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.

ORILLIA POWER'S COMPENDIUM

January 16, 2019

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*

INDEXED AS: DANYLUK *v.* AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

Mary Danyluk *Appelante*

c.

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 et Joseph McBride Watson *Intimés*

RÉPERTORIÉ : DANYLUK *c.* AINSWORTH TECHNOLOGIES INC.

Référence neutre : 2001 CSC 44.

N° du greffe : 27118.

2000 : 31 octobre; 2001 : 12 juillet.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »),

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.

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recoupait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Held: The appeal should be allowed.

Arrêt : Le pourvoi est accueilli.

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.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

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 mat-

Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont au nombre de trois : (1) que la même question ait été décidée dans une procédure antérieure; (2) que la décision judiciaire antérieure soit définitive; (3) que les parties ou leurs ayants droit soient les mêmes dans chacune des instances. Si le requérant réussit à établir l'existence des conditions d'application, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion devrait être appliquée.

Suivant ces conditions, la décision antérieure doit être une décision judiciaire. En l'espèce, la décision fondée sur la LNE était judiciaire. Premièrement, le décideur administratif ayant rendu la décision peut être investi d'un pouvoir juridictionnel et il est capable d'exercer ce pouvoir. Deuxièmement, sur le plan juridique, la décision devait être prise judiciairement. Bien que les agents des normes d'emploi aient recours à des procédures plus souples que celles des cours de justice, leurs décisions juridictionnelles doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective.

L'appelante conteste l'application de la préclusion découlant d'une question déjà tranchée parce que, conformément à la conclusion de la Cour d'appel, la décision fondée sur la LNE a été rendue sans qu'on donne à l'appelante un préavis suffisant et la possibilité de répondre aux prétentions de l'employeur. Il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Lorsque le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin* et celles relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*.

En l'espèce, les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies : la même question est à l'origine des deux instances, la décision de l'agente des normes avait un caractère définitif pour l'application de la Loi en raison du fait que ni l'employeur ni l'employée ne se sont prévalus du mécanisme de révision interne, et les parties

ter 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.

sont les mêmes. La Cour doit par conséquent décider si elle doit exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion. En l'espèce, notre Cour a le droit d'intervenir puisque les tribunaux de juridiction inférieure ont commis une erreur de principe en omettant d'examiner la question de l'exercice du pouvoir discrétionnaire. La liste des facteurs à considérer pour l'exercice de ce pouvoir n'est pas exhaustive. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice dans une affaire donnée. Parmi les facteurs pertinents en l'espèce, mentionnons : le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative, l'objet du texte de la loi, l'existence d'un droit d'appel, les garanties offertes aux parties dans le cadre de l'instance administrative, l'expertise du décideur administratif, les circonstances ayant donné naissance à l'instance administrative initiale et, facteur le plus important, le risque d'injustice. Vu l'effet cumulatif des facteurs susmentionnés, la Cour, dans l'exercice de son pouvoir discrétionnaire, doit refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. En effet, le fait demeure que la réclamation de l'employée visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

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[1964] P. 181; *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132; *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19; *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183; *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145; *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58; *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535; *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Poucher c. Wilkins* (1915), 33 O.L.R. 125; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72; *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660; *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1.

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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.

The judgment of the Court was delivered by

BINNIE J. — 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

Lange, Donald J. *The Doctrine of Res Judicata in Canada*. Markham, Ont. : Butterworths, 2000.
Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto : Butterworths, 1999.
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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (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), qui a rejeté l'appel formé par l'appelante contre une décision de la Cour de l'Ontario (Division générale) rendue le 10 juin 1996. Pourvoi accueilli.

Howard A. Levitt et *J. Michael Mulroy*, pour l'appelante.

John E. Brooks et *Rita M. Samson*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'appelante prétend que, le 12 octobre 1993, elle a été congédiée du poste de chargée de projet qu'elle occupait chez l'intimée Ainsworth Technologies Inc. Elle soutient que, au moment de son congédiement, son employeur lui devait quelque 300 000 $ en commissions impayées. Les cours de justice ontariennes ont jugé que l'appelante était précluse (« *estopped* ») de saisir les tribunaux de ce différend en raison de sa tentative infructueuse d'obtenir le paiement de cette somme en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14 (la « LNE » ou la « Loi »). Adoptant une procédure que la Cour d'appel de l'Ontario a jugé inappropriée et inéquitable, une agente des normes d'emploi a rejeté la demande de l'appelante. En règle générale, la préclusion découlant d'une question déjà tranchée (« *issue estoppel* ») peut, j'en conviens, être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif. Toutefois, je suis d'avis que la présente espèce

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

n'est pas une affaire où il convenait d'appliquer cette doctrine. Une doctrine élaborée par les tribunaux dans l'intérêt de la justice ne devrait pas être appliquée mécaniquement et donner lieu à une injustice. J'accueillerais le pourvoi.

I. Les faits

À l'automne 1993, un différend relatif à des commissions impayées a opposé l'appelante et son employeur, l'intimée Ainsworth Technologies Inc. L'appelante a rencontré ses supérieurs et elle leur a envoyé diverses lettres exposant son point de vue. Copie conforme de chacune de ces lettres était généralement transmise à son avocat, M^e^ Howard A. Levitt. L'appelante prétendait principalement avoir droit à environ 200 000 $ à titre de commissions à l'égard d'un projet connu sous le nom de projet CIBC Lan, ainsi qu'à d'autres commissions portant à approximativement 300 000 $ la somme totale réclamée.

L'appelante a rejeté le règlement proposé par l'employeur. Le 4 octobre 1993, elle a déposé, en vertu de la LNE, une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. Le dossier n'indique pas clairement si elle a profité des conseils d'un avocat sur cet aspect du litige. Le 5 octobre, l'employeur a écrit à l'appelante, lui indiquant qu'il rejetait sa demande visant les commissions. Subséquemment, lorsqu'elle s'est présentée au travail, il l'a fait conduire hors de ses locaux, considérant qu'elle avait remis sa démission.

On a demandé à une agente des normes d'emploi, M^me^ Caroline Burke, d'enquêter sur la plainte déposée par l'appelante. Madame Burke a d'abord eu un entretien téléphonique avec l'appelante puis, vers le 30 janvier 1994, elle l'a rencontrée pendant environ une heure. L'appelante a remis à M^me^ Burke divers documents, dont sa correspondance avec l'employeur. Aucune autre rencontre n'a eu lieu par la suite.

Le 21 mars 1994, plus de 6 mois après avoir déposé sa plainte en vertu de la Loi, mais sans qu'une décision ait encore été rendue à cet égard, l'appelante a intenté, par l'entremise de M^e^ Levitt,

damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

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.

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.

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

une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait également le paiement du salaire et des commissions impayés qui faisaient déjà l'objet de la plainte qu'elle avait présentée en vertu de la LNE.

6 Le 1er juin 1994, les procureurs de l'employeur ont écrit à Mme Burke au sujet de la plainte de l'appelante. La lettre de l'employeur était accompagnée d'un certain nombre de documents étayant la thèse de ce dernier. Aucun de ces documents n'a été communiqué à l'appelante. Madame Burke n'a pas non plus fourni d'information à l'appelante relativement à la thèse de l'employeur et elle ne lui a pas donné la possibilité de répondre aux arguments qui, selon l'appelante, seraient vraisemblablement avancés par l'employeur. Bref, l'appelante a été tenue à l'écart.

7 Le 23 septembre 1994, l'agente des normes d'emploi a informé l'employeur intimé (mais non l'appelante) qu'elle avait rejeté la réclamation de l'appelante pour commissions impayées. Par contre, elle a ordonné à l'employeur de verser à l'appelante la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Dix jours plus tard, dans une lettre datée du 3 octobre 1994, Mme Burke a informé l'appelante de l'ordonnance intimant à l'employeur de lui verser deux semaines de salaire à titre d'indemnité de licenciement et du rejet de la réclamation visant les commissions. La lettre disait notamment ce qui suit : [TRADUCTION] « [r]elativement à votre réclamation pour salaire impayé, l'enquête a révélé que vous n'avez pas droit aux 300 000,00 $ que vous réclamez à titre de commissions ». Elle ajoutait que l'appelante pouvait présenter au directeur des normes d'emploi une demande de révision de cette décision, information que Mme Burke a répétée lors d'un entretien téléphonique subséquent avec l'appelante. L'appelante n'a toutefois pas demandé la révision de la décision de Mme Burke, décidant plutôt de poursuivre son action en dommages-intérêts pour congédiement injustifié déposée au civil.

8 Les intimés ont invoqué la préclusion découlant d'une question déjà tranchée à l'encontre de la réclamation pour salaire et commissions impayés. Dans le cadre de l'instance civile engagée par l'ap-

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

pelante, ils ont présenté une requête en radiation des paragraphes pertinents de la déclaration. Le 10 juin 1996, le juge McCombs de la Cour de l'Ontario (Division générale) a accueilli cette requête. Seule la demande de dommages-intérêts pour congédiement injustifié a pu suivre son cours. Le 2 décembre 1998, la Cour d'appel de l'Ontario a rejeté l'appel formé par l'appelante.

II. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division générale)* (10 juin 1996)

Le juge McCombs devait décider si la doctrine de la préclusion découlant d'une question déjà tranchée s'appliquait en l'espèce. S'appuyant sur l'arrêt *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), il a estimé que cette doctrine pouvait s'appliquer à une question déjà tranchée par un décideur administratif — fonctionnaire ou tribunal. Selon lui, la seule question à trancher était de savoir si la décision de l'agente des normes d'emploi était une décision définitive. Le juge des requêtes a souligné que l'appelante n'avait pas demandé la révision de la décision de l'agente des normes d'emploi ainsi que le lui permettait le par. 67(2) de la Loi. Il a considéré que la décision de l'agente des normes d'emploi était définitive. Les critères d'application de la doctrine de la préclusion découlant d'une question déjà tranchée étaient donc respectés. Les paragraphes de la déclaration de l'appelante ayant trait aux salaire et commissions impayés ont été radiés.

B. *Cour d'appel de l'Ontario* (1998), 42 O.R. (3d) 235

Après examen des faits de l'espèce, le juge Rosenberg, s'exprimant pour la Cour d'appel, a fait état des questions que soulevait l'appel aux p. 239-240 :

[TRADUCTION] La présente affaire porte sur la seconde condition d'application de la préclusion découlant d'une question déjà tranchée, savoir celle voulant que la décision qui, affirme-t-on, donne ouverture à la préclusion soit une décision judiciaire définitive. L'appelante prétend que la décision que rend un agent des normes d'emploi n'est ni judiciaire ni définitive. Elle soutient

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.

également que, quoiqu'il en soit, la procédure suivie par M^me^ Burke en l'espèce était inéquitable et donc que sa décision ne devrait pas donner naissance à la préclusion. De façon plus particulière, l'appelante plaide qu'elle n'a pas été traitée équitablement puisqu'on ne lui a pas remis copie des observations de l'employeur et qu'on ne lui a pas, de ce fait, accordé la possibilité de les réfuter.

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.

11 Le juge Rosenberg a rejeté les prétentions de l'appelante, qu'il a regroupées sous les trois questions suivantes : La décision de l'agente des normes d'emploi était-elle une décision définitive? Cette décision était-elle une décision judiciaire? Quel est l'effet d'une iniquité procédurale sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée?

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).

12 Selon lui, la décision de l'agente était une décision définitive, étant donné que ni l'une ni l'autre des parties n'avaient exercé le droit d'appel interne prévu au par. 67(2) de la Loi. De plus, bien que les décisions administratives statuant définitivement sur les droits des parties ne soient pas toutes considérées comme « judiciaires » pour l'application de la doctrine de la préclusion découlant d'une question déjà tranchée, le juge Rosenberg a estimé que la procédure établie par la Loi respectait les conditions requises. Il a jugé que l'arrêt *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), était [TRADUCTION] « décisif à cet égard » (p. 249).

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):

13 Enfin, le juge Rosenberg s'est demandé si l'inobservation par l'agente des normes d'emploi des règles d'équité procédurale avait un effet en l'espèce sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée. Il a reconnu que l'agente des normes avait effectivement manqué à ces règles en statuant sur la plainte de l'appelante. Il a néanmoins jugé que ce manquement ne faisait pas obstacle à l'application de la doctrine (à la 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 con-

[TRADUCTION] L'agente était tenue de donner à l'appelante la possibilité de consulter et de réfuter toute information préjudiciable à sa réclamation recueillie par l'agente dans le cours de l'enquête. L'appelante aurait dû tout au moins recevoir copie de la lettre du 1^er^ juin 1994 ainsi qu'un résumé de toute autre information préjudiciable à sa réclamation recueillie dans le cours de l'enquête. Elle aurait également dû se voir accorder la

sider 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.

possibilité d'examiner cette information et d'y répondre. L'appelante n'a pas reçu communication des allégations formulées contre elle et elle a été privée de la possibilité de les réfuter : M^me^ Burke n'a donc pas agi judiciairement. En l'espèce, toutefois, ce manquement n'empêche pas l'application de la doctrine de la préclusion découlant d'une question déjà tranchée.

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):

De l'avis du juge Rosenberg, même si les agents des normes d'emploi ont l'obligation d'agir judiciairement, le manquement à cette obligation dans un cas donné, du moins lorsqu'il est possible d'interjeter appel, ne fait pas obstacle à l'application de la préclusion découlant d'une question déjà tranchée. Sa conclusion s'appuie sur les considérations de politique d'intérêt général qui sont à la base de deux règles de droit administratif (à la 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.

[TRADUCTION] Ces deux règles sont les suivantes : (1) la règle écartant les recours discrétionnaires en matière de contrôle judiciaire lorsqu'il existe un autre recours approprié; (2) la règle prohibant les contestations indirectes. Dans les faits, ces règles exigent que les parties demandent réparation au moyen de la procédure administrative établie par le législateur. Lorsque les parties disposent d'une voie d'appel, elles ne sont pas admises à l'écarter pour s'adresser aux cours de justice.

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:

Le juge Rosenberg de la Cour d'appel a souligné que, si l'appelante avait demandé la révision de la décision de l'agente des normes d'emploi en vertu du par. 67(3) de la Loi, l'arbitre saisi de l'affaire aurait dû tenir une audience. Cette constatation étayait son opinion selon laquelle la procédure de révision prévue par la Loi constitue un autre recours approprié. Le juge Rosenberg a conclu ainsi, à la 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.

[TRADUCTION] En résumé, M^me^ Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

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

La Cour d'appel a en conséquence appliqué la doctrine de la préclusion découlant d'une question déjà tranchée et a débouté l'appelante.

III. Relevant Statutory Provisions

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

III. Les dispositions législatives pertinentes

Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14 17

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« salaire » Rémunération en espèces payable par un employeur à un employé aux termes d'un contrat de travail, verbal ou écrit, exprès ou implicite, paiement qu'un employeur doit verser à un employé en vertu de la présente loi, et allocations de logement ou de repas prescrites par les règlements ou prévues par un accord ou un arrangement à cette fin, à l'exclusion des éléments suivants :

a) les pourboires et autres gratifications,

b) les sommes versées à titre de cadeaux ou de primes qui sont laissées à la discrétion de l'employeur et qui ne sont pas liées au nombre d'heures qu'un employé a travaillé, à sa production ou à son efficacité,

c) les allocations ou indemnités de déplacement,

d) les cotisations de l'employeur à une caisse, un régime ou un arrangement auxquels la partie X de la présente loi s'applique. (« wages »)

. . .

6 (1) La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte.

(2) Si un employé introduit une instance civile contre son employeur en vertu de la présente loi, l'avis d'instance est signifié au directeur, selon la formule prescrite, le jour même où l'instance civile est inscrite au rôle.

65 (1) Si l'agent des normes d'emploi conclut qu'un employé a le droit de percevoir un salaire d'un employeur, il peut, selon le cas :

a) s'entendre avec l'employeur pour que celui-ci verse directement à l'employé le salaire auquel ce dernier a droit;

b) recevoir de l'employeur, au nom de l'employé, le salaire qui doit être versé à ce dernier par suite d'une transaction;

c) ordonner, par écrit, que l'employeur verse sans délai au directeur, en fiducie, le salaire auquel un employé a droit; il ordonne également à l'employeur de verser au directeur, à titre de frais d'administration, celle

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.

. . .

des deux sommes suivantes qui est la plus élevée, à savoir : 10 pour cent du salaire ou 100 $.

. . .

(7) Si un employeur ne fait pas la demande visée à l'article 68 en vue de la révision d'une ordonnance rendue par un agent des normes d'emploi, l'ordonnance devient sans appel et lie l'employeur même si une audience en révision est tenue afin de déterminer l'obligation d'une autre personne aux termes de la présente loi.

. . .

67 (1) Si, à la suite d'une plainte par écrit d'un employé, l'agent des normes d'emploi conclut que l'employeur a versé à un employé le salaire auquel ce dernier a droit ou a conclu que l'employé n'a droit à rien d'autre ou qu'il n'y a rien que l'employeur doive faire ou s'abstenir de faire pour se conformer à la présente loi, il peut refuser de rendre une ordonnance visant l'employeur. Il en avise l'employé par lettre affranchie à sa dernière adresse connue.

(2) L'employé qui se croit lésé par le refus de l'agent de rendre une ordonnance contre l'employeur ou par une ordonnance qui, à son avis, ne comprend pas le salaire complet auquel il a droit ni ses autres droits peut, dans les quinze jours de la mise à la poste de la lettre visée au paragraphe (1) ou de la date où l'ordonnance a été rendue ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, demander au directeur, par écrit, de réviser le refus ou le montant fixé dans l'ordonnance.

(3) Sur réception de la demande de révision, le directeur peut nommer un arbitre de griefs pour tenir une audience.

. . .

(5) L'arbitre de griefs qui tient l'audience peut exercer, avec les adaptations nécessaires, les pouvoirs que la présente loi confère à un agent des normes d'emploi, et peut rendre une ordonnance à l'égard du refus ou une ordonnance modifiant, annulant ou confirmant l'ordonnance de l'agent des normes d'emploi.

. . .

(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.

(7) L'ordonnance de l'arbitre de griefs n'est pas susceptible de révision dans le cadre de l'article 68. Elle est sans appel et lie les parties.

68 (1) Après avoir versé le salaire qu'il lui est ordonné de payer ainsi que la somme à titre de pénalité qui s'y rapporte, s'il y a lieu, l'employeur qui s'estime lésé par une ordonnance rendue en vertu de l'article 45, 48, 51, 56.2, 58.22 ou 65 peut, dans les quinze jours qui suivent la remise ou la signification de l'ordonnance ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, et à la condition que le salaire n'ait pas été versé en vertu du paragraphe 72 (2), demander que l'ordonnance fasse l'objet d'une révision par voie d'audience.

. . .

(3) Le directeur choisit un arbitre au sein du tableau des arbitres pour tenir l'audience de révision.

. . .

(7) La décision que l'arbitre prend en vertu du présent article est sans appel et lie les parties et les autres personnes que l'arbitre peut préciser.

IV. Analysis

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.

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

IV. L'analyse

18 Le droit tend à juste titre à assurer le caractère définitif des instances. Pour favoriser la réalisation de cet objectif, le droit exige des parties qu'elles mettent tout en œuvre pour établir la véracité de leurs allégations dès la première occasion qui leur est donnée de le faire. Autrement dit, un plaideur n'a droit qu'à une seule tentative. L'appelante a décidé de se prévaloir du recours prévu par la LNE. Elle a perdu. Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités.

19 Le caractère définitif des instances est donc une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est

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* (looseleaf), vol. 3 Supp., at 21§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-

une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable (conclusion tirée par la Cour d'appel elle-même), l'application de cette doctrine empêche l'appelante de s'adresser aux cours de justice pour réclamer les 300 000 $ qui lui seraient dus, il convient de réexaminer certains principes fondamentaux.

Le droit s'est doté d'un certain nombre de moyens visant à prévenir les recours abusifs. L'un des plus anciens est la doctrine de la préclusion *per rem judicatem*, qui tire son origine du droit romain et selon laquelle, une fois le différend tranché définitivement, il ne peut être soumis à nouveau aux tribunaux : *Farwell c. La Reine* (1894), 22 R.C.S. 553, p. 558, et *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248, p. 267-268. La doctrine est opposable tant à l'égard de la cause d'action ainsi décidée (on parle de préclusion fondée sur la demande, sur la cause d'action ou sur l'action) que des divers éléments constitutifs ou faits substantiels s'y rapportant nécessairement (on parle alors généralement de préclusion découlant d'une question déjà tranchée) : G. S. Holmested et G. D. Watson, *Ontario Civil Procedure* (feuilles mobiles), vol. 3 suppl., 21§17 et suiv. Un autre aspect de la politique établie par les tribunaux en vue d'assurer le caractère définitif des instances est la règle qui prohibe les contestations indirectes, c'est-à-dire la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance : *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223.

Initialement, ces règles ont été établies dans le contexte de procédures judiciaires antérieures. Leur champ d'application a depuis été élargi, avec les adaptations nécessaires, aux décisions de nature judiciaire ou quasi judiciaire rendues par les juridictions administratives — fonctionnaires ou tribunaux. Dans ce contexte, l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect

making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

de l'équité envers les parties et la protection du processus décisionnel administratif, dont l'intégrité serait compromise si on autorisait trop facilement les contestations indirectes ou l'engagement d'une nouvelle instance à l'égard de questions déjà tranchées.

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.

Dans *The Doctrine of Res Judicata in Canada* (2000), p. 94 et suiv., D. J. Lange attribue l'application aux organismes administratifs canadiens de la doctrine de la préclusion découlant d'une question déjà tranchée à certaines décisions datant du milieu du XIX^e^ siècle — notamment les affaires *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103 (C.S.), p. 104-105, et *Bell c. Miller* (1862), 9 Gr. 385 (Ch. H.-C.), p. 386. Parmi les arrêts contemporains rendus par des cours d'appel, mentionnons les suivants : *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622 (C.A.C.-B.); *Rasanen*, précité; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (C.A. Alb.); *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326 (C.A. Ont.); et *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). Voir également *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Des modifications s'imposaient en raison des « différences importantes qui peuvent exister entre ces deux types d'ordonnances [c.-à-d. les ordonnances administratives et les ordonnances judiciaires], notamment quant à leur nature juridique et la place des institutions qui les rendent à l'intérieur de la structure étatique » : *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, par. 4. On s'entend généralement pour dire que les ordonnances des cours de justice sont des ordonnances de nature judiciaire; il n'en est pas de même pour les innombrables ordonnances rendues par les différents tribunaux administratifs.

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

Dans le présent pourvoi, les parties n'ont pas plaidé la préclusion fondée sur la « cause d'action », estimant apparemment que le cadre législatif de la demande fondée sur la LNE distingue suffisamment cette demande du cadre juridique de common law de l'instance judiciaire. Je n'en dirai par conséquent pas davantage à ce sujet. Les parties ont cependant lié contestation quant à l'application de la préclusion découlant d'une question

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

déjà tranchée et à la pertinence de la règle prohibant les contestations indirectes.

La préclusion découlant d'une question déjà tranchée a été définie de façon précise par le juge Middleton de la Cour d'appel de l'Ontario dans l'arrêt *McIntosh c. Parent*, [1924] 4 D.L.R. 420, p. 422 :

> [TRADUCTION] Lorsqu'une question est soumise à un tribunal, le jugement de la cour devient une décision définitive entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure. [Je souligne.]

Le juge Laskin (plus tard Juge en chef) a souscrit à cet énoncé dans ses motifs de dissidence dans l'arrêt *Angle*, précité, p. 267-268. Cette description des aspects visés par la préclusion (« [l]es droits, questions ou faits distinctement mis en cause et directement réglés ») est plus exigeante que celle utilisée dans certaines décisions plus anciennes à l'égard de la préclusion fondée sur la cause d'action (par exemple [TRADUCTION] « toute question ayant été débattue ou qui aurait pu à bon droit l'être », *Farwell*, précité, p. 558). S'exprimant au nom de la majorité dans l'arrêt *Angle*, précité, p. 255, le juge Dickson (plus tard Juge en chef) a également fait sienne la définition plus exigeante de l'objet de la préclusion découlant d'une question déjà tranchée. « Il ne suffira pas », a-t-il dit, « que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. » La question qui est censée donner naissance à la préclusion doit avoir été « fondamentale à la décision à laquelle on est arrivé » dans l'affaire antérieure. En d'autres termes, comme il est expliqué plus loin, la préclusion vise les faits substantiels, les conclusions de droit ou les conclusions mixtes de fait et de droit (« les questions ») à l'égard desquels on a nécessairement statué (même si on ne

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.

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

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

l'a pas fait de façon explicite) dans le cadre de l'instance antérieure.

25 Les conditions d'application de la préclusion découlant d'une question déjà tranchée ont été énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254 :

(1) que la même question ait été décidée;

(2) que la décision judiciaire invoquée comme créant la [préclusion] soit finale; et

(3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la [préclusion] est soulevée, ou leurs ayants droit.

26 L'appelante soutient que l'agente des normes d'emploi n'a pas — bien quelle ait été tenue de le faire — pris sa décision de manière judiciaire. L'agente disposait, en vertu de la LNE, de la compétence nécessaire pour connaître de la réclamation, mais elle a perdu cette compétence en omettant de communiquer à l'appelante les prétentions de l'employeur et de lui donner la possibilité de les réfuter. L'agente n'a donc jamais rendu une « décision judiciaire » comme elle était tenue de le faire. L'appelante soutient en outre que sa propre omission d'exercer son droit de demander la révision administrative interne de la décision de l'agente ne devrait pas se voir accorder l'effet déterminant que lui a attribué la Cour d'appel de l'Ontario. Selon elle, même si les conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies, la cour avait, dans les circonstances de l'espèce, le pouvoir discrétionnaire de la soustraire aux effets draconiens de la préclusion *per rem judicatem*, et elle a commis une erreur en s'abstenant de le faire.

A. *Le cadre législatif*

1. L'agent des normes d'emploi

27 La LNE s'applique à « tout contrat de travail, verbal ou écrit, exprès ou implicite » en Ontario (par. 2(2)), sous réserve de certaines exceptions prévues par règlement, et elle établit un certain

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).

nombre de normes d'emploi minimales en vue de protéger les employés. Ces normes portent notamment sur les heures de travail, le salaire minimum, le salaire pour les heures supplémentaires, les régimes d'avantages sociaux, les jours fériés et les congés payés. Plus particulièrement, la Loi établit une procédure sommaire permettant aux employés qui s'estiment lésés parce que leur employeur aurait omis de se conformer à ces normes de demander réparation à cet égard. L'objectif est d'offrir, dans les cas appropriés, un recours rapide et peu coûteux. Au premier palier, l'examen du différend est confié à un agent des normes d'emploi. Fonctionnaires du ministère du Travail, ces personnes n'ont généralement pas de formation juridique, mais elles possèdent une certaine expérience en matière de relations de travail. La Loi ne prescrit pas la procédure à suivre pour statuer sur les demandes. L'agent des normes d'emploi dispose de pouvoirs étendus qui l'autorisent notamment à pénétrer dans des locaux, à effectuer des inspections, à emporter des documents avec lui et à interroger toute personne à l'égard de questions pertinentes. S'il constate l'inobservation de la loi, l'agent dispose de larges pouvoirs afin de la faire respecter (art. 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.

En règle générale, sur réception de la demande d'un employé, l'agent des normes d'emploi communique avec l'employeur pour vérifier si le salaire est effectivement impayé et, dans l'affirmative, pour connaître la raison du non-paiement. Bien que, dans la présente affaire, l'agente des normes d'emploi se soit entretenue avec l'appelante pendant une heure, rien n'exige la tenue d'une telle rencontre et, manifestement, aucune audience à laquelle participeraient les deux parties n'est envisagée. D'aucuns estimeraient qu'il s'agit d'une procédure expéditive tout à fait inappropriée pour trancher de façon définitive des prétentions contractuelles présentant une certaine complexité sur les plans juridique et factuel.

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

Ce mécanisme présente de nombreux avantages pour les employés. Les services de l'agent des normes d'emploi sont gratuits. La représentation par avocat n'est pas nécessaire. L'instance se déroule plus rapidement que ce à quoi on pourrait

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.

vraisemblablement s'attendre devant les tribunaux judiciaires. À ces avantages correspondent toutefois des désavantages. Il est probable que l'agent n'a pas de formation juridique et qu'il n'a ni le temps ni les ressources nécessaires pour examiner une demande de nature contractuelle comme cela se passerait dans la salle d'audience d'une cour de justice. Au moment où ces procédures se sont déroulées, des règles inégales s'appliquaient en matière d'appel (ou de « révision » selon les termes de la Loi). En effet, l'employeur pouvait demander de plein droit la révision de la décision (art. 68). Toutefois, comme nous le verrons plus loin, l'employé pouvait lui aussi présenter une demande de révision, mais le directeur pouvait refuser d'y donner suite (par. 67(3)). De même, au cours de la période pertinente le montant des demandes à l'égard desquelles l'agent des normes d'emploi avait compétence n'était pas plafonné. La Loi a depuis été modifiée et seules les réclamations d'au plus 10 000 $ sont maintenant visées (L.O. 1996, ch. 23, par. 19(1)). Si, en l'espèce, l'agente avait statué en faveur de l'employée, l'employeur aurait pu devoir supporter une obligation de 300 000 $ découlant d'une décision présentant de profondes lacunes, à moins d'avoir gain de cause à la suite d'une révision administrative ou d'un contrôle judiciaire.

2. The Review Process

2. La procédure de révision

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.

30 Comme nous l'avons indiqué, les employés ne peuvent pas interjeter appel de plein droit. En vertu du par. 67(2) de la Loi, l'employé insatisfait de la décision rendue au premier palier peut, dans les 15 jours qui suivent la mise à la poste de la décision, demander par écrit au directeur de réviser cette décision. Aux termes du par. 67(3), « le directeur peut nommer un arbitre de griefs pour tenir une audience » (je souligne). L'emploi du mot « peut » confère au directeur le pouvoir discrétionnaire de décider s'il y aura ou non une audience. La Cour d'appel de l'Ontario a souligné ce point, mais a affirmé que les parties y avaient attaché peu d'importance.

It seems clear the legislature did not intend to confer an appeal as of right. Where the Director

31 Il paraît clair que le législateur n'a pas voulu créer un appel de plein droit. Lorsque le directeur

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.

nomme un arbitre de griefs, la Loi exige la tenue d'une audience. Il en résulte évidemment des délais et des dépenses supplémentaires pour le ministère et les parties. La juxtaposition des auxiliaires « *may* » et « *shall* » dans la version anglaise du par. 67(3) (et, dans la version française, l'indication que le directeur « peut nommer un arbitre de griefs pour tenir une audience » (je souligne)) écarte tout doute à cet égard. Le législateur ontarien entendait que le directeur dispose du pouvoir discrétionnaire de refuser de saisir un arbitre de griefs d'une demande qui, à son avis, n'est tout simplement pas justifiée. Même les arbitres chargés de la révision prévue au par. 67(3) de la LNE ne sont pas tenus par la loi de posséder une formation juridique. Le législateur ontarien a probablement jugé qu'il n'était pas souhaitable que tout employé insatisfait d'une décision puisse obtenir de plein droit la révision de celle-ci, compte tenu particulièrement du fait que la somme en jeu est souvent relativement modeste. Il va de soi que ce pouvoir discrétionnaire doit être exercé en conformité avec les principes pertinents, mais il n'en demeure pas moins un pouvoir discrétionnaire.

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.

Si une révision interne avait été ordonnée, un arbitre aurait alors examiné *de novo* la demande de l'appelante et aurait sans aucun doute permis à cette dernière de prendre connaissance des documents de l'employeur et lui aurait donné la possibilité d'y répondre et de les commenter. Je reconnais que, sous le régime de la Loi, les vices procéduraux qui surviennent à l'étape de la décision initiale, y compris l'omission de donner aux intéressés un préavis suffisant et la possibilité de se faire entendre pour réfuter la thèse de la partie adverse, peuvent être corrigés à l'étape de la révision. L'intimée soutient que, du fait que l'appelante a choisi de se prévaloir de la Loi, elle devait recourir au mécanisme de révision prévue pour celle-ci si elle était insatisfaite de la décision rendue au premier palier. Comme elle ne l'a pas fait, elle est précluse de continuer de réclamer la somme de 300 000 $. L'appelante réplique que la procédure prévue par la LNE souffrait de lacunes si profondes qu'il lui était loisible de renoncer à y recourir.

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

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.

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

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 Doc-*

B. *L'applicabilité de la préclusion découlant d'une question déjà tranchée*

1. Préclusion découlant d'une question déjà tranchée : analyse à deux volets

33 Les règles régissant la préclusion découlant d'une question déjà tranchée ne doivent pas être appliquées machinalement. L'objectif fondamental est d'établir l'équilibre entre l'intérêt public qui consiste à assurer le caractère définitif des litiges et l'autre intérêt public qui est d'assurer que, dans une affaire donnée, justice soit rendue. (Il existe des intérêts privés correspondants.) Il s'agit, au cours de la première étape, de déterminer si le requérant (en l'occurrence l'intimée) a établi l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Dans l'affirmative, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion *devrait* être appliquée : *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), par. 32; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 38-39; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), par. 56.

34 L'appelante avait parfaitement le droit, en première instance, de saisir la Cour supérieure de l'Ontario de ses diverses réclamations financières. L'intimée ne pouvait se voir accorder de plein droit l'application de la préclusion. Il appartenait à la cour de décider, dans l'exercice de son pouvoir discrétionnaire, s'il convenait qu'elle refuse de connaître ou non de certains aspects de la demande ayant déjà fait l'objet de la procédure administrative engagée sous le régime de la LNE.

2. La nature judiciaire de la décision

35 L'exigence fondamentale selon laquelle la décision antérieure doit être une décision judiciaire est un élément qui est commun aux conditions préalables à l'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Selon la doc-

trine of Res Judicata (3rd ed. 1996), at 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:

trine (voir, par exemple, G. Spencer Bower, A. K. Turner et K. R. Handley, *The Doctrine of Res Judicata* (3e éd. 1996), par. 18-20), trois éléments peuvent être pris en considération. Premièrement, il faut se pencher sur la nature du décideur administratif ayant rendu la décision. S'agit-il d'un organe pouvant être investi d'un pouvoir juridictionnel et capable d'exercer ce pouvoir? Deuxièmement, sur le plan juridique, la décision litigieuse devait-elle être prise judiciairement? Troisièmement — question mixte de fait et de droit — la décision *a-t-elle été* rendue de manière judiciaire? Il s'agit d'exigences distinctes :

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.

[TRADUCTION] Il ne sert à rien de prouver que la prétendue chose jugée était une décision ou qu'elle a été prononcée conformément aux principes applicables aux tribunaux judiciaires à moins qu'elle ait été rendue par un tel tribunal dans l'exercice de son pouvoir juridictionnel; il ne suffit pas non plus qu'elle ait été prononcée par un tel tribunal, sauf s'il s'agit d'une décision judiciaire sur le fond. Par conséquent, il importe de bien saisir dès le départ ce qu'est un tribunal judiciaire et ce qu'est une décision judiciaire pour les fins qui nous occupent.

(Spencer Bower, Turner and Handley, *supra*, para. 20)

(Spencer Bower, Turner et Handley, *op. cit.*, par. 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:

En ce qui concerne le troisième élément, soit la question de savoir si la décision en cause a effectivement été rendue conformément aux exigences applicables aux décisions judiciaires, je souligne l'affirmation suivante, faite récemment par le juge Handley (éditeur actuel de l'ouvrage *The Doctrine of Res Judicata*) en dehors du cadre de ses fonctions de juge :

The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

[TRADUCTION] La décision antérieure — qu'elle soit judiciaire, arbitrale ou administrative — doit avoir été rendue dans les limites de la compétence du décideur pour que puisse être plaidée la préclusion découlant d'une question déjà tranchée.

("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

(« Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214, 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

En l'espèce, le désaccord porte principalement sur ce troisième élément : une décision prise sans avoir respecté les exigences en matière de préavis et sans avoir donné à l'intéressé la possibilité de se

estoppel? In my opinion, the answer to this question is yes.

(a) *The Institutional Framework*

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)*

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

One distinction between administrative and judicial decisions lies in differentiating adjudicative

faire entendre est-elle *capable* de fonder l'application de la préclusion découlant d'une question déjà tranchée? À mon avis, la réponse à cette question est oui.

a) *Le cadre institutionnel*

38 La décision sur laquelle s'est appuyé le juge Rosenberg de la Cour d'appel de l'Ontario à cet égard a trait à la fonction et au rôle génériques de l'agent des normes d'emploi : *Re Downing and Graydon*, précité, le juge Blair, p. 305 :

> [TRADUCTION] En l'espèce, l'agent des normes d'emploi a le pouvoir de décider ainsi que celui d'enquêter. Il fait enquête afin de recueillir les renseignements qui fonderont la décision qu'il doit rendre. Ses fonctions comportent tous les indices importants de l'exercice d'un pouvoir judiciaire, notamment la détermination des faits, l'application du droit à ces faits et la prise d'une décision liant les parties.

Les parties ne contestent pas le fait que les fonctionnaires chargés de l'application de la LNE pouvaient à bon droit être investis de fonctions juridictionnelles devant être exercées de manière judiciaire. Le plafond de 4 000 $ que prévoyait la Loi à l'égard des réclamations pour salaire impayé (à l'exclusion de l'indemnité de cessation d'emploi et des prestations payables au titre des dispositions relatives au congé de maternité et au congé parental) a été aboli en 1991 par L.O. 1991, ch. 16, par. 9(1), mais après la décision rendue en application de la LNE dans la présente affaire, un nouveau plafond de 10 000 $ a été fixé. Il s'agit du même plafond auquel est assujettie la Cour des petites créances par la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, par. 23(1), et le Règl. de l'Ont. 626/00, par. 1(1).

b) *La nature des décisions rendues en application du par. 65(1)*

39 Un tribunal administratif peut exercer des fonctions judiciaires ainsi que des fonctions administratives ou ministérielles. Il en est de même d'un fonctionnaire.

40 Une des caractéristiques qui distinguent les décisions administratives des décisions judiciaires est

tive 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.

la différence qui existe entre des fonctions juridictionnelles et des fonctions d'enquête. Dans l'exercice des secondes, l'agent des normes d'emploi prend l'initiative de recueillir des éléments d'information. Il agit en tant qu'enquêteur autonome et n'est pas assujetti aux contraintes de la procédure contradictoire. La distinction entre les pouvoirs d'enquête et les pouvoirs juridictionnels a été examinée dans l'arrêt *Guay c. Lafleur*, [1965] R.C.S. 12, p. 17-18. L'inapplicabilité de la préclusion découlant d'une question déjà tranchée aux enquêtes administratives a été mentionnée par le lord juge Diplock dans *Thoday c. Thoday*, [1964] P. 181 (C.A. Angl.), 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, § 7:1310, p. 7-7.

Quoique les agents des normes d'emploi puissent avoir des fonctions non juridictionnelles, lorsqu'ils accomplissent des fonctions juridictionnelles ils sont tenus de le faire de manière judiciaire. Bien qu'ils aient recours à des procédures plus souples que celles des cours de justice, leurs décisions doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective. Il s'agit là d'une caractéristique de fonctions judiciaires : D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, par. 7:1310, p. 7-7.

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

La décision qui statue sur une plainte après l'obtention de l'information pertinente est une décision de nature judiciaire.

(c) *Particulars of the Decision in Question*

c) *Le détail de la décision en cause*

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.

La Cour d'appel de l'Ontario a conclu que la décision de l'agente des normes d'emploi avait de fait été rendue au mépris des principes de justice naturelle. L'appelante n'a pas été informée des prétentions de l'employeur et n'a pas eu la possibilité de les réfuter.

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:

L'appelante soutient qu'il ne suffit pas de dire que la décision *aurait dû* être prise de manière judiciaire, mais qu'il faut plutôt se demander : La décision a-t-elle été prise de manière judiciaire en l'espèce? Cet argument trouve un certain appui dans l'arrêt *Rasanen*, précité, où madame le juge Abella de la Cour d'appel de l'Ontario a dit ceci, à la p. 280 :

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.]

[TRADUCTION] Pour autant que la procédure d'instruction du tribunal administratif donne à chacune des parties la possibilité de connaître les prétentions de l'autre et de les réfuter et que la décision rendue relève de la compétence du tribunal, peu importe alors à quel point la procédure s'apparente à un procès ou aux procédures préalables à celui-ci, je ne vois aucune raison fondée sur des principes qui justifierait, dans le cadre d'une action subséquente, de soustraire les questions décidées par un tribunal administratif à l'application de la préclusion découlant d'une question déjà tranchée. [Je souligne.]

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: 45

Cette approche a subséquemment été retenue par des tribunaux de première instance en Ontario : *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (C. Ont. (Div. gén.)); *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (C. Ont. (Div. gén.)); *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (C. Ont. (Div. gén.)); *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (C.S.J.). Les propos suivants du juge Métivier dans l'affaire *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (C. Ont. (Div. gén.)), p. 60, reflètent ce point de vue :

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".

[TRADUCTION] La partie demanderesse s'appuie sur [l'arrêt *Rasanen*] et sur d'autres décisions au même effet pour affirmer que le principe de la préclusion découlant d'une question déjà tranchée devrait s'appliquer aux décisions administratives. Ce n'est le cas que lorsque la décision est le fruit d'un processus décisionnel équitable et impartial « comportant une audience dans le cadre de laquelle chacune des parties a la possibilité de prendre connaissance des prétentions de l'autre et de les réfuter ».

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.). 46

Dans l'arrêt *Wong*, précité, la Cour d'appel de l'Alberta a rejeté une contestation visant la décision d'un agent de révision en matière de normes d'emploi et a conclu qu'il était possible de plaider la préclusion à l'égard de cette décision dans la mesure où [TRADUCTION] « l'appelant connaissait les prétentions formulées contre lui et avait eu la possibilité de faire valoir son point de vue » (par. 20). Voir également *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (C.S.C.-B.).

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.

En toute déférence, j'estime que la thèse voulant que l'inobservation des principes de justice naturelle ait pour effet d'enlever tout caractère « judiciaire » à la décision fondée sur la LNE repose sur une idée fausse. Il se peut que la décision présente des failles, mais elle demeure « judiciaire » (plutôt qu'administrative ou législative). Une fois qu'il est établi que l'auteur de la décision pouvait être investi d'un pouvoir juridictionnel, qu'il pouvait exercer ce pouvoir et que la décision litigieuse devait être rendue de manière judiciaire, celle-ci ne perd pas son caractère « judiciaire » parce que son auteur a commis une erreur dans l'accomplissement de ses fonctions. Dans un vieil arrêt, *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), il a été jugé que la déclaration de culpabilité inscrite par un magistrat albertain ne pouvait être annulée pour cause d'absence de compétence sur le fondement que les témoignages ne révélaient aucune preuve étayant la déclaration de culpabilité ou parce que le magistrat s'était donné des directives erronées dans l'examen de la preuve. Une distinction a été établie entre le pouvoir de juger les accusations et les erreurs qui auraient été commises en matière d'[TRADUCTION] « observation de la loi dans l'exercice de ce pouvoir » (p. 156). Si les conditions préalables à l'exercice d'une compétence de nature judiciaire sont réunies (comme c'est le cas en l'espèce), toute erreur subséquente dans l'exercice de cette compétence, y compris les manquements aux règles de la justice naturelle, ne rend pas la décision nulle mais annulable : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 584-585. La décision reste une décision « judiciaire », quoiqu'elle souffre de sérieuses lacunes du fait de l'absence de préavis suffisant et du défaut d'accorder la possibilité de se faire entendre.

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

Comme je l'ai mentionné plus tôt, la préclusion *per rem judicatem* est étroitement liée à la règle prohibant les contestations indirectes et, de fait, aux principes régissant le contrôle judiciaire. Si l'appelante s'était adressée à une cour de justice pour demander le contrôle judiciaire de la décision de l'agente des normes d'emploi sans se prévaloir au préalable du mécanisme de révision administrative interne, on lui aurait opposé l'arrêt *Harelkin*, précité, de notre Cour. Dans cette affaire, la

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.

demande de contrôle judiciaire qu'avait présentée un étudiant de l'université de Regina en vue d'obtenir l'annulation de la décision rendue par un comité d'une faculté de cet établissement et portant que ses notes étaient insatisfaisantes a été rejetée. Ce comité était tenu d'agir judiciairement, mais, tout comme en l'espèce, il avait omis de donner à l'étudiant un préavis suffisant et la possibilité de se faire entendre. Il a été jugé que cette omission n'avait pas fait perdre au comité sa compétence juridictionnelle. La décision du comité était susceptible de contrôle judiciaire, mais notre Cour, dans l'exercice de son pouvoir discrétionnaire, a refusé de faire droit à ce recours. Retenir la thèse de l'appelante en l'espèce entraînerait un résultat anormal. Si elle a raison de prétendre que l'agente des normes d'emploi a cessé d'agir judiciairement et a perdu compétence, à tout point de vue, y compris pour l'application de la préclusion découlant d'une question déjà tranchée, l'obstacle au contrôle judiciaire que constitue l'arrêt *Harelkin* serait habilement contourné. Elle n'aurait en effet pas besoin de demander le contrôle judiciaire de la décision de l'agente pour la faire annuler puisque, selon ce qu'elle soutient, elle a d'office droit à ce qu'on n'en tienne pas compte dans le cadre de son action au civil.

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

49

La thèse avancée par l'appelante créerait également une situation anormale pour ce qui concerne la règle prohibant les contestations indirectes. Comme l'a souligné l'intimée, le refus d'appliquer la préclusion découlant d'une question déjà tranchée en l'espèce équivaudrait, en un sens, à faire droit à une contestation indirecte de la décision de l'agente des normes d'emploi, décision qui n'a été contestée ni par voie de révision administrative ni par voie de contrôle judiciaire. Suivant la thèse de l'appelante, un excès de compétence pendant le déroulement de la procédure administrative prévue par la LNE empêche l'application de la préclusion découlant d'une question déjà tranchée, bien que dans l'arrêt *Maybrun*, précité, notre Cour ait dit qu'une mesure outrepassant la compétence que possédait initialement le décideur ne donne pas nécessairement ouverture aux contestations indirectes de cette décision. Suivant cet arrêt, tout dépend du forum devant lequel le législateur a

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

voulu que soit présentée la contestation d'ordre juridictionnel, savoir le tribunal administratif chargé de la révision ou une cour de justice (par. 49).

À mon sens, il faut inciter le plaideur qui n'a pas gain de cause dans le cadre d'une instance administrative à se prévaloir de tous les recours administratifs qui lui sont ouverts. Il convient de rappeler que, en l'espèce, l'appelante a opté pour le recours prévu par la LNE. Tant les employeurs que les employés doivent être en mesure de s'en remettre aux décisions rendues sous le régime de la LNE à moins qu'une mesure ne soit prise rapidement pour en obtenir l'annulation. Un objectif important du régime établi par le législateur dans la LNE est de faciliter le règlement rapide des différends portant sur les indemnités de licenciement, de sorte que l'employé et l'employeur puissent tourner la page. Dans les cas où, comme en l'espèce, les questions touchant à l'application de la LNE sont tranchées dans un délai d'un an ou moins, il est néanmoins possible, en Ontario, d'intenter une action contractuelle dans les six ans qui suivent le manquement allégué, ce qui peut donner lieu à cinq années d'incertitude. De telles situations doivent être évitées.

En résumé, il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Les conditions préalables à l'exercice de la compétence juridictionnelle doivent être réunies. Lorsqu'il est possible d'affirmer que le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais qu'il a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin*, précité, et celles

governing judicial review in *Harelkin*, *supra*, and collateral attack in *Maybrun*, *supra*.

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.

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*

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

relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*, précité.

52 Là où je diverge d'opinion avec la Cour d'appel de l'Ontario, c'est relativement à sa conclusion que le fait pour l'appelante de ne pas avoir demandé la révision administrative de la décision lacunaire de l'agente porte un coup fatal à la thèse de l'appelante. En toute déférence, je suis d'avis que le refus de l'agente des normes d'emploi de donner à l'appelante un préavis suffisant et la possibilité de se faire entendre est un facteur très important dans l'exercice du pouvoir discrétionnaire de la cour, comme nous le verrons plus loin.

53 Je vais maintenant examiner les trois conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254.

3. La préclusion découlant d'une question déjà tranchée : application des conditions

a) *La condition requérant que la même question ait déjà été tranchée*

54 Traditionnellement, on définit la cause d'action comme étant tous les faits que le demandeur doit prouver, s'ils sont contestés, pour étayer son droit d'obtenir jugement de la cour en sa faveur : *Poucher c. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Pour que le demandeur ait gain de cause, chacun de ces faits (souvent qualifiés de faits substantiels) doit donc être établi. Il est évident que des causes d'action différentes peuvent avoir en commun un ou plusieurs faits substantiels. En l'espèce, par exemple, l'existence d'un contrat de travail est un fait substantiel commun au recours administratif et à l'action pour congédiement injustifié intentée au civil par l'appelante. L'application de la préclusion découlant d'une question déjà tranchée signifie simplement que, dans le cas où le tribunal judiciaire ou administratif compétent a conclu, sur le fondement d'éléments de preuve ou d'admissions, à l'existence (ou à l'inexistence) d'un fait pertinent — par exemple un contrat de travail valable — , cette même question ne peut être débattue à nouveau dans le cadre d'une instance ultérieure opposant les mêmes parties. En d'autres termes, la pré-

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

clusion vise les questions de fait, les questions de droit ainsi que les questions mixtes de fait et de droit qui sont nécessairement liées à la résolution de cette « question » dans l'instance antérieure.

En l'espèce, les parties conviennent que la condition relative à l'existence d'une « même question » est remplie. Dans son action pour congédiement injustifié, l'appelante réclame 300 000 $ à titre de commissions impayées. Cela met en jeu le droit même qui lui a été refusé dans le cadre de l'instance fondée sur la LNE. Une ou plusieurs des questions de fait ou de droit essentielles à la reconnaissance de ce droit ont nécessairement été tranchées en faveur de l'employeur dans le cadre de la procédure administrative. Si la préclusion découlant d'une question déjà tranchée s'applique, cela a pour effet d'empêcher l'appelante de soutenir que ces questions devraient maintenant être tranchées en sa faveur.

b) *La condition requérant que la décision judiciaire qui entraînerait l'application de la préclusion ait un caractère définitif*

Comme il a été indiqué plus tôt, la condition requérant que la décision antérieure soit une décision « judiciaire » (plutôt qu'administrative ou législative) est satisfaite en l'espèce.

En outre, je souscris à l'opinion de la Cour d'appel de l'Ontario selon laquelle, en raison du fait que l'employée ne s'est pas prévalue du mécanisme de révision interne, la décision de l'agente des normes d'emploi avait un caractère définitif pour l'application de la Loi et était donc susceptible, dans le cours normal des choses, de faire naître la préclusion.

J'ai déjà souligné que, en l'espèce, contrairement à l'affaire *Harelkin*, précitée, l'appelante ne disposait d'aucun droit d'appel. Elle pouvait uniquement demander au directeur de faire réviser par un arbitre la décision de l'agente des normes d'emploi. Bien qu'il puisse s'agir d'un facteur à prendre en considération dans l'exercice du pouvoir discrétionnaire de refuser l'application de la préclusion découlant d'une question déjà tranchée, il n'a aucun effet sur le caractère définitif de la décision.

decision must nevertheless be treated as final for present purposes.

L'appelante pourrait à juste titre prétendre, dans le cadre d'une demande de contrôle judiciaire, que contrairement à M. Harelkin elle ne disposait pas, de plein droit, d'un autre « recours approprié ». Néanmoins, la décision de l'agente des normes d'emploi doit être tenue pour définitive pour les fins du présent pourvoi.

(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*

c) *La condition requérant que les parties à la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties aux procédures au cours desquelles la préclusion est plaidée, ou leurs ayants droit*

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§24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

Cette condition garantit la réciprocité. Si elle ne s'appliquait pas, un tiers aux procédures antérieures pourrait exiger qu'une partie à celles-ci soit considérée comme liée, dans le cadre d'une instance ultérieure, par les conclusions tirées au cours des premières procédures, alors que ce tiers, qui ne serait partie qu'à la seconde instance, ne serait pas lié par ces conclusions : *Machin*, précité; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), le juge Laskin, p. 339-340. Cette condition de réciprocité a fait l'objet de certaines critiques par le juge McEachern (plus tard Juge en chef de la Colombie-Britannique), pendant qu'il siégeait en première instance, dans l'affaire *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (C.S.), p. 96, et elle a été modifiée de façon substantielle dans bon nombre d'États américains : voir Holmested et Watson, *op. cit.*, 21§24, et G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 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.

Évidemment, la notion de « lien de droit » est assez élastique. J. Sopinka, S. N. Lederman et A. W. Bryant, les éminents éditeurs de l'ouvrage *The Law of Evidence in Canada* (2e éd. 1999), affirment avec un certain pessimisme, à la p. 1088, qu'[TRADUCTION] « [i]l est impossible d'être catégorique quant à l'étendue de l'intérêt qui crée un lien de droit » et qu'il faut trancher au cas par cas. En l'espèce, les parties sont les mêmes et il n'y a pas lieu d'explorer davantage les confins des notions de « réciprocité » et d'« identité des parties ».

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:

J'arrive à la conclusion que les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies en l'espèce.

4. L'exercice du pouvoir discrétionnaire

L'appelante fait valoir que la Cour doit néanmoins exercer son pouvoir discrétionnaire et refuser l'application de la préclusion. Il ne fait aucun doute que ce pouvoir discrétionnaire existe. Dans l'arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, le juge Estey a souligné, à la p. 101, que dans le contexte d'une instance judiciaire « ce pouvoir discrétionnaire est très limité dans son application ». À mon avis, le pouvoir discrétionnaire est nécessairement plus étendu à l'égard des décisions des tribunaux administratifs, étant donné la diversité considérable des structures, missions et procédures des décideurs administratifs.

Dans l'arrêt *Bugbusters*, précité, le juge Finch de la Cour d'appel (maintenant Juge en chef de la Colombie-Britannique) a fait les observations suivantes, au par 32 :

> [TRADUCTION] Il faut toujours se rappeler que, bien que les trois conditions d'application de la préclusion découlant d'une question déjà tranchée doivent être réunies pour que celle-ci puisse être invoquée, le fait que ces conditions soient présentes n'emporte pas nécessairement l'application de la préclusion. Il s'agit d'une doctrine issue de l'*equity* et, comme l'indique la jurisprudence, elle présente des liens étroits avec l'abus de procédure. Elle se veut un moyen de rendre justice et de protéger contre l'injustice. Elle implique inévitablement l'exercice par la cour de son pouvoir discrétionnaire pour assurer le respect de l'équité selon les circonstances propres à chaque espèce.

Mis à part, entre parenthèses, le fait que la préclusion *per rem judicatem* soit généralement considérée comme une doctrine de common law (contrairement à la préclusion fondée sur une promesse, qui tire clairement son origine de l'*equity*), j'estime qu'il s'agit d'un énoncé fidèle du droit applicable. Cette remarque incidente du juge Finch a été retenue et appliquée par la Cour d'appel de l'Ontario dans l'affaire *Schweneke*, précitée, par. 38 et 43 :

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.

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 . . . .

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.

In my view it was an error of principle not to address the factors for and against the exercise of

[TRADUCTION] Le pouvoir discrétionnaire de refuser de donner effet à la préclusion découlant d'une question déjà tranchée ne naît que lorsque les trois conditions d'application de la doctrine sont réunies. [. . .] Ce pouvoir discrétionnaire est nécessairement exercé au cas par cas et son application dépend de l'ensemble des circonstances. Dans l'exercice de ce pouvoir discrétionnaire, la cour doit se poser la question suivante : existe-t-il, en l'espèce, une circonstance qui ferait en sorte que l'application normale de la doctrine créerait une injustice?

. . .

. . . L'exercice du pouvoir discrétionnaire doit tenir compte des réalités propres à chaque affaire et non de préoccupations abstraites, qui sont présentes dans pratiquement tous les cas où la décision invoquée au soutien de la demande d'application a été rendue par un tribunal administratif et non par un tribunal judiciaire.

Voir également *Braithwaite*, précité, par. 56.

64 Les cours de justice d'autres pays du Commonwealth appliquent des principes analogues. Dans l'arrêt *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41, la Chambre des lords a exercé son pouvoir discrétionnaire et refusé d'appliquer la préclusion découlant d'une question déjà tranchée à l'égard d'une sentence arbitrale. Voici ce qu'a dit lord Keith of Kinkel, à la p. 50 :

[TRADUCTION] L'une des raisons d'être de la préclusion étant de rendre justice aux parties, il est loisible aux cours de justice de reconnaître que, dans certaines circonstances, son application rigide produirait l'effet contraire. . .

65 Dans la présente affaire, le juge Rosenberg a mentionné, aux p. 248-249, l'existence possible d'un pouvoir discrétionnaire potentiel mais, en toute déférence, il ne s'y est pas attardé. Il n'a ni examiné ni analysé le bien-fondé de l'exercice de ce pouvoir. Il a simplement conclu ainsi, à la p. 256 :

[TRADUCTION] En résumé, M^me^ Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

66 Je suis d'avis que la Cour d'appel a commis une erreur de principe en omettant de soupeser les fac-

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.

teurs favorables et défavorables à l'exercice du pouvoir discrétionnaire dont elle était clairement investie. Il ne s'agit pas d'un cas où notre Cour est invitée par la partie appelante à substituer son opinion à celle du juge des requêtes ou de la Cour d'appel. L'appelante a droit à ce que, à un certain point dans le processus, on examine de façon appropriée les facteurs pertinents à l'exercice du pouvoir discrétionnaire, et jusqu'à maintenant on ne l'a pas fait.

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.

La liste de ces facteurs n'est pas exhaustive. Elle comporte bon nombre de ceux qui ont été mentionnés dans l'arrêt *Maybrun* en rapport avec la règle prohibant les contestations indirectes. Le juge Laskin a lui aussi proposé une liste fort utile dans l'affaire *Minott*, précitée. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice concrète dans une affaire donnée. Sept facteurs, mentionnés ci-après, sont pertinents dans la présente affaire.

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

a) *Le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative*

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.]

En l'espèce, la LNE comporte le par. 6(1), qui prévoit ce qui suit :

> La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte. [Je souligne.]

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.)

Cette disposition tend à indiquer que, à l'époque pertinente, le législateur ontarien n'entendait pas que le forum prévu par la LNE ait pour effet d'exclure tous les autres. (De récentes modifications apportées à la Loi obligent désormais l'employé à choisir entre la procédure prévue par la LNE ou le recours aux tribunaux judiciaires. Cependant, même avant ces modifications, les cours de justice pouvaient à bon droit conclure que l'engagement de nouvelles procédures à l'égard d'une question constituait un abus : *Rasanen*, précité, le juge en chef adjoint Morden de la Cour d'appel de l'Ontario, p. 293, le juge Carthy, p. 288.)

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*

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 dis-

70 Bien qu'il soit généralement raisonnable pour un défendeur d'escompter pouvoir tourner la page après des procédures — y compris tout appel possible — au terme desquelles sa responsabilité n'a pas été retenue, en l'espèce l'appelante a intenté son action civile contre les intimés avant que l'agente des normes d'emploi n'ait rendu sa décision (comme l'y autorisait clairement la loi pertinente à l'époque). En conséquence, les intimés savaient parfaitement, en droit et en fait, qu'ils devaient se défendre dans des procédures parallèles se chevauchant dans une certaine mesure.

b) *L'objet de la loi*

71 Il est fort possible que le nœud d'une instance administrative soit totalement différent de celui d'un litige subséquent, même si une ou plusieurs des questions litigieuses sont les mêmes. Dans l'affaire *Bugbusters*, précitée, une entreprise forestière a été conscrite afin d'aller combattre un incendie de forêt en Colombie-Britannique. Elle a par la suite demandé le remboursement de ses dépenses en vertu de la *Forest Act*, R.S.B.C. 1979, ch. 140, de cette province. On a fait droit à sa demande *malgré* des allégations selon lesquelles l'incendie avait été causé par un de ses employés qui aurait négligemment jeté une cigarette. (Si l'allégation avait été prouvée, Bugbusters n'aurait pas eu droit au remboursement.) Sa Majesté a par la suite intenté une action en négligence de 5 000 000 $ contre Bugbusters pour être indemnisée des pertes occasionnées par le feu de forêt. Cette dernière a plaidé la préclusion découlant d'une question déjà tranchée. Exerçant son pouvoir discrétionnaire, la Cour d'appel a refusé d'appliquer la doctrine, notamment pour le motif suivant, exposé par le juge Finch, au par. 30 :

> [TRADUCTION] . . . pendant l'instance [en remboursement fondée sur la *Forest Act*], aucune des parties ne pouvait raisonnablement s'attendre à ce qu'il soit statué définitivement sur le droit de Sa Majesté d'être indemnisée de ses pertes.

Une remarque au même effet a été formulée par le juge Carthy dans l'affaire *Rasanen*, précitée, p. 290 :

> [TRADUCTION] Il serait injuste vis-à-vis d'un employé qui a demandé sans délai une indemnité limitée de

covery 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.

4 000 $, renonçant de ce fait à la communication de la preuve et au droit d'être représenté par avocat, de lui opposer ensuite qu'il est lié par le résultat de ce recours et par son effet sur la réclamation d'une somme dix fois plus élevée.

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

Une réserve semblable est formulée dans l'ouvrage américain *Restatement of the Law, Second : Judgments 2d* (1982), vol. 2, § 83(2)(e), où l'on fait état

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.

[TRADUCTION] . . . des éléments procéduraux requis pour que l'instance permette de régler décisivement le différend, compte tenu de l'ampleur et de la complexité de celui-ci, de l'urgence avec laquelle il faut le trancher et de la possibilité pour les parties de recueillir de la preuve et de formuler des arguments juridiques.

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

Je suis bien sûr conscient du fait que, en l'espèce, l'appelante a choisi la procédure prévue par la LNE. L'avocat de l'intimée a fait remarquer à juste titre, non sans une certaine exaspération :

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. . . .

[TRADUCTION] Comme l'indique clairement le dossier, M^me^ Danyluk était représentée par avocat avant la cessation d'emploi, au moment de celle-ci et par la suite. Son avocat et elle savaient fort bien qu'elle avait au départ le choix du forum devant lequel présenter sa réclamation pour salaire et commissions impayés. . .

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.

Néanmoins, l'objet de la LNE est d'offrir un moyen relativement rapide et peu coûteux de régler les différends entre employés et employeurs. Accorder un poids excessif aux décisions prises en vertu de la LNE, dans le contexte de l'application de la préclusion découlant d'une question déjà tranchée, obligerait vraisemblablement les parties, en pareils cas, à préparer une demande et une défense équivalentes à celles préparées dans le cadre d'un véritable procès et tendrait ainsi à enlever à l'ensemble du régime établi par la LNE son caractère expéditif. Cette situation compromettrait l'objectif visé par la loi.

(c) *The Availability of an Appeal*

c) *L'existence d'un droit d'appel*

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

Ce facteur correspond à celui de l'autre « recours approprié » applicable en matière de contrôle judiciaire : *Harelkin*, précité, p. 592. Dans la présente affaire, l'employée ne disposait d'aucun *droit* d'appel, mais la possibilité d'une révision

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*

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.

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*

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):

administrative et l'omission de s'en prévaloir doivent être retenues contre elle : *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660, (C.A.), p. 662.

d) *Les garanties offertes aux parties dans le cadre de l'instance administrative*

75 Comme il a été mentionné précédemment, la procédure expéditive propre à permettre la réalisation des objectifs de la LNE peut tout simplement ne pas convenir pour l'examen de complexes questions de fait ou de droit. Étant maîtres de leur procédure, les organismes administratifs peuvent écarter des éléments de preuve que les cours de justice estiment probants ou encore agir sur le fondement d'éléments que ces dernières ne jugent pas fiables. Si cela s'est produit, il peut s'agir d'un facteur à prendre en compte dans l'exercice du pouvoir discrétionnaire de la cour. En l'espèce, le manquement aux règles de justice naturelle est un facteur clé en faveur de l'appelante.

76 Dans l'affaire *Rasanen*, précitée, p. 295, le juge en chef adjoint Morden a souligné le point suivant, dans ses motifs de jugement concourants : [TRADUCTION] « Je n'exclus pas la possibilité que des lacunes dans la procédure ayant conduit à la première décision puissent à juste titre constituer un facteur dans la décision d'appliquer ou non la préclusion découlant d'une question déjà tranchée. » Le juge Laskin de la Cour d'appel de l'Ontario a tenu des propos analogues dans l'affaire *Minott*, précitée, p. 341-342.

e) *L'expertise du décideur administratif*

77 Dans la présente affaire, l'agente des normes d'emploi, qui n'avait aucune formation juridique, était appelée à trancher une question potentiellement complexe en matière de droit des contrats. L'approche expéditive qui convient pour la grande majorité des demandes fondées sur la LNE n'est pas le genre d'expertise requise en l'espèce. Un facteur similaire s'applique à l'égard de la règle prohibant les contestations indirectes (*Maybrun*, précité, par. 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.

. . . le fait que la contestation de l'ordonnance repose sur des considérations étrangères à l'expertise ou à la raison d'être d'une instance administrative d'appel suggère, sans toutefois être déterminant en lui-même, que le législateur n'a pas voulu réserver à cette instance le pouvoir exclusif de se prononcer sur la validité de l'ordonnance.

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

f) *Les circonstances ayant donné naissance à l'instance administrative initiale*

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:

Un argument qui peut être avancé en faveur de l'appelante est qu'elle s'est prévalue du recours fondé sur la LNE à un moment où l'imminence de son congédiement faisait d'elle une personne vulnérable. Il est peu probable que le législateur ait voulu qu'une procédure sommaire applicable à la réclamation de petites sommes fasse obstacle à l'examen approfondi de réclamations plus considérables. (La décision ultérieure du législateur de plafonner à 10 000 $ les réclamations pouvant être présentées en vertu de la LNE concorde avec cette interprétation.) Comme l'a fait observer le juge Laskin dans l'arrêt *Minott*, précité, p. 341-342 :

. . . 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 . . . .

[TRADUCTION] . . . les employés présentent une demande au moment où ils sont le plus vulnérables, soit immédiatement après la perte de leur emploi. Le fait qu'ils doivent invariablement agir rapidement pour demander réparation compromet leur aptitude à présenter adéquatement leur point de vue ou à réfuter la thèse de la partie adverse. . .

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.

Par contre, il convient de rappeler que dans la présente affaire l'appelante, agissant alors de son propre chef ou sur les conseils de son avocat, a inclus dans sa demande fondée sur la LNE les 300 000 $ réclamés à titre de commissions et elle doit assumer la responsabilité d'au moins une partie des difficultés résultant de cette décision.

(g) *The Potential Injustice*

g) *Le risque d'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

Suivant ce dernier facteur, qui est aussi le plus important, notre Cour doit prendre un certain recul et, eu égard à l'ensemble des circonstances, se demander si, dans l'affaire dont elle est saisie, l'application de la préclusion découlant d'une question déjà tranchée entraînerait une injustice. Le juge Rosenberg de la Cour d'appel a conclu que l'appelante n'avait pas été informée des allégations

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.

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

I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Lang Michener, Toronto.

Solicitors for the respondents: Heenan Blaikie, Toronto.

de l'intimée et n'avait pas eu la possibilité d'y répondre. Le juge Rosenberg était donc aux prises avec le problème signalé par le juge Jackson, dans ses motifs dissidents dans l'arrêt *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (C.A. Sask.), p. 21 :

> [TRADUCTION] Constituant un moyen de rendre justice aux parties dans le contexte d'une procédure contradictoire, la doctrine de l'autorité de la chose jugée porte en elle-même le germe de l'injustice, spécialement lorsque le droit des parties de se faire entendre est en jeu.

Indépendamment des diverses erreurs de nature procédurale commises par l'appelante en l'espèce, il n'en demeure pas moins que sa réclamation visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

81 Vu l'effet cumulatif des facteurs susmentionnés, je suis d'avis que notre Cour doit exercer son pouvoir discrétionnaire et refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée.

V. Le dispositif

82 Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Lang Michener, Toronto.

Procureurs des intimés : Heenan Blaikie, Toronto.

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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DATED at Toronto, July 27, 2017

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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

DECISION AND ORDER

EB-2017-0320

HYDRO ONE INC.

ORILLIA POWER DISTRIBUTION CORPORATION

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

BEFORE: Lynne Anderson
Presiding Member

Emad Elsayed
Member

Michael Janigan
Member

January 4, 2018

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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

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

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DATED at Toronto, February 5, 2018

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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

DECISION AND ORDER

EB-2016-0276

HYDRO ONE INC.

ORILLIA POWER DISTRIBUTION CORPORATION

Application for approval to purchase Orillia Power Distribution Corporation

BEFORE: Ken Quesnelle
Presiding Member and Vice-Chair

Christine Long
Member and Vice-Chair

Cathy Spoel
Member

April 12, 2018

TABLE OF CONTENTS

1 INTRODUCTION AND SUMMARY

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

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

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

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

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

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

2 THE APPLICATION

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

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

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

Process

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

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

The OEB provided for interrogatories and submissions on the application.

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

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

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

[2] EB-2017-0049

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

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

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

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

[3] EB-2017-0320

3 REGULATORY PRINCIPLES

3.1 The No Harm Test

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

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

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

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

   1.1 To promote the education of consumers.

2 To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

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

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

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

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

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

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

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

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

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

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

3.2 OEB Policy on Rate-Making Associated with Consolidation

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

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

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

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

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

4 DECISION ON THE ISSUES

4.1 Application of the No Harm Test

Price, Cost Effectiveness and Economic Efficiency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OEB Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19] Hydro One Final Argument, Attachment 1

Reliability and Quality of Electricity Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OEB Findings

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

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

Financial Viability

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

[26] Handbook, p. 7

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

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

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

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

OEB Findings

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

The OEB's primary considerations in this regard are:

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

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

4.2 Other Approval Requests

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

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

OEB Findings

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

5 CONCLUSION

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

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

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

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

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

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

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

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

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

DATED at Toronto April 12, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

12:6211 — *Generally*

The doctrine of *functus officio* provides that once an adjudicator has done everything necessary to perfect the decision, the decision-maker is barred from revisiting the decision other than to correct clerical or other minor technical errors.[489] Originally applicable to courts of law,[490] this rule also applies with some modifications to administrative tribunals, notwithstanding the presumption contained in the *Interpretation Acts*.[491] The basic principles of the doctrine of *functus officio* have been set out by Sopinka J. as follows:

> Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute.[492]

Thus, for example, a decision by an adjudicator awarding a letter of reference after he had decided that an employee had been dismissed for cause was held to be invalid on the ground that the adjudicator was *functus*.[493] Similarly, a rentalsman was held to be *functus*, and thus unable to cancel his order, after it had been made an order of the court.[496] And a human rights commission was held to be unable to allow some leeway in its compensation order.[497] As well, boards of variance may be barred from permitting a second variance by virtue of the doctrine,[498] as will workers' compensation panels in considering new evidence.[499]

Moreover, where an error in an award is perceived by a tribunal to be "one of substance," the tribunal cannot correct it once it has issued a final award.[500] Accordingly, the Canadian Pension Commission was unable to reduce the amount of a pension that it had awarded, with the result that an appellate tribunal had no jurisdiction to hear an appeal from the altered decision.[501] Likewise, a professional body cannot redefine its order for "supervision" over a disciplined

member on the basis of new criminal charges against him.[502]

On the other hand, if the matter in question is new in that the issue is different from that dealt with previously, the doctrine of *functus officio* will not apply.[503] Nor will it apply where a notice of decision was issued in error and there had never been any intention to issue a decision in an applicant's favour.[504] Furthermore, it has been held that a tribunal panel is not *functus* when it refers a matter to a plenary session.[505] And where, pursuant to its statutory mandate, a tribunal decided to state a case to court about the interpretation of its Regulations, it was held not to be *functus officio*.[506] Although the question has a jurisdictional aspect, it has been held that the standard of review where a tribunal determined that it was not *functus* is "reasonableness".[507]

FOOTNOTES

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[489] E.g. *Paley v. Fishing Lake First Nation* (2005), 282 F.T.R. 224 (FC) (adjudicator under *Canada Labour Code*); *Newfoundland (Treasury Board) v. N.A.P.E.* (2002), 2002 CarswellNfld 274, 217 Nfld. & P.E.I.R. 163 (Nfld. & Lab. C.A.).

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[490] See ***Doucet-Boudreau v. Nova Scotia (Minister of Education),*** 2003 CarswellNS 375, 2003 SCC 62 for a discussion of this principle as applied to trial judges.

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[491] *Legislation Act, 2006*, S.O. 2006, C. 21, Sch. F, s. 79; similar provisions are contained in the Interpretation Acts of other provinces. **See also** *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(3) for a generously formulated version of the presumption.

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[492] ***Chandler v. Alberta Assn. of Architects***, 1989 CarswellAlta 160, [1989] 2 S.C.R. 848 at pp. 861-62. **See also** *McCormick v. British Columbia (Superintendent of Motor Vehicles)* (2001), 2001 CarswellBC 1868, 96 B.C.L.R. (3d) 390 (BCSC) (adjudicator not *functus* until there was a decision); *Kheiri v. Canada (Minister of Citizenship and Immigration),* 2000 CarswellNat 1989, [2000] F.C.J. No. 1383 (FCTD) (application of *functus* doctrine unduly technical in circumstances).

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[493] *Royal Bank v. Procaccini* (1987), 24 Admin. L.R. 319 (FCA), cited in *Transport Georges Leger Inc. v. Groupil* (1993), 1993 CarswellNat 616, 72 F.T.R. 152 (FCTD). **See also** *I.M.P. Group Ltd. Aerospace Division (Comox) v. P.S.A.C.* (2007), 312 F.T.R. 297 (FC) (interest arbitrator *functus* at time of fourth award); *Teleglobe Canada Inc. v. Larouche* (1999), 1999 CarswellNat 1365, 170 F.T.R. 300 (FCTD).

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[496] *Kelsey v. Williams* (1980), 1980 CarswellBC 299, 24 B.C.L.R. 136 (B.C. Co. Ct.).

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[497] *Lodger's International Ltd. v. O'Brien* (1983), 1983 CarswellNB 134, 118 A.P.R. 342 (NBCA).

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498 *Heading v. Delta* (1994), 1994 CarswellBC 773, 22 M.P.L.R. (2d) 256 (BCSC). **See also** *Davidson v. Calgary (City)* (2006), 2006 CarswellAlta 1448, 52 Admin. L.R. (4th) 204 (Alta. Q.B.) (subdivision approval), rev'd on basis impugned decision not a reconsideration, but new application (2007), 65 Admin. L.R. (4th) 199 (Alta. C.A.).

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499 E.g. *Galger v. Saskatchewan (Workers' Compensation Board)*, 2009 CarswellSask 333, 2009 SKQB 206.

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500 *I.B.E.W., Local 213 v. Premier Cable Systems Ltd., Vancouver Division* (1985), 1985 CarswellBC 241, 65 B.C.L.R. 251 (BCSC); **see also** *Baudisch v. Canada (Civil Aviation Tribunal)* (1999), 1999 CarswellNat 1841, 247 N.R. 269 (FCA); *Baudisch v. Canada (Minister of Transport)*, [1997] F.C.J. No. 498 (FCA), aff'g (1997), 1997 CarswellNat 4292, 129 F.T.R. 241 (FCTD); *Olson v. Law Society of Manitoba* (1998), 1998 CarswellMan 171, 125 Man. R. (2d) 308 (Man. Q.B.); *Baxandall v. Canada (Attorney General)* (1996), 1996 CarswellNat 2107, 206 N.R. 296 (FCA).

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501 *Page v. Canada (Veterans Appeal Board)* (1994), 1994 CarswellNat 301, 82 F.T.R. 115 (FCTD); **see also** *Wiemer v. Director General, Canada Pension Plan Income Security Programs* (1996), 1996 CarswellNat 1960, 122 F.T.R. 24 (FCTD).

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502 *Saskatchewan Veterinary Medical Assn. v. Murray* (2002), 261 Sask. R. 22 (Sask. Q.B.).

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503 *CU.P.W. v. D'Aoust* (1991), 1991 CarswellOnt 1006, 7 O.R. (3d) 598 at para. 27 (Ont. Div. Ct.).

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504 *Nozem v. Canada (Minister of Citizenship and Immigration)* (2003), 2003 CarswellNat 4119, 10 Admin. L.R. (4th) 158 at para. 32 (FC). **See also** *Assn. of Justice Counsel v. Canada (Attorney General)*, 2016 CarswellNat 10096, 2016 FCA 56 (arbitrator not *functus* where award did not reflect intended decision); *Berberi and Canada (Attorney General), Re*, 2013 CarswellNat 3501, 2013 FC 921 at para. 44 (that tribunal premised decision on an agreed transaction but failed to make it enforceable justified retention of jurisdiction); *Salewski v. Canada (Minister of Citizenship and Immigration)* (2008), 331 F.T.R. 237 (FC) (permanent residence card wrongly issued; no final decision so *functus* doctrine not applicable). **Compare** *Narvaez v. Canada (Minister of Citizenship and Immigration)*, 2009 CarswellNat 2556, 2009 FC 514 (even though earlier decision wrongly made, officer had no basis to reopen).

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505 *C.U.P.E. v. Canadian Broadcasting Corp.* (1985), 1985 CarswellNat 158, 57 N.R. 188 (FCA).

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506 *Ottawa (City) v. Ontario (Attorney General)* (2002), 2002 CarswellOnt 2054, 64 O.R. (3d) 703 (Ont. C.A.).

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507 E.g. *Air Canada and CUPE, Re*, 2014 CarswellOnt 5357, 2014 ONSC 2552 (Ont. Div. Ct.) at para. 7. **See also** *Scimtar Enterprises Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2012 CarswellBC 910, 2012 BCSC 472 (not unreasonable for general manager to conclude that she was *functus officio*).

Date: 19980504
Docket: CA022657
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTER OF FORESTS

PLAINTIFF
(RESPONDENT)

AND:

BUGBUSTERS PEST MANAGEMENT INC.

DEFENDANT
(APPELLANT)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Finch

J. A. Dowler G.E.H. Vanderburgh	Counsel for the Appellant
D. C. Prowse J. D. Eastwood	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia March 2, 1998
Place and Date of Judgment	Vancouver, British Columbia May 4, 1998

Written Reasons by:

The Honourable Mr. Justice Finch

Concurred in by:

The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert

Reasons for Judgment of the Honourable Mr. Justice Finch:

I

[1] The defendant (Bugbusters) appeals the judgment of the Supreme Court of British Columbia pronounced 29 November, 1996 dismissing its motion for judgment on the grounds of issue estoppel. The question for the chambers judge, and for this Court, is whether the plaintiff's claim for damages alleged to result from the defendant's negligence in causing a forest fire, is barred by the decision of a statutory tribunal appointed under the ***Forest Act***, R.S.B.C. 1979 c.140 (the ***Act***) which held that Bugbusters was not shown to have caused the fire. All references to the ***Forest Act*** in these reasons are to that Act as it stood at the relevant time.

II

[2] Bugbusters is a forestry consultant and sometimes provides tree-planting services to the Minister of Forests. In June, 1992 it performed a three-day planting contract for the Minister on a cut block east of Prince George near the Bowron River. At about noon on 29 June, 1992 as Bugbusters' employees were leaving the cut block, the planting crew supervisor, Matthew Whitford saw smoke on the cut block. A forest fire

known as the Eagle Fire subsequently developed in that area and spread, causing considerable damage.

[3] As it was empowered to do by s.12 of the ***Forest Act***, the Prince George Forest District advised Bugbusters on 2 July 1992 that it was required to provide personnel and equipment to fight the Eagle Fire. On the same day, the Forestry Department retained W.R.M. Investigations Inc. (WRM) with a mandate to establish the cause of the fire, the approximate point of ignition, and the party, if any, responsible for causing the fire. Later that month WRM reported that the fire was caused by one of the tree-planters employed by Bugbusters.

[4] On 31 July, 1992 the Prince George Forest District relieved Bugbusters of its obligation to fight the fire. Section 122 of the ***Act*** permitted a person, such as Bugbusters, who had incurred expenses fighting fires at the request of a Forestry District to claim compensation for doing so and authorized the Regional Manager to accept or reject such claims. On 4 September, 1992, in compliance with the requirements of the ***Act***, Bugbusters submitted an invoice to the Ministry claiming reimbursement for its fire fighting expenses in the sum of $96,812.63.

[5] On 22 October, 1993, the Minister provided Bugbusters with a copy of the WRM report, which included a number of witness statements, some signed, some not, taken by the investigators.

In due course, Ministry employees reported to the Regional Manager of the Prince George Forestry District, and on 5 January, 1994 the Regional Manager issued his decision. He said he was satisfied that the fire had been caused by Bugbusters' employees and, relying on s.122 of the ***Forest Act***, he refused Bugbusters' claim for compensation. Section 122(2)(a) of the ***Act*** provided:

> Compensation is not payable if the regional manager determines that
> (a) the fire was caused by the person or by a person employed on the occupied area;...

[6] On 24 March, 1994, the Crown issued the writ in this action claiming damages from the defendant for having negligently caused the fire. We are told the amount of the damages claimed is about $5 million.

[7] An appeal process from the decision of the Regional Manager was provided by s.154 of the ***Act***. Under s.154(2)(b) an appeal lay from the decision of the Regional Manager to the Chief Forester. An appeal from the Chief Forester lay under s.154(2)(c) to the Forest Appeal Board.

[8] In this case the appeal from the Regional Manager was heard by the Deputy Chief Forester. The appeal hearing occupied three days in November, 1994 and ended on 31 January, 1995. The Deputy Chief Forester received oral and written

submissions from counsel for both Bugbusters and the Forest Service, and by agreement of the parties, also received independent legal advice. On 7 April, 1995 she issued her decision. It concludes as follows:

> Conclusion
>
> I find, on the basis of all the evidence, and bearing in mind the limitations of some of it, that the Eagle Fire was more likely than not caused by a discarded match or cigarette. I cannot conclude, however, that the evidence could reasonably be said to establish on a balance of probabilities that the Appellant or its employees were the source or cause of the discarded match or cigarette. My doubts turn on a combination of factors:
>
> 1. nearly all of the testimony used to identify the locations and smoking activities of the planters on June 29 is hearsay evidence that was not tested by cross-examination;
> 2. the only firsthand testimony presented regarding the locations of the planters on June 29 was given by Matt Whitford, and he testified that he didn't see anyone smoking outside the designated areas;
> 3. the two smokers identified as being on site on June 29 signed statements to the effect that they smoked only in designated areas and extinguished their smoking materials; no testimony was presented to contradict this; and
> 4. there is a possibility that the fire may have started on June 28 when there were several smokers on site, including a Forest Service employee who was seen smoking on the half-moon landing.
>
> DECISION
>
> I uphold the appeal and overrule the determination of the Regional Manager. I further recommend that the invoice for expenses submitted by the Appellant be assessed for accuracy and compensation granted.

[9] It is this decision of the Deputy Chief Forester on the issue of the fire's causation which is said to create issue estoppel in the present action by the Crown for damages.

[10] On 27 April, 1995 the Minister of Forests appealed the decision of the Deputy Chief Forester to the Forest Appeal Board as provided for by s.154(2)(c) of the ***Act***. The appeal was heard on 6 and 7 June, 1995, and on 17 July, 1995, the Appeal Board issued its decision. It concluded that "...the most reasonable and probable cause of the fire was through an act of an employee of Bugbusters Pest Management Inc."

[11] Bugbusters appealed the decision of the Appeal Board as provided for by s.156(8) of the ***Act*** to the Supreme Court of British Columbia. Mr. Justice Wilson gave judgment on the appeal on 22 December, 1995. He held that the Forest Appeal Board had, in essence, erred in retrying factual issues which should have been left to the Deputy Chief Forester. In addition, the judge said the Appeal Board asked itself the wrong question, in conducting a general inquiry into "the cause of the fire", and that the Deputy Chief Forester had posed the right question in her hearing, namely: "Is it more likely than not that an employee or employees of the appellant started the fire?" Accordingly, the court set aside the decision of the Appeal Board and restored the decision of the Deputy Chief Forester. There was no appeal from the decision of the Supreme Court of British Columbia to this Court.

[12] Bugbusters then brought an application for judgment dismissing this action, alleging that "the Plaintiff is estopped and precluded from alleging that any acts by the Defendant and/or its employees caused the fire, known as the Eagle Fire, which is the subject matter of this action". That application was heard by Mr. Justice Sigurdson, and on 29 November, 1996 he dismissed the application in written reasons. In his view "The Court has a discretion, to be exercised judicially, when considering if the nature and surrounding circumstances of the administrative decision properly support an issue estoppel."

[13] Mr. Justice Sigurdson held (at para.45) that the decision of the Deputy Chief Forester should not form the basis of an issue estoppel in the action brought by the Crown because in the proceedings before the Deputy Chief Forester the Crown did not have the power to subpoena witnesses, to conduct examinations for discovery, to deliver interrogatories, or to examine witnesses before trial. He found it to be more likely that the correct decision would have been made had those procedures been available. On this issue he concluded:

> Although the Deputy Chief Forester attempted to conduct an appeal which was as fair as possible to both parties, the difference in substance between the procedures followed by the Deputy Chief Forester and those available in a traditional judicial proceeding may well have made a substantive difference to the conclusions of the tribunal. This is therefore a factor that I should take into consideration in determining whether the administrative decision was

> sufficiently "judicial" to form the foundation for an issue estoppel.

[14] He then considered the independence and neutrality of the Deputy Chief Forester as an administrative tribunal. On that issue he said:

> For the purposes of issue estoppel, the question is whether the tribunal is reasonably perceived by all parties as independent and neutral. For the purposes of the doctrine of issue estoppel, it is, in my view, a relevant consideration to examine the apparent distance between the parties and the statutory decision maker. Objectively, it could not be within the reasonable expectation of the parties that the Deputy Chief Forester would decide the issue of causation for all purposes, including for the question of the liability of the defendant in a civil lawsuit for damages.

[15] Finally Mr. Justice Sigurdson considered whether the Deputy Chief Forester had any special expertise in deciding the issue before her, and concluded that it was the court, rather than the administrative tribunal, which had the expertise in deciding questions such as the cause of the fire. In the result, he held that this was not an appropriate case to apply the doctrine of issue estoppel, and he dismissed the defendant's application.

III

[16] In ***Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. et al. (No.2)***, [1967] 1 A.C. 853; [1966] 2 All E.R. 536 (H.L.) Lord

Guest traced the development of issue estoppel as a form of estoppel by *res judicata*. At 564 he said:

> The doctrine of estoppel *per rem judicatam* is reflected in two Latin maxims, (i) *interest rei publicae ut sit finis litium* and, (ii) *nemo debet bis vexare pro una et eadem causa*. The former is public policy and the latter is private justice. The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (SPENCER BOWER ON *RES JUDICATA*, p.3)

[17] He concluded at 565:

> The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) 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.

[18] In this case the chambers judge held, and before us the Crown conceded, that the question of whether Bugbusters caused the Eagle Fire is one of the critical issues that will have to be determined in the action brought by the Crown. The Crown also concedes that the parties in both proceedings are identical. Bugbusters contends, however, that the learned chambers judge erred in finding that the decision of the Deputy Chief Forester was not "judicial", and that in exercising his

discretion he did not give effect to overriding considerations of fairness in Bugbusters' favour.

[19] This Court has already held that issue estoppel may arise from the decisions of an administrative tribunal in subsequent litigation between the same parties. In ***Raison v. Fenwick*** (1981), 120 D.L.R. (3d) 622 (B.C.C.A.) a review committee established under the ***School Act*** terminated a teacher's employment on the ground that the "learning situation in the teacher's classes was less than satisfactory", a test for termination stipulated by the Act. The teacher subsequently sued for libel, the essence of the libel being that the learning situation in the teacher's classes was less than satisfactory. This Court supported the chambers judge's conclusion (except for one issue) that there was no merit in the whole of the statement of claim because the review committee had already decided the very issue that was fundamental to the libel action. It is to be noted that under the ***School Act*** the decision of a review committee reviewing a teacher's termination was, by s.135(3) "final and binding upon the teacher and the Board".

[20] More recently, in ***Rasanen v. Rosemount Instruments Limited*** (1994), 17 O.R. (3d) 267; 112 D.L.R. (4th) 683 (Ont.C.A.), leave to appeal to the Supreme Court of Canada refused (1994), 19 O.R. (3d) XVI (note), a majority of the Ontario Court of Appeal held that the decision of a referee under the

Employments Standards Act on the issue of whether an employee was entitled to compensation from an employer arising from termination of his employment gave rise to the defence of issue estoppel in the employee's subsequent action for damages for wrongful dismissal. Counsel for Bugbusters before us relied heavily on the judgment of Madam Justice Abella, one of the two judges who held that issue estoppel applied. At D.L.R. 704, she said:

> The second requirement is that there be a prior, final, judicial decision. The appellant argued that the procedure before the referee was not sufficiently "judicial", and that the absence of discovery, costs, production of documents, and a judge rendered it so dissimilar a process to that of the courts that no decision resulting from it should be binding.
>
> This is an argument, in my opinion, which seriously misperceives the role and function of administrative tribunals. They were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies.

[21] And at 705:

> 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. If the purpose of issue estoppel is to prevent the retrial of "any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction" (***McIntosh v. Parent,*** [(1924), 55 O.L.R. 552 (S.C.A.D.)]), then it is difficult to see why the decisions of an

> administrative tribunal having jurisdiction to decide the issue, would not qualify as decisions of a court of competent jurisdiction so as to preclude the redetermination of the same issues: ***Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*** (1991), 81 D.L.R. (4th) 121, [1991] 2 S.C.R. 5, 50 Admin. L.R. 44; ***Douglas/Kwantlen Faculty Assn. v. Douglas College*** (1990), 77 D.L.R. (4th) 94, [1990] 3 S.C.R. 570, 50 Admin. L.R. 69. On the contrary, the policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.

[22] In that case, the Ontario ***Employment Standards Act*** provided by s.50(7) that "a decision of the referee under this section is final and binding upon the parties...".

[23] The creation of issue estoppel by the decision of an administrative tribunal was again considered by this Court in ***Hamelin v. Davis*** (1996), 18 B.C.L.R. (3d) 85, [1996] 6 W.W.R. 318, additional reasons (1996), 18 B.C.L.R. (3d) 112, [1996] 6 W.W.R. 341 (B.C.C.A.), leave to appeal refused (1997), 211 N.R. 320n (S.C.C.). The majority held that the defendant auditors could not rely on issue estoppel as they were not parties to the proceedings before the Securities Commission which had concluded that the plaintiffs had not relied on the auditors' advice. In dissent, Madam Justice Newbury considered in detail the Ontario Court of Appeal judgment in ***Rasanen***, and concluded that to allow the action to proceed would amount to an abuse of process. She said at B.C.L.R. 102:

> Setting aside the proffered fresh evidence, then, one is left with the core question - was the Chambers judge correct in concluding that because the Commission was not bound by the rules of evidence, it should not be regarded as "equivalent" to a court of law for purposes of the doctrine of abuse of process? Put another way, should a person against whom a finding of fact has been made by a tribunal such as the Commission be permitted to relitigate that issue because of the chance that with the benefit of pre-trial discovery, disclosure of documents, and different rules governing admissibility, a court might reach a different result? In my view, the answer to these questions is no. There is by now considerable Canadian and other authority for the proposition that even in the absence of mutuality, a person who has had a "full and fair" opportunity (per Denning, M.R. in [***McIlkenny v. Chief Constable of West Midlands***, [1980] Q.B. 283, [1980] 2 All E.R. 227, affirmed [1982] A.C. 529 (H.C.)] at 238) to meet the case against him should not generally be permitted to relitigate an adverse finding made as an essential part of the ruling of another court. Where the first adjudicating body is not a court of law but a regulatory tribunal such as the Commission, with a recognized mandate and expertise, the same rule should generally apply, again subject to any particular prejudice being shown.

[24] Bugbusters urges us to accept and adopt this line of reasoning.

[25] We were also referred to ***Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*** (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C.S.C.). The question there was whether the plaintiff could rely on issue estoppel or abuse of process to prevent the defendants from pleading fraud, an issue which had been decided against the defendant in earlier proceedings to which the plaintiff was not a party. Chief Justice McEachern, (then of the Supreme Court) referred with approval

to U.S. authorities holding that even where privity could not be shown "trial courts ought to have a broad discretion to determine whether issue estoppel should be applied. Fairness seems to be a test they applied...." (at B.C.L.R. 96). He concluded in this way:

> Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.
>
> The exceptions to the foregoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence: ***McIlkenny***, *supra*, at p.703. No material has been filed which would create such an exception in the circumstances of this case.
>
> I decline to decide whether the foregoing conclusion represents the application of a species of estoppel by *res judicata* or abuse of process as the result is the same. The fact that the plaintiff in this action was not a party to the earlier proceedings is of no consequence. With the defendants participating fully, it was judicially determined at trial by Spencer J. that the lease and transfers between the defendants were fraudulent and that is the end of that issue. The defendants are stopped from saying otherwise.

IV

[26] Bugbusters says the learned chambers judge erred in concluding that the decision of the District Chief Forester was

not sufficiently judicial or final to give rise to an estoppel on the issue of the fire's causation. Bugbusters says that although the pre-trial proceedings available in the ordinary litigation process were not available to either party prior to the hearing by the Deputy Chief Forester, the Crown has put forward no material to suggest that any other evidence has been discovered which was not then available, and which might affect the resolution of that issue. It says that the Deputy Chief Forester did have special expertise on the issue of fire causation. And it says that the argument that the District Chief Forester was not an independent tribunal, or was tainted with the perception of bias, cannot lie in the mouth of the Crown who created the statutory process and appointed its officers. This is especially so, says Bugbusters, where the decision of the Deputy Chief Forester was subsequently found by the Supreme Court of British Columbia to be within jurisdiction, and without legal error.

[27] Bugbusters points out that the hearing conducted by the Deputy Chief Forester was a hearing *de novo*, and not just an appeal from the Regional Manager. It was the Crown who sought to adduce hearsay evidence in the form of witness statements, when those witnesses were not available for cross-examination, and it was Bugbusters who resisted the admission of such evidence. Bugbusters says it is manifestly unfair for the Crown now to argue that the process was not judicial when the case was decided on the evidence which the Crown adduced.

[28] Bugbusters also points out that it had no choice but to advance its claim for fire fighting expenses by following the statutory process mandated by the ***Forest Act***. When the Regional Manager refused to pay on the grounds that Bugbusters' employees had caused the fire, Bugbusters could not avoid having the issue of causation being decided by the administrative tribunal, and subject to the statutory appeal provisions. So Bugbusters says the third test for issue estoppel, a final judicial decision, has been met, and that it would be unfair not to give effect to it in the circumstances.

[29] The Crown responds by saying that although the decision of an administrative tribunal may satisfy the requirements for final judicial decision in some cases, it does not do so here. It is fundamental to the doctrine of issue estoppel that the parties have a full and fair opportunity to meet the case against it. Here, there was no reasonable expectation by either party that the Deputy Chief Forester would be making a final determination of the Crown's right to recover forest fire losses estimated at $5 million. All the parties thought they were fighting over was Bugbusters' expenses claimed in the sum of $100,000. The resources which one might devote to resisting a claim of $100,000 are in no way commensurate with what might reasonably be devoted to recovery of $5 million. There was no power to subpoena witnesses before the Deputy Chief Forester, and the Crown was therefore forced to rely upon hearsay evidence. Moreover, the Crown says the Deputy Chief Forester

did not have any special expertise on the question of causation. That is a question of fact and of evidence, matters in which the courts are the experts.

[30] In my respectful view the learned chambers judge was right in holding that issue estoppel did not apply in the circumstances of this case. There are two principal reasons for rejecting issue estoppel as a defence in this case. The first is 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 proceedings. The second is that unlike the relevant statutes in the ***Raison*** and ***Rasanen*** cases, *supra*, the ***Forest Act*** did not provide that the decisions of the Deputy Chief Forester (or other levels of administrative tribunal) would be final and binding. To the contrary, s.129 of the ***Forest Act*** said:

> Nothing in this part[10] limits, interferes with, or extends the right of a person to commence and maintain a proceeding for damages caused by fire.

[31] I do not suggest that either the presence of this provision, or the absence of a provision such as could be found in the ***Teachers Act*** in ***Raison***, or the ***Employment Standards Act*** in ***Rasanen***, is conclusive on the question of issue estoppel. But the statutory provisions touching on the nature and quality of decisions by administrative tribunals are in my view an indicium as to how the court should apply issue estoppel,

because they may be considered as factors which would affect the parties' reasonable expectations.

[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.

[33] In this case it would be quite unfair to hold the Crown bound by the decision of the Deputy Chief Forester.

[34] I would dismiss the appeal.

"The Honourable Mr. Justice Finch"

I AGREE: "The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Mr. Justice Lambert"

In the Court of Appeal of Alberta

Citation: Davidson v. 1167648 Alberta Ltd., 2007 ABCA 364

Date: 20071129
Docket: 0601-0370-AC
0701-0009-AC
Registry: Calgary

Appeal No. 0601-0370-AC
Q.B. No. 0601-09572

Between:

James W. Davidson and Patricia M. Davidson

Respondents
(Applicants)

- and -

The City of Calgary

Respondent
(Respondent)

- and -

1167648 Alberta Ltd. and Vango Custom Homes Inc.

Appellants
(Respondents)

- and -

The Registrar of the Land Titles Office
(South Alberta Land Titles District)

Not a Party to the Appeal
(Respondent)

Appeal No. 0701-0009-AC
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(Respondents)

- and -

The Registrar of the Land Titles Office
(South Alberta Land Titles District)

Not a Party to the Appeal
(Respondent)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice L.D. Acton
Dated the 5th day of December, 2006
Filed on the 15th day of December, 2006
(2006 ABQB 801, Docket: 0601-09572)

Memorandum of Judgment

The Court:

Introduction

[1] The appellants 1167648 Alberta Ltd. and Vango Custom Homes Inc. ("Vango") and the appellant City of Calgary ("Calgary") each challenge a decision of a chambers judge which quashed a decision of Calgary's designate dated July 24, 2006, to approve a subdivision of certain lands of Vango within Calgary. The chambers judge had acted upon an Originating Notice of Motion filed by the respondents, James W. Davidson and Patricia M. Davidson, who owned property neighbouring the lands proposed for subdivision.

Reasons of the Chambers Judge

[2] The chambers judge accepted the standing of the respondents to apply for judicial review of the 2006 decision on the basis that they *lacked* a right of appeal of the decision in light of ***Morris v. Wetaskiwin (County)***, (2002) 326 A.R. 281, 2002 ABQB 1090, appeal dismissed (2003) 339 A.R. 355, 2003 ABCA 356. She did not explain why the respondents, as neighbours or adjacent landowners, should automatically be taken to have standing to challenge a *subdivision* decision for neighbouring land, as compared with a *development* decision on neighbouring land, when the Legislature gave neighbours no right of appeal in subdivision approval situations.

[3] The chambers judge ruled that the standard of review of the 2006 decision was correctness, on the issue whether "the City could revisit essentially the same application and on whether it was required to give reasons" (para. 15). The chambers judge ruled that the standard of review as to the subdivision approval itself was reasonableness *simpliciter*.

[4] The chambers judge ruled that the 2006 decision of Calgary, which allowed the subdivision to proceed upon conditions, was in essence a repeat of an October 6, 2005 decision of Calgary, which also allowed the subdivision to proceed, but with additional conditions that Vango did not accept: 2006 ABQB 801; 66 Alta. L.R. (4th) 296, 27 M.P.L.R. (4th) 79. The chambers judge accepted the respondents' contention that Calgary was *functus officio* insofar as the 2005 decision was concerned, and rejected the contention of Vango and Calgary that the 2006 decision was based upon a new subdivision approval application. She found the 2006 decision amounted to "merely a reconsideration of the 2005 decision" (para. 27) which eliminated the conditions objected to by Vango.

[5] The chambers judge opined that in order for Vango to make another subdivision application and for Calgary to grant it, the application must be "a new and different proposal for subdivision from the one they made previously" (para. 28). She found the 2006 decision was therefore erroneous in law and she quashed it for that reason. In part, she grounded this conclusion on the opinion that

the respondents were "entitled to the reasonable expectation, that once the decision was made, conditions set, and no appeal taken, that the matter was at an end" (para. 25).

[6] The chambers judge went on to conclude that the 2006 decision should also be quashed on the basis that Calgary did not give reasons for its decision to grant the subdivision approval. S. 665(2)(b) of the *Municipal Government Act*, R.S.A. 2000, c. M-26, ("*MGA*") requires a subdivision authority to state its reasons for decision if it *refuses* an application but imposes no such requirement on grants of such applications.

[7] The chambers judge noted that s. 8 of the *Subdivision and Development Regulation*, A.R. 43/2002 sets out that the "written decision of a subdivision authority provided under section 656 of the *Act* must include the reasons for the decision, including an indication of how the subdivision authority has considered (a) any submissions made to it by adjacent landowners, and (b) the matters listed in section 7." The matters listed in s. 7 include "use of land in the vicinity" and other factors. She did not find s. 8 of the *Regulation* to conflict with s. 656 of the *MGA*. She read the *Regulation* to impose a duty to give reasons. Moreover, she opined, in the alternative, that inasmuch as she had concluded that the neighbours had a right to judicial review, they were entitled as a matter of procedural fairness to have reasons to facilitate judicial review.

Issues on Appeal

[8] The respondents first contend, at the outset, that the appeal is moot because the specific subdivision approval given to Vango was dated July 24, 2006 and it expired after one year by operation of s. 657 of the *MGA*. We do not accept that this renders the appeal moot from the perspective of Calgary, because it is plain that the decision of the chambers judge affects the power of Calgary to entertain successive applications for subdivision approval generally, not just in this case. We would entertain the appeal of Vango because it adds perspective to Calgary's appeal.

[9] Vango and Calgary contend that the chambers judge misconceived the nature of the 2006 application by Vango. They contend that whether or not Vango used much of the same information given on its 2005 application, and whether or not Vango sought the same subdivision approval, and whether or not the differences were slight, such as there being two houses being torn down, it could not be said that the 2006 application was the "same" application as the 2005 application in the sense of merely being a continuation of the 2005 application. The respondents contend that the 2006 application was not just redundant by being very close in terms and details to the 2005 application, but it was actually just a case of re-hearing the 2005 application. The respondents suggest, in a sense, that Vango was just shopping for a better adjudicator, because the 2005 decider was "most experienced and seasoned" while the 2006 decider was a "newcomer".

[10] Vango and Calgary contend that repetition in the content of a later application does not bar that later application as duplicative or as a re-casting of an earlier application. They suggest that the

only barrier to a repeated application for subdivision approval is that which is set out in s. 656(3) of the *MGA* as follows:

> "656(3) If an application for subdivision approval is refused, the subdivision authority may refuse to accept for consideration, with respect to the same land or part of the same land, a further application for subdivision approval submitted to it within the 6-month period after the date of the subdivision authority's decision to refuse the application."

S. 657 of the *MGA* also provides that if a subdivision approval is given and the plan of subdivision or other instrument is not registered in a land titles office within one year, the subdivision approval is void. Vango and Calgary submit that otherwise the subdivision authority, Calgary in this instance, is required to act upon an application that conforms with the *Subdivision Development Regulation* 43/2002. They say that nothing in the *MGA* authorizes Calgary or any other subdivision authority to summarily reject an application merely because it revisits the substance of an earlier application, except for s. 656(3) of the *MGA*. As such, there was no error of law by Calgary in accepting the application and considering it as a new application.

[11] Vango and Calgary submit that there is no legal barrier to consideration by Calgary of further applications for subdivision approval based on "reasonable expectations" of neighbouring landowners. Vango and Calgary submit that this was not a situation of re-consideration of the earlier application and not a situation of *functus officio* under ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848, [1989] S.C.J. No. 102 (QL), at paras. 19 to 21.

Analysis

[12] It is not strictly necessary to decide whether the chambers judge selected the correct standard of review in relation to Calgary's decision under judicial review, because she did not review the substantive decision. She applied two propositions against Calgary's approval. Both of those were outside of the substance of the decision. The first was that Calgary was dis-entitled to allow the 2006 application as it was repetitious of, or a re-presentation of, the 2005 decision. The second was that Calgary's failure to give reasons for the 2006 decision invalidated the 2006 decision. The chambers judge erred in law on both of these points.

[13] The similarity of the basis for the 2005 and 2006 decisions is neither here nor there. The 2006 application conformed to the *Regulation* and the *MGA*. Calgary was required to make a decision: ***26365 Alberta Ltd. v. Banff (Town)***, (2003) 346 A.R. 236, [2003] A.J. No. 1019 (QL), 2003 ABCA 244 at paras. 8 to 14. The *MGA* sets out the jurisdiction and criteria for such applications. As pointed out in ***26365 Alberta Ltd.*** by Wittman J.A.:

> 14 On a second application, the obligations of the MPC and DAB are triggered. Those obligations include an assessment of the evidence and submissions, and a

> consideration of what they had done on the first application. Otherwise a system of immutable restrictive covenants despite changing conditions or consents would be created: ***Condominium Plan 8310407 v. Calgary (City)***, [1995] A.J. No. 1033 (Alta. C.A.), at para. 15.

[14] The respondents contend that the decision of the chambers judge only operates to bar a later application if it is essentially the same as the earlier application. Nothing in the MGA suggests that the Legislature intended such a barrier or such an amorphous cloud on the title of landowners. In addition, the protean word "essentially" in the decision of the chambers judge reveals that such a common law barrier would be unmanageably vague.

[15] If the Legislature intended to provide neighbouring landowners with a "reasonable expectation" that decisions would stand for a specified period, it could have done so by language extending s. 656(3) of the *MGA.* The Legislature did not do so. As noted in ***Chandler***:

> 21 To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> 22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened *in order to enable the tribunal to discharge the function committed to it by enabling legislation.* This was the situation in *Grillas, supra*. [Emphasis added]

[16] In other words, the principles governing the making of subdivision approval decisions are that which are specified by the statute. The statute may displace the common law doctrine of *functus officio*. For that matter, a statute may also displace the common law principle of issue estoppel which seems to be what the respondents are really raising in bar of the 2006 decision. Realistically, it is the absence of three conditions from the 2005 decision that the respondents find objectionable in the 2006 decision, not that there is a 2006 decision as such.

[17] Moreover, as pointed out in ***Nanaimo v. Rascal Trucking Ltd.***, [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14 (QL), 2000 SCC 13, at para. 35, there is the "reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest". Decisions, such as subdivision approval, do not necessarily fit the adjudicative model of "Plaintiff versus Defendant" upon which principles such as finality of litigation largely rest. The chambers judge erred in importing into her evaluation of the 2006 decision a consideration that the 2005 decision was being

re-visited and the outcome changed. This was not a situation of historical revisionism. This is not a matter of *functus officio*. Calgary simply did what the *MGA* provides. The chambers judge read into the *MGA* a bar to applications which is not in the *MGA*.

[18] The chambers judge was also in error to read into the *MGA* an entitlement on the part of the respondent to "reasonable expectations" of finality. This notion resembles the concept of issue estoppel. The concept of "reasonable expectations" refers to ensuring that the procedural rights possessed by parties appearing before deciders conform to natural justice: ***Old St. Boniface Residence Association v. Winnipeg,*** [1990] 3 S.C.R. 1170, [1990] S.C.J. No. 137 (QL) at paras. 73 to 75. Reasonable expectations do not create substantive rights: ***Moreau-Berube v. New Brunswick (Judicial Council)***, [2002] 1 S.C.R. 249, [2002] S.C.J. No. 9 (QL), 2002 SCC 11, at para. 78:

> 78 I am not persuaded by any of these arguments. *The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker*. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: ***Reference re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525, at p. 557; ***Baker***, *supra*, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 J. L. & Social Pol'y 282, at p. 297. [Emphasis added]

See also ***Baker v. Canada***, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL), at para. 26. The chambers judge, accordingly, erred in finding that Calgary lacked jurisdiction to receive, consider and decide on the 2006 application for subdivision approval.

[19] The chambers judge also erred in relation to the question of reasons. The Legislature's decision to expressly require reasons for cases of refusal is clear indication that it did not intend to mandate reasons for grants of approval. If the Legislature intended a more general duty of the subdivision approval body to give reasons, it could easily have said so and would have had no need to be specific. Such precision is revelatory of legislative intention on the principle of implied exclusion: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition (Butterworths Canada Ltd., 2002) at 186. The *Regulation* did not make up for the absence of a requirement in the *MGA* by imposing such under the *Regulation*, because the *Regulation* only specified features of reasons which were otherwise to be given under the *MGA*. In other words, if Calgary gave reasons, or if there was a refusal as to which reasons were required, the *Regulation* would apply. The *Regulation* did not create a duty to give reasons in all cases.

[20] The respondents contended to the chambers judge that even if the statute does not require reasons when an application is allowed, there is a common law requirement to that effect. But as the Court ruled in ***C.U.P.E. v. Ontario (Minister of Labour)***, [2003] 1 S.C.R. 539, 2003 SCC 29, "a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice, as recently affirmed by this Court in ***Ocean Port***". Since the statute has expressly dealt with the need for reasons, there is no room to superimpose an inconsistent common law requirement for reasons.

[21] In this context as to reasons, the respondents suggest that Calgary's substantive decision is vulnerable to judicial review. The chambers judge found the standard of review on the merits of the subdivision approval to be reasonableness. While there are many factors suggesting that the standard is "patently unreasonable", we need not explore that issue, as the decision in question meets both standards, and in any event the chambers judge did not find the decision to be unreasonable.

[22] Finally, we do not find it necessary to address the subject of the standing of the respondents to seek judicial review in the first place. Our silence on the topic should not be taken as affirmation of the seemingly direct line conclusion of the chambers judge that the absence of a right to appeal meant judicial review was available to the respondents. We consider that to be a question that remains open. It is a question to be decided in future on a full argument and on a record giving vitality to the question.

Conclusion

[23] The chambers judge erred in finding that Calgary's 2006 decision was merely a reconsideration of its 2005 decision. The 2006 decision was made on a new application and there were no statutory impediments shown to embargo the granting of the 2006 application. The principles of *functus officio* and issue estoppel did not apply to prevent Calgary from granting the 2006 application. The lack of reasons elaborating on Calgary's decision on the 2006 application was not contrary to the *MGA*, and did not constitute a denial of procedural or adjudicative fairness to the respondents in the circumstances of this case. No basis for subverting the 2006 decision on its merits was found by the chambers judge, nor was such shown to us. In the result, the appeal is allowed, the decision of the chambers judge is set aside, and the 2006 decision is restored.

Appeal heard on November 8, 2007

Memorandum filed at Calgary, Alberta
this 29th day of November, 2007

Conrad J.A.

Watson J.A.

Slatter J.A.

Appearances:

T. Bardsley
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L.J. Gosselin
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