of the legal question of whether the Warden had the authority to reject on probation.

[31] In addition, Mr Chaudhry might have been able to raise the lack of authority issue when he grieved his termination before the Board under section 92 of the PSSRA. Whether the Warden had the legal authority to reject him on probation might have constituted evidence that the termination of his employment was in bad faith, and might have enabled the Adjudicator to decide the grievance. The issue was not considered by the Federal Court or this Court in the application for judicial review of the Adjudicator's decision because Mr Chaudhry had not raised it in his notice of application and memorandum of fact and law.

[32] It is thus clear that Mr Chaudhry had opportunities to litigate the legal authority of the Warden in the context of his section 91 grievance proceeding and, possibly, before the Board in his section 92 grievance.

[33] The only remaining question is whether there was any basis on which the Judge should have exercised his discretion and allowed the action to proceed, despite Mr Chaudhry's failure to argue previously that the power to reject him on probation had not been subdelegated to the Warden. In my view there was not.

[34] On his own admission during the hearing of the present appeal, Mr Chaudhry did not become aware of the issue of whether the Warden had the necessary subdelegated authority until January 2007 when preparing for the upcoming hearing of his application for judicial review. He stated that he had previously assumed that the Guidelines applied to the termination of his employment. Section 1 of the Guidelines, headed "Authority", states that subsection 12(3) of the *Financial Administration Act* provides that a deputy head may subdelegate the authority to terminate other than for breaches of discipline or misconduct. When he realized that the Guidelines do not apply to rejections on probation, but the PSEA does, he then questioned whether there had been a subdelgation to the Warden of the deputy head's power to reject on probation under subsection 28(2) of the PSEA.

[35] While expressing no opinion on the merits of whether Mr Chaudhry's contention, I would make the following points.

[36] First, the Warden's letter dated February 6, 2004, advising him that he would be rejected on probation stated that he was being terminated under subsection 28(2) of the PSEA.

[37] Second, in his decision dated July 13, 2005, dismissing Mr Chaudhry's grievance as outside his jurisdiction under section 92 of the PSSRA, the Adjudicator stated that the Guidelines do not apply to probationary employees: 2005 PSLRB 72, para. 115. However, the Adjudicator also expressed the view (at para. 5) that the Warden "had the delegated authority to reject on probation (Exhibit E-17)." The document labelled Exhibit E-17 is the Guidelines: see 2007 FC 389 at para. 433.

[38] Third, the fact that the Guidelines do not apply to the rejection of employees on probation is not determinative of the Warden's authority to terminate Mr Chaudhry's employment under subsection 28(2) of the PSEA. Subsection 6(5) of the PSEA permits a deputy head to subdelegate the exercise of powers conferred by the Act.

[39] Fourth, Justice Simpson's reasons for dismissing Mr Chaudhry's application for judicial review of the Adjudicator's decision do not specifically mention the issue of the Warden's subdelegated authority. However, it appears to have been included in the nine points raised by Mr Chaudhry under the heading "Errors and Omissions", which Justice Simpson (at para. 41) declined to consider because they were not contained in his memorandum of fact and law.

[40] In all the circumstances of this case, there is no basis for permitting Mr Chaudhry to raise the issue in the present action or in any subsequent proceedings. The public interest in the finality of litigation must prevail.

[41] Refusal to provide information: Mr Chaudhry's statement of claim says that the Crown is under a duty to provide him access to an independent and impartial tribunal to determine his legal rights, and to inform him which tribunal has the jurisdiction to determine whether the Warden of Millhaven had the delegated legal authority to terminate his employment.

[42] Mr Chaudhry argues that the Motions Judge misunderstood the statement of claim by thinking that he was seeking advice from the Court on where he should litigate whether the Warden had the subdelegated power to terminate his employment under subsection 28(2) of the PSEA. Rather, the statement of claim requests the Court to order the Respondent to give him this information.

[43] Even if the Motions Judge did err as Mr Chaudhry alleges, the error is not material. As discussed above, Parliament had provided an opportunity for Mr Chaudhry to challenge the Warden's legal authority. He could have raised this issue when he grieved his rejection on probation in his grievance proceedings under section 91 of the PSSRA. If the argument had not succeeded, he could have made an application for judicial review of the dismissal of his grievance in the Federal Court and, if necessary, appealed from there to this Court.

[44] In addition, he could probably have raised the issue of the Warden's authority before the Adjudicator. If the Adjudicator had nonetheless dismissed his grievance under section 92 of the PSSRA, he could have included it in his notice of application for judicial review and in his memorandum of fact and law. His failure to do so led the Federal Court and this Court to refuse to determine the issue.

[45] Thus, in my view, the law provided Mr Chaudhry with adequate opportunities to litigate the Warden's legal authority to terminate his employment. Unfortunately, he failed to avail himself of them. His statement of claim is therefore unfounded in so far as it assumes he has been denied an opportunity to litigate this issue. Further, the Crown owes no legal duty to give legal advice or information to those litigating against it. In an adversarial litigation system, parties must obtain their own legal advice; they cannot look to their opponents, including the Crown, to provide it.

[46] To be clear, I repeat that I express no view on whether there is any merit to Mr Chaudhry's contention that the Warden had no power to issue him a rejection on probation notice under subsection 28(2) of the PSEA. Mr Chaudhry should have requested evidence that the deputy head had subdelegated this power to the Warden under subsection 6(5) of the PSEA when he was grieving his termination under sections 91 and 92 of the PSSRA.

[47] For all the above reasons, I would dismiss the appeal with costs.

"John M. Evans"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Eleanor R. Dawson J.A."

APPENDIX A

Public Service Employment Act, R.S.C. 1985, c. P-33.

6. (5) Subject to subsection (6), a deputy head may authorize one or more persons under the jurisdiction of the deputy head or any other person to exercise and perform any of the powers, functions or duties of the deputy head under this Act including, subject to the approval of the Commission and in accordance with the authority granted by it under this section, any of the powers, functions and duties that the Commission has authorized the deputy head to exercise and perform.	6. (5) Sous réserve du paragraphe (6), un administrateur général peut autoriser des subordonnés ou toute autre personne à exercer l'un des pouvoirs et fonctions que lui confère la présente loi, y compris, mais avec l'approbation de la Commission et conformément à la délégation de pouvoirs accordée par celle-ci en vertu du présent article, l'un de ceux que la Commission l'a autorisé à exercer.
28. (2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.	28. (2) À tout moment au cours du stage, l'administrateur général peut aviser le fonctionnaire de son intention de le renvoyer, pour un motif déterminé, au terme du délai de préavis fixé par la Commission pour lui ou la catégorie de fonctionnaires dont il fait partie. Le fonctionnaire perd sa qualité de fonctionnaire au terme de cette période.

Public Service Staff Relations Act, R.S.C. 1985, c. P-35.

8. (2) Subject to subsection (3), no person shall … *(c)* seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee	8. (2) Sous réserve du paragraphe (3), il est interdit : […] *c)* de chercher, notamment par intimidation, par menace de destitution ou par l'imposition de sanctions pécuniaires ou autres, à obliger un fonctionnaire :

…

(ii) to refrain from exercising any other right under this Act.

[…]

(ii) à s'abstenir d'exercer tout autre droit que lui accorde la présente loi.

23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed

(a) to observe any prohibition contained in section 8, 9 or 10;

…

23. (1) La Commission instruit toute plainte dont elle est saisie et selon laquelle l'employeur ou une organisation syndicale ou une personne agissant pour le compte de celui-là ou de celle-ci n'a pas, selon le cas :

a) observé les interdictions énoncées aux articles 8, 9 ou 10;

[…]

91. (1) Where any employee feels aggrieved

…

91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :

[…]

(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, …

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas a)(i) ou (ii) et portant atteinte à ses conditions d'emploi.

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

…

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

…

(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the *Public Service Employment Act*.

…

92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :

[…]

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

[…]

(3) Le paragraphe (1) n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief portant sur le licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*.

[…]

Federal Courts Act, R.S.C. 1985, c. F-7.

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

…

28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

[…]

(i) the Public Service Labour Relations Board established by the Public Service Labour Relations Act;	i) la Commission des relations de travail dans la fonction publique constituée par la Loi sur les relations de travail dans la fonction publique;

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-383-11
STYLE OF CAUSE:	Mohammad Aslam Chaudhry v. The Attorney General of Canada
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 26, 2012
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	SHARLOW AND DAWSON JJ.A.
DATED:	April 13, 2012

APPEARANCES:

Mohammad Aslam Chaudhry	ON HIS OWN BEHALF
Jessica M. Winbaum	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

31

ONTARIO ENERGY BOARD

IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation, made pursuant to section 86(2)(b) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking to include a rate rider in the current[1] Board-approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to their Base Distribution Delivery Rates (exclusive of rate riders), made pursuant to section 78 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc., made pursuant to section 86(1)(a) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking cancellation of its distribution licence, made pursuant to section 77(5) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc. seeking an order to amend its distribution licence, made pursuant to section 74 of the *Ontario Energy Board Act, 1998,* to serve the customers of the former Orillia Power Distribution Corporation.

[1] Current rates as of the Closing Date of the transaction based upon the revenue requirement approved in EB-2015-0024.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its rate order to Hydro One Networks Inc., made pursuant to section 18 of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF an application made by Hydro One Networks Inc., seeking an order to amend the Specific Service Charges in Orillia Power Distribution Corporation's transferred rate order made pursuant to section 78 of the *Ontario Energy Board Act, 1998*.

APPLICATION

1.0 INTRODUCTION

Hydro One Inc. ("HOI") is a corporation incorporated under the laws of the Province of Ontario and is the parent company of Hydro One Networks Inc. ("Hydro One"). Hydro One is a licensed distributor regulated by the Ontario Energy Board in accordance with the *Ontario Energy Board Act, 1998* (the "Act"). A corporate organizational chart of Hydro One, both before and after the transaction, is provided as **Attachment 1**.

Hydro One's distribution system serves approximately 1.3 million customers in its service territory (see **Attachment 2** for further customer details).

Orillia Power Distribution Corporation ("OPDC") is, at the date of this Application, a wholly owned subsidiary of Orillia Power Corporation ("OPC"). OPC is a holding company, currently wholly owned by The Corporation of the City of Orillia (the "City"). A corporate organizational chart of OPC is provided as **Attachment 3**.

OPDC's distribution system serves approximately 13,830 Residential and General Service customers in the OPDC service territory (see **Attachment 4** for further customer details).

2.0 OVERVIEW OF APPLICATION

On August 15, 2016, the City and Orillia Power Corporation (the "Vendor") and HOI (the "Purchaser") entered into a Share Purchase Agreement (the "Agreement"), the effect of which is that the Vendor and the City have agreed to sell, and the Purchaser has agreed to purchase, all of the issued and outstanding shares of OPDC. The purchase price is $41.3 million, comprising a cash payment of approximately $26.4 million for the shares and the assumption of OPDC's short- and long-term debt (including regulatory deferral account balances) of approximately $14.9 million[2]. The Agreement contemplates the closing of the transaction on the first business day of a month and at least 90 days following the Parties' receipt of all required approvals, including Ontario Energy Board ("the Board" or "OEB") approval of this Application.

The Agreement (see **Attachment 5**) contemplates the following items in addition to the sale of the shares:

(a) OPDC will apply to the OEB for approval to include a negative rate rider to OPDC's electricity rates[3] to reduce Base Distribution Delivery Rates by one per cent across residential and general service rate classes, and to have such reduced rates apply for the next five years (see **Exhibit A, Tab 2, Schedule 1 Section 2.0** for further detail);

(b) The Purchaser or its affiliates shall offer all active employees of OPDC continued employment in the City of Orillia for a period of at least one year;

[2] As contemplated in the share purchase agreement, the final purchase price is subject to closing adjustments.

[3] This refers to OPDC's base distribution delivery rates as approved in EB-2015-0024 and adjusted for the move to a monthly fully fixed charge ("Move to Fixed"), as contemplated in the Report of the Board "A New Distribution Rate Design for Residential Electricity Customers" issued April 2, 2015 under proceeding EB-2012-0410. These rates are hereafter referred to as OPDC's "Base Distribution Delivery Rates".

(c) The Purchaser shall establish an advisory committee (the "Advisory Committee") to provide a forum for communication between the Purchaser and the community;

(d) After closing, the community will be eligible for Hydro One's community programs;

(e) The purchase price is subject to adjustment, within 90 days following closing, for working capital, net fixed assets, regulatory accounts and long term debt, as defined in the Agreement.

The resolutions that give way for the execution of the Agreement are provided as **Attachment 6**.

This Application adheres to the principles of the "*Report of the Board on Rate-Making Associated with Distributor Consolidation*" issued on March 26, 2015 ("Amended Report"). The Amended Report provides Board policy pronouncements pertaining to rate-making for associated distributor consolidation transactions. These include: (1) an extension to the rate rebasing deferral period, to a duration of up to ten years after the close of the transaction; (2) a requirement for use of an earning sharing mechanism ("ESM") where an applicant seeks a deferral period greater than five years and up to ten years; (3) utilization of the incremental capital investment module ("ICM") by the consolidating entity during the rate rebasing period; and (4) clarifications as to which incentive plan would apply to distributors who are party to a merger, amalgamation, acquisition, and divestiture ("MAAD") transaction during any deferred rebasing period. Further guidance was provided by the Board with the release of the "*Handbook to Distributor and Transmitter Consolidations and Filing Requirements for Consolidation Applications"* (the "Handbook") released on January 19, 2016. Hydro One has considered the intent of these reports in developing this Application.

The proposed Transaction will both benefit and protect ratepayers:

- Ratepayers will receive the benefit of: (i) a reduction of 1% in their Base Distribution Delivery Rates in Years 1 to 5; (ii) a rate increase of less than inflation in years 6 to 10 (inflation less productivity stretch factor); and (iii) a further guaranteed ESM amount of

$2.6 million. In addition, customers will benefit in the longer term from the lower ongoing cost structures.

- The implementation of a guaranteed ESM protects OPDC ratepayers from the risk of Hydro One failing to achieve the forecast level of synergy.

3.0 PREVIOUS MAAD APPLICATION

On September 27, 2016, Hydro One Inc. applied (EB-2016-0276) to the OEB to acquire the shares of OPDC, and sought other approvals as discussed in that application. On April 12, 2018 the OEB issued its Decision and Order on this application denying the acquisition, but indicating that with the exception to pricing, the transaction met the no harm test[4]. In this regard, the evidence in this application is similar to that provided in EB-2016-0276, with the exception of updates to reflect current variables to costs and other metrics. Additionally, in the EB-2016-0276 Decision, the OEB indicated that it required additional evidence on what Hydro One "expects the overall cost structure to be following the deferral period and to explain the impact on Orillia's customers". As a result, Hydro One has complied with the Board's order and has provided a new exhibit (**Exhibit A, Tab 4, Schedule 1**) on Future Cost Structures.

4.0 OEB APPROVAL REQUESTS

The following OEB approvals are requested under Sections 86(2)(b), 86(1)(a), 77(5) and 74 of the Act:

[4] See - Page 12 of Decision and Order, saying that the OEB accepts that the acquisition will lead to some savings on account of eliminating redundancies; Page 16 saying the Board is satisfied that OPDC's quality and reliability of service would be maintained and that the requirement to report on reliability and quality of service would confirm to the OEB that any reduction in service quality would become apparent; and, Page 17 accepting that there will be no adverse impact on Hydro One's financial viability as a result of its proposals for financing the transaction.

- Hydro One is applying to the Board pursuant to section 86(2)(b) of the Act, seeking leave to acquire all the issued and outstanding shares of Orillia Power Distribution Corporation from the City.
- OPDC is applying pursuant to section 86(1)(a) of the Act to dispose of its distribution system to Hydro One.
- If the Board grants leave for OPDC to dispose of its distribution system to Hydro One, after closing and upon integration of the proposed transactions, OPDC requests, pursuant to section 77(5) of the Act, that its electricity distribution licence be cancelled. Hydro One requests, pursuant to section 74 of the Act, that Hydro One's distribution licence be amended such that Appendix B, Tab 1 of Schedule 1 include *The City of Orillia, County of Simcoe as at October 31, 1991*, as described in Schedule 1 of OPDC's licence.
- If the Board grants leave for OPDC's distribution system to be transferred to Hydro One and amends Hydro One's distribution licence to include the former service territory of OPDC, pursuant to section 18 of the Act, Hydro One is also requesting the Board transfer OPDC's rate order to Hydro One.
- OPDC is seeking approval pursuant to section 78 of the Act, to include a rate rider to its OEB-approved rate schedules, to give effect to a 1% reduction relative to the Base Distribution Delivery Rates applicable at the time of closing. This rate rider is proposed to be implemented during the first five years of the deferred rebasing period.
- Hydro One is seeking pursuant to section 78 of the Act to update OPDC's Specific Service Charges to align with the Specific Service Charges that are, or will be, approved by the OEB for Hydro One Distribution.
- Upon completion of integration, HOI will transfer the assets and liabilities of the electricity distribution business from OPDC to Hydro One.
- If the Board grants leave for OPDC to dispose of its distribution system to Hydro One, Hydro One is seeking approval to establish a new deferral account to record the costs of the ESM refund amount for future disposition. Principal amounts recorded in this account will

be added annually, and those balances will attract interest calculated consistent with the Board's approved methodology using the Board's Prescribed Interest Rates.

5.0 OTHER APPROVALS AND CONSIDERATIONS

- Hydro One is applying for approval to defer the rate rebasing of OPDC for ten years from the date of closing of the proposed transaction, consistent with the new Board policy set out in the Amended Report.
- Hydro One is applying for approval to continue to track costs to the regulatory asset accounts currently approved by the OEB for OPDC and to seek disposition of their balances at a future date. See **Exhibit A, Tab 2, Schedule 1, Section 3** for further details.
- All OPDC rate riders will continue as per OPDC's existing rate schedules until expiry.
- Hydro One is applying for approval to utilize US GAAP for OPDC financial reporting.
- Hydro One is applying for approval to use an ESM to operate during the extended deferred rebasing period (i.e., years six to ten), consistent with page 16 of the Handbook. Hydro One's proposed ESM is described in **Exhibit A, Tab 3, Schedule 1**.
- Hydro One is applying to use an Incremental Capital Module ("ICM"), should it be required for the former OPDC service territory, consistent with the OEB's policies for an ICM as described on page 17 of the Handbook.
- During the extended deferred rebasing period, rates of customers of OPDC will be set using the Price Cap Index adjustment mechanism as described in **Exhibit A, Tab 2, Schedule 1**.

This transaction was completed on a commercial basis between a willing seller and a willing buyer. It is a demonstration of the types of benefits that can be realized from voluntary consolidation, and it will deliver cost synergies and economy of scale savings contemplated by the Ontario Distribution Sector Review Panel. Hydro One submits that the evidence supports approval of the Application, as the transaction will have a positive or neutral effect on the

attainment of the OEB's statutory objectives, and the customers of both local distribution companies will be held harmless. This is achieved as a result of the following:

- The application has no adverse impact on the price, adequacy, reliability and quality of electricity service of OPDC or Hydro One;
- The application has no adverse impact on the promotion of electricity conservation and demand management, the use and generation of electricity from renewable energy sources, and it facilitates the implementation of a smart grid in Ontario;
- Hydro One is committed to promoting the education of consumers through community involvement and customer consultation for future rate-setting applications;
- The implementation of Hydro One's ESM benefits and protects OPDC customers during the extended deferred rebasing period by guaranteeing $2.6 million, established on an estimate of savings from the transaction. The guaranteed amount of $2.6 million corresponds to approximately 37% of OPDC's current Board-approved base revenue requirement;
- The transaction eliminates the duplication of effort between Hydro One and OPDC and results in a single electricity service provider for the Orillia area, the northeastern portion of Simcoe County. This will ultimately create downward pressure on cost structures across both Hydro One and OPDC service areas.

Hydro One respectfully requests a written hearing for this Application.

Hydro One requests that a copy of all documents filed with the Board be served on the Applicant and the Applicant's counsel, as follows:

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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.

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Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2005-0317

COST ALLOCATION REVIEW

Board Directions on Cost Allocation Methodology For Electricity Distributors

September 29, 2006

Chapter 1

1. Introduction

1.1 Purpose of Report

This Report sets out the Board's common cost allocation methodology to govern the cost allocation review informational filings due from licensed electricity distributors starting in the Fall of 2006.

The Board released for comment a Board Staff proposal (Cost Allocation Review: Staff Proposal on Principles and Methodologies) dated June 28, 2006. A letter seeking additional comment on three specific issues was sent out on August 21st, 2006. Comments were received on the June and August proposals from the parties listed in Appendix 1.1.

This Report provides the cost allocation methodology directions approved by the Board. A cost allocation review filing model and accompanying instructions, consistent with the Board's Directions, will be issued in October 2006.

Licensed distributors will be required to provide the cost allocation filings in accordance with the provision in their respective licences that require distributors to "provide, in the manner and form determined by the Board, such information as the Board may require from time to time".

1.2 Scope of the Review

The Chair of the Ontario Energy Board advised stakeholders in a letter dated March 9, 2005 that a cost allocation review would proceed and that the review would be based "primarily on the existing rate classifications and a limited number of rate design issues".

As indicated in the September 2005 Staff Discussion Paper, discussions on a number of topics are outside the scope of the present consultations, including smoothing of rate classification boundaries, substantial changes to the fixed/variable distribution rate philosophy, rate classification changes to current density, seasonal and polyphase rates, and new time of use distribution rates. Issues involving acceptable revenue-to-cost ratios, rate impacts and mitigation measures are also outside of the scope of the initial filing process.

As previously announced, Board Staff will be commencing a separate comprehensive study of distribution rate design. The "Electricity Distribution Rate Design Review" is scheduled to proceed in early 2007. Comments from that process, along with information from the current filings, will be considered when the Board decides how best to proceed on rate classification and rate design matters.

1.3 Preliminary Technical and Modeling Discussions

A Technical Advisory Team (see Appendix 1.2) consisting of stakeholders representing large, medium and small distributors, as well as ratepayer groups, was established and met to provide technical input on policy, implementation and modeling issues. In addition, public Technical Workshops (five in total) were held to update all stakeholders on the progress of this project.

The Board would like to thank all stakeholders for their extensive input to the consultation process.

1.4 Load Data Directions

Certain load data issues were examined in earlier consultations, which led to the Board's 2003 Load Data Report and November 10th, 2003 Load Data Collection Directions. Further aspects of the load data requirements for cost allocation filings were addressed during the present consultations. A Staff proposal regarding rate classifications to be modeled, and associated load data requirements, was issued for public comment in May 2006. Additional comments were sought on one aspect in the August 21st letter. The Board has reviewed the stakeholder comments. The resulting Board Directions in these areas are incorporated in Chapter 2 "Rate Classifications for the Filings" and Chapter 3 "Load Data Requirements".

1.5 Objectives of the Informational Filings

1.5.1 Common Cost Allocation Methodology

In this Report the Board has established a common cost allocation methodology for use by Ontario electricity distributors. To assist in the completion and review of the filings, certain default values will be incorporated into the filing model. Using a consistent methodology, along with various utility-specific inputs, the upcoming filings will provide the Board with the information required to undertake the cost allocation reviews.

The primary criterion in developing the cost allocation methodology is to follow sound cost causality. Secondary considerations include the availability and reliability of the data to support the exercise, as well as concerns of materiality, practicability and consistency.

1.5.2 Cost Allocation Information

The filings will provide the revenue to cost ratio, and rate of return, for each rate classification of a distributor. This information will document the extent of any inherent cross-subsidization between rate classifications.

1.5.3 Rate Classification Information

For the purpose of the cost allocation filings, the term “rate classification” will generally refer to any separate distribution rate class or subclass. Each rate classification will be modeled separately.

The filings will model the implications of the following potential rate classification changes**:**

- eliminating the legacy rate class known as “Time of Use”, including placing customers currently in a GS>50 kW “TOU” rate classification into GS discrete demand range, GS Intermediate, or GS >50 kW classifications
- adding a new embedded distributor rate classification for all host distributors
- adding a new Large User classification where a distributor has a customer with a demand above 5,000 kW in its GS classification
- adding a common separate rate classification for unmetered scattered loads (the model will also calculate an appropriate metering credit where Unmetered Scattered Load customers stay within the GS<50 kW classification)
- adding a common separate rate classification for distributors serving customers with significant load displacement facilities (the directions will also address calculation of an appropriate credit or charge where load displacement customers remain part of a main rate classification).

For the bulk of distributors that used a historical test year in their 2006 applications, rate classification changes will be assessed using 2004 data. The filings should indicate if there is a significant change since that date which may impact rate classifications.

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Ontario (Energy Board) v. Ontario Power Generation Inc., [2015] 3 S.C.R. 147

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

Heard: December 3, 2014;

Judgment: September 25, 2015.

File No.: 35506.

[2015] 3 S.C.R. 147 | *[2015] 3 R.C.S. 147* | *[2015] S.C.J. No. 44* | *[2015] A.C.S. no 44* | *2015 SCC 44*

Ontario Energy Board, Appellant; v. Ontario Power Generation Inc., Power Workers' Union, Canadian Union, of Public Employees, Local 1000 and Society of Energy Professionals, Respondents, and Ontario Education Services Corporation, Intervener.

(161 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether [page148] Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

Summary:

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation

industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

[page149]

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising [page150] a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals

on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and [page151] utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs -- but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood [page152] as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an

inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable [page153] for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield [page154] these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast [page155] costs. But no factual findings were made by

the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

[page156]

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

Cases Cited

By Rothstein J.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Goudge and Blair JJ.A.), *2013 ONCA 359*, *116 O.R. (3d) 793*, *365 D.L.R. (4th) 247*, *307 O.A.C. 109*, *[2013] O.J. No. 3917* (QL), 2013 CarswellOnt 9792 (WL Can.), setting aside a decision of the Divisional Court (Aitken, Swinton and Hoy JJ.), *2012 ONSC 729*, *109 O.R. (3d) 576*, *347 D.L.R. (4th) 355*, *[2012] O.J. No. 862* (QL), 2012 CarswellOnt 2710 (WL Can.), and setting aside a decision of the Ontario Energy Board, EB-2010-0008, March 10, 2011 (online: http://www.ontarioenergyboard.ca/), *2011 LNONOEB 57* (QL), 2011 CarswellOnt 3723 (WL Can.). Appeal allowed, Abella J. dissenting.

Counsel

Glenn Zacher, *Patrick Duffy* and *James Wilson*, for the appellant.

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Richard P. Stephenson and *Emily Lawrence*, for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach*, for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

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The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ. was delivered by

ROTHSTEIN J.

1 In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating

period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

2 OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

3 OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence [page160] methodology, OPG argues that its decision was unreasonable.

4 The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

5 OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

6 The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

7 In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility [page161] costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

8 In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

9 Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

10 Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

11 The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board

in regulating electricity, which include:

> **1.** (1) ...
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the [page162] electricity industry. The Board's role has also been described as that of a "market proxy": *2012 ONSC 729*, *109 O.R. (3d) 576*, at para. 54; *2013 ONCA 359*, *116 O.R. (3d) 793*, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, *2010 ONCA 284*, *99 O.R. (3d) 481*, at para. 48.

12 One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

> (5) The Board may fix such other payment amounts as it finds to be just and reasonable,
>
> (a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; ...

13 Section 78.1(6) provides: "... the burden of proof is on the applicant in an application made under this section".

14 As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that the amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

15 This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, *[1929] S.C.R. 186*. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on [page163] the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

16 This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, *2004 FCA 149*, *319 N.R. 171*.

17 This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has

an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

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18 As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

19 Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

20 In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

21 OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

22 It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated [page165] businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

23 Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.

(A.R., vol. III, at p. 215)

24 As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over

the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 ("Board 2008-2009 Decision") (online), at pp. 5-6.

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25 The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. ("Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

26 In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

27 On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

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28 On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

29 OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

30 A substantial portion of OPG's wage and compensation expenses was fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

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III. Judicial History

A. *Ontario Energy Board: 2011 LNONOEB 57 (QL) ("Board Decision")*

31 In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (para. 73). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

32 The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (para. 350). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

33 Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of [page169] industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. *Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576*

34 OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test - that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

35 The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms [page170] inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

36 Justice Aitken dissented, finding that,

> to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. *Ontario Court of Appeal:* 2013 ONCA 359, 116 O.R. (3d) 793

37 The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

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IV. Issues

38 The Board raises two issues on appeal:

1. What is the appropriate standard of review?
2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

39 Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

40 It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

41 In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own

decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and [page172] issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: "... it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

42 The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board - which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) - was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

43 This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [*[1989] 2 S.C.R. 983*](), which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

44 This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* [*(1988), 26 B.C.L.R. (2d) 145*]() (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

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> those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

45 Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, [*2013 SCC 67*](), [*[2013] 3 S.C.R. 895*](); *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [*2001 SCC 4*](), [*[2001] 1 S.C.R. 221*](); *Tremblay v. Quebec (Commission des affaires sociales)*, [*[1992] 1 S.C.R. 952*](); see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* [*(2005), 75 O.R. (3d) 309*]() (C.A.) ("*Goodis*"), at para. 24.

46 A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

47 In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision [page174] was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual,

discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.

(*Goodis*, at para. 34)

48 The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and [page175] to what extent the tribunal should be permitted to make submissions: paras. 36-38.

49 In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

50 The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

51 A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern [page176] Utilities* but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

52 The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

53 Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and

familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

54 Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court [page177] ensure it has heard the best of both sides of a dispute.

55 Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

56 The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, *2011 BCCA 476*, *344 D.L.R. (4th) 292*, at para. 42.

57 I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

58 In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

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59 In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

60 Consideration of these factors in the context of this case leads me to conclude that it was not improper for the

Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board - tasked by statute [page179] with acting to safeguard the public interest - with few alternatives but to participate as a party.

61 Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

62 The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

63 The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e. [page180] jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

64 As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, *2002 NBCA 27*, *249 N.B.R. (2d) 93*. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

65 The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, *[1989] 2 S.C.R. 848*. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

66 By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to [page181] support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

67 There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new

arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

68 I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also [page182] respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

69 I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

70 In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out - correctly, in my view - that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

71 I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> ... if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone [page183] of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

72 In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

73 The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998*, the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, *2011 SCC 61*, *[2011] 3 S.C.R. 654*, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, *2015 SCC 3*, *[2015] 1 S.C.R. 161*, at para. 35. Nothing in this case suggests the presumption should be rebutted.

74 This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the [page184] decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. *Choice of Methodology Under the Ontario Energy Board Act, 1998*

75 The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

76 The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

77 The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of *O. Reg. 53/05* expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

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78 As a contrasting example, para. 4.1 of s. 6(2) of *O. Reg. 53/05* establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were prudently incurred" and that "the financial commitments were prudently made": para. 4.1 of 6(2). The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

79 Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor *O. Reg. 53/05* expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

80 Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact

prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998*: "... the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just [page186] and reasonable. The Board has broad discretion to determine the methods it may use to examine costs - it just cannot shift the burden of proof contrary to the statutory scheme.

81 In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, *2009 SCC 40*, *[2009] 2 S.C.R. 764*, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates (1954), 76 C.R.T.C. 12* (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. *Characterization of Costs at Issue*

82 Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be [page187] made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

83 There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

84 In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility [page188] regarding overall compensation rates or staffing levels - OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements - and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

85 However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

86 Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. *The Prudent Investment Test*

87 In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has [page189] been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

88 American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, *2006 SCC 4*, *[2006] 1 S.C.R. 140*, at para. 54.

89 The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn.1.

90 In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

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91 By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test - a test that allows for payments related to investments that may not be used or useful - it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the

first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

92 The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

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93 American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> ... we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.

(*U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), at p. 274)

94 Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

95 Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

96 In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, *[1960] S.C.R. 837*, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

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> *(a)* ... shall consider all matters which it deems proper as affecting the rate: [and]
>
> *(b)* ... shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, c. 277, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

97 In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

> ... prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made... . Hindsight is not applied in assessing prudence... . A utility's decision is [page193] prudent if it was within the range of decisions reasonable persons might have made... . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

98 The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

99 In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

> - Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
>
> [page194]
>
> - To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
>
> - Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
>
> - Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

100 Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether

Enbridge's requested rate increase was just and reasonable,

> the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

101 However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether [page195] the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

102 The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exist different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

103 However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment [page196] amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: *O. Reg. 53/05, s. 6*(1).

104 To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

105 This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly

required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

[page197]

(4) Application to the Board's Decision

106 In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

107 First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

108 Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

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109 Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

110 By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

111 Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

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112 The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at para. 350. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

113 Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

114 There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its [page200] obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

115 Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at para. 75. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

116 With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

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117 It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at paras. 73-75, but rather represents an exercise of the

Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

118 Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

119 Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has ... imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at [page202] pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

120 I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

121 I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

ABELLA J. (dissenting)

122 The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned [page203] Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

123 A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder - the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

124 As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15,

Sch. B, s. 78.1(2); *O. Reg. 53/05*, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": *O. Reg. 53/05, s. 6*(1); *Ontario Energy Board Act, 1998*, paras. 1 and 2 of s. 1(1).

125 Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in [page204] the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

126 Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, *S.O. 1995, c. 1*, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

127 The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, *S.C. 1997, c. 9*, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

128 On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs - wages, benefits, pension servicing, and annual incentives - to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

129 In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs - costs that the utility has estimated for [page205] a future period and which can still be reduced or avoided - the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review ... conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

130 The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

131 On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

> First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and [page206] not predetermined. Third, in my view, the [Board] was

> required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

132 The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

133 I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs [page207] were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": para. 75.

134 In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

135 Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, *[1929] S.C.R. 186*, at pp. 192-93.

136 The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being [page208] used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown. [Emphasis added.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting)

137 The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

* Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
* To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
* Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
* Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be [page209] based on facts about the elements that could or did enter into the decision at the time.

(*Enersource Hydro Mississauga Inc. (Re)*, *2012 LNONOEB 373* (QL), at para. 55, citing *Enbridge Gas Distribution Inc. (Re)*, *2002 LNONOEB 4* (QL), at para. 3.12.2.)

138 This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* *(2006), 210 O.A.C. 4*, at paras. 8 and 10-12.

139 In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

> When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence - and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.
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> [page210]
>
> The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [paras. 74-75]

140 A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

> Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [para. 75]

141 In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

> This issue concerns expenditures which have largely already been incurred by the company... . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

142 As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket [page211] for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

143 The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce" (para. 75). The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts ... will take time" (paras. 346 and 352), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

144 The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

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145 Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

146 Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were

imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, *[2011] O.L.A.A. No. 117* (QL).

147 The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

148 Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and [page213] the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of 3 per cent on January 1, 2011, 2 per cent on January 1, 2012, and a further 1 per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

149 The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

150 Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: para. 347. Had the Board used the approach it said it would use for costs the company had "no opportunity ... to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

[page214]

151 Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act, 1998* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

152 The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation's] unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review

> allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

153 The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant [page215] the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

154 It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

155 Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's [page216] words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": para. 75.

156 Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

157 The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

158 In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine [page217] whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

159 I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and,

subject to certain limitations, to "establish the ... methodology" used to determine such amounts: *O. Reg. 53/05, s. 6*, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board (2004), 319 N.R. 171* (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

160 In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements [page218] and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

161 I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

35

Toronto Hydro-Electric System Limited v. Ontario Energy Board

[Indexed as: Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)]

99 O.R. (3d) 481

Court of Appeal for Ontario,
Feldman, Lang and MacFarland JJ.A.
April 20, 2010

Public utilities -- Ontario Energy Board -- Ontario Energy Board concerned about large dividends paid by electricity distributor to affiliate at time when capital was needed for reinvestment in aging infrastructure -- Board imposing, as condition of rate decision, requirement that distributor obtain approval of majority of its independent directors before declaring any future dividends payable to its affiliates -- Board not exceeding its jurisdiction by imposing that condition -- Decision reviewable on standard of reasonableness -- Decision reasonable.

THESL is an electricity distributor licensed and regulated by the Ontario Energy Board. It is a wholly owned subsidiary of THC. All of the shares of THC are owned by the City of Toronto. When THESL applied to the Board for approval of its distribution rates to be effective May 2006, the Board expressed a concern about large dividends paid by THESL to its affiliates at a time when capital was required for reinvestment in aging infrastructure. The Board imposed a duty on THESL to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. The Divisional Court allowed THESL's appeal, holding that the Board had no jurisdiction to impose the

condition and that the imposition of such a condition represented an unwarranted and unlawful restriction on the authority of the board of directors to declare a dividend. The Board appealed.

Held, the appeal should be allowed.

Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid legislative purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. The Ontario Energy Board's power in respect of setting rates is to be interpreted broadly. The Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B specifies that in carrying out its responsibilities, the Board shall be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity services. The Act also permits the Board in making an order, to impose such conditions as it co nsiders proper, and states that those conditions may be general or particular in application. It was apparent that as part of its rate-setting function, the Board was entitled to consider the history of THESL's dividend payments. That was part of the inquiry into whether and how to control outgoing cash-flows from THESL in order to ensure adequate capital. That line of inquiry went to the heart of the Board achieving its statutory objectives. The inquiry and the condition imposed were within the Board's jurisdiction.

The Board's decision to impose the impugned condition was reviewable on a standard of reasonableness. The Board's reasons provided an intelligible explanation for the condition. The reasons disclosed a concern relating to prices and the adequacy, reliability and quality of service and explained how the chosen [page482] remedy would help alleviate that concern. The Board was concerned because THESL was paying THC very large dividends even though increased capital spending was going to

be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately have adverse effects on ratepayers. The Board also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts was to require that any dividend paid by THESL be approved by a majority of its independent directors. The decision was reasonable.

Cases referred to

Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC 14,209 at 111, [1979] 2 A.C.W.S. 108; Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, 2007 SCC 15, 279 D.L.R. (4th) 1, 360 N.R. 1, J.E. 2007-670, 59 Admin. L.R. (4th) 1, 155 A.C.W.S. (3d) 7, EYB 2006-116801, 59 C.H.R.R. D/276, apld

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, 2006 SCC 4, 263 D.L.R. (4th) 193, 344 N.R. 293, [2006] 5 W.W.R. 1, J.E. 2006-358, 54 Alta. L.R. (4th) 1, 380 A.R. 1, 39 Admin. L.R. (4th) 159, 145 A.C.W.S. (3d) 725, distd

Other cases referred to

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684, 166 A.C.W.S. (3d) 384, 238 O.A.C. 343 (Div. Ct.); Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339, [2009] S.C.J. No. 12, 2009 SCC 12, 304 D.L.R. (4th) 1, 385 N.R. 206, 77 Imm. L.R. (3d) 1, 82 Admin. L.R. (4th) 1, EYB 2009-155418, J.E. 2009-481; Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC 220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33, 193 O.A.C. 180, 136 A.C.W.S.

(3d) 375 (C.A.); Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, 2003 SCC 20, 223 D.L.R. (4th) 577, 302 N.R. 1 , J.E. 2003-713, 257 N.B.R. (2d) 207, 48 Admin. L.R. (3d) 33, 31 C.P.C. (5th) 1, 121 A.C.W.S. (3d) 172; Natural Resource Gas Ltd. v. Ontario Energy Board, [2006] O.J. No. 2961, 214 O.A.C. 236, 149 A.C.W.S. (3d) 889 (C.A.); Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, [1997] S.C.J. No. 74, 149 D.L.R. (4th) 577, 216 N.R. 1, [1997] 8 W.W.R. 517, J.E. 97-1695, 158 Sask. R. 81, 50 Admin. L.R. (2d) 1, 30 C.C.E.L. (2d) 149, 37 C.C.L.T. (2d) 1, 73 A.C.W.S. (3d) 560; Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, [2009] O.J. No. 1872, 252 O.A.C. 188 (Div. Ct.); U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, [1988] S.C.J. No. 101, 95 N.R. 161, J.E. 89-141, 24 Q.A.C. 244, 35 Admin. L.R. 153, 89 CLLC 14,045 at 12372, 13 A.C.W.S. (3d) 23

Statutes referred to

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17 [rep. R.S.A. 2007, c. A-37.2, s. 83]

Business Corporations Act, R.S.O. 1990, c. B.16, s. 127(3)(d)

Electricity Act, 1998, S.O. 1998, c. 15, Sch. A, ss. 29, 142

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, ss. 1 [as am.], (1), [as am.], 23(1), 36(3), 44(1), 78 [as am.], (2) [as am.], (3) [as am.], 128(1) [page483]

Authorities referred to

Jones, David Phillip, and Anne S. de Villars, Principles of Administrative Law, 5th ed. (Toronto: Carswell, 2009)

Ontario Energy Board, Affiliate Relationships Code for Electricity Distributors and Transmitters (Toronto: Ontario Energy Board, 2003)

APPEAL from the order of the Divisional Court (Lederman, Kiteley and Swinton JJ.) (2008), 93 O.R. (3d) 380, [2008] O.J. No. 3904 (Div. Ct.) allowing an appeal from a decision of the Ontario Energy Board.

Glenn Zacher and Patrick G. Duffy, for appellant Ontario Energy Board.

James D.G. Douglas and Morgana Kellythorne, for respondent Toronto Hydro-Electric System Limited.

The judgment of the court was delivered by

[1] MACFARLAND J.A.:-- This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ.; Lederman J. dissenting) dated September 9, 2008. The court declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

Overview

[2] Toronto Hydro-Electric System Limited ("THESL") is an electricity distributor licensed and regulated by the Ontario Energy Board ("OEB"). THESL is a wholly owned subsidiary of Toronto Hydro Corporation ("THC"). All of the shares of THC are owned by the City of Toronto (the "City").

[3] In 2004-2005, THC paid over $116 million to the City in the form of dividends and interest payments. THC funded a significant part of these payments through substantial annual increases in dividends from THESL and by charging THESL an above-market rate of interest on an inter-company loan. At the time THESL made the payments, it had not completed a capital plan for reinvestment in its aging infrastructure.

[4] When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its [page484] 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the City demanded substantial increases in dividends from THC, which, in turn, demanded increased

dividends from THESL.

[5] The OEB is the regulator of Ontario's electricity industry and is statutorily mandated to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service". The OEB manages this mandate primarily by setting just and reasonable rates.

[6] In its decision, the OEB disallowed as a regulatory expense any interest charges above market rates and required a majority of THESL's independent directors to approve any future dividend payments. In reaching this decision, the OEB noted that if a utility like THESL was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which, in turn, could harm ratepayer interests by causing higher costs and degradation in services. THESL appealed this decision.

[7] In the Divisional Court, THESL argued that the OEB had no jurisdiction to impose the condition it did, either by statute or at common law, and further, that the imposition of such a condition represented an unwarranted and indeed unlawful restriction on the authority of the board of directors to declare a dividend.

[8] The majority in the Divisional Court accepted THESL's position on both bases advanced, allowed the appeal and set aside the part of the OEB decision that imposed the condition.

[9] The OEB argues that the majority of the Divisional Court panel failed to appreciate and distinguish the principles that govern regulated utilities like THESL, which operate as monopolies, from those that apply to private sector companies, which operate in a competitive market. The OEB submits that this distinction is critical because whereas the directors and officers of an unregulated company have a fiduciary obligation to act in the best interests of the company (which usually equates to the interests of the shareholders), a regulated utility must operate in a manner that balances the interests of the utility's shareholders against the interests of its

ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

[10] For the reasons that follow, I would allow the appeal, set aside the order of the Divisional Court and restore the part of the rate decision that imposed the condition.

[11] The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends. [page485]

Analysis

[12] This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see Natural Resource Gas Ltd. v. Ontario Energy Board, [2006] O.J. No. 2961, 214 O.A.C. 236 (C.A.), at para. 18.

[13] The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B (the "Act"):

Boards objectives, electricity

1(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. [See Note 1 below]

[14] In short, the OEB is to balance the interests of

ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

[15] The Electricity Act, 1998, S.O. 1998, c. 15, Sch. A requires a distributor of electricity to sell electricity to every person connected to the distributor's distribution system (s. 29). However, the distributor can only charge for the distribution of electricity in accordance with an order of the OEB. Section 78 of the Act provides in part:

> 78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the Electricity Act, 1998 except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> . . . . .
>
> (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity . . . and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the Electricity Act, 1998. [page486]

[16] In relation to its ability to make orders, the Act provides:

> 23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

[17] In order to determine the appropriate standard of review, the inquiry must begin with a consideration of the nature of the OEB's decision.

Avoiding the "jurisdiction" trap

[18] In recent years, administrative law has undergone a significant transformation. Ever since Dickson J. championed the notion of increased deference to specialized administrative tribunals in Canadian Union of Public Employees, Local 963 v.

New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45 ("CUPE"), courts have sought to avoid labelling matters as jurisdictional where such a label might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, Bastarache and LeBel JJ. underlined the importance of CUPE in this regard, at para. 35:

> Prior to CUPE, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. CUPE marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

[19] Support for the CUPE conceptualization of jurisdiction is also found in the majority reasons of Abella J. in Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, at paras. 88-89:

> The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court -- its specialized expertise. It ignores Dickson J.'s caution in [CUPE] that courts "should not be alert to brand as

jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".

If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own [page487] view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.

(Emphasis added; citations omitted)

[20] Genuine questions regarding the boundaries of administrative authority under statute do arise. Administrative bodies must be correct in answering these questions. It is crucial to distinguish, however, between these "true" matters of jurisdiction and the wider understanding of jurisdiction that Dickson J. rebuked in CUPE. This point was highlighted by Bastarache and LeBel JJ. in Dunsmuir, at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction. An

example may be found in United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or vires. These questions will be narrow. We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

(Emphasis added; citations omitted)

[21] David Phillip Jones and Anne S. de Villars offer a helpful analysis of the difference between the "narrow" and "wide" meaning of jurisdiction in their text, Principles of Administrative Law, 5th ed. (Toronto: Carswell, 2009) at pp. 140-41:

In its broadest sense, "jurisdiction" means the authority to do every aspect of an intra vires action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors -- such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result -- which take place after the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction. [page488]

. . . . .

It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to exceed its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction.

(Italics in original; footnotes omitted)

[22] Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in VIA Rail. At para. 91, she cited Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, [1997] S.C.J. No. 74, at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, [1988] S.C.J. No. 101, at p. 1087 S.C.R., where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

[23] Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (Dunsmuir, at para. 54), and Abella J.'s conclusion that "[a] tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (VIA Rail, at para. 92). It also accords with Jones and de Villars observation, at p. 146:

> [A] conscious and clearly-worded decision by the legislature to use a subjective or open-ended grant of power has the effect of widening the delegate's jurisdiction and, therefore, narrowing the ambit of judicial review of the legality of its actions.

[24] Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling

statute includes a broad grant of open-ended power to achieve that purpose, the matter [page489] should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons -- on either a reasonableness or correctness standard -- but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its dec isions to be ultra vires. These principles are consistent with Abella J.'s reasoning in VIA Rail, at para. 96:

> It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction . . . in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

II. Broad powers of the OEB

[25] The case law suggests that the OEB's power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task.

[26] For example, in Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684 (Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate". In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

> [T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." . . . the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the Act. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."
>
> . . . . .
>
> [T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As [page490] well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."
>
> The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner.

[27] The jurisdiction of the OEB was also reviewed in Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33 (C.A.). In Enbridge, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act,

in paras. 27-28:

> [The appellants] say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. . . .
>
> In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. . . . Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

[28] A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, [2009] O.J. No. 1872, 252 O.A.C. 188 (Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in Dunsmuir. Rather, a reasonableness standard applied because the decision in the case -- whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement -- was squarely within the rate-setting authority of the OEB and went to [the] [page491] very core of the OEB's mandate. The cou rt noted the expansive content of the rate-setting power, at para. 17:

> An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this

> case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the OEBA which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests.

(Citations omitted)

[29] The present appeal does not engage a "true" question of jurisdiction. As confirmed above, the Act is to be interpreted broadly. It is clear that the legislative intent of s. 78 of the Act is that the OEB have the principal responsibility for setting electricity rates. The Act specifies that in carrying out its responsibilities, the OEB shall be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity service. The Act also permits the OEB in making an order, to impose such conditions as it considers proper, and states that these conditions may be general or particular in application (s. 23(1)). Thus, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the OEB to engage in the impugned inquiry in the course of rate setting.

[30] Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An

inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are insulated from review (see Part IV).
[page492]
III. The ATCO decision

[31] THESL argues that the Supreme Court of Canada's recent decision in ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4 militates in favour of reviewing OEB decisions using a correctness standard. ATCO involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17 set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

[32] Writing on behalf of three other justices, Bastarache J. divided the inquiry into two questions. The first question was whether the Board had the power pursuant to its enabling statutes to allocate the proceeds from the sale of the utility's asset to its customers when approving the sale. The second question was whether the Board was permitted to allocate the proceeds of the sale in the way that it did. Bastarache J. concluded that the first question was to be reviewed on a correctness standard and the second question was to be reviewed on a more deferential standard.

[33] This case is distinguishable from ATCO. The statutory grant of power in ATCO to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives

are not vague, elastic and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the ATCO provision, the objectives in the Act require that the OEB protect the interests of both the customer and the utility.

[34] There are four other factors that support distinguishing ATCO from this case. First, the decision in ATCO reveals that Bastarache J. reasoned that ATCO was not a rate-setting case. He noted that the provision granting the power to impose conditions could not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the [page493] main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "are grounded in its main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system" (para. 7).

[35] Second, at para. 30, Bastarache J. determined that the Board's protective role -- safeguarding the public interest in the nature and quality of the service provided to the community by public utilities by ensuring that utility rates are always just and reasonable -- did not come into play. This factor pointed to a less deferential standard of review. In the present case, the OEB's "protective role" was central to the dividend condition.

[36] Third, Bastarache J. viewed the issue in ATCO as the Board's power to transfer proprietary rights in the assets of the utility to the customers. In this case, the dividend condition did not result in the transfer of proprietary rights.

[37] Fourth, in giving examples of conditions that could attach to the approval of a sale, Bastarache J. stated, at para. 77, that the Board "could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system". As will be

explained, the OEB placed the condition on the payment of dividends to ensure that dividends would not be paid when there was insufficient capital for plant maintenance.

IV. Reviewing the exercise of OEB jurisdiction: The reasonableness standard

[38] Having determined that the OEB did not exceed its statutory grant of power, the question remains whether it could order that the declaration of a dividend requires the approval of the majority of THESL's independent directors. This question is reviewable on a reasonableness standard.

[39] Recently, a reasonableness standard was used by this court in Natural Resource Gas Ltd. v. Ontario Energy Board, supra. The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriansz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations [at paras. 7-10, 18-19, 23-24]:

> In two recent decisions, Graywood Investments Ltd. v. Toronto Hydro-Electric System, [2006] O.J. No. 2030 (C.A.) [page494] and Enbridge Gas Distribution Inc. v. Ontario (Energy Board), [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.
>
> In Enbridge, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".
>
> In Graywood, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):
>
> First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its

> decisions are, therefore, entitled to substantial deference.
>
> In order to take this case outside the application of this general conclusion, [the distributor] must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in Graywood.
>
> . . . . .
>
> It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.
>
> The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction".
>
> . . . . .
>
> While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.
>
> Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness.

[40] The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision -- structuring a condition that will protect the long-term integrity of THESL's energy infrastructure -- falls

squarely within the category of "mixed fact and law" with "policy considerations".

[41] One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation, the fact that corporate law principles are at play [page495] does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

V. Is the decision a reasonable one?

[42] At para. 47 of Dunsmuir, Bastarache and LeBel JJ. described the two inquiries involved in assessing the reasonableness of a decision:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(Emphasis added)

[43] The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process". The second

inquiry is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law". Thus, the first inquiry deals with the justification process as articulated in the reasons for the decision and the second inquiry looks at the outcome. As noted in Dunsmuir, the reasonableness analysis will concern mostly the first inquiry.

(a) Justification, transparency and intelligibility

[44] The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, Iacobucci J., at para. 55, articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can [page496] stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

(Emphasis added; citations omitted)

[45] Further, as Abella J. explained in Via Rail, at para. 104:

> Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

[46] And as more recently noted by Binnie J. in Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339,

[2009] S.C.J. No. 12, at para. 59:

> Reasonableness is a single standard that take its colour from the context. . . . [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

and, at para. 63:

> Dunsmuir thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court.

[47] The OEB's reasons provide an intelligible explanation for the condition. The reasons both disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern.

[48] Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in ATCO, at para. 3, "utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see Advocacy Centre for Tenants-Ontario. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of Advocacy Centre for Tenants-Ontario, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service". [page497]

[49] While THESL is incorporated, as is required by s. 142 of

the Electricity Act, under the provisions of the [Ontario] Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"), it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons [(2008), 93 O.R. (3d) 380, [2008] O.J. No. 3904 (Div. Ct.)] in the court below, at para. 78:

> At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.

[50] The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

[51] The decision reveals that the OEB was concerned about the aging plant and the lack of necessary capital. At the hearing, it was argued that there appeared to be underinvestment in the physical plant over the past several years (para. 4.4.1). Evidence was presented that 30 to 40 per cent of the plant in service had exceeded its expected life (para. 4.5.3). The Board concluded that increased capital spending was required to address the issues of the aging plant (para. 4.7.1) and to maintain system reliability (para. 4.10.8).

[52] However, despite the need for capital, the evidence was that there was a very dramatic increase in the dividend payouts in 2004 and 2005. As the OEB noted, at para. 6.4.1, "[t]he level of dividends appears to be greater than the net income of the utility over at least a two year period". At para. 6.4.4, the OEB explained why these events were of concern:

> The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating. [page498]

[53] In sum, the OEB was concerned because THESL was paying THC very large dividends even though increased capital spending was going to be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately, as the OEB explained, have adverse effects on ratepayers. Lederman J. effectively summarized these circumstances, at paras. 80 and 85:

> The setting of rates will accomplish little in terms of public protection if the revenue can be stripped out of the company without any controls.
>
> . . . . .
>
> The OEB had evidence before it that THESL was paying increased dividends and an above market rate of interest while it was under investing by about $60 million in its capital expenditures. The OEB noted that if a utility like THESL was to pay all its retained earnings to its shareholder, this could adversely impact its credit rating, which in turn, could cause higher costs and degradation in service to electricity consumers.

[54] The OEB also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts was to require that any dividend paid by THESL be approved by a majority of its independent

directors.

[55] At the time of the hearing, the composition of the board of directors of THESL was identical to the THC. The reasons reveal that the OEB was very concerned about the relationships between THESL, THC and the City. For example, at para. 3.2.3, the OEB questioned the percentage of THC's costs recovered from THESL:

> It is readily apparent to the Board that allocating these costs based on gross revenues produces an unwarranted bias against the ratepayers. The revenues of the utility are inflated by the high cost of wholesale power. That is an ever increasing amount. Because these costs are increasing, it does not follow the utility's share of the overhead costs should be increasing. In short, there is no necessary relationship between the revenue share and the share of overhead cost.

[56] The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional $16 million per year, which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note, at para. 5.3.8, it is "apparent that the financing [page499] decisions are being made unilaterally by the City, which is the sole shareholder of the utility".

[57] With respect to dividends, as already noted, the OEB was concerned about the very dramatic increase in the dividend payouts in 2004 and 2005. At para. 5.3.18, the OEB stated:

> Nor is it any defence to say this is not a decision of the utility but is being made unilaterally by the City of Toronto. That is exactly the problem. In fact it could be argued that this is part of a pattern. The City has extracted extensive dividends from this utility in recent years. It is likely one of the rare occurrences in Canadian

financial markets where the level of dividends exceeds the net income.

(Emphasis added)

[58] Moreover, the OEB was aware of a change in a shareholder direction and the payment of special dividends. These facts are referred to in para. 6.4.2:

> At one time, there was a shareholder direction that limited the dividend payout to 40% of the utility's income, but that was changed to 50% of consolidated income. Moreover, it appears that were special dividends over and above that amount.

[59] Thus, the OEB was of the opinion that one of the reasons for the THESL's unusual dividend payouts was the THC's, and ultimately the City's, control over THESL's decision making. The OEB explained, at paras. 6.4.5 and 6.4.6 of the decision:

> A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical. And none of the members of management are to be on the Board. This is an unusual situation.
>
> There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

[60] Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the Affiliate Relationships Code for Electricity Distributors and Transmitters ("ARC") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the ARC required that one

third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates. [page500]

[61] Following this line of reasoning, the Board concluded, at paras. 6.4.7 to 6.4.9, that the condition was needed to balance the interests of both the customer and the shareholder:

> Given the unusual high level of dividend payout and the concern expressed by a number of parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.
>
> Much of the controversy in this case has been dominated by discussion about non arms length transaction between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders. The Board believes this is in keeping with the policy intent of Section 2 of the ARC.
>
> This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations.

(Emphasis added)

[62] For the reasons set out above, this was a reasonable decision.

(b) Acceptable outcomes

[63] To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". It is in this part of the analysis where, in my

opinion, this court should address THESL's argument that the imposed condition violated corporate law.

[64] THESL argued at the Divisional Court, and argues before this court, that the OEB order was contrary to settled principles of corporate law that the directors of a public company cannot delegate their power to declare dividends. Section 127(3)(d) of the OBCA confirms this prohibition by expressly excluding any delegation of the board of directors' power to declare a dividend from the general rule permitting delegation to a managing director or committee of directors.

[65] The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act, which provides that "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails". [page501]

[66] The majority judgment below accepted THESL's argument, and found that the OEB had effectively delegated the power to declare dividends to the majority of the independent directors contrary to the OBCA and long-standing corporate law principles.

[67] In dissenting reasons, Lederman J. accepted the submission of the OEB -- that the order leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors.

[68] In the context of a regulated corporation, I agree with Lederman J. As he explained, at para. 81, "the OEB has crafted a reasonable and less intrusive remedy that balances the interests of THESL's shareholder and its ratepayers and is consistent with the 'regulatory compact'".

Conclusion

[69] For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an

order in accordance with these reasons. In the circumstances, I would not order costs.

Appeal allowed.

Notes

Note 1: On September 9, 2009, three additional objectives were added to s. 1(1).

36

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

37

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2009-0063

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

AND IN THE MATTER OF an Application by Brantford Power Inc. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2008.

AND IN THE MATTER OF a Motion being brought by Brant County Power Inc. to review and vary the implementation of the Board's Interim Order Dated April 21, 2008 in this proceeding; and the Board's Decision dated July 18th, 2008;

BEFORE: Gordon Kaiser
Vice-Chair and Presiding Member

Ken Quesnelle
Member

DECISION AND ORDER

[1] This is an appeal by Brant County Power Inc. ("Brant County") of the Board's Decision of July 18, 2008[1] regarding the distribution rates to be charged by Brantford Power Inc. ("Brantford"). For the reasons set out below, the Board is granting a variance of this Decision.

[2] The heart of this motion concerns a billing dispute between Brantford and Brant County concerning the rates that Brantford charges Brant County for electricity. There are two rates at issue, the rate for distribution services and the rate for retail transmission services ("RTS"). Aside from the actual rate, there is a question as to when Brantford is entitled to start charging for these services. The School Energy Coalition intervened in this Motion but did not present argument. Board Counsel participated and presented detailed argument.

Background

[3] Brantford Power Inc. is a licensed distributor of electricity providing service to 35,000 consumers within the City of Brantford. Brantford supplies electricity to Brant County, an embedded distributor.

[4] Brant County is a licensed distributor, providing distribution service to approximately 9,500 customers, in the Municipality of Brant County. The Brant County service area completely surrounds the service area of Brantford. Part of the Brant County distribution system is embedded within the Brantford distribution system. Brantford delivers power to Brant County through three transformer stations; Colborne East, Colborne West and Powerline Road.

[5] The Decision that Brant County is appealing is the Board's Decision of July 18, 2008 which, for the first time, set the rates that Brantford should charge Brant County. Those rates, the Board determined, should be set at the rate that Brantford was currently charging the GS > 50 kW class of customers.

[6] The rates that the Board set in the Decision of July 18, 2008 were effective September 1, 2008. Notwithstanding that, Brantford apparently issued its first bill to Brant County on June 15, 2008. That bill was paid by Brant County on July 7, 2008 but Brant County refused to pay any subsequent bills. On February 25, 2009, Brant County

[1] *Re: Brantford Power Inc.,* EB-2007-0698, (July 18, 2008).

filed this Motion asking the Board to alter the distribution rate that the Board had established for Brant County.

[7] Brantford is also is seeking payment of $2.1 million for unbilled RTS charges. These relate to the acquisition by Brantford of certain assets from Hydro One on October 15, 2005 at two transaction sites, Colborne East and Colborne West. Apparently, Brantford did not start billing Brant County for RTS at that time. This mistake was discovered in these proceedings. This Motion was then amended seeking recovery of these costs.

[8] There are also unbilled RTS charges relating to the Powerline Road transformer station which is jointly owned by Brant County and Brantford. Those charges date back to July, 2008.

[9] There are eight issues in this motion:

i. Should the Board hear the Motion and review the July 18, 2008 Decision
ii. Was the notice provided by Brantford sufficient?
iii. What is the Standard of Review?
iv. Is the distribution rate charged by Brantford to Brant County just and reasonable? If not, what rate should be charged by Brantford?
v. At what date should Brantford be permitted to commence charging Brant County for distribution services?
vi. At what date should Brantford be permitted to charge Brant County for RTS Network and Connection Charges for Colborne East and Colborne West?
vii. What interest should be paid on the monies owed? and
viii. What time period should be allowed for payment?

Should the Board Review the July 18, 2008 Decision?

[10] Rule 42.01 permits any person to bring a motion to the Ontario Energy Board requesting a review and variance of a Board's decision. Rule 44 provides:

> 44.01 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 regarding the correctness of the order or decision, which grounds may include:

(i) Error in fact;

(ii) Change in circumstances;

(iii) New facts have arisen;

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

[11] Brant County relies on subsections (a)(i), (iii) and (iv), and states:

i. The Decision was based upon Brantford evidence that underforecasts the demand for the General Service Greater than 50 kW ("GS > 50kW") rate classification.

ii. Brantford did not inform the Board of its discussions with Brant County regarding a separate rate classification for Brant County.

iii. Brantford has not been charging Brant County Retail Transmission Services at Colborne East and Colborne West and therefore the cumulative impact on Brant County of both distribution and RTS charges was not put before the Board at the time of the Decision.

iv. The distribution revenue claimed by Brantford far exceeds the proposed allocated costs to Brant County. Brantford included Brant County in a rate classification that has a revenue to cost ratio of at least 1.39:1. With the 2008 approved rates, Brant County would be subsidizing Brantford ratepayers by more than $120,000 each and every year.

v. The distribution charge by Brantford represents approximately 8% of Brant County's revenue requirement.

[12] Brant County also argues that Board staff raised the issue of a separate rate classification during the proceeding and the Board accepted, based upon the evidence before it at that time, that using the GS > 50kW classification was acceptable. Brant County submits that had all the facts been available during the original hearing, a different decision would have resulted.

[13] Before the Board will hear a Motion to vary a previous Decision it must be satisfied that the review raises a question as to the correctness of the Decision. The test was clearly stated by the Board in the *Connection Procedures* Decision[2];

[2] *Re Hydro One Networks Connection Procedures*, EB-2007-0797 (November 26, 2007) at paragraph 20.

The moving party must also satisfy the Board of the following:

To the extent that an error in the *Connection Procedures* Decision is alleged:

- that the error is identifiable, material and relevant to the outcome of the *Connection Procedures* Decision and that, if the error is corrected, the reviewing panel could change the outcome of the Connection Procedures Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the *Connection Procedures* Decision should be varied, cancelled or suspended); and

- that the findings of the *Connection Procedures* panel are contrary to the evidence that was before that panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.

To the extent that the incompleteness of evidence is raised as a ground for review:

- that the facts now sought to be brought to the attention of the Board could not have been discovered by reasonable diligence at the time; and

- that those facts are material and relevant to the outcome of the *Connection Procedures* Decision and that, if considered by the reviewing panel, could change the outcome of the *Connection Procedures* Decision (in other words, the facts are such that a review based on a consideration of those facts could result in the reviewing panel deciding that the *Connection Procedures* Decision should be varied, cancelled or suspended).

Board Findings – Grounds for Review

[14] Applying the *Connections Procedures* test we find that Brant County has met the threshold for review. There is no question that there is new evidence. The issue of the RTS charges was not even before the panel in the 2008 hearing. Not only was Brant County not aware of it but even Brantford was apparently not aware of until it was discovered in the course of these proceedings. This is an important issue with significant consequences. The Board believes it should be determined as soon as possible.

[15] Having decided to consider the billing dispute regarding RTS it is also important to consider billing dispute regarding the distribution rate. While the question of whether the GS > 50 kW rate was the proper rate for Brant County was before the original panel,

there was very limited discussion of the issue and very little evidence. That was driven, in large part, by the fact that Brant County did not participate in the hearing.

[16] It is also significant that the original panel's Decision was driven in part by an understanding that the Board would be studying the question of embedded distributor charges in an upcoming proceeding[3]. It now turns out that this proceeding no longer exists and has been substituted by another, more distant, proceeding[4].

[17] This is an important issue. It is in the interest of all parties to have the distribution rate, like the RTS charges, resolved. We find that the Applicant has met the threshold test and are prepared to review the Decision with respect to the billing disputes in question. In addition, we face two issues that were not before the original panel which is the proper start date for billing each of the services.

Was Proper Notice Given?

[18] Brant County also argues that the Board should review the July 18 Decision because Brant County did not receive effective notice of Brantford's Application for 2008 rates. Brant County goes so far as to say that because effective notice was not given, the Board lacked jurisdiction and the Decision of July 18 should be set aside.

[19] Brant County claims that the Notice was deficient in terms of both delivery and content. With respect to delivery, Brant County says that they have no record of receiving the Notice. Brantford, however, claims they delivered the Notice to Brant County. Regardless of whether the Notice was physically received by Brant County, there is evidence that Brantford published the Notice, as approved by the Board, in the local newspaper.

[20] As to content, Brant County says the Notice did not indicate that Brantford had decided not to create a special embedded distributor charge for Brant County (as Brant County believed they would) but instead proposed to bill Brant County as a GS > 50kW customer. Nor, they argue, was there any indication what impact the rate would have on Brant County. Brant County argues that the impact will be approximately $425,000 a

[3] *Review of Electricity Distribution Rate Design*, EB-2007-0031

[4] *Review of Electricity Distribution Cost Allocation Policy*, EB-2010-0219

year which they claim is a material amount that should have been disclosed in the Notice.

Board Findings – Notice

[21] In reviewing the legal standards with respect to Notice it is useful to consider the remarks of the panel in the recent *Hydro One Networks* case[5]. In that case the intervenors claimed insufficient notice because the Notice made no reference to the Board's Cost of Capital Report which had the effect of increasing the Return on Equity for the Applicant. The reason was that the Report was issued by the Board after the date of the Notice but nonetheless had an impact on the decision.

[22] The Board's remarks in the *Hydro One Networks* case go to the question of the how detailed the Notice can be from a practical point of view.

> Drafting a notice for a complex hearing is an important responsibility of the Board. The Board discharges its responsibility by converting a highly technical application of several thousand pages into a two- to three-page summary.
>
> It must be able to be published in a newspaper, and to be read quickly and easily. It must accurately summarize the general potential impacts of the application. It must use language that can be understood by a person who has no background whatever in the complex field of utility rate setting.
>
> It must find a balance between including too much information, which could be confusing in addition to being impractical, and including too little information such that the reader is unable to understand how the application may impact him or her.
>
> Due to the length and the complexity of the hearing process, a number of changes may occur to the application after the notice is issued. There may also be other factors external to the application itself that have an impact on rates.
>
> The Board notes that the notice also provides information on how the application itself can be accessed through both the Board's and Hydro One's websites. In this way, an interested person is invited to supplement the information imparted by the notice by reading as much of the detail of the application as he or she may wish.

[5] *Re Hydro One Networks Inc*, EB-2009-0096 (January 19, 2010).

> The Board is satisfied that the notice in this case strikes an appropriate balance and provided readers with the necessary information for them to determine if they wanted to participate further.

[23] As indicated in the *Hydro One Networks* Decision adequate Notice is always a balancing act and often turns on the sophistication of the party questioning the Notice. The *Hydro One Networks* Decision referenced the *Nolan* case[6], where the Ontario Court of Appeal stated;

> When determining whether adequate notice has been given, two questions must be asked: (1) was the content of the notice accurate and sufficient? And (2) were all affected parties given notice?

[24] In the *Central Ontario Coalition*[7] case, the Ontario Divisional Court stated;

> In any event, it is well established that where the form or content of notice is not laid down it must be reasonable in the sense that it conveys the real intentions of the giver and enables the person to whom it is directed to know what he must meet.

[25] It is also accepted as the Ontario Court of Appeal said in *Ontario Racing*[8] that the adequacy of Notice will often turn on the circumstances of the case;

> I now turn to the other issue as to whether or not the Respondent was denied natural justice by the action of the Board. The cases establish beyond peradventure that whether a notice given in any particular case is sufficient depend entirely upon the circumstances of the case.

[26] And as the Court said in *Wilson*[9], it is also important to consider who was the party reviewing the Notice;

> I, therefore, now consider the contents of the notice. In my view the principle is that the notice must be in such terms as are fairly and reasonably necessary to enable members of the public in the area of the land affected to appreciate that they are interested and to make representations or objections

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[6] *Nolan v. Ontario (Superintendent of Financial Services)*, [2007] OJ. No. 2176, 86 O.R. (3d) 1 (C.A.) (QL).

[7] *Central Ontario Coalition Concerning Hydro Transmission Systems and Ontario Hydro* (1984) 46 OR (2d) 715, 10 DLR (4th) 341 (Div. Crt.)

[8] *R. v. Ontario Racing Commission*, (1971), 1 O.R. 400, 15 D.L.R. (3d) 430.

[9] *Wilson v. Secretary of State for the Environment* [1973] 1 WLR 1083

> if they think fit. In deciding whether the notice would give the necessary information, one must, in my view, assume an imaginary member of the public familiar with Aldridge. One must not assume a trained lawyer nor someone experienced in local government, whether a councilor or an officer. On the other hand, one must not assume someone unusually stupid or unusually careless.

[27] Brant County in alleging inadequate Notice relies on the *Conception Bay*[10] case. There, the Court found that the Nova Scotia Public Utilities Board failed to give adequate notice to a number of municipalities of a new charge to the municipalities that was not disclosed in the Notice. We do not believe that *Conception Bay* applies here. In *Conception Bay,* the municipalities were not familiar with the Board's process. Here, the customer is a utility not an ordinary consumer.

[28] It is significant that prior to filing this Notice of Application, the two parties, Brant County and Brantford, through senior officers, had been negotiating a special rate for Brant County. And the discussion was whether it would be the GS > 50 kW rate or some special rate. Brant County states that they believed they would get a special rate and were "shocked" to find that Brantford unilaterally decided to change its approach and took no steps to inform Brant County. The first indication of the new approach, they claim, was an email after the first invoice was issued.

[29] That, however, is not the issue. This Notice was published on January 18, 2008 in the Brantford Expositor which had the highest circulation rate in the Brantford service area. The Notice of Application, which was issued by the Board on January 9, 2008, allowed any interested party to request intervenor status no later than 10 days after the publication date.

[30] It is highly improbable that someone in authority at Brant County was not aware of the Notice. It is also highly improbable that they would not have a passing interest in knowing what Brantford had decided regarding the rate under negotiation. The Board believes that Brant County, in these circumstances, had an obligation to take reasonable steps to determine what rate would apply to them and whether they should participate in the hearing.

[31] Instead, they took no steps and now complain that the utility did not inform them. There is no question that Brantford could have been more responsive. But in our view

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[10] *Conception Bay v. Newfoundland Public Utilities Board*, (1991) Admin L.R. (2d) 287.

the Notice was sufficient. It may not have detailed the specific rate but as the Board found in *Hydro One Networks* it is impossible to detail every specific rate change.

[32] In the end this was a sophisticated customer. Not only was it the largest customer, it was also a utility that had recently been negotiating the rate at issue. It is difficult to believe that they would not have reviewed the evidence. The Notices often state, as this one did, that the evidence can be easily found on the utility's website or the Board's website. That is the logical step that those receiving the Notice should take to determine if their interests will be impacted. It is impossible to detail every change in rates in a Notice published in a newspaper.

[33] These Notices have to be prepared so that they can be read by the common person. Brant County was certainly not the common man. Rather they were a large and sophisticated customer that apparently they did not review any of the evidence. While there was only one line in the evidence identifying the rate it did indentify the rate. That rate turned out to be the GS > 50kW rate.

The Standard of Review

[34] Counsel for Brant County also made submissions regarding the standard of review to be used by the Board in reviewing this Decision. Counsel argues that if the reviewing tribunal does not reach the same Decision, the reviewing tribunal must consider the Motion as if it were hearing the matter for the first time. Specifically Counsel argued;

> A tribunal must determine the appropriate standard – that of reasonableness or correctness – upon which to consider the prior decision. BCP submits that the Board, in conducting a motion to review and vary a decision, must consider whether the original decision on a correctness standard and not defer to the prior panel. Would the current panel have reached the same decision? If not, then the reviewing tribunal panel must replace the prior decision.
>
> The Board's Rules provide that the threshold for such a review is grounds "that raise a question regarding the correctness of the order or decision". Therefore, the appropriate standard of review to be applied in the consideration of such a motion is correctness. This is the most stringent standard of review required by law. The reviewer must insert themselves in the original tribunal's place and determine whether it would have reached the identical result as the original tribunal. It is insufficient for the reviewer to state

> that the original decision was reasonable or that it was not unreasonable – the decision **must** be correct[11].

Board Findings – Standard of Review

[35] With respect we disagree. 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 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. That is not the situation here.

[36] 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*[12] 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. But it also concerned with whether the Decision falls within a range of possible acceptable outcomes which are defensible in respect of facts and law".

[37] In finding that the Decision was justified, the Court referred to the often cited passage from *Law Society of New Brunswick vs. Ryan*[13] where Iacobucci, J. articulated the relationship between the reasons of the tribunal and the reasonableness of its Decision.

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can 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.*

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[11] Brant County Power Inc. Argument-In-Chief, page 6, para. 10 - 11

[12] *Toronto Hydro-Electric System Ltd v. Ontario Energy Board* [2010] OJ No. 1594

[13] [2003] 1 SCR 247 at para 55.

[38] 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.

What is the Correct Distribution Rate?

[39] The Board in its Decision of July 18, 2008 regarding the Brant County rate stated at page 16;

> **Rate Classes**
>
> The Company is a host to one embedded distributor, Brant County Power, and also serves one large customer with demand greater than 5000 kW.
>
> Board staff noted that the Company did not propose separate rate classifications for these loads; rather, they are being served within the GS>50 kW rate class.
>
> With respect to the large customer, the Company noted that the customer is new in this size range and the Company did not want to jeopardize the timing of its application for 2008 rates by designing and implementing a new rate class. The Company proposed that it would undertake a cost allocation study to support the establishment of a large user rate class for its next rate rebasing.
>
> With respect to the embedded distributor, Brantford clarified in response to an interrogatory that it intends to begin billing the embedded distributor in the 2008 rate year, and will do so by using the GS>50 kW rate classification. Board staff submitted that host distributors should be proposing a rate for embedded distributors, but noted that the practice of using the General Service rate is not unusual.
>
> **Board Findings**
>
> The Board accepts as reasonable the Company's proposal to defer the rate classification matter for the time of its next rebasing application. The Board notes that the issue of rates for embedded distributors is in the scope of a study currently underway at the Board (EB-2007-0031), the Rate Design study. The Board expects Brantford to keep itself informed as to potential developments through that process.

[40] Brant County argues that the GS > 50kW rate which Brantford used to charge Brant County is not just and reasonable because it over-recovers from Brant County. They say that the charges are not based on a proper cost allocation, that the services

being charged to Brant County are different than other customers in the GS > 50kW rate classification, that the rate does not include a proper loss factor for Brant County and the rate is based on an under forecast of demand.

[41] Brantford's response is that the Board should reject Brant County's Motion and confirm that Brant County must pay Brantford for all distribution services from May 1, 2008 at the GS > 50kW rate.

[42] Board staff presented a detailed submission regarding the proper rate that Brant County should be paying to Brantford. They argue that Brant County's consumption was greater than GS > 50kW category and that the services being provided to Brant County are different than those provided to the other customers in the GS > 50kW classification.

[43] Board staff examined the volume characteristics of the customers in the GS > 50 kW class and found that Brant County's energy and demand volumes were much greater than the average for customers in this class. For example at one delivery point (Colborne East) monthly demand for Brant County was 8500 kW. The response to Board Staff Interrogatory No. 9 indicated that the average demand for customers in the GS > 50 kW class, without Brant County, is 271 kW per month. This compares to an average monthly demand for Brant County of 4700 kW. In the case of energy, the average annual consumption for the members of the class, without Brant County, is 1.3 million kWh compared to 25.7 million kWh for Brant County.

[44] The cost differences of serving Brant County and the GS > 50 kW rate class are set out at Page 6 of the Board Staff submission. The relative costs which are reproduced in the table below are based on information provided by Brantford in response to Board Staff Interrogatory No. 9. It indicates that the average cost per kWh of serving Brant County is 40% less than for the GS > 50 kW class. This suggests that the rate should be 40% less for Brant County than for the rate to serve the GS > 50 kW class.

	GS > 50 kW	**Brant County**
Revenue Requirement ($)	3,295,266	303,456
kWh	513,051,214	77,273,702
¢/kWh	0.6423	0.3927

[45] Board staff also argues that the costs associated with Brant County are different than other customers in that class. They argue that Brant County should not be responsible for the cost of transformers, distribution lines, poles and related equipment which do not apply to Brant County.

[46] There is also a difference in the distribution loss factor. The factor applied to Brant County customers was 4.2% which represents the total distribution system. In response to Board Staff Interrogatory No. 11, Brant County estimated the loss on its system at approximately 1% for the main feed and approximately 2% for the alternative feed.

[47] In the end, Board staff argues that the Board should direct that a separate rate be set for Brant County. They argue that rate should reflect the following principles;

(a) The revenue-to-cost ratio for any specific rate for Brant County should fall with in the range for the Large User class, that is 85% - 115%,

(b) The GS 50 – 4,999 kW class' revenue-to-cost ratio remain at the approved EB-2007-0698 ratio of 140%, and

(c) Any additional revenue is to be recovered from those classes that have revenue-to-cost ratios below 100%.

Board Findings – The Distribution Rate

[48] We agree with Board staff that a separate rate should be set for Brant County. We also agree that rate should be set based on the principles set out above by Board staff. We are also of the view that further delay is no longer warranted. This issue first arose in Brantford's Application for 2008 rates. It remains unresolved and no payments are being made by Brant County.

[49] The Board directs Brantford to design a rate in compliance with principles set out by Board staff and to file that rate within 10 days of receipt of this Decision. Brant County will have an opportunity to comment on the proposed rate within 5 days of receipt. The Board expects to be in a position to issue a written decision following these submissions.

[50] If the new rate is less than the existing rate there may be an under-recovery by Brantford. That is, the utility would not be able to achieve its revenue requirement.

Accordingly, the difference between the existing approved GS > 50 kW rate and the new Brant County rate times the Brant County volumes for the relevant period should be tracked in a variance account for recovery at Brantford's next rebasing. The Board notes that Brant County has no objection.

The Retail Transmission Rate

[51] Brant County has paid RTS charges for Power Line Road at the GS > 50 kW rate for the period commencing December 2005 until August 2008 and these amounts are not in dispute. The RTS charges for Colborne Street East and Colborne Street West have not been paid but Brant County does not dispute the quantity of electricity or the rate. The parties agree that the $2.1 million is owing.

[52] What Brant County disputes is the period for which it is responsible for the costs. Brant County, in this Motion, asked the Board for an Order specifying the date at which Brantford is entitled to charge Brant County for retail transmission, network and connection charges for Colborne Street East and Colborne Street West. Brantford seeks an Order that Brant County must pay Brantford, in full, for all retail transmission service since Brantford acquired Colborne Street East and Colborne Street West from Hydro One in October, 2005.

[53] Board staff agrees that there is no dispute between the parties as to the rate and the volumes and agrees that this is an obligation of Brant County. However, Board staff takes the position that the RTS arrears should be limited to two years based on the *Limitations Act*[14].

[54] Board staff submits that Brantford's claim against Brant County is in the nature of a debt and that there is a claim of money owed to Brantford which is governed by the *Limitations Act*. They argue that the limitation period is two years from the date that the claim arises or the date the claiming party discovered the claim or should have discovered the claim. Board staff states that Brantford's claim arose on the day it acquired the Colborne assets (October 2005) and Brantford therefore has two years from that date to commence an action for payment.

[14] SO 2002 Ch.35

[55] Board staff argues that a claimant is not entitled to a longer limitation period because it did not discover its right to make a claim until some later date unless the delayed discovery was reasonable. Section 5 of the Act provides that the discovery of the claim occurs on the day on which a reasonable person in the circumstances ought to have known of the claim.

[56] Board staff argues that Brantford is a sophisticated commercial entity and should have exercised greater diligence in exercising its right to charge the RTS upon acquiring the two Colborne assets. The utility failed to invoice Brant County within the two year limitation period, that is by October 2007.

[57] Board staff also argue that Brantford's claim for the RTS is not completely prescribed by the *Limitations Act* since the claim has been ongoing. Accordingly, Board staff submits any amounts owing by Brant County for the two years prior to the date that Brantford made its claim (December 11, 2009) are outside the limitation period and Brantford should only be entitled to recover amounts from and after December 10, 2007.

Board Findings – Retail Transmission Rates

[58] Brantford acquired transmission assets at Colborne Street East and Colborne Street West from Hydro One on October 2005. Brantford began billing Brant County for RTS service for Powerline Road in 2005. For some reason, Brantford failed to bill Brant County for RTS services at Colborne Street East and Colborne Street West until much later.

[59] There is no question that Brantford provided Brant County RTS services at Colborne Street East and Colborne Street West facilities. The question is, when should the payments start? Brant County states that the payments should start September 1, 2008, when the Brant County rate first became effective. Brantford responds that the payments should start when the services first started (October 2005). Board staff submits that the payments should be governed by the *Limitations Act, 2002* and payments therefore should start December 10, 2007.

[60] It is significant that there will be no harm to Brant County customers if Brant County pays the full amount to Brantford. Brant County has continued to collect for RTS service in its rates and has approximately $4.2 million in reserve accounts. Brantford

submits, and Brant County agrees, that approximately $2.1 million is owed to Brantford for RTS service. Brantford argues that there is no good reason why Brant County should not pay the entire amount owing. Brant County does not risk under recovery from its customers because the entire amount can be paid from these reserve accounts.

[61] The Board is not persuaded that the *Limitations Act, 2002* constrains the Board's jurisdiction to order full recovery. This is not a claim being pursued in a court. It is not clear that the *Limitations Act* applies.

[62] In any event, the Board has the exclusive jurisdiction to set just and reasonable rates and that includes not only the rate, but the time period in which the rate should be paid. Section 19(6) of the *Ontario Energy Board Act, 1998* gives the Board exclusive jurisdiction in all areas where the Act confers jurisdiction. Where there is a conflict between the OEB Act and any other Act the OEB Act prevails[15]. Special legislation like the Ontario Energy Board Act takes precedence over general legislation like the *Limitations Act*[16]*.* The Board has exercised jurisdiction in this area in enacting Section 7.7 of the *Retail Settlement Code* with respect to residential and non-residential customers.

[63] We conclude that the full amount is owing and should be paid by Brant County. However, Brantford will not be entitled to any interest payable on the outstanding amounts for Colborne East and Colborne West. There is no good reason why Brantford failed to bill for RTS service at the two assets. It was an error on the utility's part. Under those circumstances interest is disallowed.

[64] Where there is a billing error, the Board will allow a utility to correct that error and bill (or credit) customers going forward. There can, however, be a penalty in terms of loss of interest if there is an element of negligence on the part of the utility. This was the situation in the *NRG Gas Cost* case[17]. There, NRG, due to an accounting error failed to collect over $500,000 in gas costs that incurred over a period of 15 months between October, 2002 and December, 2003. The Board, in setting 2004 rates, allowed NRG to recover these costs through rates going forward but refused the utility's request for

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[15] *Kingston vs. Ontario Energy Board* [2001] OJ No. 3485

[16] *Union Gas v. Dawn* (1977) 15 OR (2d) 722, 76 DLR (3d) 613

[17] *Re Natural Resource Gas Ltd*, Board Review Decision, April 19, 2004. *Natural Resource Gas Ltd. v. Ontario Energy Board* [2005] OJ No. 1520 (Div Ct.)

interest and the recovery of the regulatory costs involved in bringing forth the Application.

[65] The remaining issue is the time period over which the unpaid RTS is to be paid. There appears to be no dispute that Brant County has collected these amounts from its customers and is holding funds in a reserve account. In the circumstances, RTS amounts should be repaid within 30 days of the Board's Order in this proceeding.

Retroactivity – Distribution Rates

[66] If a new rate is set for Brant County, is it effective at the date of this Decision or September 1, 2008? Or May 1, 2008? Brant County argues that it should become effective, September 1. 2008. Brantford and Board staff argue that it should become effective on the date of this Decision. The reason for that position, they claim, is the rule against retroactivity prevents back dating to September 1, 2008.

[67] No one disputes that retroactive rate making is not proper. This was most recently recognized by the Supreme Court of Canada in the *ATCO* Decision[18] and a number of decisions before[19].

[68] Board staff relies upon the Supreme Court of Canada decision in *Bell Canada vs. CRTC*[20] where the court distinguished between Interim Rate and Final Rate noting that if the rates are interim the Board could backdate the effective date to the date of the interim order which is not possible in the case of a Final Order. We do not agree that this principle applies to the present case. This is not a case where the Board is varying the rate for the GS > 50 kW class. This is the case of a billing dispute. In particular, a dispute related to a rate classification. To say that a utility could hide behind the retroactivity principle and never address billing disputes would be contrary to the Board's policy objectives.

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[18] *ATCO Gas & Pipelines Ltd. v. Alberta Energy & Utilities Board* [2006] 1 SCR 140, 263 D.L.R. (4th) 193

[19] *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684; *Re Coseka Resources Ltd. And Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731.

[20] *Bell Canada v. Canada Radio-Television and Telecommunications Commission,* (1989) S.C.J. No. 68 at 708.

[69] The overriding responsibility of the Board is to set just and reasonable rates. That principle applies to the actual level of the rates as well as the time period during which the rates are in effect. It is also important to understand the fundamental principle behind the retroactivity principle in public utility law. This is not a mechanical rule of statutory interpretation. The rule is based on two fundamental principles.

[70] The first principle is that a utility must be able to rely on Decisions to have revenue certainty in order to be able to plan its investments. If the revenue requirement is subject to change this is impossible. In other words, a utility must be able to rely on a Final Order and the revenues that flow from the Final Order unless there is clear notice that this is not the case. That's why this Board will often convert a Final Order to an Interim Order and then proceed with the next rate case. The magic of that conversion is that the utility has notice that it can no longer rely upon that revenue stream. It may go up or it may go down, depending on the result of the next rates case. And that rate decision can then be back dated to the date of the Interim Order.

[71] The utility also has notice where there is a billing dispute with a customer. In this case there was a period of time when there was no rate. Then the Board applied a rate to this particular customer that was admittedly incorporated in a Final Order. The matter did not end there. The customer refused to pay and launched this appeal. There has been an ongoing dispute and the utility was well aware that this matter would likely be subject to adjustment in a subsequent proceeding.

[72] The other principle behind the retroactivity rule is that future customers should not pay for electricity consumed by past customers. This is also known as the intergenerational equity problem. Broadly speaking, that means that today's customers should not be responsible for the expenses associated with the services provided to yesterday's customers.

[73] The principles behind the retroactivity rule were set out by the Newfoundland Court of Appeal in *Re: Board of Commissioner of Public Utilities*[21] at Page 25.

> Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

[21] *Re Section 101 of the Public Utilities Act* (1998) CanLII 18064 (NL C.A.)

> …the rule is concerned more with issues of fairness, both to customers and to the utility shareholders. The customer-related fairness issue is often referred to as the "inter-generational equity" problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity investment in a utility, shareholders require some certainty that matters already dealt with by the regulator have some degree of finality associated with them.

[74] The *Newfoundland* case questioned the importance of intergenerational equity at Page 28.

> While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning observes:
>
> As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers – especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force.

The Supreme Court of Canada in the *Bell Rebate* case[22] made the same point;

> ….it is true that the one time credit ordered by the appellant will not necessarily benefit the customers who are actually billed excessive rates. However, once it is found that the appellant does have the power to make remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect way of reimbursing excess revenues. However, in the view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement among its several classes of customers to determine just and reasonable rates, the appellant's decision was imminently reasonable…

[22] *Bell Canada v. Canadian Radio-Television & Telecommunication Commission* [1989] 1 SCR 1722 at 1762-3.

[75] The rule against retroactivity was first established by the Supreme Court of Canada in 1961[23]. That Court established an important qualification 20 years later in Nova V. Amoco[24]. There, the court was dealing with a regulatory scheme that provided that the utility could set a rate that would be in effect until such time that any interested party or the Public Utilities Board complained that the rate was not just and reasonable. At that point the Public Utilities Board would hold a hearing and make a decision.

[76] The question in *Nova* was, having made a decision to change the rate, was the new rate effective the date of the decision or at the date of the complaint. Mr. Justice Estey speaking for the Court held that it was permissible to issue a retroactive order and that the new rate could become effective at the date of the complaint because at that point the utility had notice.

[77] The British Columbia Court of Appeal in *EuroCan Pulp and Paper vs. British Columbia Energy Commission*[25] came to the same conclusion stating at Page 731;

> Under either section it is contemplated that the Commission may consider rates established and collected in the past, or the rates to be collected or enforced by it in the future. In the former case there would be a retroactive aspect to any consequent order made by the Commission. Under s. 38 it seems clear that the Commission would have jurisdiction to entertain a complaint that existing rates in effect and collected are unjust or insufficient. In that event it would clearly have the jurisdiction to correct the injustice or the insufficiency. There is nothing to lead one to the conclusion that the Legislature intended that the Commission could only act in this respect prospectively.
>
> Reading the Act as a whole, it is my opinion that the Commission has been empowered to make rates effective to the date of the application, even though there is no specific language in the Act to that effect.

[78] In summary, this is a billing dispute that relates to one particular customer not all customers in the rate class. That customer never accepted the rate, never paid the rate and gave clear notice to the utility.

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[23] *Edmonton v. Northwestern Utilities Ltd.* [1961] SCR 392.

[24] *Nova v. Amoco Canada Petroleum Co.,* (1981) 2 SCR 437.

[25] (1978) 87 DLR (3d) 727.

[79] This is no different than correcting a utility error as this Board did in the *NRG Gas Cost* case[26]. Natural Resource Gas, like Brant County, was an embedded distributor. NRG discovered in October 2003 that its gas costs for 15 months were under-collected by over $500,000 due to a flaw in its accounting methodology. The Board allowed the utility to recover these costs in a subsequent rate case. The Board recognized that there was a retroactivity issue but at the same time was satisfied there was an under-recovery of costs due to a faulty accounting method. The Board, however, stated;

> In light of the above, while we accept that NRG's customers have underpaid by $531,794 and the 2003 PGCVA balances have not been finalized by the Board, we find that NRG's error has resulted in a substantial and avoidable accumulation of potential customers' charges, through no fault of the customer.
>
> We must therefore look for a balance.
>
> It would not be reasonable in our view to deny NRG recovery of reasonably incurred gas costs of a magnitude of $541,794 because of an accounting error. These are legitimate costs incurred prudently on behalf of the customers, and are of material consequence to the utility.
> Considering the need for NRG to recover its prudently incurred unrecorded gas costs and mitigating the impact on customers, as well as not creating undue inter-generational inequity, we find that the 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.

[80] In summary, the Board in *NRG* allowed past costs to be recovered in future rates. However, the Board imposed a penalty and disallowed the interest claimed by NRG as well as the regulatory costs incurred to recover the missing gas costs and the legal costs associated with proceeding. The Board could have disallowed all recovery on a broad interpretation of the retroactivity rule. However, there as here, the Board must consider what constitutes just and reasonable rates. If by error there is an under-collection or over-collection it should be remedied going forward. The NRG decision was upheld by the Divisional Court[27] and the Court of Appeal[28].

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[26] *Re Natural Resource Gas Ltd*, Board Review Decision, April 19, 2004.
[27] *Natural Resource Gas Ltd. v. Ontario Energy Board* [2005] OJ No. 1520 (Div. Crt.)

[28] *Natural Resource Gas Ltd. v. Ontario Energy Board* [2006] OJ No. 2961 (CA)

[81] It is also helpful to refer to Section 7.7 of the Retail Settlement Code. The Code provides that where there is a billing error from any cause that results in a consumer being overbilled, the distributor should credit the consumer the amount erroneously billed for a period of up to 6 years. In the case where the billing error causes the consumer to be under-billed, the distributor can charge the consumer the amount not previously billed. The time limit, however, varies depending on whether the customer is a residential or a non-residential customer. In the case of an individual residential customer, who is not responsible for the error, the maximum period for which the consumer may be charged is two years. However, in the case of a non-residential consumer, the consumer can be charged for the entire period.

[82] It is unlikely that Section 7.7 of the Retail Settlement Code applies to the case at hand. That is because the definition of a “consumer” in the Code is a person who uses electricity “for his own consumption”. While Brant County may not be a consumer within that definition, the section does indicate the Board’s policy with respect to billing errors – the rule against retroactivity does not apply.

Board Findings – Retroactivity

[83] For the reasons indicated above, the Board does not believe that the rule against retroactivity prevents the Board from correcting certain billing errors. It would appear that the rate should be significantly less than the rate used which means we have a case of overbilling for distribution services. And in the case of RTS, there has been a period when there was no billing and therefore under-collection.

[84] This leaves open the question regarding the date which billing should begin. The Board in the previous Decision set the Brant County rate (and the rates for other customers) effective September 1, 2008. The rates could have been made effective on April 21, which is the date of the Interim Order. The Board chose not to go back to April 21st because they felt that Brantford had been late in filing and penalized the utility by making the rates effective September 1. That Decision, however, had an unintended consequence. Brant County can argue that any distribution charges levied by Brantford beginning May 1, 2008 to September 1, 2008 had no force or effect. That is based on the argument that the Interim Order did not have a Brant County rate component because all it did was convert the 2007 rates from a Final Order to an Interim Order. The 2007 Rates Decision did not have a Brantford County rate.

[85] This clearly was not a matter addressed by the Panel in the July 18, 2008 Decision. Brant County does have an argument but it is a technical argument. The fact of the matter is that the utility provided service for the period of May 1, 2008 to September 1, 2008, and billed Brant County. In fact, Brant County paid one invoice. Having received service from the utility we believe that Brant County should pay for the service. But it should do so at the correct rate. Accordingly, Brantford is entitled to be paid distribution charges beginning as of May 1, 2008[29]. The rate to be used is the new rate to be set pursuant to this proceeding.

[86] The other question left open is whether Brant County should have time to pay. We believe that it is appropriate to allow Brant County 24 months to pay the distribution charges. Unlike the situation with RTS rates, there is no failure to bill by Brantford and accordingly interest shall be allowed on any outstanding balances.

THE BOARD THEREFORE ORDERS THAT:

1. Brantford shall file a proposed new distribution rate for Brant County within 10 days of this Decision. Brant County and Board staff will have 5 days, after receiving the proposed new rate, to file written comments on the proposed new rate.

2. Brant County shall pay the outstanding RTS charges within 30 days of the date of the Board's Order in this proceeding. The charges outstanding for Powerline Road date from July, 2008 while the charges outstanding for Colborne Street East and Colborne Street West date from October, 2005. No interest charges will be included in the Colborne Street East and Colborne Street West amounts. Interest will be allowed on the Powerline Road amounts.

3. The new distribution rate for Brant County shall be effective May 1, 2008. Brantford is entitled to interest on all outstanding amounts at the interest rate the Board currently allows for deferral accounts. The amount outstanding will be paid in 24 equal instalments commencing 30 days after the date of the Rate Order.

4. Brantford will track the amount of any revenue deficiency that may result from the differences in the GS > 50 kW rate and the new rate in a tracking account which will be considered for disposition by the Panel in Brantford's next rate case.

[29] Brantford does not seek payment for service prior to May 1, 2008. Brantford Power Inc. Final Argument paragraph 80.

DATED at Toronto, August 10, 2010

ONTARIO ENERGY BOARD

Original Signed By

_____
Gordon Kaiser
Vice-Chair

Original Signed By

_____
Ken Quesnelle
Board Member